IN RE TAKIE O.*
(AC 44992)

Alvord, Elgo and Seeley, Js.

Syllabus

The petitioner, the Commissioner of Children and Families, sought to terminate the respondents' parental rights with respect to their minor child. Due to the COVID-19 pandemic, the trial on the termination petition was held remotely via Microsoft Teams. The respondent father was represented by counsel and participated in the proceedings through audio and video means. The respondent mother consented to termination. At the conclusion of the trial, the trial court rendered judgment terminating the respondents' parental rights. On the respondent father's appeal, *held* that the record was inadequate to review the father's claim that he was denied the right to confront the witnesses against him at the virtual trial in violation of the due process clause of the fourteenth amendment to the United States constitution: the father conceded that his claim was unpreserved because he did not raise it before the trial court; moreover, there was no factual record or factual finding on which this court could have based a determination of whether the father's right to confront the petitioner's witnesses was violated by the virtual format of the trial or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually; accordingly, the situation was analogous to those set

* 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.

forth in *In re Annessa J.* (343 Conn. 642), and *In re Vada V.* (343 Conn. 730), in which our Supreme Court recently determined that the respective respondents' claims failed to satisfy the first prong of the test for review of unpreserved constitutional claims set forth in *State* v. *Golding* (213 Conn. 233).

Argued September 6—officially released October 4, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the respondent mother consented to the termination of her parental rights; thereafter, the matter was tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, with whom, on the brief, was *Albert J. Oneto IV*, assigned counsel, for the appellant (respondent father).

Nisa Khan, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent father, Takie O., Sr., appeals from the judgment of the trial court terminating his parental rights with respect to his minor child, Takie O. (child).[1] On appeal, the respondent claims that he

** October 4, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of the respondent mother, Lisa S., who consented to termination and has not appealed from that judgment. We hereinafter refer to the respondent father as the respondent and to Lisa S. by name.

was denied the right to physically confront the witnesses against him at the virtual trial, conducted via Microsoft Teams,[2] in violation of the due process clause of the fourteenth amendment to the United States constitution.[3] We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On May 4, 2017, the respondent and Lisa S. were arrested following an incident in which East Hartford police officers observed the child, who was six years old, sitting without a seat belt in the front seat of a vehicle being driven by the respondent. The police found nineteen bags of marijuana packaged for sale in Lisa S.'s purse and ninety-three bags of marijuana inside the child's bookbag, which also contained his school homework. The respondent also was found with two bags of marijuana in his pocket. The police notified the Department of Children and Families (department). When the department investigator spoke with the respondent that same day at a basketball court, the respondent appeared "to be impaired by marijuana" and acknowledged that he was unable to care for the child due to substance abuse issues.

[2] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited October 3, 2022).

[3] In his principal appellate brief, the respondent also raised an unpreserved claim that "the judgment terminating his parental rights was unconstitutional under article fifth, § 1, and article first, § 10, of the Connecticut constitution . . . where the trial was not conducted in the physical presence of the judicial authority." Considering the same unpreserved claim, our Supreme Court, in *In re Annessa J.*, 343 Conn. 642, 660, A.3d (2022), determined that the respondent had "failed to establish that there exists a fundamental right under article first, § 10, and article fifth, § 1, of the Connecticut constitution to an in person termination of parental rights trial." At oral argument before this court, the respondent's counsel conceded that this claim was no longer viable in light of *In re Annessa J.* Accordingly, we do not discuss it further.

On May 12, 2017, the petitioner, the Commissioner of Children and Families, filed an ex parte motion for an order of temporary custody, which was issued, and a neglect petition. On May 19, 2017, the order of temporary custody was sustained by agreement of the respondent and Lisa S. On August 8, 2017, the respondent and Lisa S. entered nolo contendere pleas to the neglect petition, and the child was adjudicated neglected and committed to the care and custody of the petitioner. The respondent and Lisa S. were given specific steps to facilitate reunification with the child. On December 26, 2019, the trial court approved a permanency plan of termination of parental rights and adoption. In February, 2020, the petitioner filed a petition seeking to terminate the parental rights of the respondent and Lisa S. as to the child on the ground that they had failed to rehabilitate. Subsequently, Lisa S. consented to the termination of her parental rights, and the petition was amended as to Lisa S. to allege consent as the sole ground for terminating her parental rights.

The trial court set forth the following procedural history. "The first hearing on the [petition] was initially scheduled for March 26, 2020, but was not held on that date because of the public shutdown caused by the COVID-19 pandemic. In June, 2020, before the next court date, the parents applied for and were appointed counsel for the [termination] proceeding. In late December, 2020, a new date for the initial [termination] hearing was scheduled for February 3, 2021. The court on that day confirmed that both parents had been served with orders of notice to appear that day, but since neither one was present the court scheduled a default trial for the following month. A default trial never did occur, however, and the court file reflects that counsel for the parents subsequently participated in a case status conference and two court hearings in March and April [2021]. The matter was subsequently assigned for trial

before [the Honorable *Stephen F. Frazzini*, judge trial referee] to begin on June [25], 2021."

The trial on the petition was conducted virtually using Microsoft Teams over two days, June 25 and 29, 2021, with the respondent appearing with his counsel on both days. On the first day of trial, the respondent joined the proceeding by telephone. All parties then identified themselves for the record, including the respondent. At some point during the first day of trial, the respondent appeared by video.[4]

When the petitioner's first witness experienced technical difficulties joining the proceeding, the petitioner's counsel remarked: "I will be relieved when . . . we're back in person." The court commented: "Well, I think that's going to happen pretty quickly. Apparently, the—I've been told that the Chief Administrative Judge has indicated [that termination of parental rights] trials should go in person ASAP." The court commented: "I don't know whether that's—we haven't gotten—we

[4] The following exchange occurred:

"[The Petitioner's Counsel]: . . . Your Honor, I would just note that there's another individual with [the respondent] that appeared on the screen a moment ago.

"The Court: I missed that. So, [respondent], is there—these proceedings are private and confidential, so are you on headphones so that only you could hear what's going on, or can anybody hear what's going on? Let's take that first.

"[The Respondent]: No, I'm in the room.

"The Court: And . . . is there someone else in the room with you?

"[The Respondent]: No, they not—she walking out. No, nobody not in here.

"The Court: But there—yes, I saw somebody in the background just a second ago after the lawyer mentioned it. But you need to make sure—

"[The Respondent]: Again, she walk—she walking back out. She . . . picked something off the floor.

"The Court: Okay, so—

"[The Respondent]: But she left out the room. She left out the room.

"The Court: Okay. If she comes back in again let me know, and I'll wait for her to leave, okay?

"[The Respondent]: Yeah."

didn't get the email yet today, but it—I think it's—from my understanding it's imminent."

The petitioner presented the testimony of six witnesses and introduced exhibits into evidence, and the respondent's counsel cross-examined the petitioner's witnesses. The respondent's counsel periodically conferred with her client, including through text message. Specifically, counsel conferred with the respondent during cross-examination of the petitioner's witnesses,[5] before informing the court that the respondent elected not to testify, and during closing argument.[6]

In its memorandum of decision issued on July 27, 2021, the court terminated the parental rights of the respondent and Lisa S. The court found that the department had made reasonable efforts to reunify the respondent with the child. It found by clear and convincing evidence that the respondent had failed to rehabilitate. After making the seven findings required by General Statutes § 17a-112 (k), the court found by clear and

[5] For example, following cross-examination of one of the petitioner's witnesses, the following exchange occurred:

"[The Respondent's Counsel]: One second, Your Honor. I just want to confer with my client really quick. It'll take a minute [because] I have to use text.

"The Court: No problem.

"[The Respondent's Counsel]: [Respondent], did you . . . get my text question?

"[The Respondent]: Yes. . . . I just was looking at it.

"[The Respondent's Counsel]: If there's something—am I all set with questions?

"[The Respondent]: Yep."

[6] After counsel for the child concluded his closing argument, the court informed the respondent's counsel that "it looks like your client wants to say something" and asked counsel whether she would like to confer with her client. The respondent's counsel then muted her microphone, and the court went off the record. When the proceeding resumed, the respondent's counsel made additional closing remarks regarding the respondent's prior inquiry of the social worker regarding housing.

convincing evidence that termination of the respondent's parental rights was in the child's best interest. This appeal followed.

On appeal, the respondent claims that "he was denied the right to confront and cross-examine personally adverse witnesses against him at the virtual trial, in violation of the due process clause of the fourteenth amendment to the United States constitution."[7] The respondent concedes that he did not raise this claim before the trial court and, therefore, seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

Pursuant to *Golding*, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*). "The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the

[7] Counsel for the child adopted the brief of the respondent. At oral argument before this court, the petitioner's counsel represented that it is the department's understanding that the child was in support of the termination of parental rights at the time of the trial, that the child is still in support of the termination of parental rights, and that the child wishes to be adopted as soon as possible. When asked for the position of the child during oral argument, counsel for the child stated that the child enjoys being with his maternal grandmother and wants her to adopt him, the child is in contact with his father, and the child has a relationship with his father.

merits of the claim." (Internal quotation marks omitted.) *In re Aisjaha N.*, 343 Conn. 709, 719, 275 A.3d 1181 (2022).

On June 20, 2022, our Supreme Court released its decision in *In re Annessa J.*, 343 Conn. 642, A.3d (2022), and its companion cases, *In re Vada V.*, 343 Conn. 730, 275 A.3d 1172 (2022), and *In re Aisjaha N.*, supra, 343 Conn. 709.[8] *In re Annessa J.* and *In re Vada V.* are controlling of the issue raised in the present appeal. Accordingly, we begin with a discussion of those cases.

In *In re Annessa J.*, supra, 343 Conn. 649–50, the trial court terminated the parental rights of the respondent mother, Valerie H., after a trial held virtually, via Microsoft Teams. Valerie's counsel joined in the respondent father's objection "to the trial court's conducting the trial via Microsoft Teams instead of in person . . . ." Id., 653. The basis for the objection was the suggestions by the respondents' attorneys that the court would be unable to see the parties and witnesses and would have difficulty making assessments regarding their demeanor and truthfulness. Id. The court denied the respondents' oral motion objecting to the virtual format, explaining that it had "talked to the chief administrative judge for juvenile [matters], and she confirmed that there is nothing precluding the court from going forward. And, in fact, the court has been directed by the chief court administrator's office to proceed, whenever possible, to go forward with matters that are necessary, important, and appropriate. I do believe that the matter can be conducted appropriately virtually. We do have

[8] In the present case, the petitioner's counsel filed with this court a letter in which she represented that all counsel agreed that this court should hold oral argument in this appeal after the release of our Supreme Court's decisions in *In re Annessa J.*, *In re Vada V.*, and *In re Aisjaha N.*

the Connecticut Guide to Remote Hearings [for Attorneys and Self-Represented Parties] that was promulgated by the Judicial Branch. I intend to follow it." (Footnote omitted; internal quotation marks omitted.) Id., 654. The court rejected the respondents' contention that it would not be able to properly weigh the evidence. Id. The virtual trial proceeded, during which Valerie, through counsel, entered nine exhibits into evidence, and presented the testimony of three witnesses. Id., 655. Valerie also testified on her own behalf. Id. The court took corrective measures to address technical issues that arose during the trial, and the court "regularly paused the proceedings so that the parties could confer with their counsel." Id.

On appeal, Valerie claimed, inter alia, that the trial court "violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings over the Microsoft Teams platform . . . ." (Internal quotation marks omitted.) Id., 650–51. This court concluded that the record was inadequate to review her unpreserved federal due process claim. Id., 651. Following certification to appeal, our Supreme Court agreed with this court. Id., 661.

Our Supreme Court explained: "Unlike her state constitutional claim, which did not require any factual predicates because she claimed an unqualified right to an in person trial, Valerie's federal constitutional claim is not based on an alleged unqualified right to confront the petitioner's witnesses in person under the fourteenth amendment to the United States constitution. Rather, Valerie claims that she had the right to do so 'in the absence of evidence demonstrating the existence of a compelling governmental interest sufficient to curtail the right.' Valerie thus acknowledges that there are certain countervailing governmental interests that may be sufficient to justify curtailing any constitutional right

to in person confrontation. Indeed, to address the merits of Valerie's claim, this court would apply the three part test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The third part of that test requires us to consider the governmental interests at stake. Id. . . . [T]he trial court explained that, '[d]ue to the COVID-19 . . . pandemic, the trial [on the termination of parental rights petition] was conducted virtually.' As a result, we would need to consider the specific factual circumstances surrounding the trial and the COVID-19 pandemic to properly evaluate Valerie's claim. As Valerie concedes, '[a]lthough the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that [SARS-CoV-2, the virus that causes COVID-19], threatened the health or safety of any of the persons involved in this particular case.' It is for this reason that the record is inadequate to review Valerie's unpreserved federal due process claim. Even if this court were to assume that Valerie had a right to in person confrontation in the absence of compelling countervailing interests, this court has no factual record or factual findings on which to base a determination of whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually." *In re Annessa J.*, supra, 343 Conn. 661–62.

Our Supreme Court further rejected Valerie's contention that "the lack of evidence in the record regarding 'whether there was a compelling reason to curtail her right [to] physical confrontation was not her burden to overcome under the first prong of . . . *Golding*.' " Id., 662. Our Supreme Court explained that, because the petitioner and trial court had not been put on notice that Valerie objected to the virtual format of the trial on the basis of a violation of her right to confront

the petitioner's witnesses, the trial court "did not have occasion to make findings of fact regarding the threat posed by the COVID-19 pandemic and whether that threat was sufficiently compelling to curtail any constitutional right to in person confrontation." Id., 662–63. Thus, the petitioner bore no responsibility for the evidentiary lacunae, and it would be unfair to the petitioner for our Supreme Court to reach the merits of Valerie's claim " 'upon a mere assumption that [the factual predicate to her claim has been met].' " Id., 663. Accordingly, our Supreme Court agreed with the Appellate Court that the record was inadequate to review Valerie's claim. Id., 664.

In *In re Vada V.*, supra, 343 Conn. 732, 734, the court terminated the parental rights of the respondents after a trial held virtually, via Microsoft Teams, in October and November, 2020, during the COVID-19 pandemic. "The respondents were represented by separate counsel and participated in the proceedings through audio and video means." Id., 734. The respondent mother's counsel confirmed that she had been communicating with her client through text messages and email, and the respondent father's counsel indicated that he was communicating with his client through a messaging application. Id., 735–36. Although they experienced some connectivity issues, both respondents testified at trial. Id., 737.

On appeal, the respondents in *In re Vada V.* raised an unpreserved claim that "they were denied the right to physically confront the witnesses against them at the virtual trial, in violation of the due process clause of the fourteenth amendment to the United States constitution." Id., 733. Our Supreme Court determined that the record was inadequate to review the respondents' unpreserved claim, which was identical to the claim that it had considered in *In re Annessa J.* Id., 739–40. Our Supreme Court reiterated that, even if it were to

assume that "there is a constitutional right to in person confrontation, there is no factual record or factual findings for this court to rely on to determine whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually." Id., 740.

Following the release of our Supreme Court's decision in *In re Annessa J.* and *In re Vada V.*, this court ordered the parties in the present case to submit supplemental briefs. The petitioner argues, inter alia, that "the record in this case is inadequate for review in the same manner as the Supreme Court explained that the respective records in *In re Annessa J.* and *In re Vada V.* were inadequate." The respondent contends that the record in the present case is adequate to review his claim.[9] In arguing that "the trial court believed it had no discretion in the decision of whether the trial should be held in person," the respondent highlights the trial court's remark that it had "been told that the chief administrative judge has indicated [that termination of parental rights] trials should go in person ASAP." The respondent contends that "the decision of whether to hold a virtual trial was not made by the trial court and that, indeed, the public health emergency brought on by COVID-19 had already been determined by authority outside the trial court to override not only confrontation rights but all other similar rights guaranteed by due process." Thus, according to the respondent, the "record is adequate to review [his claim] because the only question is whether the right to physical confrontation, if it applies to civil matters, can be overridden by a blanket administrative judicial order."

We disagree with the respondent that the comment made by the trial court renders the record adequate for

[9] Counsel for the child adopted the supplemental brief of the respondent. See footnote 7 of this opinion.

review. It does not create the factual record required to apply the three part test set forth in *Mathews* v. *Eldridge*, supra, 424 U.S. 335. In the present case, the respondent's counsel did not raise any objection to the virtual format of the trial, let alone raise an objection on the basis that it violated the respondent's right to confront the petitioner's witnesses. Consequently, just as in *In re Annessa J.*, supra, 343 Conn. 662, and *In re Vada V.*, supra, 343 Conn. 740, there is no factual record or factual findings on which this court could base a determination of whether the respondent's right to confront the petitioner's witnesses was violated by the virtual format of the trial or whether the court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually. Thus, the respondent's claim fails under the first prong of *Golding*.

The judgment is affirmed.

RICARDO MYERS *v.* COMMISSIONER OF CORRECTION (AC 44679)

RICARDO O. MYERS *v.* STATE OF CONNECTICUT (AC 44736)

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

Syllabus

The petitioner, who had been convicted of murder and assault in the first degree in connection with a shooting, filed, in one case, a petition for a writ of habeas corpus and, in a second case, a petition for a new trial. Six days after the shooting, R gave a video recorded interview to the police, in which he admitted to being present at the shooting and identified another individual, P, as the shooter. R subsequently failed to appear at the petitioner's criminal trial, even though the petitioner's trial counsel had served him with a subpoena ad testificandum. The trial court issued

a capias warrant for R and continued the case for the weekend at the request of trial counsel, but R could not be located. Rather than request an additional continuance to give the authorities additional time to locate R and execute the capias, trial counsel moved to admit the video recording of R's interview under the residual exception to the hearsay rule, but the trial court concluded that it was inadmissible. In his habeas petition, the petitioner alleged actual innocence and ineffective assistance of counsel, insofar as trial counsel failed to undertake greater efforts, after learning that the capias warrant had not been served, to secure R's presence and testimony at the criminal trial. Thereafter, R was served with a subpoena to appear at the petitioner's habeas trial, but he again failed to appear. The petitioner requested a capias warrant to secure R's attendance and a continuance for the purpose of locating R and executing the capias, but the habeas court denied the requests. Following the habeas trial, the habeas court denied the habeas petition and, thereafter, granted the petition for certification to appeal. In his petition for a new trial, the petitioner claimed that R's statement to the police identifying P as the shooter constituted newly discovered evidence that was likely to produce a different result in a new trial. The respondent in that case, the state of Connecticut, moved for summary judgment on the ground that the petition for a new trial was filed outside the applicable statute of limitations (§ 52-582) and, therefore, was time barred. In response, the petitioner argued that the petition was not time barred because that statute includes an exception for petitions, like his, that are "based on DNA (deoxyribonucleic acid) evidence or other newly discovered evidence . . . that was not discoverable or available at the time of the original trial," which "may be brought at any time after the discovery or availability of such new evidence . . . ." The trial court granted the respondent's motion for summary judgment, noting, inter alia, that there was no support for the position that the unavailability of a witness was the equivalent of newly discovered evidence. Accordingly, the court dismissed the petition for a new trial and denied the petitioner's petition for certification to appeal therefrom. *Held*:

1. The habeas court properly denied the petition for a writ of habeas corpus, and, accordingly, this court affirmed the habeas court's judgment in that case:

   a. The habeas court correctly concluded that the petitioner failed to prove that his trial counsel rendered deficient performance by not undertaking greater efforts to secure R's testimony after learning that the capias warrant had not been served: trial counsel testified at length at the habeas trial about his efforts to secure R's appearance and testimony at trial, which included retaining a private investigator to locate R, having a subpoena served on R, following up with R prior to trial, obtaining the weekend continuance, and moving to admit the video recording of R's interview into evidence pursuant to the residual hearsay exception; moreover, this court could not conclude that trial counsel's failure to

request a second continuance amounted to ineffective assistance or that it was unreasonable for trial counsel to conclude that additional attempts to locate R would have been in vain, especially in light of R's previous success at evading authorities, and the petitioner did not overcome the presumption that trial counsel's decision not to further delay the criminal trial by continuing the search for R was sound trial strategy, given that additional efforts to locate R might have resulted in jurors becoming unavailable or the jurors' memories fading; furthermore, trial counsel's decision to seek to admit the video recording under the residual exception in lieu of undertaking further efforts to locate R was reasonable, despite the rare application of the residual exception, given the circumstances of the petitioner's criminal case.

b. The petitioner could not prevail on his claim that the habeas court improperly denied his actual innocence claim, which was premised on his argument that, by denying his request for a capias warrant and a continuance to secure R's testimony at the habeas trial, the habeas court prevented the petitioner from proving that P was the shooter: even if it is assumed that the habeas court abused its discretion by denying the requests for a capias warrant and a continuance, any error was harmless because, even had R testified at the habeas trial consistent with his video recorded interview, that testimony was not sufficient to establish, by clear and convincing evidence, that the petitioner was actually innocent of the charged crimes; in the present case, R's testimony identifying P as the shooter could not have unquestionably established the petitioner's innocence as it would not have negated the evidence of the petitioner's guilt that was admitted at his criminal trial, including eyewitness testimony that it was the petitioner who shot the victim, the fact that the gun used in the shooting was owned by the petitioner and found in his possession one month afterward, and the fact that the petitioner made no effort at his habeas trial to undermine the evidence pointing to his guilt.

2. The trial court properly dismissed the petitioner's petition for a new trial, as R's video recorded interview did not constitute newly discovered evidence under § 52-582, and, accordingly, this court dismissed the petitioner's appeal in that case: because the language of § 52-582 was ambiguous with respect to whether "newly discovered evidence," as used therein, included both forensic evidence and all other types of evidence or, instead, only evidence that was forensic in nature, this court looked to the statute's legislative history, and especially a recent amendment (P.A. 18-61) expanding the circumstances in which a petition for a new trial may be filed after the limitation period had otherwise run, which indicated the legislature's intent to narrowly define newly discovered evidence, for purposes of § 52-582, to include only forensic evidence; in the present case, because the petitioner's untimely petition for a new trial was not based on newly discovered forensic evidence but, rather, R's statement to the police identifying P as the shooter, the trial court

correctly concluded that the petition for a new trial was time barred and that it lacked subject matter jurisdiction over it.

(*One judge concurring in part and dissenting in part*)

Argued May 9—officially released October 11, 2022

Procedural History

Amended petition, in the first case, for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court, and petition, in a second case, for a new trial following the petitioner's conviction of the crimes of murder and assault in the first degree, brought to the Superior Court in the judicial district of New Haven, where the court, *Young*, *J.*, dismissed the petition; thereafter, the court, *Young*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed in Docket No. AC 44679*; *appeal dismissed in Docket No. AC 44736*.

Vishal K. Garg, for the appellant in Docket Nos. AC 44679 and AC 44736 (petitioner).

Linda Frances Rubertone, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, former state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee in Docket No. AC 44679 (respondent).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, former state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee in Docket No. AC 44736 (state).

Opinion

MOLL, J. These two appeals arise out of two postconviction actions filed by the petitioner, Ricardo Myers.

In Docket No. AC 44679, the petitioner appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly (1) concluded that he failed to show that his trial counsel had performed deficiently, (2) rejected his actual innocence claim, and (3) determined that his due process rights were not violated. The petitioner further claims that the habeas court erred in denying his request for a capias and a continuance so that the petitioner could secure the appearance of an exculpatory witness at his habeas trial. In Docket No. AC 44736, the petitioner appeals, following the denial of his petition for certification to appeal, from the judgment of the trial court dismissing his petition for a new trial. The petitioner claims on appeal that the trial court erred in determining that his petition for a new trial was time barred pursuant to General Statutes § 52-582. As to AC 44679, we affirm the judgment of the habeas court. As to AC 44736, we dismiss the petitioner's appeal.

The following facts, as set forth by this court in the petitioner's direct appeal from his conviction and as supplemented by the record, and procedural history are relevant to our resolution of both appeals. "On May 17, 2013, the [petitioner], along with Dwight Crooks and Gary Pope, was at the Lazy Lizard club in New Haven. The club let out during the early hours of May 18, 2013, and the trio made its way out with the crowd. Once outside, an argument ensued between the [petitioner's] group and another group that was across the street. The argument escalated to a physical altercation before officers of the New Haven police stepped in and caused the groups to disperse. The [petitioner] and his friends then got into Pope's car and drove around before parking in a different lot not far from the club. The three then headed out on foot to meet someone they knew

when they encountered again the group from [the] Lazy Lizard. Some provocative remarks were made and the two groups moved toward each other. Crooks testified at trial that, at this point, he heard gunshots, and he turned to see the [petitioner] holding a gun. Two bullets struck and killed Tirrell Drew, who was a member of the other group, and stray bullets injured two bystanders. The bullets recovered from Drew's body were found to have been fired from a .40 caliber semiautomatic Glock handgun owned by the [petitioner] and seized from his residence by the police on June 14, 2013, nearly a month after the shooting.

"The [petitioner] subsequently was arrested and charged with murder and two counts of assault in the first degree. . . . [S]ix days after the shooting, a person named Latrell Rountree, while in custody on an unrelated matter, revealed to the police that he was Drew's friend and was present when Drew was shot. Rountree identified Pope as the shooter." *State* v. *Myers*, 178 Conn. App. 102, 103–104, 174 A.3d 197 (2017). Rountree's interview with the police was video recorded.

The petitioner planned to call Rountree as a witness at his criminal trial and intended to use his testimony about the shooting as the basis for a third-party culpability defense. Id., 104. The petitioner's trial counsel believed that Rountree's identification of Pope as the shooter was the strongest piece of evidence that the defense had to support its theory of defense.[1] To that end, trial counsel hired Daniel Markle, a private investigator, to locate Rountree and serve him with a subpoena ad testificandum.

Markle located Rountree on May 28, 2015, after two and one-half weeks of searching and on the third day

[1] Trial counsel initially considered claiming that the petitioner had acted in self-defense, but he later decided to present a third-party culpability defense instead.

of the petitioner's criminal trial. That same day, Markle met Rountree at a McDonald's in North Haven and served him with a subpoena commanding him to appear in court the following day, May 29, 2015. According to Markle, Rountree was not happy to be served with the subpoena and left it behind after reading it.

On May 29, 2015, Rountree failed to appear in court. Trial counsel then requested that the court issue a capias warrant pursuant to General Statutes § 54-2a in order to secure Rountree's attendance.[2] After Markle testified that he had located Rountree the day before and had served him with a subpoena, the court granted trial counsel's request, stating: "Court's exhibit 3 reflects the fact that Mr. Rountree was commanded to appear in court today, May 29, at 9:30 a.m. to testify in this proceeding. Obviously, he is not here. We have had no contact from him. Therefore, the court is going to authorize pursuant to statute a capias to secure his appearance. This matter will be continued until Monday, at which time that will give the authorities the rest of today, tonight, tomorrow, and Sunday to attempt to serve him and bring him to court."

The authorities, however, were unable to locate Rountree by Monday. After learning that Rountree had not been found, trial counsel did not ask for a continuance or request that the authorities be given additional time to locate him. Instead, trial counsel moved to admit into evidence the video recording of Rountree's interview with the police, in which Rountree had identified Pope as the shooter. The court ruled that the recording

[2] "A capias is a vehicle to compel attendance at a judicial proceeding." *State* v. *Shawn G.*, 208 Conn. App. 154, 176, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021).

General Statutes § 54-2a (a) provides in relevant part: "In all criminal cases the Superior Court, or any judge thereof . . . may issue . . . capias for witnesses . . . who violate an order of the court regarding any court appearance . . . ."

was not admissible under the residual exception to the hearsay rule[3] because it did not bear the requisite indicia of trustworthiness and reliability necessary for admission under the exception.[4] See *State* v. *Myers*, supra, 178 Conn. App. 104–105; id., 105 n.2. Thereafter, the parties rested, and the matter was submitted to the jury. "On June 3, 2015, the jury found the [petitioner] guilty on all three counts, and the court rendered judgment accordingly." Id., 105.

The petitioner then appealed from his judgment of conviction to this court, claiming that the trial court had abused its discretion in refusing to admit into evidence the video recording in which Rountree identified Pope as the shooter. We affirmed the judgment of the trial court, concluding that, because "the jury reasonably could have found that the [petitioner] shot Drew to death . . . we are not convinced that any harm resulting from the exclusion of Rountree's interview is self-evident in light of the evidence presented at trial." Id., 108. We further held that, "because the [petitioner] failed to brief and analyze . . . the resulting harm from the court's exclusion of the video recording," we would not consider whether the trial court abused its discretion. Id. Additional facts and procedural history will be set forth as necessary.

I

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On appeal, the petitioner challenges the habeas court's denial of his amended petition for a writ of

[3] Section 8-9 of the Connecticut Code of Evidence provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

[4] Specifically, the court concluded that Rountree's statement to the police suffered from numerous trustworthiness problems, including that Rountree was intoxicated when he witnessed the shooting, waited six days to give a

habeas corpus, wherein he asserted that (1) his trial counsel was ineffective for failing to secure the testimony of Rountree and (2) he was actually innocent based on Rountree's identification of someone else as the shooter.[5] The petitioner further claims that the habeas court abused its discretion when it denied his request to issue a capias warrant and to grant a continuance in order to secure Rountree's attendance and testimony at the petitioner's habeas trial.

We first set forth the following additional facts and procedural history, which are relevant to our resolution of these claims. On March 16, 2020, the self-represented petitioner filed a three count amended petition for a writ of habeas corpus, which is the operative habeas petition in the present case.[6] In count one, the petitioner alleged that his right to effective assistance of counsel had been violated because his trial counsel had failed: (1) "to request [an] adjournment to locat[e] [Rountree]," (2) "to proffer a written or verbal request to the court for a third-party culpability jury instruction," (3) "to adequately search for [Rountree]," and (4) "to investigate to ensure the execution of [a] capias warrant." In count two, the petitioner alleged that he was actually

statement to the police, and gave a statement only after being arrested himself.

[5] In his principal appellate brief, the petitioner also appeared to claim that the habeas court had improperly denied his due process claim, wherein he asserted that his due process rights were violated by "the marshal service's failure to execute the court-ordered capias intended to secure Rountree's presence and testimony at the criminal trial" and "[a trial court clerk's] purported failure to follow the capias warrant procedures." At oral argument before this court, however, the petitioner expressly abandoned his due process claim. Accordingly, we do not consider this claim. See *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 65 n.1, 223 A.3d 85 (2019) (declining to review claims that counsel expressly abandoned at oral argument), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020).

[6] The petitioner initially filed a petition for a writ of habeas corpus in December, 2016. A scheduling order was issued in connection with that petition, but no action was taken on the claims asserted therein.

innocent, based on Rountree's identification of Pope as the shooter. Last, in count three, the petitioner alleged that his state and federal due process rights had been violated by (1) the state marshal service's failure to execute the capias warrant and (2) the court clerk's failure to follow the proper procedures for issuing the capias warrant. See footnote 5 of this opinion.

On May 5, 2020, the respondent, the Commissioner of Correction, filed a return to the amended habeas petition, wherein he admitted the petitioner's procedural allegations but otherwise left the petitioner to his proof. Thereafter, on July 24, 2020, the petitioner filed two separate applications for issuance of subpoenas by a self-represented party pursuant to Practice Book § 7-19,[7] seeking subpoenas for his trial counsel, Rountree, and Markle.[8] On August 12, 2020, the habeas court granted the petitioner's applications, and subpoenas later were issued and served on trial counsel, Rountree, and Markle.[9]

[7] Practice Book § 7-19 provides in relevant part: "Self-represented litigants seeking to compel the attendance of necessary witnesses in connection with the hearing of any matter shall file an application to have the clerk of the court issue subpoenas for that purpose. The application shall include a summary of the expected testimony of each proposed witness so that the court may determine the relevance of the testimony. The clerk, after verifying the scheduling of the matter, shall present the application to the judge before whom the matter is scheduled for hearing . . . which judge shall conduct an ex parte review of the application and may direct or deny the issuance of subpoenas as such judge deems warranted under the circumstances . . . ."

[8] The petitioner also requested that a subpoena be issued for Giovanni Spennato, the chief clerk for the judicial district of New Haven. That subpoena was issued and served. At his habeas trial, however, the petitioner informed the court that he had "chosen to forgo that witness" and, thus, he did not present testimony from Spennato at that proceeding.

[9] These subpoenas were not immediately served on the witnesses because, on August 17, 2020, the court vacated its August 12, 2020 order after learning that Attorney W. Theodore Koch III had filed an appearance in the petitioner's habeas case. Thereafter, on August 26, 2020, the court reinstated its original order granting the petitioner's application for issuance of subpoenas, stating: "Following a further review of the file, which established that Attorney Koch is acting as standby counsel only on behalf of the petitioner, the court's

It was the petitioner's belief, based on the information available on the Department of Correction's website, that Rountree would be released from custody after the last scheduled trial date of October 8, 2020. In late September, 2020, however, the petitioner learned that Rountree's release date had been changed and that Rountree was scheduled to be released on October 2, 2020. The petitioner then filed, through his standby counsel, a motion to move the scheduled habeas trial date of October 8, 2020, to October 1, 2020, to ensure that Rountree would appear and testify. The motion further stated that, "[i]f Rountree is released, there is a significant chance that he will not honor a subpoena to testify at the petitioner's habeas trial, much the way he did at the petitioner's criminal trial." The court denied the motion to change the trial date without prejudice, stating that the requested date was unavailable.

A two day habeas trial was held on October 7 and 8, 2020. The petitioner, assisted by standby counsel, represented himself at the trial. On October 7, 2020, he presented testimony from his trial counsel and Markle.

Trial counsel testified about the steps he took to locate Rountree and to secure his attendance at the petitioner's criminal trial. Trial counsel specifically testified that he had subpoenaed Rountree for the criminal trial and that the subpoena was successfully served, but that Rountree failed to appear in court. Trial counsel further stated that, after Rountree failed to appear, he requested a capias warrant and the requested capias warrant was issued, but Rountree could not be located. Trial counsel also stated that it was not his responsibility to follow up on the capias warrant and, thus, he could not testify as to what steps the state marshals

[August 17, 2020] order is vacated. The [August 12, 2020] order granting the application for subpoena as requested is reinstated." The requested subpoenas were then served.

took when trying to find Rountree. Last, trial counsel testified that when it became clear on Monday that Rountree was not going to appear, he developed another strategy for introducing his testimony, specifically, by "hav[ing] the judge find Mr. Rountree not available and attempt[ing] to admit his videotaped statement into evidence in place of his testimony."

Markle testified about what he did to locate Rountree and to serve him with the subpoena. Markle stated that it took him about two and one-half weeks to find Rountree and that he was a "middle of the road" person to locate. Markle further testified that it might have been "possible" to locate Rountree a second time. Last, Markle stated that trial counsel never asked him to assist the state marshals in their search for Rountree.

On October 8, 2020, the petitioner sought to present testimony from Rountree. Rountree, however, failed to honor his subpoena and did not appear in court. The petitioner then presented testimony from Salvatore Viglione, a private investigator whom the petitioner's family had hired to locate and communicate with Rountree. Viglione testified that he had met with Rountree several months earlier at the Willard-Cybulski Correctional Institution in Enfield, where Rountree was incarcerated at the time. Viglione also stated that he exchanged phone calls and text messages with Rountree after he was released from custody on October 2, 2020. Viglione further testified that, on October 7, 2020, Rountree called him from a "throwaway phone"[10] with a New Jersey area code to tell Viglione that he had changed his mind about testifying. When speaking with Rountree, Viglione asked him where he was, but Rountree declined to say.

[10] Viglione testified that a "throwaway phone" is a phone for which the user "buy[s] a certain amount of minutes" and then the user can either "reuse that phone on additional minutes and/or buy a different phone with a different number linked up to it."

The petitioner then requested that the habeas court issue a capias warrant to secure Rountree's attendance and to grant a continuance for the purpose of locating Rountree and executing the capias. As to the continuance, the petitioner initially asked for a continuance "until such time as the court resume[s] [in-person] hearings," unless the state marshals were able to find Rountree earlier. The petitioner later indicated that a one month continuance would be sufficient. The court denied both requests, stating: "[N]oting [Rountree's] potential presence in New Jersey, his unwillingness to indicate his location, and his specific unwillingness to [testify], it's certainly a similar situation [as] at the underlying trial. And in this court's discretion I see no reasonable basis to grant this capias, also no reasonable basis to simply continue this matter for such purpose. The capias request is denied and the motion for a continuance is denied." The petitioner then rested his case without presenting testimony from Rountree.

In a memorandum of decision dated November 23, 2020, the court denied the petitioner's habeas petition. As to the petitioner's ineffective assistance of counsel claim, the court found that the petitioner had failed to prove that his trial counsel had rendered deficient performance because the evidence introduced at trial demonstrated that trial counsel had made repeated attempts to secure Rountree's appearance and that, when those efforts failed, attempted to introduce video recorded evidence of Rountree's testimony instead.[11] The court further held that, even if trial counsel's performance had been deficient, because Rountree did not

[11] On July 2, 2021, during the pendency of the present appeal, the petitioner filed a motion for articulation with the habeas court asking it to articulate the basis of its denial of his ineffective assistance of counsel claim. The habeas court denied the petitioner's motion for articulation, and the petitioner then filed a motion for review with this court. We granted review but denied the relief requested.

testify at the habeas trial, the court was unable to determine whether any prejudice had occurred. The court next denied the petitioner's actual innocence claim on the grounds that "[t]he petitioner has not presented any newly discovered evidence in support of his actual innocence claim" and "there is no evidence that satisfies the clear and convincing standard" for such claims. Last, the court concluded that the petitioner's due process claim failed because insufficient evidence was presented to substantiate the claim. On November 23, 2020, the petitioner filed a petition for certification to appeal, which the habeas court granted. The present appeal followed.[12]

A

Ineffective Assistance of Counsel

As previously stated, in his amended petition for a writ of habeas corpus, the petitioner alleged that his trial counsel was ineffective in four separate ways. On appeal, however, the petitioner concedes in his principal appellate brief that the "gravamen of the petitioner's [ineffective assistance] claim is that [trial counsel] failed to request an adjournment to search for and locate [Rountree] and secure via a capias his presence at the criminal trial." (Internal quotation marks omitted.) More specifically, the petitioner claims that the habeas court improperly concluded that he failed to show that

[12] In connection with the petitioner's petition for certification to appeal, the petitioner also applied for the appointment of counsel and a waiver of appellate fees. On December 23, 2020, the habeas court denied that application because "the petitioner was assisted by privately retained standby counsel." Thereafter, on February 26, 2021, the petitioner filed with this court a motion for permission to bring a late appeal from the decision of the habeas court. In that motion, the petitioner represented that, after the habeas court had denied the application for the appointment of counsel, the petitioner and his family had contacted the Office of the Chief Public Defender in an attempt to reverse that denial, but they ultimately retained private counsel. On April 14, 2021, this court granted the petitioner's motion to file a late appeal, and the petitioner filed the present appeal on May 4, 2021.

his trial counsel performed deficiently by failing to undertake greater efforts to secure Rountree's testimony after learning that the capias warrant had not been served. We are not persuaded.

We begin by setting forth the law governing claims of ineffective assistance of counsel and the corresponding standard of review. "In *Strickland* v. *Washington*, [466 U.S. 668, 687,104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citations omitted; internal quotation marks omitted.) *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 364–65, 77 A.3d 777 (2013).

Moreover, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be

whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . Thus, a court deciding an [ineffective assistance] claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (Citations omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 688–90.

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Holloway* v. *Commissioner of Correction*, supra, 145 Conn. App. 365.

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard [of review]." (Internal quotation marks omitted.) *Leconte* v. *Commissioner of Correction*, 207 Conn. App. 306, 319–20, 262 A.3d 140, cert. denied, 340 Conn. 902, 263 A.3d 387 (2021).

On the basis of our careful review of the record, we conclude that the habeas court properly found that the petitioner failed to prove that trial counsel's failure to secure the testimony of Rountree amounted to deficient performance.

On appeal, the petitioner claims that trial counsel's efforts to secure Rountree's testimony were insufficient and amounted to ineffective assistance because, after learning that Rountree had not been taken into custody following the issuance of the capias warrant, trial counsel undertook no additional efforts to secure his appearance. Specifically, the petitioner contends that trial counsel should have asked for a second continuance during which trial counsel and the state marshals could have continued looking for Rountree. The petitioner further argues that trial counsel "was not absolved of his obligation to seek additional time to secure Rountree's presence simply because counsel had an alternative strategy of offering Rountree's video recorded statement," given that "[r]easonably competent counsel would have recognized that seeking admission of a video-recorded statement under the residual exception to the hearsay rule was a longshot . . . ." Last, the petitioner argues that trial counsel provided ineffective

assistance because he abdicated responsibility for ensuring that the capias warrant was served on Rountree by not following up with the state marshal service regarding the marshals' efforts to locate Rountree. Conversely, the respondent claims that trial counsel's performance was reasonable because Rountree's failure to appear was unrelated to anything trial counsel did and because trial counsel took reasonable steps to secure his attendance. The respondent further argues that trial counsel's backup plan of offering Rountree's recorded statement into evidence was also reasonable, given the particular circumstances of this case. We agree with the respondent.

During the habeas trial, trial counsel testified at length about his efforts to secure Rountree's testimony. Upon learning that Rountree had identified someone other than the petitioner as the shooter, trial counsel hired a private investigator, Markle, to locate Rountree, which Markle was able to do. Prior to the criminal trial, trial counsel secured a subpoena for Rountree's appearance and Markle was able to successfully serve that subpoena on Rountree. When Rountree failed to appear, trial counsel then requested that the court issue a capias warrant. The court granted that request and continued the trial to the following Monday, so that Rountree could hopefully be located and brought to court to testify. That Monday, however, when trial counsel spoke with the state marshal service, he learned that the marshals had been unable to locate Rountree. Thereafter, trial counsel moved for the court to admit into evidence the recorded interview of Rountree pursuant to the residual hearsay exception, but the trial court denied that motion.

Despite the fact that Rountree's testimony was never presented to the jury in the petitioner's criminal trial, the petitioner failed to prove that the efforts that trial counsel undertook to try to secure his testimony were

objectively unreasonable. Although trial counsel could have requested a second continuance within which to try again to locate Rountree, we cannot conclude based on the evidence before the habeas court that his failure to do so amounted to ineffective assistance. We cannot say that it was unreasonable for trial counsel to conclude that additional attempts to locate Rountree would have been in vain, given that Rountree had successfully evaded authorities in the past and that the petitioner's jury trial could not be continued indefinitely until Rountree could be found. In fact, as the petitioner conceded at oral argument before this court, no evidence was presented at the habeas trial that, if either the state marshal service or Markle had had a few more days, they would have been able to find Rountree. Furthermore, the petitioner did not overcome the presumption that it "might be considered sound trial strategy" on trial counsel's part not to further delay the petitioner's criminal trial by continuing to search for Rountree, given that undertaking additional efforts to locate him, which may well have been futile, might have resulted in jurors becoming unavailable and/or the fading of jurors' memories concerning the petitioner's case. See *Holloway* v. *Commissioner of Correction*, supra, 145 Conn. App. 364–65 (courts must indulge strong presumption that challenged actions may have been strategic decisions).

Moreover, trial counsel's decision to ask that the video recording of Rountree's testimony be admitted under the residual exception to the hearsay rule in lieu of undertaking further efforts to locate him also did not rise to the level of ineffective assistance. Although our Supreme Court has noted that the residual exception to the hearsay rule "[should be] applied in the rarest of cases"; *State* v. *Bennett*, 324 Conn. 744, 762, 155 A.3d 188 (2017); it was reasonable for trial counsel to believe that the circumstances of the petitioner's

criminal case—a case in which the only witness whose testimony could support the defense's theory could not be located but a video recording of his exculpatory testimony existed—was one of those rare cases where the residual hearsay exception applied. Additionally, as explained above, this decision "might be considered sound trial strategy," given the time constraints of a jury trial and the lack of evidence that Rountree could quickly and easily be located if a continuance was granted. See *Holloway* v. *Commissioner of Correction*, supra, 145 Conn. App. 364–65.

We are not persuaded by the petitioner's claim that the facts of the present case are identical to those in *Hodgson* v. *Warren*, 622 F.3d 591 (6th Cir. 2010), and that we therefore should reach the same outcome. In *Hodgson*, trial counsel failed to seek a continuance of a criminal trial when an exculpatory witness whom counsel had subpoenaed failed to appear. Id., 594. Instead, all that counsel did was to refuse the state's request to waive the witness' presence, a step that caused the court to issue a bench warrant in an attempt to secure the witness' appearance. Id., 600. Counsel, however, did not seek to delay the proceedings so that the warrant could be served, and the jury began deliberating only three hours after the warrant had issued. Id. Following the defendant's conviction on all charges, the defendant filed a petition for a writ of habeas corpus alleging, in relevant part, that his trial counsel had rendered ineffective assistance by failing to undertake additional efforts to secure the testimony of the exculpatory witness. Id., 598. The United States District Court for the Eastern District of Michigan found that counsel's inaction constituted ineffective assistance. Id. On appeal, the United States Court of Appeals for the Sixth Circuit agreed, holding that counsel's failure to seek at least an adjournment in order to make an additional

attempt to secure the witness' testimony amounted to ineffective assistance. Id., 599–600.

We conclude that the present case is distinguishable from *Hodgson* in two crucial respects. First, here, after learning that Rountree had failed to appear in accordance with his subpoena, trial counsel requested that a capias warrant issue and also secured a continuance of the trial until the following Monday, which gave the state marshal service three days to locate Rountree. Second, upon learning that the state marshal service had been unable to locate Rountree, trial counsel made an additional attempt to introduce Rountree's testimony by moving for his recorded statement to be admitted into evidence under the residual hearsay exception. Thus, in the present case, trial counsel took additional steps to secure the exculpatory witness' testimony beyond those taken by trial counsel in *Hodgson*. Therefore, we decline to reach the same conclusion as was reached in that case.

Accordingly, because the petitioner failed to present sufficient evidence that trial counsel did not make reasonable efforts to secure Rountree's appearance and introduce his testimony, we cannot say that his failure to request a second continuance constituted deficient performance. Therefore, the habeas court properly found that the petitioner failed to prove that trial counsel performed deficiently.[13]

B

Actual Innocence

The petitioner next claims that the habeas court improperly denied his actual innocence claim. We again are not persuaded.

[13] At oral argument before this court, the petitioner conceded that the habeas court's failure to grant his request for a capias warrant and for a continuance to secure Rountree's testimony went only to the prejudice prong of the *Strickland* test. Accordingly, because we can resolve the petitioner's ineffective assistance claim on the deficient performance prong alone, we

We begin by setting forth the law governing claims of actual innocence and the corresponding standard of review. "Actual innocence, also referred to as factual innocence . . . is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . .

"[T]he proper standard for evaluating a freestanding claim of actual innocence . . . is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime. . . .

"Our Supreme Court recently clarified the actual innocence standard in *Gould* [v. *Commissioner of Correction*, 301 Conn. 544, 560–61, 22 A.3d 1196 (2011)]. In *Gould*, the habeas court found that the petitioner was entitled to relief on his actual innocence claim after the recantations of testimony that was the sole evidence of [the petitioner's] guilt. . . . On appeal, our Supreme Court held that the clear and convincing burden . . . requires more than casting doubt on evidence presented at trial and the burden requires the petitioner to demonstrate actual innocence through affirmative evidence that the petitioner did not commit the crime. . . .

need not determine, with regard to this claim, whether the habeas court's failure to grant a capias warrant and a continuance was an abuse of discretion.

"Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred. . . . Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility. . . .

"With respect to the first component of the petitioner's burden, namely, the factual finding of actual innocence by clear and convincing evidence . . . [t]he appropriate scope of review is whether, after an independent and scrupulous examination of the entire record, we are convinced that the finding of the habeas court that the petitioner is actually innocent is supported by substantial evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 706–707, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016); see also *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92, 700 A.2d 1108 (1997) (establishing clear and convincing evidence standard for actual innocence claims).

"As to the second component of the petitioner's burden, that no reasonable fact finder would find the petitioner guilty . . . our scope of review is plenary. A habeas court is no better equipped than we are to make the probabilistic determination of whether, considering the evidence as the habeas court did, no reasonable fact finder would find the petitioner guilty. That type of determination does not depend on assessments of credibility of witnesses or of the inferences that are the most appropriate to be drawn from a body of evidence—assessments that are quintessentially [the] task for the [fact finder] in a habeas proceeding. . . .

Determining whether no reasonable fact finder, considering the entire body of evidence as the habeas court did, would find the petitioner guilty is either an application of law to the facts or a mixed question of law and fact to which a plenary standard of review applies." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 134 Conn. App. 44, 51–52, 37 A.3d 802, cert. denied, 304 Conn. 919, 41 A.3d 306 (2012).

On appeal, the petitioner contends that the court improperly denied his actual innocence claim. Specifically, the petitioner argues that the court prevented him from proving his actual innocence claim by denying his request for a capias warrant and a continuance to secure Rountree's testimony at the habeas trial, testimony that would have demonstrated that Pope, and not the petitioner, was the shooter.

According to the petitioner, both requests should have been granted because the petitioner had satisfied the requirements for the issuance of a capias warrant. Conversely, the respondent argues that (1) the habeas court acted within its discretion when it denied the petitioner's requests for a capias warrant and a continuance and, alternatively, (2) even if it is assumed that the habeas court erred in denying the petitioner's requests, any error was harmless.

"[T]he issuance of a capias [warrant] is not mandatory but, rather, rests in the sole discretion of the trial court." *State* v. *Shawn G.*, 208 Conn. App. 154, 177, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021). Accordingly, we review a court's denial of a request for a capias warrant for an abuse of discretion. Id. Our review of a court's ruling on a request for a continuance is likewise governed by the abuse of discretion standard. Id. "In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did."

Id. Moreover, it is well settled that, in the absence of structural error, the mere fact that a court issued an improper ruling does not entitle the party challenging that ruling to relief. See *State* v. *Myers*, supra, 178 Conn. App. 105. An improper ruling must also be harmful to justify any relief. See *Gonzalez* v. *Commissioner of Correction*, 127 Conn. App. 454, 460, 14 A.3d 1053, cert. denied, 302 Conn. 933, 28 A.3d 991 (2011).

Even if we assume that the habeas court abused its discretion in denying the petitioner's requests for a capias warrant and a continuance, we conclude that any error was harmless because, even had Rountree testified at the habeas trial consistent with the recorded statement that he gave to the police before the petitioner's criminal trial, his testimony would have been insufficient to meet the demanding clear and convincing standard under *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 791–92.

Rountree's testimony at the petitioner's habeas trial would not have satisfied the clear and convincing standard because his testimony would have been contradictory to the state's evidence and, thus, it could not have unquestionably established the petitioner's innocence. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 795 ("the clear and convincing evidence standard . . . *forbids relief whenever the evidence is* loose, equivocal or *contradictory*" (emphasis added; internal quotation marks omitted)); see also *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 561 ("actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime"). More specifically, Rountree's testimony concerning the identity of the shooter would not have negated the evidence of the petitioner's guilt that was admitted at his criminal trial, specifically, Crooks' eyewitness testimony that the petitioner was the one who shot the victim and the fact that the gun that was used to kill the victim was owned

by the petitioner and found in his possession one month after the shooting. See *State* v. *Myers*, supra, 178 Conn. App. 108. This is particularly true because the petitioner made no effort at his habeas trial to impeach or otherwise call into question the evidence that was introduced against him at the criminal trial. At most, Rountree's testimony might have raised a question as to the petitioner's guilt that, in turn, could have raised a reasonable doubt in the minds of the jury. That, however, is not enough to satisfy the clear and convincing standard under *Miller* and *Gould*. See *Gould* v. *Commissioner of Correction*, supra, 560–61 ("[a]ctual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt"); *Miller* v. *Commissioner of Correction*, supra, 795.

Put another way, Rountree's testimony at the petitioner's habeas trial would not have satisfied the clear and convincing standard because, even if Rountree's identification of Pope as the shooter had been presented at the petitioner's criminal trial, there was still sufficient evidence from which the jury could find the petitioner guilty. As this court summarized in the petitioner's direct appeal of his conviction, "the jury reasonably could have found that the [petitioner] shot Drew to death by firing two bullets that entered Drew's body. Both bullets came from the [petitioner's] gun and were recovered from Drew's body. The [petitioner] still was in possession of this gun a month after the shooting. Crooks testified at the defendant's trial under oath and was cross-examined on his testimony that it was the defendant who shot Drew." *State* v. *Myers*, supra, 178 Conn. App. 108. Because the jury would not have been required to believe Rountree, and because the petitioner at his habeas trial did nothing to undermine the evidence pointing to his guilt, the jury reasonably could have found him guilty even if Rountree had testified.

In sum, for the foregoing reasons and after an independent and scrupulous examination of the entire record, we conclude that the habeas court did not err in denying the petitioner's actual innocence claim.

II

AC 44736

The petitioner claims that the trial court erred in dismissing his petition for a new trial because the court incorrectly concluded that (1) the petition had been filed after the expiration of the limitation period under General Statutes § 52-582 and (2) therefore, it lacked subject matter jurisdiction over the petition. We disagree.

We first set forth the following additional facts and procedural history that are relevant to our resolution of this claim. On February 26, 2020, the petitioner filed a petition for a new trial, claiming, in relevant part, that he was entitled to a new trial on the basis of newly discovered evidence that was likely to produce a different result in a new trial.[14] On April 27, 2020, the respondent, the state of Connecticut, filed an answer in which it denied the petitioner's claim. Thereafter, on May 11, 2020, the respondent filed a motion for summary judgment and a memorandum in support of that motion. In its motion, the respondent claimed that the court lacked subject matter jurisdiction over the petitioner's petition for a new trial because the petition had been filed after the applicable three year statute of limitations had run and, accordingly, the petitioner's claim was time barred. The respondent then also filed an amended answer wherein it asserted as a special defense that § 52-582,

[14] The petitioner also claimed in his petition for a new trial that his right to compulsory process under the sixth amendment had been violated because he was unable to secure Rountree's attendance and testimony at his criminal trial. The court held that this claim also was time barred by § 52-582 and the petitioner does not challenge that result on appeal.

which provides the applicable statute of limitations, "may apply depriving this court of subject matter jurisdiction."

On May 29, 2020, the petitioner filed an objection to the respondent's motion for summary judgment. According to the petitioner, when § 52-582 was amended by No. 18-61 of the 2018 Public Acts (P.A. 18-61), a new exception to the limitation period was created. Under that exception, the petitioner argued that he was permitted to file his petition for a new trial after the limitation period had run because the petition relied on evidence that was unavailable at the time of the trial, specifically, Rountree's testimony that someone else was the shooter.

On March 2, 2021, the parties appeared and presented argument on the respondent's motion for summary judgment. The respondent first argued that any testimony from Rountree did not qualify as newly discovered evidence because such evidence was known to the parties at the time of the petitioner's criminal trial. The respondent also argued that the new exception under § 52-582 applied only to newly discovered *forensic* evidence, not to any and all newly discovered evidence. Conversely, the petitioner argued that § 52-582, as amended by P.A. 18-61, permits the late filing of a petition for a new trial based on any newly discovered evidence, including newly *available* evidence, and that because Rountree's testimony constituted newly available evidence (given that such testimony was not available at the petitioner's criminal trial), his petition was not time barred.

Thereafter, the court granted the respondent's motion for summary judgment and dismissed the petitioner's motion for a new trial, stating: "[The petitioner] has already indicated in his petition itself that Mr. Rountree's statement was known to him, Mr. Rountree's testimony was known to him at the time of the underlying

criminal proceeding. And the court finds no support for the position that the unavailability of a witness is the equivalent of newly discoverable evidence. So, consequently, the petitioner did not file [his] petition prior to the expiration of the statute of limitations, depriving the court of subject matter jurisdiction. So, the petition is dismissed for lack of subject matter jurisdiction." On March 10, 2021, the petitioner filed a petition for certification to appeal, which the habeas court denied. This appeal followed.

We now set forth the relevant standards of review for the petitioner's claim. "It is well established that we apply the abuse of discretion standard when reviewing a court's decision to deny a request for certification to appeal from a denial of a petition for a new trial. . . . Therefore, the threshold issue that we must now decide is whether the court abused its discretion in denying the petition for certification to appeal. *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), establishes the framework for satisfying the criteria necessary to show an abuse of discretion. A petitioner satisfies that burden by demonstrating: [1] that the issues are debatable among jurists of reason; [2] that a court could resolve the issues [in a different manner]; or [3] that the questions are adequate to deserve encouragement to proceed further." (Citation omitted; internal quotation marks omitted.) *Holliday* v. *State*, 111 Conn. App. 656, 658, 960 A.2d 1101 (2008), cert. denied, 291 Conn. 902, 967 A.2d 112 (2009). In our review of whether the court abused its discretion in denying certification to appeal, we necessarily must examine the petitioner's underlying claim that the court improperly concluded that his petition was time barred. See id., 659.

Whether the court had subject matter jurisdiction to consider the petitioner's petition for a new trial on the basis of newly discovered evidence is an issue of

statutory construction over which our review is plenary. *Turner* v. *State*, 172 Conn. App. 352, 361, 160 A.3d 398 (2017). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . 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.) Id., 362.

We next set forth the law governing petitions for a new trial. "Pursuant to [General Statutes] § 52-270, a convicted criminal defendant may petition the Superior Court for a new trial on the basis of newly discovered evidence." *Skakel* v. *State*, 295 Conn. 447, 466, 991 A.2d 414 (2010). A critical limitation on the exercise of the court's discretion in ruling on a petition for a new trial, however, is the statute of limitations. As a general rule, "[n]o petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of. . . . The three year period begins to run from the date of rendition of judgment by the trial court . . . which, in a criminal case, is the date of imposition

of the sentence by the trial court." (Citations omitted; internal quotation marks omitted.) *Summerville* v. *Warden*, 229 Conn. 397, 426, 641 A.2d 1356 (1994).

Section 52-582 (a) establishes the three year limitation period for petitions for a new trial. Prior to 2018, § 52-582 included an exception to the limitation period for petitions based on certain DNA evidence, providing: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, *except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial* may be brought at any time after the discovery or availability of such new evidence." (Emphasis added.) General Statutes (Rev. to 2017) § 52-582. Then, in 2018, the legislature enacted P.A. 18-61, wherein it expanded the circumstances under § 52-582 in which a petition for a new trial could be filed after the limitation period had otherwise run.

General Statutes § 52-582, as amended by P.A. 18-61, now provides in relevant part: "(a) No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition for a new trial in a criminal proceeding based on DNA (deoxyribonucleic acid) evidence *or other newly discovered evidence, as described in subsection (b) of this section, that was not discoverable or available at the time of the original trial or at the time of any previous petition* under this section, may be brought at any time after the discovery or availability of such new evidence, and the court may grant the petition if the court finds that had such evidence been presented at trial, there is a reasonable likelihood there would have been a different outcome at the trial.

"(b) (1) *Such newly discovered evidence* in support of a petition for a new trial *may include newly discovered forensic scientific evidence that was not discoverable or available at the time of the original trial* or original or previous petition for a new trial . . . including that which might undermine any forensic scientific evidence presented at the original trial." (Emphasis added.)

Resolving the petitioner's claim on appeal requires us to interpret the language of § 52-582. The petitioner argues that, under § 52-582, the court had subject matter jurisdiction to consider his petition for a new trial because, even though the petition was filed outside of the limitation period, it was based on newly available evidence—specifically, Rountree's identification of Pope as the shooter—and, under the plain language of § 52-582, newly discovered evidence includes newly available evidence. Accordingly, he argues, because his petition was based on newly discovered evidence, it was not subject to the limitation period. The petitioner also argues that to the extent that § 52-582 has two possible interpretations—one interpretation where newly discovered evidence includes newly available evidence and one where it does not—the interpretation in which newly discovered evidence includes newly available evidence is the more logical interpretation.

Conversely, the respondent argues that the court did not have subject matter jurisdiction to consider the petitioner's petition for a new trial because § 52-582 permits a petition for a new trial to be filed outside of the statute's limitation period *only* when the petition is based on newly discovered DNA or *forensic* evidence, neither of which is the basis for the petitioner's petition. The respondent further argues that, even if § 52-582 can be interpreted as applying broadly to all newly discovered evidence, Rountree's identification of Pope as the shooter still does not constitute newly discovered evidence because that information was known and

available to the petitioner at the time of his criminal trial.

We now turn to the statute at issue. The relevant statutory language in § 52-582 is as follows: "(a) No petition for a new trial . . . shall be brought but within three years . . . except that a petition for a new trial in a criminal proceeding based on DNA . . . evidence *or other newly discovered evidence, as described in subsection (b) of this section*, that was not discoverable or available at the time of the original trial . . . may be brought at any time . . . . (b) (1) Such newly discovered evidence . . . *may include newly discovered forensic scientific evidence* that was not discoverable or available at the time of the original trial . . . ." (Emphasis added.)

On the basis of this language, specifically, the words "may include," we conclude that there are two reasonable ways to interpret the phrase "newly discovered evidence," as used in § 52-582. Although the word "may" generally conveys "permissive conduct and the conferral of discretion," "may" can also be interpreted as mandatory rather than directory when "the context of legislation permits such interpretation and if the interpretation is necessary to make a legislative enactment effective to carry out its purposes . . . ." (Internal quotation marks omitted.) *Stone* v. *East Coast Swappers, LLC*, 337 Conn. 589, 601, 255 A.3d 851 (2020); see also *In re Clinton Nurseries, Inc.*, 608 B.R. 96, 115 (Bankr. D. Conn. 2019), ("'[m]ay' means 'have permission to . . .' but it also means 'shall, must—used esp[ecially] in deeds, contracts, and statutes' "), rev'd on other grounds, 998 F.3d 56 (2d Cir. 2021); Black's Law Dictionary (9th Ed. 2009) p. 1068 (defining "may" as both "[t]o be a possibility" and "is required to"; also stating, "[i]n dozens of cases, courts have held *may* to be synonymous with *shall* or *must* . . . in an effort to effectuate legislative intent" (emphasis in original)).

The plain language of § 52-582 does not resolve whether "may," as used in the statute, was meant to import permissive or mandatory conduct. If the legislature intended for "may" to be permissive, then § 52-582 must be read to provide that newly discovered evidence includes both forensic evidence *and* all other types of evidence. On the other hand, if it was the legislature's intent for "may" to be mandatory, then § 52-582 must be interpreted to provide that newly discovered evidence *only* includes evidence that is forensic in nature. Both interpretations are equally reasonable and plausible readings of § 52-582. Thus, we conclude that § 52-582 is ambiguous; see *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 430, 994 A.2d 1265 (2010) ("[t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)); and, therefore, we may properly look to extratextual sources to ascertain the intent of the legislature. See *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 111, 202 A.3d 262 (2019).

Accordingly, we turn to the legislative history concerning the legislature's 2018 amendments to § 52-582. The legislative history of P.A. 18-61 demonstrates that it was the legislature's intent for its amendments to § 52-582 to narrowly define newly discovered evidence as including *only* forensic evidence.

In a written submission to the Judiciary Committee, Senator Martin M. Looney, one of the five sponsors of P.A. 18-61 (Senate Bill 509), explained the purpose of the act, stating: "[Senate Bill 509] will update our laws to accommodate advances in the methods and kinds of *forensic evidence* found to be foundationally valid by the scientific community. . . . The bill would amend Section 52-582 . . . to permit a convicted person to petition for a new trial *based on newly discovered forensic evidence* without being subject to the current

three year time limit on non-DNA evidence. . . . Senate Bill 509 would allow a judge to grant a new trial *upon a showing that forensic evidence* not available at the time of the original trial would likely have led to a different outcome. . . . I hope the [c]ommittee will support this bill to establish a way for the wrongfully convicted to use *newly discovered forensic evidence*." (Emphasis added.) M. Looney, Written Testimony Before the Judiciary Committee in Support of Senate Bill 509–An Act Concerning Newly Discovered Evidence (March 21, 2018) pp. 1–3. When considering the legislative history of a statute, we pay particular attention to the statements of legislators who sponsored the bill. See *Manchester Sand & Gravel Co.* v. *South Windsor*, 203 Conn. 267, 275, 524 A.2d 621 (1987). Senator Looney's statement before the Judiciary Committee makes clear that it was his belief that P.A. 18-61 would amend § 52-582 to allow a petition for a new trial to be filed outside of the limitation period *only* if the petition was based on DNA evidence or newly discovered *forensic* evidence.

In addition, Representative William Tong, when moving for acceptance of the Joint Committee's favorable report and passage of P.A. 18-61 before the House of Representatives, explained that the act was "an expansion of our state's existing law on newly discovered evidence and the right of a person who petitioned for a new trial based on newly discovered evidence. We already have a provision for newly discovered evidence and a new trial when DNA evidence is provided . . . we [are now] expanding that provision to include *new forensic and scientific* information . . . ." (Emphasis added.) H.R. Proc., 2018 Sess., May 8, 2018, pp. 608–609. Following Representative Tong's motion, Representative Rosa Rebimbas expressed her support for the bill, stating, "Because this expansion is specifically *only*

forensic scientific evidence, I'm comfortable in supporting it . . . . I just wanted to say I actually did reach out to [the Legislative Commissioners' Office] and just reaffirmed *that in fact it is limited only to scientific evidence—forensic scientific evidence* . . . . ." (Emphasis added.) Id., pp. 609–10. Similarly, when Senator Paul Doyle moved before the Senate for acceptance of the Joint Committee's favorable report and passage of P.A. 18-61, he too stated that the act was intended to expand current law to give criminal defendants the right to petition for a new trial after the expiration of the three year limitation period when such petitions were based on newly discovered *forensic* evidence. S. Proc., 2018 Sess., May 2, 2018, pp. 16–18.

Accordingly, guided by this legislative history, we conclude that the legislature intended for newly discovered evidence under § 52-582 to include only newly discovered forensic evidence. Consequently, because the petitioner's untimely petition for a new trial was not based on such evidence, the court correctly concluded that it lacked subject matter jurisdiction over the petition and properly dismissed the petition on that basis.[15]

The judgment of the habeas court in Docket No. AC 44679 is affirmed; the appeal in Docket No. AC 44736 is dismissed.

In this opinion BRIGHT, C. J., concurred.

PRESCOTT, J., concurring in part and dissenting in part. I agree with part II of the majority opinion and, on the basis of the well reasoned analysis set forth

[15] Because we conclude that § 52-582 does not allow the petitioner to file his petition for a new trial outside of the three year limitation period, we need not address the petitioner's argument that Rountree's testimony constitutes newly discovered evidence under *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1978).

therein, concur that the trial court properly dismissed the petition of the petitioner, Ricardo Myers, for a new trial. I also agree with the majority's conclusion in part I B of the opinion that the habeas court properly denied his actual innocence claim.

I do not, however, agree with the majority's conclusion in part I A of the opinion that the habeas court properly determined that the petitioner failed to demonstrate that his trial counsel provided ineffective assistance of counsel. In my view, the habeas court improperly concluded that the petitioner failed to demonstrate that his trial counsel's performance was deficient and that he suffered prejudice from any alleged deficient performance. I additionally conclude that the habeas court abused its discretion by denying the petitioner's requests for the issuance of a capias warrant and for a continuance. Thus, I would reverse the habeas court's denial of the petitioner's request for the issuance of a capias warrant and remand the case to the habeas court with direction to grant the petitioner's request and to conduct a new trial on the issue of prejudice. Accordingly, I respectfully dissent.

To start, I agree with the majority that the habeas court properly denied the petitioner's claim of actual innocence. As the majority persuasively explained, the petitioner was required to meet the extremely high burden of establishing that, "after considering all of th[e] evidence [adduced at the original criminal trial and the habeas trial] and the inferences drawn therefrom . . . *no reasonable fact finder* would find the petitioner guilty of the crime" for which he was convicted. (Emphasis added.) *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 747, 700 A.2d 1108 (1997). In the present case, even if Latrell Rountree had testified at trial that Gary Pope, as opposed to the petitioner, had shot Tirrell Drew, Dwight Crooks testified on behalf of the state that the *petitioner* had shot Drew. See *State*

v. *Myers*, 178 Conn. App. 102, 104, 174 A.3d 197 (2017). Thus, even if Rountree's testimony was exculpatory with respect to the issue of the identity of the shooter, the state presented conflicting evidence as to that issue, and the jury reasonably could have discredited Rountree's testimony in favor of the testimony of Crooks. The petitioner thus failed to establish that "no reasonable fact finder" would have concluded that he shot Drew. See *Miller* v. *Commissioner of Correction*, supra, 747.

I next turn to the petitioner's claim of ineffective assistance of trial counsel. The facts and procedural history are well articulated by the majority, and I do not disagree with the habeas court's factual findings or the majority's recitation thereof. It is important to emphasize, however, the relevant facts that put in context the importance of Rountree's testimony to the petitioner's case in the underlying criminal trial. As the majority explained, after the petitioner, Crooks, and Pope exited the Lazy Lizard club in New Haven during the early hours of May 18, 2013, an argument ensued between them and another group of individuals in the vicinity of the club. *State* v. *Myers*, supra, 178 Conn. App. 103–104. "The argument escalated to a physical altercation . . . [resulting in] officers of the New Haven police stepp[ing] in and caus[ing] the groups to disperse." Id., 104. The petitioner, Crooks, and Pope then drove to a second location, after which they once again encountered the other group. Id. "Some provocative remarks were made and the two groups moved toward each other." Id.

At this point, according to Crooks' testimony at trial, Crooks "heard gunshots, and he turned to see the [petitioner] holding a gun. Two bullets [had] struck and killed . . . Drew, who was a member of the other group, and stray bullets [had] injured two bystanders." Id. Six days after the shooting, however, "Rountree,

while in custody on an unrelated matter, revealed to the police that he was Drew's friend and was present when Drew was shot." Id. "Rountree identified *Pope*," not the petitioner, "as the shooter." (Emphasis added.) Id.

At trial, the petitioner's trial counsel made the strategic choice not to raise or pursue a claim of self-defense. Consequently, the most, if not only, viable theory of the case that trial counsel could pursue at trial was that the petitioner was not the shooter. As the majority states, trial counsel hired a private investigator to locate Rountree and to serve on him a subpoena ad testificandum. Despite the fact that the private investigator served the subpoena on Rountree on May 28, 2015, which required that Rountree appear in court the following day, Rountree failed to appear in court on May 29, 2015. Trial counsel requested that the court issue a capias warrant to locate Rountree over the weekend and to secure his attendance at trial the following Monday, June 1, 2015. The court issued a capias warrant, but a marshal was unable to locate Rountree to serve the capias warrant on him, and he failed to appear to testify on June 1, 2015.

After informing the court that the authorities were unable to locate Rountree, the court asked trial counsel whether the defense had "[a]ny additional requests," to which trial counsel answered, "[n]o." Instead, and in lieu of Rountree's live testimony, trial counsel offered into evidence Rountree's recorded statement to the police, in which he identified Pope as the shooter, under the residual exception to the hearsay rule. Due to the narrowness of the residual exception to the hearsay rule, and in light of the facts that Rountree had provided his statement to the police while incarcerated in connection with an unrelated matter six days after the shooting; see *State* v. *Myers*, supra, 178 Conn. App. 104; and that Rountree was not under oath when he provided

the statement to the police, the court determined on June 1, 2015, that Rountree's recorded statement was inadmissible under the residual exception. Specifically, the court determined, the statement did not satisfy the requirement of the residual exception that the statement be "supported by equivalent guarantees of trustworthiness and reliability" necessary for its admission. Conn. Code Evid. § 8-9.

After the court concluded that Rountree's recorded statement was inadmissible, trial counsel made no additional effort to secure Rountree's live testimony. Significantly, trial counsel did not request a continuance to try to locate Rountree and to secure his testimony in court. Instead, and almost immediately after the court made its ruling,[1] the defense rested without presenting any additional evidence. Shortly thereafter, the parties proceeded to closing argument. Despite the court informing the jury that the evidentiary portion of the trial likely would last "five to six days,"[2] the evidentiary portion of the trial had taken only four full days—May 26, 27, 28 and 29, 2015—with the defense resting on the beginning of the fifth day of the trial, June 1, 2015, and closing argument taking place that same day. During the trial, the jury did not hear testimony from any witness, or see any other evidence, supporting an assertion that Pope, not the petitioner, was the shooter.

[1] After the court concluded that Rountree's recorded statement was inadmissible, the court asked the parties whether they would like to be heard as to the court's proposed jury instructions and, after the parties declined, summoned the jury to return to the courtroom. After the jury returned to the courtroom and counsel stipulated to the presence of the jurors, the defense rested.

[2] Specifically, the court stated in its opening remarks to the jury on the first day of the trial: "As I've told you, the lawyers have informed me they expect the evidentiary portion of this trial to take approximately *five to six days*. Of course that's only an estimate; the trial may go a little longer or a little shorter than that. . . . [I]t's inevitable that there will be some delays during the trial, unanticipated things always happen." (Emphasis added.)

Despite failing to present evidence advancing the theory that Pope was the shooter, trial counsel nonetheless argued during closing argument that Pope, and not the petitioner, had shot Drew. Specifically, trial counsel argued, "[t]here's another person who has been developed as a suspect . . . [specifically] Pope, [and] all [of] the evidence points to the fact that he" shot Drew. Trial counsel, however, failed to identify any specific evidence that corroborated the petitioner's alternative shooter theory. During its rebuttal argument, counsel for the state easily undermined the petitioner's alternative shooter theory by repeatedly asking the jury whether it had seen any evidence to corroborate that theory and reciting the evidence that the state had presented to prove that the petitioner was the shooter, including Crooks' eyewitness testimony. The jury subsequently found the petitioner guilty of murder and two counts of assault in the first degree. See *State* v. *Myers*, supra, 178 Conn. App. 103.

Having set forth the relevant factual context, I briefly reiterate the legal principles that govern claims of ineffective assistance of counsel. The United States Supreme Court, in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted a two part test "[t]o determine whether a defendant is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation . . . . First, the defendant [or petitioner in the habeas context] must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment [to the United States constitution]. Second, the defendant [or petitioner] must show that the deficient performance prejudiced [his] defense. This requires [a] showing that counsel's errors were so serious as to deprive the defendant [or petitioner] of a

fair trial, a trial whose result is reliable. Unless [the] defendant [or petitioner] makes both showings, it cannot be said that [his] conviction . . . resulted from a breakdown in the adversary process that renders the result [of conviction] unreliable." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 30, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"With respect to the first component of the *Strickland* test, the proper standard for attorney performance is that of reasonably effective assistance. . . . Consequently, to establish deficient performance by counsel, a [petitioner] must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." (Citation omitted; internal quotation marks omitted.) Id., 31. "The first prong [of the *Strickland* test] requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 537 n.4, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). "[T]he [petitioner] must overcome the presumption that, under the circumstances, the challenged action [of counsel] might be considered sound trial strategy." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 31.

"[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019). "[I]n some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial . . . [but] it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (Internal quotation marks omitted.) *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 284 n.10, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019).

In *People* v. *Clamuextle*, 255 Ill. App. 3d 504, 505, 508, 626 N.E.2d 741, appeal denied, 155 Ill. 2d 567, 633 N.E.2d 8 (1994), the defendant claimed on direct appeal from his conviction of aggravated battery that he had been "deprived of the effective assistance of counsel when his attorney failed to seek a continuance during trial in order to secure the presence of an alibi witness." The defendant had been charged with aggravated battery after a victim was stabbed in her apartment building. Id. The victim identified the defendant as the assailant to her roommate and subsequently to the police. Id., 505–506. When, however, a police officer interviewed the victim's roommates on the night of the attack, none of the roommates could identify the assailant. Id., 506. Further, no weapon or blood was found in the vicinity of the area of the apartment in which the attack took place, and the police searches of the defendant's apartment uncovered no evidence that he was involved in the attack. Id. The police found bloodstains on the defendant's pants on the night of the attack, but the victim's blood was not detected on the defendant's pants. Id.

At trial, the defendant called his roommate to testify on his behalf, and his roommate testified that, five

minutes after the attack allegedly had taken place, she saw the defendant at the restaurant at which she worked. Id., 507. The roommate, however, admitted during cross-examination that her husband and the victim previously had a romantic affair and, accordingly, she "did not get along with" the victim. Id. Following the roommate's testimony, the defendant's trial counsel informed the court that the final defense witness, the roommate's coworker, had failed to appear in court pursuant to a subpoena with which she had been served.[3] Id. The coworker later averred in an affidavit that, had she appeared at trial, she would have testified that "she had seen the defendant at the restaurant . . . approximately [ten minutes before the attack], at which time [the pair] engaged in a brief conversation," and that "[a]pproximately [ten] to [fifteen] minutes later, she observed the defendant in the . . . lobby of the restaurant." Id., 508. The state presented rebuttal evidence, including the testimony of the victim, who confirmed the romantic relationship between herself and the roommate's husband. Id. Despite the fact that the court "stated [that] it would allow . . . the defense . . . to reopen its case when [the coworker] appeared" to testify; id., 507; counsel for the defendant "determined that the [coworker] still had not arrived [following the victim's rebuttal testimony] . . . [and] rested without seeking a continuance to locate [the coworker]." Id., 508.

[3] In an affidavit that the defendant filed in connection with a posttrial motion for judgment notwithstanding the verdict or, alternatively, a new trial, the coworker averred that she had informed counsel for the defendant that she was unavailable to appear to testify in court on the date listed on the subpoena and that she "mistakenly [had] thought that she was not supposed to be in court until 1:30 p.m. on" the date on which she was available to appear. *People* v. *Clamuextle*, supra, 255 Ill. App. 3d 508. She further averred that "she learned that she was supposed to have appeared in the morning [on the date on which she was available to appear] only after the case had gone to the jury for deliberation." Id.

On appeal, the defendant argued that his trial counsel "had been ineffective for failing to seek a continuance when [the coworker failed to] appear [in court] pursuant to a subpoena" that had been served on her. Id., 508. The court, citing *Strickland* v. *Washington*, supra, 466 U.S. 687, first considered whether "his counsel's representation [of him] fell below an objective standard of reasonableness"; *People* v. *Clamuextle*, supra, 255 Ill. App. 3d 509; and noted that the "theory of defense at trial was that the defendant could not have stabbed [the victim] in her apartment building at [the purported time of the attack] . . . because at that time he was either en route to or already present at . . . [the] restaurant." Id. The court stated that, at trial, the "only witness to testify . . . about the defendant's presence in the restaurant"; id.; was the roommate, whose "credibility was damaged . . . on cross-examination . . . ." Id. The court noted, "[t]his [wa]s not a case where the evidence against the defendant was overwhelming. . . . The case . . . hinged on whether a jury would either believe [the victim's] testimony that the defendant was the assailant, or [the roommate's] testimony that at the time of the stabbing the defendant was at the restaurant . . . ." Id., 510. Because the roommate's "credibility had been damaged, [the coworker's] testimony that she, too, saw the defendant at the restaurant was the key evidence in support of the alibi defense." Id. Specifically, "[the coworker's] testimony that she spoke with the defendant at the restaurant [ten minutes before the purported time of the attack] and saw him [in the lobby of the restaurant fifteen] minutes later would have corroborated [the roommate's] testimony [concerning the defendant's presence at the restaurant] and bolstered the defendant's alibi defense." Id., 509–10. Further, the coworker "had no . . . obvious reasons to testify in favor of the defendant," unlike the roommate. Id., 511.

The court acknowledged that counsel for the defendant had contended that he "did not seek a continuance . . . to locate [the coworker] . . . because he did not know why she had failed to appear." Id., 510. The court stated, however, that "counsel did not need this information in order to request a continuance" under Illinois law; id.; because "[a] motion for a continuance sought to secure the presence of a witness should be granted [if]: (1) the defendant was diligent in attempting to secure the witness for trial; (2) the defendant shows that the testimony was material and might affect the jury's verdict; and (3) the failure to grant the continuance would prejudice the defendant." Id. "All three [requirements] were met in this case, [but] defense counsel [nonetheless] mistakenly believed that he did not have sufficient information to request a continuance." Id. Thus, the court determined that the failure of counsel for the defense "to seek the continuance in order to locate a material witness did not constitute trial strategy but . . . instead [was] an objectively unreasonable error." Id. Because the coworker's "testimony in support of the defendant was . . . so important to the defendant's alibi defense," the court determined that "counsel's error in not seeking a continuance to locate her undermine[d] confidence in the outcome of the proceeding." Id., 511.

Other courts, like the court in *Clamuextle*, have determined that, under the relevant factual circumstances of the cases before them, counsel rendered deficient performance by failing to request a continuance. In *Dunn* v. *Jess*, 981 F.3d 582, 594–95 (7th Cir. 2020), for example, the United States Court of Appeals for the Seventh Circuit concluded that a defendant's trial counsel's performance was deficient when, inter alia, counsel failed to request a continuance to review certain expert reports he received shortly before trial, which contained exculpatory information. See also *Woolley* v.

Rednour, 702 F.3d 411, 415, 423 (7th Cir. 2012) (counsel's performance was deficient when counsel failed to request continuance to take remedial measures after state untimely disclosed expert opinion on first day of trial), cert. denied sub nom. *Woolley* v. *Harrington*, 571 U.S. 821, 134 S. Ct. 95, 187 L. Ed. 2d (2013); *Turpin* v. *Bennett*, 272 Ga. 57, 57–58, 525 S.E.2d 354 (2000) (counsel's performance was deficient when counsel failed to request continuance to locate new expert witness or take other remedial measures after defendant's initial expert suffered from dementia episode while testifying at trial); *People* v. *Vera*, 277 Ill. App. 3d 130, 138–39, 660 N.E.2d 9 (1995) (counsel's performance was deficient when counsel failed to request continuance to hire interpreter to translate from Spanish to English contents of audio recording, which allegedly included exculpatory information), appeal denied, 167 Ill. 2d 567, 667 N.E.2d 1062 (1996).

Having considered the facts of the present case in light of the foregoing, I disagree with the habeas court's determination that trial counsel's performance was not deficient. Because, as I have stated, trial counsel elected not to pursue a claim of self-defense, the most, if not only, viable theory of the case that trial counsel could have pursued at trial was that the petitioner was not the shooter. To successfully pursue this theory, it was crucial for trial counsel to raise reasonable doubt as to whether the petitioner was the actual shooter. The only viable way trial counsel could cast such reasonable doubt would be to present testimony from at least one witness that the weapon that caused Drew's death was in the hands of a person other than the petitioner at the time the shots were fired. The state's case was extremely strong, unless trial counsel presented before the jury some evidence that supported this alternative shooter theory.

Like in *People* v. *Clamuextle*, supra, 255 Ill. App. 3d 510, the petitioner's success at trial depended on whether the jury believed Crooks' testimony that the petitioner was the shooter, or Rountree's testimony that Pope was the shooter. Unlike in *Clamuextle*, however, Rountree's testimony would not simply have "bolstered" or "corroborated"; see id.; the petitioner's alternative shooter theory; Rountree's testimony would have been the *only* evidence that supported the petitioner's theory of the case. As the habeas court noted in its memorandum of decision, "Rountree was the only person who identified Pope as the shooter, so the [petitioner's alternative shooter theory] *hinged* on [the admission of] Rountree's [recorded] statement [or] testimony." (Emphasis added.)

Given these high stakes, in my view, trial counsel was obligated to take additional steps to ensure that Rountree's testimony identifying Pope as the shooter was presented before the jury. It was not sufficient for trial counsel to attempt to have admitted Rountree's recorded statement under the residual exception to the hearsay rule. Section 8-9 of the Connecticut Code of Evidence, which sets forth the residual exception to the hearsay rule, "allows a trial court to admit hearsay evidence not admissible under any of the established [hearsay] exceptions"; (internal quotation marks omitted) *State* v. *Bennett*, 324 Conn. 744, 762, 155 A.3d 188 (2017); but *only* "if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." Conn. Code Evid. § 8-9. As this court and our Supreme Court have iterated, "[t]he residual hearsay [exception] [should be] applied in the *rarest* of cases . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Bennett*, supra, 762;

see also *State* v. *Heredia*, 139 Conn. App. 319, 331, 55 A.3d 598 (2012), cert. denied, 307 Conn. 952, 58 A.3d 975 (2013). "[T]he [residual] exception is not to be treated as a broad license to admit hearsay inadmissible under other exceptions, and is to be used *very rarely* and *only in exceptional circumstances*." (Emphasis added; footnote omitted.) *State* v. *Dollinger*, 20 Conn. App. 530, 540, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990).

Given the circumstances, the probability was slim that a court would have concluded that "there [was] a reasonable necessity for the admission of the statement, *and* . . . the statement [was] supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule"; (emphasis added) Conn. Code Evid. § 8-9; such that the statement should be admitted under the residual exception. The bitter reality was that it was highly unlikely that the court would conclude that Rountree's recorded statement was admissible under that narrow exception. After the court concluded that Rountree's recorded statement was inadmissible under the residual exception to the hearsay rule, trial counsel then had little choice but to ask the trial court for additional time to find Rountree and to compel his appearance so that he could testify before the jury. I can divine no reason, strategic or otherwise, as to why his trial counsel should not have taken such a simple step.

In concluding that the petitioner had failed to prove that his trial counsel's performance was deficient, the habeas court relied on the facts that trial counsel hired a private investigator to serve a subpoena on Rountree, requested a capias warrant after Rountree failed to appear at trial, and attempted to enter into evidence Rountree's recorded statement under the residual hearsay exception. By relying on these facts, however, the

habeas court overlooked the reality that, once the trial court concluded that Rountree's recorded statement was inadmissible, the need for Rountree's live testimony heightened drastically, because, at that point, the petitioner's alternative shooter theory entirely "hinged on" the ability to secure Rountree's live testimony. Notwithstanding this critical need, trial counsel made *no* effort to secure Rountree's live testimony—including, but not limited to, requesting that the trial be continued a few more days to attempt to locate Rountree. Trial counsel's failure to request a continuance, in my view, was objectively unreasonable, given how vital Rountree's in-court testimony was to the petitioner's case and in light of the heightened need for Rountree's live testimony after the court concluded that his recorded statement was inadmissible.

The majority concludes in its opinion that the petitioner has failed to "overcome the presumption" that trial counsel's decision not to request a continuance was " 'sound trial strategy.' " See *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 365, 77 A.3d 777 (2013). In its view, "undertaking additional efforts to locate [Rountree] . . . might have resulted in jurors becoming unavailable and/or the fading of jurors' memories concerning the petitioner's case." As I have noted, however, the court explained to the jury during its opening remarks that the parties expected the evidentiary portion of the trial to last approximately "five to six days." The court additionally stated to the jurors, "[o]f course that's only an estimate; the trial may go a little longer or a little shorter than that." The court concluded that Rountree's recorded statement was inadmissible on the beginning of the fifth day of the trial—after only four full days of evidence—and the defense rested almost immediately after the court made its ruling. Once the defense rested, the parties immediately proceeded

to closing arguments. Thus, the entire evidentiary portion lasted only four days, as opposed to five or six days as the jury initially had been advised.

Because the court informed the jury that the evidentiary portion of the trial would last five to six days, it is reasonably likely that at least twelve of the fifteen jurors would have been available to continue to serve if trial counsel requested, and the court granted, a continuance of a few additional days. Had trial counsel requested such a continuance, the court could have taken one of the following actions: granted the request and continued the trial a few days; denied the request, which the petitioner could have challenged on direct appeal had he subsequently been convicted; or inquired of the jurors whether a brief continuance would create any barriers to the jurors' continued service. Because, however, trial counsel never requested a continuance, the court never asked the jurors whether a continuance would make it difficult for them to serve. The court could not deny, or express any concern it had regarding the ramifications of, a request that trial counsel never made. Likewise, because trial counsel never requested a continuance of the trial for a few days, there is no way of knowing whether undertaking additional efforts to locate Rountree, as the majority states, "may well have been futile . . . ." Because, in my view, the petitioner's trial counsel performed deficiently by failing to request a continuance to locate Rountree and to secure his testimony, I conclude that the habeas court improperly determined that the petitioner failed to meet its burden of establishing that his trial counsel performed deficiently.

I next turn to the prejudice prong of the *Strickland* test—that is, whether trial counsel's deficient performance prejudiced the petitioner's defense at trial. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 30. In its memorandum of decision, the habeas court

provided the following conclusory statement as to the prejudice prong of the *Strickland* test: "The petitioner has also not shown how any deficient performance was prejudicial. Rountree did not testify in the habeas trial and, even assuming the showing of deficient performance has been satisfied, this court lacks an evidentiary basis to assess the prejudice prong of the *Strickland* test." I interpret this statement by the court to mean that it had evaluated the prejudice prong on the basis of the evidence before it—or lack thereof, with respect to Rountree's testimony—and determined that the petitioner had not met his burden as to prejudice.

In determining that the petitioner had failed to prove prejudice, the habeas court based its conclusion entirely on the fact that Rountree did not testify before the habeas court. The reason, however, that the court could not consider Rountree's testimony is because Rountree failed to appear at the habeas trial and the court denied the petitioner's request for the issuance of a capias warrant and a continuance to secure his appearance at trial. In my view, the court abused its discretion in denying the petitioner's request for the issuance of a capias warrant and corresponding request for a continuance.

The following additional procedural history is relevant. After the respondent, the Commissioner of Correction, filed a return to the petitioner's amended petition for a writ of habeas corpus, the petitioner, who was representing himself, filed two applications for the issuance of subpoenas, including one for Rountree. On September 14, 2020, a subpoena was issued and served on Rountree. At the time he was served the subpoena, Rountree was incarcerated.

As the majority explained, "[i]t was the petitioner's belief, based on the information available on the Department of Correction's website, that Rountree would be

released from custody after October 8, 2020," the initial date of the habeas trial. Accordingly, the petitioner reasonably believed that, because Rountree would be incarcerated at the time of the habeas trial, Rountree's presence and testimony at the habeas trial had been secured. The petitioner learned in late September, 2020, however, that Rountree's release date had been changed to October 2, 2020. To ensure that Rountree would appear at the habeas trial to testify, the petitioner filed, through his standby counsel, a motion dated September 24, 2020, to move the date of the habeas trial from October 8, 2020, to October 1, 2020. The court denied the motion without prejudice because the requested date of October 1, 2020, was "unavailable for trial."

The habeas trial subsequently occurred on October 7 and 8, 2020, and, on October 8, 2020, the petitioner attempted to call Rountree to testify. By this date, Rountree already had been released from incarceration. Rountree failed to honor his subpoena and to appear in court to testify. The petitioner thus requested that the habeas court issue a capias warrant to secure Rountree's attendance at the habeas trial. In connection with this request, the petitioner additionally requested that the habeas trial be continued for the purpose of locating Rountree and effectuating the capias. The petitioner initially requested that the trial be continued until the earlier of the following dates: the date on which in-person hearings, which at that time had been suspended pursuant to the coronavirus pandemic, resumed, or the date on which Rountree was located. The petitioner, however, later clarified that a continuance of one month would be sufficient.

The court denied the petitioner's request for the issuance of a capias warrant and the corresponding request for a continuance. The court stated that the petitioner had the opportunity to secure Rountree's testimony

prior to the habeas trial by way of deposition, interview, or recorded statement. The court also stated that the petitioner's "last minute request" to move the trial date "could not be accommodated by the court." The court ultimately concluded that, because Rountree may have been located in New Jersey at the time of the habeas trial, Rountree had declined to provide his location to the petitioner's private investigator when asked, and Rountree had indicated to the petitioner's private investigator that he had changed his mind about testifying, it "[saw] no reasonable basis to grant [the petitioner's request for a] capias [warrant]" and found "no reasonable basis to . . . continue th[e] matter . . . ."

As our Supreme Court has stated, "[i]f one is not warranted in refusing to honor a subpoena and it is clear to the court that his absence will cause a miscarriage of justice, the court should issue a capias to compel attendance. [It is] not, however . . . mandatory for the court to issue a capias when a witness under subpoena fails to appear; issuance of a capias is in the discretion of the court. The court has the authority to decline to issue a capias when the circumstances do not justify or require it. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Footnote omitted; internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 32–33, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019).

In my view, the court abused its discretion by denying the petitioner's requests for the issuance of a capias warrant and a corresponding continuance to secure Rountree's appearance at the habeas trial for several reasons. First, Rountree's expected testimony identifying Pope, rather than the petitioner, as the shooter was critical to the issue of prejudice. The admission of

this testimony at the habeas trial was essential for the petitioner to meet his burden as to the prejudice prong of the *Strickland* test.[4]

Second, the petitioner had taken several steps to ensure Rountree's attendance at the habeas trial by requesting that a subpoena be issued for and served on Rountree. The petitioner believed that Rountree would be incarcerated at the time of the habeas trial based on the information available on the Department of Correction's website and, accordingly, would testify at the habeas trial. In accordance with this belief, there was little need for the petitioner, who was incarcerated and representing himself, to depose Rountree. Once he learned that Rountree's date of release from incarceration fell before the date of the habeas trial, he wisely moved to change the date of the habeas trial. Despite the petitioner's efforts, Rountree slipped out of the petitioner's grasp after he was released from incarceration. Given these circumstances, it was by no fault of the petitioner that Rountree failed to appear to testify at the habeas trial. Cf. *Greene* v. *Commissioner*, supra, 330 Conn. 32–33 (citing, as reason for concluding that habeas court did not abuse its discretion when it denied petitioner's request for issuance of capias warrant to secure witness' appearance at habeas trial, fact that "the court reasonably could have concluded that the petitioner was partially responsible for [the witness'] failure to appear" at habeas trial).

Third, the court provided no justification for its determination that it was unreasonable to delay the habeas

[4] Additionally, Rountree's testimony—the content of which we have no way of knowing with certainty—may very well have been relevant to the issue of trial counsel's deficient performance. For example, if Rountree testified that, at the time of the criminal trial, he easily could have been located, that fact would make stronger the petitioner's argument that trial counsel should have requested a continuance of the trial date for a few days to locate Rountree.

trial for one month. Unlike the petitioner's criminal trial, the habeas trial was a bench trial; there were no jurors who might have become unavailable if the habeas court granted the petitioner's requests for a capias warrant and a continuance of one month to locate Rountree. The fact that the marshal service "potential[ly]" may have faced difficulty locating Rountree echoes the very reason that the petitioner sought to have the habeas trial date moved in the first place—because the petitioner was concerned that Rountree's presence at trial would be difficult to secure if he was released from incarceration. The fact that the marshal service "potential[ly]" may have faced difficulty locating Rountree likewise demonstrated why the petitioner's request for a capias warrant was reasonable—because Rountree successfully had evaded the subpoena with which he had been served.

In light of the foregoing, in my view, the habeas court improperly determined that the performance of the petitioner's trial counsel was not deficient. Additionally, I conclude that the habeas court abused its discretion by denying the petitioner's request for the issuance of a capias warrant and the corresponding request for a continuance to secure Rountree's appearance at the habeas trial. Because it abused its discretion and, thus, did not hear Rountree's testimony, the court did not have the opportunity to assess properly the issue of prejudice—a limitation of the court's own doing. Thus, to the extent that the court nonetheless concluded that the petitioner failed to prove prejudice, I would reverse that determination. Consequently, I would remand the case to the habeas court with direction to grant the petitioner's request for the issuance of a capias warrant to secure Rountree's appearance, and to hold a new trial on the issue of prejudice.

For these reasons, I respectfully concur and dissent.

J. Y. *v.* M. R.*
(AC 44312)

Elgo, Moll and Suarez, Js.

Syllabus

The defendant mother appealed to this court from the trial court's adjudication of several postjudgment motions for modification of custody and visitation orders relating to the parties' minor child and its issuance of additional orders related to the same. After the plaintiff father filed a custody application, the trial court approved an agreement between the parties, who had never been married, which provided that they would share joint legal custody of the child, with the child's primary residence being with the mother, and set forth a parenting schedule. Approximately one year later, the father filed a postjudgment motion to modify, requesting an increase in overnight visits and that his residence be designated as the child's primary residence for school purposes. Thereafter, the parties executed stipulation agreements revising the parenting schedule, which the trial court approved. The mother then filed a postjudgment motion for modification, seeking to impose certain restrictions on the father's parenting time. The trial court heard evidentiary hearings on the parties' motions for modification. Thereafter, it filed interim orders indicating, inter alia, that the parties would continue to share joint legal and physical custody of the child and were required to comply with the applicable rule of practice (§ 25-26 (g)) in filing any future motions for modification. A few months later, in response to health concerns relating to the COVID-19 pandemic, the mother filed an application for an emergency ex parte order of custody, along with a second postjudgment motion for modification, which requested that the court temporarily deny the father visitation. The trial court declined to award ex parte relief but ordered a hearing to be held on the application and the motion. That hearing was postponed and never rescheduled. Thereafter, the trial court denied the mother's second modification motion and issued final orders relating to the parties' initial modification motions, which incorporated the interim orders. The final orders provided, inter alia, that the parties would continue to share joint legal and physical custody of the child, with the father's residence serving as the child's primary residence for school purposes and required the parties

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

to file a request for leave pursuant to Practice Book § 25-26 (g), in the event that they wished to modify the final orders. The mother appealed and, after being granted leave by the trial court, filed two additional postjudgment motions for modification, seeking to modify the final orders with respect to the parenting schedule and the child's primary residence for school purposes. Following a hearing, the trial court denied the mother's additional modification motions, and the mother amended her appeal to encompass that denial. *Held*:

1. The trial court did not commit error in issuing the interim orders or the final orders:

a. The defendant mother's claim that the trial court improperly issued interim orders was moot: the interim orders ceased to exist after they were subsumed by the final orders, and, accordingly, there was no practical relief that the trial court could afford the mother with respect to the interim orders; moreover, the "capable of repetition, yet evading review" exception to the mootness doctrine did not apply because the mother failed to demonstrate that there was a reasonable likelihood that the issue presented would arise again in the future.

b. The defendant mother's claim that the trial court committed error in issuing the final orders was unavailing: in issuing the final orders, the court considered the child's best interests as required by the applicable statute ((Rev. to 2019) § 46b-56), and such orders were not fatally flawed merely because they incorporated the interim orders, which the mother argued were defective; moreover, the mother's alternative argument that, even if it is assumed that the interim orders properly modified the prior custody and visitation orders, the trial court applied the wrong legal standard in issuing the final orders was unavailing, as, at the time of issuance, the court plainly stated that the interim orders were temporary in nature and that final orders disposing of the initial orders were forthcoming, and, accordingly, the interim orders did not constitute prior court orders that required a material change in circumstances for modification; furthermore, the mother failed to establish that the trial court abused its discretion in transferring the child's primary residence for school purposes from the mother to the plaintiff father because, in issuing its orders, the court did not engage in speculation but, rather, properly considered the child's best interests, and its determination was supported by the guardian ad litem's testimony and was reasonable despite the amount of time between the issuance of the order and the start of the child's schooling in light of the history of extensive litigation between the parties; additionally, the mother failed to demonstrate that the trial court abused its discretion in issuing the order pursuant to Practice Book § 25-26 (g), requiring the parties to seek leave of the court before filing motions for modification of the final orders for a period of five years because the order applied to both parties, the parties had filed numerous modification motions following the initial judgment, and the guardian ad litem had testified in favor of the order, considering it to

be appropriate in light of the length of the litigation, the financial and emotional toll it was taking on the parties, and her belief that the child had been affected by the distress the litigation caused to the parties.

2. The trial court did not err in denying the defendant mother's two modification motions filed after the issuance of the final orders: that court applied the correct legal standard in denying the two modification motions, as it properly determined that there had been no material change in circumstances since the date the final orders were issued, and, in arguing that exigent circumstances, including the COVID-19 pandemic, warranted the court's consideration of circumstances prior to the issuance of the final orders, the mother was essentially attempting to use her motions to mount an improper collateral attack on the final orders; moreover, the mother's alternative argument, that the trial court improperly determined that she had failed to demonstrate that a material change in circumstances had occurred since the issuance of the final orders, was unavailing because the court was free to credit or reject all or part of the conflicting testimony regarding such change in circumstances that was presented by the parties.

3. The defendant mother's claim that the trial court improperly had denied her second modification motion, which she had filed between the issuance of the interim orders and the final orders, was moot: the only practical relief this court could have afforded the mother was a remand to the trial court with direction to conduct an evidentiary hearing, which would have been superfluous because the mother's second modification motion raised the same issues that were encompassed by one of the modification motions she filed after the issuance of the final orders, and the trial court conducted an evidentiary hearing on that motion, giving the mother the opportunity to be heard and to submit evidence as to those issues; accordingly, the mother already had received the relief that she was seeking.

Argued March 7—officially released October 11, 2022

Procedural History

Application for custody as to the parties' minor child, brought to the Superior Court in the judicial district of Waterbury and transferred to the judicial district of New Haven, where the court, *Klatt*, *J.*, rendered judgment in accordance with the parties' custody and parenting agreement; thereafter, the plaintiff filed a motion for modification; subsequently, the court, *Klau*, *J.*, issued an order modifying the judgment in accordance with the parties' agreement; thereafter, the defendant filed a motion for modification; subsequently, the court,

Klau, *J.*, issued interim orders pending the issuance of final orders on the parties' respective pending motions for modification; thereafter, the court, *Price-Boreland*, *J.*, ordered that a hearing be held with respect to an application for ex parte relief and a second motion for modification filed by the defendant; subsequently, the court, *Klau*, *J.*, issued final orders disposing of the plaintiff's motion for modification and the defendant's initial motion for modification and denied the defendant's second motion for modification, and the defendant appealed to this court; thereafter, after being granted leave by the court, *Goodrow*, *J.*, the defendant filed two additional motions for modification, which the court, *Price-Boreland*, *J.*, denied, and the defendant filed an amended appeal. *Appeal dismissed in part*; *affirmed.*

Samuel V. Schoonmaker IV, for the appellant (defendant).

James J. Healy, for the appellee (plaintiff).

Opinion

MOLL, J. In this custody dispute, the defendant, M. R., appeals from the decisions of the trial court adjudicating several postjudgment motions for modification of custody and visitation orders. On appeal, the defendant claims that the court improperly (1) issued interim orders pending its issuance of final orders vis-à-vis two motions for modification filed in 2018 and 2019, respectively, (2) issued final orders disposing of the two aforesaid motions for modification, (3) denied two motions for modification that she filed in 2021, following the issuance of the final orders, and (4) denied a motion for modification that she filed in 2020, in between the issuance of the interim orders and the final orders.[1] We

[1] For ease of reference, we address the defendant's claims in a different order than they are presented in her appellate briefs.

dismiss, as moot, the portions of the appeal challenging the propriety of the interim orders and the denial of the defendant's motion for modification filed in 2020, and we affirm the remainder of the trial court's decisions.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff, J. Y., and the defendant, who never married, have a minor child who was born in April, 2016. In January, 2017, the plaintiff filed a custody application, requesting joint legal custody of the child and that the child's primary residence be with him. On September 29, 2017, the parties executed a custody and parenting agreement. The agreement provided, inter alia, that the parties would share joint legal custody of the child, with the child's primary residence being with the defendant, and set forth a parenting schedule. Pursuant to the parenting schedule, the child would have seven overnight visits with the plaintiff over the course of a recurrent four week schedule. The agreement further provided that, "[u]nless or until the [defendant] relocates to another school district, the [t]own of Cheshire shall be considered the child's primary town of residence for school purposes." The same day, the trial court, *Klatt*, *J.*, approved the agreement and incorporated its terms into the court's judgment rendered that day.

On October 17, 2018, the plaintiff filed a postjudgment motion to modify the September 29, 2017 judgment, requesting, inter alia, an increase in the number of the child's overnight visits with him from seven to fourteen and that his residence be designated as the child's primary residence for school purposes. On January 16, 2019, the parties executed a stipulation agreeing, inter alia, to a revised parenting schedule, which increased the number of the child's overnight visits with the plaintiff from seven to eight. On January 23, 2019, the court, *Tindill*, *J.*, approved the stipulation. On September 18,

2019, the parties executed an agreement further modifying the parenting schedule, increasing the number of the child's overnight visits with the plaintiff from eight to ten. The court, *Klau*, *J.*, approved the agreement on the same day. On November 25, 2019, the defendant filed a postjudgment motion for modification, seeking, inter alia, to impose certain limitations and restrictions with respect to the plaintiff's parenting time.

In December, 2019, the court held three evidentiary hearings on the parties' respective October 17, 2018 and November 25, 2019 motions for modification (initial modification motions). On January 7, 2020, the defendant filed a motion to continue the evidentiary hearings for personal medical reasons. On January 9, 2020, the court ordered that a telephonic conference would be held on January 13, 2020, to address the motion for continuance. The court further ordered the parties' trial counsel to "be prepared to discuss whether a continuance should be contingent upon the court entering a temporary order adopting [a] proposed parenting schedule [submitted by the plaintiff]." The plaintiff's proposed parenting schedule increased the number of the child's overnight visits with him from ten to fourteen.

On January 13, 2020, during the telephonic conference, the court granted the defendant's motion for continuance and reserved its decision as to whether it would issue an interim order. The same day, the defendant filed a memorandum in opposition to the court issuing an interim order. On January 29, 2020, the plaintiff filed a motion for order requesting that the court adopt his proposed parenting schedule on a temporary basis. On February 6, 2020, the court held one additional evidentiary hearing on the initial modification motions,[2]

[2] Prior to the evidentiary hearings held in December, 2019, the court conducted several evidentiary hearings on certain motions for contempt that are not relevant to this appeal. The parties and the court agreed that the evidentiary record as to the initial modification motions would include the evidence introduced during the contempt proceedings.

and the parties' trial counsel presented closing arguments on February 13, 2020. Both parties submitted proposed orders. The plaintiff requested, inter alia, sole legal and physical custody, with the child attending school in the town in which he resided, which, at all relevant times, was Southington. The defendant sought, inter alia, joint legal custody, with the child's primary residence being with her and the child attending kindergarten in Cheshire, where the defendant lived.

On February 26, 2020, citing *Yontef* v. *Yontef*, 185 Conn. 275, 440 A.2d 899 (1981), the court issued interim orders (interim orders) pending the issuance of final orders on the initial modification motions.[3] The interim orders provided that (1) the parties continued to share joint legal custody of the child, (2) effective immediately, the parties were to share physical custody of the child in accordance with the plaintiff's proposed parenting schedule, (3) the parties were required to comply with Practice Book § 25-26 (g) in filing any future motions for modification, and (4) all prior custody and visitation orders "not inconsistent" with the temporary orders remained in full force and effect.[4]

On May 8, 2020, the defendant filed an application for an emergency ex parte order of custody, seeking temporary custody of the child with no visitation allowed for the plaintiff. The defendant averred that, during the plaintiff's parenting time, the child was being

[3] In his proposed orders filed in relation to the initial modification motions, the plaintiff requested that the court issue "an immediate interim postjudgment order in accordance with the [plaintiff's proposed orders] regarding custody and parenting access. [The plaintiff asserted that] [t]he court ha[d] authority to do so pursuant to [*Yontef*] . . . ."

[4] The court initially issued the interim orders on February 21, 2020. On February 24, 2020, the plaintiff filed a motion, which the court treated as a motion to reargue, requesting that the court alter a portion of the interim orders identifying the start date of the temporary parenting schedule. On February 26, 2020, the court vacated the February 21, 2020 interim orders and issued the operative interim orders.

left with third parties and the plaintiff was not following the then current guidelines set forth by the Centers for Disease Control and Prevention with regard to the nascent COVID-19 pandemic. Concurrently with the application for ex parte relief, the defendant filed a postjudgment motion for modification, requesting that the court temporarily deny the plaintiff visitation (May 8, 2020 modification motion).[5] The same day, the court, *Price-Boreland*, *J.*, declined to award ex parte relief but ordered that a hearing would be held on June 5, 2020, as to the application and the May 8, 2020 modification motion. Thereafter, the June 5, 2020 hearing was postponed and never rescheduled. On September 1, 2020, without conducting a hearing, the court, *Klau*, *J.*, denied the May 8, 2020 modification motion.

On September 1, 2020, the court issued a memorandum of decision that resolved the initial modification motions.[6] The court stated that, in addition to issuing related orders, it was incorporating the interim orders into its final orders disposing of the initial modification motions (final orders). The court ordered in relevant part that (1) the parties shared joint legal and physical custody of the child, with the plaintiff's residence serving as the child's primary residence for school purposes, (2) the plaintiff's proposed parenting schedule was adopted and approved, (3) any party seeking to modify the new custody and visitation orders within five years

[5] The defendant filed the application seeking ex parte relief and the May 8, 2020 modification motion as a self-represented party.

[6] The September 1, 2020 decision reflects that, in addition to the initial modification motions, the court resolved a postjudgment motion that the defendant filed on August 2, 2018, seeking to modify the parties' parenting schedule. In her principal appellate brief, however, the defendant states that the August 2, 2018 motion had been disposed of by stipulations executed by the parties and was no longer at issue at the time of the evidentiary hearings held on the initial modification motions. Whether the defendant's August 2, 2018 motion was properly before the court does not affect our resolution of the defendant's claims on appeal, and, therefore, we need not discuss the issue further.

was required to file a request for leave pursuant to Practice Book § 25-26 (g), and (4) the new custody and visitation orders superseded "all prior inconsistent orders," whereas "[p]rior orders not inconsistent" with the new orders remained in full force and effect. On September 18, 2020, the defendant filed a motion to reargue, which the court denied on the same day.[7] On October 6, 2020, the defendant filed this appeal.[8]

On March 30, 2021, after being granted leave by the court, *Goodrow*, *J.*, in accordance with Practice Book § 25-26 (g) and the final orders, the defendant filed two postjudgment motions for modification, seeking to modify the final orders as to (1) the parties' parenting schedule and (2) the child's primary residence for school purposes (March 30, 2021 modification motions).[9] On April 22, 2021, the plaintiff filed objections. On August 11, 2021, following an evidentiary hearing, the court, *Price-Boreland*, *J.*, denied the March 30, 2021 modification motions. On August 30, 2021, the defendant filed a motion for reconsideration and reargument, which the court denied on September 1, 2021. The defendant subsequently amended her appeal to encompass the court's denials of the March 30, 2021 modification motions.[10] Additional facts and procedural history will be set forth as necessary.

Before addressing the defendant's claims, we set forth the following relevant legal principles. "General

[7] On September 18, 2020, the defendant also filed (1) a motion for articulation, (2) a motion to open, vacate, and/or modify, and (3) a motion to correct, all of which were substantively similar to her motion to reargue. The court denied these motions.

[8] On July 16, 2021, counsel for the guardian ad litem for the minor child filed a statement adopting the appellate brief filed by the plaintiff. See Practice Book § 67-13.

[9] On March 10, 2021, the defendant filed requests for leave to file the March 30, 2021 motions for modification, which the court granted on March 24, 2021.

[10] Following the September 29, 2017 judgment, the parties filed other postjudgment motions for modification not mentioned in this opinion, none of which is relevant to this appeal.

Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. General Statutes (Rev. to 2019) § 46b-56 (c) directs the court, when making or modifying any order regarding the custody, care, education, visitation and support of children, to consider the best interests of the child, and in doing so [the court] may consider, but shall not be limited to, one or more of [sixteen enumerated] factors[11] . . . . The court is not required to assign any weight to any of the factors that it considers . . . .'' (Footnote in original; internal quotation marks omitted.) *Dolan* v. *Dolan*, 211 Conn. App. 390, 398–99, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

[11] ''The statutory factors are as follows: '(1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b.' General Statutes (Rev. to 2019) § 46b-56 (c).'' *Dolan* v. *Dolan*, 211 Conn. App. 390, 398–99 n.6, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

Before modifying a custody order, "a court must satisfy two requirements. First, modification of a custody award must be based upon either a material change [in] circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall consider the best interests of the child and in doing so may consider several factors. . . . Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child. . . . These requirements are based on the interest in finality of judgments . . . and the family's need for stability." (Footnotes omitted; internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 511–12, 146 A.3d 26 (2016); see also *Cleveland* v. *Cleveland*, 161 Conn. 452, 459–60, 289 A.2d 909 (1971) (material changes in circumstances requirement was developed, in part, "to give effect to the principle of res judicata"). "The burden of proving a change to be in the best interest of the child rests on the party seeking the change." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, supra, 512. "The power of the trial court to modify the existing order does not . . . include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties. . . . [I]ts inquiry is necessarily confined to a comparison between the current conditions and the last court order." (Citations omitted.) *Borkowski* v. *Borkowski*, 228 Conn. 729, 738, 638 A.2d 1060 (1994).

In considering whether to modify visitation orders, as opposed to custody orders, a court "is not required to find as a threshold matter that a change in circumstances

has occurred. . . . Instead, [i]n modifying an order concerning visitation, the trial court shall be guided by the best interests of the child . . . .'' (Citations omitted; footnote omitted; internal quotation marks omitted.) *Balaska* v. *Balaska*, 130 Conn. App. 510, 515–16, 25 A.3d 680 (2011).

''Our standard of review of a trial court's decision regarding custody [and] visitation . . . orders is one of abuse of discretion. . . . [T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference. . . .

''The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence.'' (Citations omitted; internal quotation marks omitted.) *Dolan* v. *Dolan*, supra, 211 Conn. App. 399–400. ''Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal.'' (Internal quotation marks omitted.) *Coleman* v. *Bembridge*, 207 Conn. App. 28, 34, 263 A.3d 403 (2021).

I

We first address the defendant's claims that, as to the initial modification motions, the trial court committed

error in issuing (1) the interim orders and (2) the final orders. We consider each claim in turn.

A

The defendant asserts that the court improperly issued the interim orders pursuant to *Yontef* v. *Yontef*, supra, 185 Conn. 275.[12] The defendant maintains that *Yontef* does

[12] As this court recently summarized, "[i]n *Yontef*, our Supreme Court noted that pendente lite custody orders do not survive the rendition of a judgment and that the judgment itself, being automatically stayed by operation of Practice Book (1981) § 3065 (now § 61-11), is not binding for twenty days. *Yontef* v. *Yontef*, supra, 185 Conn. 291. The court further noted that, '[i]n this twenty-day gap period, the parties arguably may revert to their common law rights, under which both are entitled, without preference, to take custody.' Id. The court found that such a resolution was both 'unseemly' and 'inconsistent with the concern, repeatedly enunciated in the statutes and the cases, for the best interests of the children.' Id. The court therefore advised that '[a] trial court rendering a judgment in a disputed custody case should . . . consider entering protective orders sua sponte to ensure an orderly transition that protects the primary interests of the children in a continuous, stable custodial placement.' Id., 291–92.

"More specifically, the court stated: 'In the interest of minimizing the emotional trauma so often imposed upon the children of divorce, a trial court should, at or before the time of its judgment, inquire whether its custody order is apt to be acceptable to the parties or is apt to be further litigated upon appeal. If an appeal appears likely, the court should enter whatever interim postjudgment order it deems most appropriate, in the exercise of its broad discretion, taking into consideration the needs of the minor children for continuity, stability and well-being as well as the need of the parent who appeals for a fair opportunity fully to present his or her case. These legitimate needs are not, in all probability, apt to be protected if dissatisfied parties are able to intervene unilaterally, without judicial supervision, to effect changes in custody pending appeal. A court exercising its equitable jurisdiction with regard to custody has the duty to assure itself that its judgment will be implemented equitably to serve the best interests of the children for the near as well as for the more distant future.' Id., 293–94." (Footnote omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 687–89, 220 A.3d 194 (2019).

As this court further explained, "[our Supreme Court's] concern in *Yontef* was to ensure an orderly transition [from prejudgment status to postjudgment status] that protects the primary interests of the children in a continuous, stable custodial placement during the period in which the enforcement of the judgment is stayed. . . . In 1986, however, Practice Book § 61-11 was amended to exclude custody and visitation orders from operation of the automatic stay of execution provision. . . . Such orders, once issued, are now immediately enforceable, and, thus, there is no longer a gap period between pendente lite

not authorize a court, postjudgment, to modify custody and visitation orders on an interim basis without first satisfying the statutory requirements of § 46b-56. In addition to addressing the merits of this claim, the plaintiff argues that this claim is moot because the interim orders were superseded by the final orders. We agree with the plaintiff that the claim is moot.[13]

"Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer exists." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 220–21, 219 A.3d 378 (2019).

In the present case, the interim orders, issued on February 26, 2020, ceased to exist after they were subsumed

custody orders and the final orders. . . . Thus . . . *Yontef*-type protective orders may be superfluous in most cases involving issues of custody and visitation." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 690 n.20.

[13] The plaintiff also argues that (1) the defendant did not appeal from the interim orders, (2) any such appeal would be subject to dismissal for lack of a final judgment, and (3) the defendant did not object to the interim orders and, thus, has waived her claim on appeal. We note that the defendant's appeal form reflects that her original appeal, filed on October 6, 2020, encompassed the interim orders. As to the plaintiff's remaining arguments, we need not address them further in light of our conclusion that the defendant's claim is moot.

by the final orders issued on September 1, 2020. Thus, we conclude that there is no practical relief that we may afford the defendant vis-à-vis the interim orders, and, therefore, her claim challenging the interim orders is moot. See, e.g., *Schult* v. *Schult*, 40 Conn. App. 675, 692, 672 A.2d 959 (1996) (claim regarding temporary custody order was moot when order merged with final dissolution decree), aff'd, 241 Conn. 767, 699 A.2d 134 (1997).

The defendant argues that her claim is not moot because, in incorporating the interim orders into the final orders, the court "reiterat[ed]" the interim orders and left them "largely unchanged." As we have explained, however, the interim orders became inoperative following the issuance of the final orders. Insofar as the defendant takes issue with the interim orders as integrated into the final orders, her redress is to challenge the propriety of the final orders. See part I B of this opinion.

The defendant further argues that, even if her claim is moot, it is subject to appellate review under the "capable of repetition, yet evading review" exception to the mootness doctrine. We disagree.

"[F]or an otherwise moot question to qualify for review under the 'capable of repetition, yet evading review' exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as

moot." *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995).

Focusing on the second prong of the exception, the analysis "entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the current litigation. A requirement of the likelihood that a question will recur is an integral component of the 'capable of repetition, yet evading review' doctrine. In the absence of the possibility of such repetition, there would be no justification for reaching the issue, as a decision would neither provide relief in the present case nor prospectively resolve cases anticipated in the future." Id., 384. The second prong "does not provide an exception to the mootness doctrine when it is merely *possible* that a question could recur, but rather there must be a *reasonable likelihood* that the question presented in the pending case will arise again in the future . . . ." (Emphasis in original; internal quotation marks omitted.) *Russo* v. *Common Council*, 80 Conn. App. 100, 110, 832 A.2d 1227 (2003).

In arguing that the second prong of the exception is satisfied in the present case, the defendant broadly asserts that, "if allowed, family courts [in reliance on *Yontef*] will render many more 'interim' modifications in this and other custody cases . . . ." Although it is *possible* that this issue will reoccur, the defendant has not demonstrated that there is a *reasonable likelihood* that it will. Her concern is purely speculative. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) ("speculation and conjecture . . . have no place in appellate review" (internal quotation marks omitted)). Accordingly, we conclude that the "capable of repetition, yet evading review" exception does not apply to enable us to review the defendant's moot claim.

B

The defendant next claims that the court committed error in issuing the final orders. The defendant raises four

contentions: (1) the final orders are "taint[ed]" because they incorporate the allegedly flawed interim orders; (2) assuming that the interim orders operated to modify the prior custody and visitation orders, the court applied the wrong legal standard in failing to consider the present best interests of the child and whether circumstances had changed since the issuance of the interim orders; (3) the court abused its discretion in transferring the child's primary residence for school purposes from the defendant to the plaintiff, and (4) the court abused its discretion in ordering the parties, for a period of five years, to comply with Practice Book § 25-26 (g) in filing motions to modify the final orders. These contentions are unavailing.

1

The defendant's first contention is that the final orders are fatally flawed because they incorporate the interim orders, which, as summarized in part I A of this opinion, the defendant maintains were defective. The defendant argues that the defects that plagued the interim orders carried over into the final orders. We disagree.

Resolving the defendant's claim requires us to construe the final orders. "As we previously set forth in this opinion, [o]ur deferential standard of review [in domestic relations cases] . . . does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . . Moreover, [t]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary." (Internal quotation marks omitted.) *Coleman* v. *Bembridge*, supra, 207 Conn. App. 34.

In issuing the final orders, the court cited the statutory factors delineated in General Statutes (Rev. to 2019) § 46b-56 (c) and considered the child's best interests. This analysis applied to the final orders in toto, including the portion of the final orders that assimilated the interim orders. In other words, in incorporating the interim orders into the

final orders, the court considered the child's best interests as required by statute. Even if we assume arguendo that the court committed a legal error in issuing the interim orders, that error was not transferred to the final orders simply by virtue of the fact that the final orders contain the interim orders. Accordingly, we reject the defendant's argument.

2

The defendant's second contention is that, assuming that the interim orders functioned to modify the prior custody and visitation orders, the court applied the wrong legal standard in issuing the final orders because the court neither considered whether there had been a material change in circumstances since February 26, 2020, when the court issued the interim orders, nor examined the present best interests of the child. The crux of the defendant's argument is that the interim orders, when issued, became the "prior court order[s]" for purposes of any future modifications. The defendant asserts that, because no evidentiary record was developed for the period between the issuance of the interim orders and the final orders, the court had no basis on which to issue the final orders. We are not persuaded.

The question of whether the court applied the correct legal standard is a question of law subject to plenary review. See *In re Paulo T.*, 213 Conn. App. 858, 867, 279 A.3d 766, cert. granted, 344 Conn. 904, A.3d (2022). "Before a court may modify a custody order, it must find that there has been a material change in circumstances *since the prior order of the court*, but the ultimate test is the best interests of the child." (Emphasis added; internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, supra, 167 Conn. App. 511–12. We disagree with the defendant's legal premise that, at the time that the final orders were issued, the interim orders constituted the "prior court order[s]" in effect. In issuing the interim orders, which

followed the close of evidence on the initial modification motions, the court plainly stated that the interim orders were temporary in nature and that final orders disposing of the initial modification motions were forthcoming. We cannot conclude that such temporary orders established the starting point for the court's modification analysis vis-à-vis the final orders. Accordingly, the defendant's argument fails.

3

The defendant's third contention is that the court abused its discretion in transferring the child's primary residence for school purposes from the defendant to the plaintiff. The defendant argues that the modified school residence order was not in the child's best interests and that the court speculated as to the suitability of the school district in which the plaintiff lives, particularly given that the child would not start attending kindergarten until the fall of 2021. We disagree.

The following additional facts and procedural history are relevant. The parties' 2017 custody and parenting agreement, as incorporated into the September 29, 2017 judgment, provided that, unless or until the defendant relocated, the town of Cheshire was designated as the child's primary residence for school purposes. In their respective proposed orders filed in connection with the initial modification motions, the parties separately requested that their respective residences be deemed as the child's primary residence and that the child attend school in their respective towns.

During the evidentiary hearings held on the initial modification motions, the guardian ad litem for the minor child testified that it was "appropriate" for the court to designate the child's primary residence for school purposes in advance of the child attending kindergarten in the fall of 2021 in light of, in part, the parties' lengthy litigation history. The guardian ad litem further testified

that deeming the plaintiff's residence as the child's primary residence for school purposes would be "appropriate" if the court was "concern[ed] about [his] position in the child's life" and wanted to "fortify that position a little bit for him . . . ." Along those lines, the guardian ad litem testified, inter alia, that she was "concerned that [the defendant] doesn't seem to value . . . [the plaintiff's] role as [the child's] father," was "concerned for [the child's] future relationship with [the plaintiff] if [the defendant] cannot embrace in a way that [the child] can see and feel the importance of [the plaintiff] in [the child's] life," did not believe that the defendant was able to "acknowledge that . . . [the plaintiff] has redeemable qualities as a parent," and did not believe that the defendant "[saw] the value to [the plaintiff's] time with [the child] . . . to the same degree that she values her own time as a parent with [the child]."

The guardian ad litem also offered testimony comparing the Cheshire and Southington school districts. She testified that both towns had full day kindergarten programs starting at approximately the same time and that, although Cheshire's school system ranked higher than Southington's school system on the basis of a report that she had reviewed, the data indicated that students from both schools were scoring "very close" on various tests.[14]

After hearing the parties' closing arguments on February 13, 2020, the court stated on the record that, "[g]iven

[14] During an evidentiary hearing held on December 18, 2019, while subject to direct examination by the plaintiff's trial counsel, the guardian ad litem testified as to research that she had performed comparing the Cheshire and Southington school districts. The defendant's trial counsel moved to strike that testimony on the basis that the guardian ad litem was testifying from facts not in evidence, and the court ordered that testimony to be stricken. During subsequent evidentiary hearings held on December 19, 2019, and February 6, 2020, on cross-examination, the defendant's trial counsel asked the guardian ad litem about the research that she had performed regarding the Cheshire and Southington school districts. The guardian ad litem proceeded to testify as to her research. The defendant's trial counsel did not move to strike that testimony.

the history of the litigation between the parties, I do think it is better, even at this point, rather than waiting to the fall [of] 2021 when [the child] starts school, to make a decision [as to the child's primary residence for school purposes] one way or the other. I really don't want to leave doors open that sort of invite issues in the future. I think it needs to be decided, subject of course always to the parties' right to seek modifications, setting aside the issue of the request [for] leave [requirement of Practice Book § 25-26 (g)]."

In the final orders, the court transferred the child's primary residence for school purposes from the defendant to the plaintiff. Before issuing its orders, the court found in relevant part that "[t]he parties' relationship effectively ended about ten months after their [child's] birth in April, 2016. The [defendant] was, and still is, uncertain about the role she wants the [plaintiff] to play in the child's life." The court further found that, although "the [defendant] believes it is important for [the child] to have a father figure in [the child's] life, it is questionable whether she believes that the [plaintiff] should play that role. Obviously, this leads to significant tensions in the parties' ongoing relationship."

We conclude that the court, in transferring the child's primary residence for school purposes from the defendant to the plaintiff, properly considered the child's best interests and did not engage in speculation. Although the child was not scheduled to begin kindergarten until the fall of 2021, approximately one year following the issuance of the final orders, the court reasonably determined that issuing the modified school residence order immediately was proper "[g]iven the history of the litigation between the parties" and to avoid "leav[ing] doors open that sort of invite issues in the future." This determination was buttressed by the guardian ad litem's testimony advocating for swift action on the school residence issue. Moreover, against the backdrop of the guardian ad litem's

testimony that designating the plaintiff's residence as the child's primary residence for school purposes would be "appropriate" if the court was "concern[ed] about [his] position in the child's life" and wanted to "fortify that position a little bit for him," the court found that the defendant was "uncertain about the role she wants the [plaintiff] to play in the child's life" and that it was "questionable" whether the defendant believed that the plaintiff should be a "father figure" for the child. Finally, the record contained evidence indicating that the Southington and Cheshire school systems, although not identical, were comparable in educational quality.

In sum, we conclude that the defendant has not established that the court abused its discretion in modifying the prior custody orders by transferring the child's primary residence for school purposes from the defendant to the plaintiff.

4

The defendant's fourth contention is that the court abused its discretion in ordering the parties, for a period of five years, to seek leave of the court to file motions for modification of the final orders in accordance with Practice Book § 25-26 (g). The defendant maintains that an order pursuant to § 25-26 (g) can be issued only in cases presenting " 'extreme, compelling situation[s].' " The defendant argues that the court did not find that the present matter constituted an " 'extreme, compelling [situation]' " and that, even if it had, the record does not support such a finding. We are not persuaded.

Practice Book § 25-26 "governs a litigant's ability to file a postdissolution motion for modification of a custody or visitation order." *Morera* v. *Thurber*, 162 Conn. App. 261, 269, 131 A.3d 1155 (2016). Section 25-26 (g) provides in relevant part: "[U]pon or after entry of a judgment or final order of custody and/or visitation . . . the judicial

authority may order that any further motion for modification of a final custody or visitation order shall be appended with a request for leave to file such motion . . . . The specific factual and legal basis for the claimed modification shall be sworn to by the moving party or other person having personal knowledge of the facts recited therein. If no objection to the request has been filed by any party within ten days of the date of service of such request on the other party, the request for leave may be determined by the judicial authority with or without hearing. If an objection is filed, the request shall be placed on the next short calendar, unless the judicial authority otherwise directs. At such hearing, the moving party must demonstrate probable cause that grounds exist for the motion to be granted. . . .''

In proposing that a Practice Book § 25-26 (g) order may be issued in '' 'extreme, compelling situation[s]' '' only, the defendant cites several appellate cases addressing either a trial court's refusal to consider motions or a trial court's orders restricting a party's ability to file motions. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 484–85, 706 A.2d 960 (1998) (recognizing that exceptions to general rule that court must consider and decide ''on a reasonably prompt basis'' all motions properly before it may exist in ''extreme, compelling situation,'' such as case involving harassing or vexatious litigation, and concluding that record did not support conclusion that circumstances existed to justify court's refusal to consider motions); see also *Ramin* v. *Ramin*, 281 Conn. 324, 339, 915 A.2d 790 (2007) (quoting *Ahneman* in concluding that case did not present '' 'extreme and compelling circumstance' '' supporting court's refusal to consider motion); *Eisenlohr* v. *Eisenlohr*, 135 Conn. App. 337, 346–48, 43 A.3d 694 (2012) (concluding that court did not abuse its discretion in restricting defendant's ability to file motions for modification of custody and parenting access orders in light of ''troubling facts'' of case, including court's findings that

defendant had failed to comply with prior court orders and had engaged in "lengthy pattern of contemptuous conduct"); *Strobel* v. *Strobel*, 92 Conn. App. 662, 665, 886 A.2d 865 (2005) (order prohibiting parties from filing motions or pleadings without prior approval was deemed "praiseworthy" when record reflected that parties had filed "barrages of repetitive and abusive motions in an apparently ceaseless war of hostility and vindictiveness toward one another and that those motions are not only abusive to the system but, more importantly, to their now teenage son"). We do not construe these cases as curbing a court's discretion to impose filing restrictions by limiting such orders to cases with circumstances deemed to be extreme and compelling. Indeed, neither *Eisenlohr* nor *Strobel*, which were decided after *Ahneman*, cites *Ahneman* or instructs that orders imposing filing restrictions are reserved for such cases. See *Eisenlohr* v. *Eisenlohr*, supra, 346–48; *Strobel* v. *Strobel*, supra, 665.

We perceive no clear abuse of discretion underlying the court's inclusion of the Practice Book § 25-26 (g) order, which applies to both parties, in the final orders.[15] The parties' child was nearly one and one-half years old when the September 29, 2017 judgment was rendered, and the child was four years old at the time of the final

[15] Notably, in their respective proposed orders vis-à-vis the initial modification motions, both parties requested that the court impose restrictions with respect to the filing of motions for modification. The plaintiff requested an order providing that (1) neither party was permitted to file motions for modification of custody, child support, or the parenting schedule for a period of five years, unless there was an " 'emergency' involving the safety and the physical well-being of the minor child," in which case the movant was required to file a request for leave to file a motion for modification pursuant to Practice Book § 25-26 (g), and (2) either party could file motions for modification of custody, child support, or the parenting schedule after five years, provided that attendant requests for leave were filed in accordance with § 25-26 (g). The defendant requested an order providing that, in the event that a dispute arose between the parties regarding "the health, education, or general welfare of the child," the parties were required to attend at least five counseling sessions with a co-parenting counselor before filing any motion to modify.

orders. As the court stated in issuing the final orders, less than one year following the September 29, 2017 judgment, the parties began filing "[a] slew of . . . motions" concerning the child. Moreover, during the evidentiary hearings held on the initial modification motions, the guardian ad litem for the minor child testified in favor of the court issuing a § 25-26 (g) order, considering such an order to be "an appropriate mechanism to use" in light of the length of the litigation, the financial and emotional toll of the litigation on the parties, and the guardian ad litem's belief that the child was "not unscathed by the distress that [the parties] ha[d] gone through." See *Eisenlohr* v. *Eisenlohr*, supra, 135 Conn. App. 347 n.5 (in concluding that trial court did not abuse its discretion in imposing filing restrictions on defendant, this court cited guardian ad litem's testimony that case warranted imposition of such order and that such order " 'would be best' " for minor child).

"An appellant who seeks to reverse the trial court's exercise of judicial discretion assumes a heavy burden." (Internal quotation marks omitted.) Id., 347. We conclude that the defendant has failed to demonstrate that the court abused its discretion in issuing the Practice Book § 25-26 (g) order.[16]

II

We next turn to the defendant's claim that the trial court improperly denied her March 30, 2021 modification motions. The defendant asserts that the court (1) applied the wrong legal standard in denying these motions or, alternatively, (2) incorrectly determined that there had

[16] The defendant also asserts that the Practice Book § 25-26 (g) order will lead to unnecessary and harmful delays. This argument is unavailing. As noted in footnote 15 of this opinion, the defendant requested an order requiring the parties to participate in a minimum of five counseling sessions before filing a motion for modification. Such an order, if issued, unquestionably would have caused significant delays if either party sought to file a motion to modify.

not been a material change in circumstances since the issuance of the final orders. We disagree.

The following additional facts and procedural history are relevant. In the March 30, 2021 modification motions, the defendant sought to modify the portions of the final orders incorporating the plaintiff's proposed parenting schedule and designating the plaintiff's residence as the child's primary residence for school purposes. As to the parenting schedule, the defendant argued that (1) in adopting and approving the parenting schedule in the final orders, the court had no evidence before it regarding the COVID-19 pandemic, and (2) the plaintiff was unavailable to spend sufficient time with the child, frequently leaving the child with his girlfriend or family members during his parenting time. As to the school residence order, the defendant argued that (1) at the time it issued the final orders, the court had no evidence before it regarding (a) the suitability of the Southington school system or (b) how the Cheshire and Southington school systems were addressing the COVID-19 pandemic, and (2) the child was developing strong ties with the town of Cheshire. In her proposed orders filed in connection with the March 30, 2021 modification motions, the defendant requested that the court, inter alia, (1) adopt a new parenting schedule reducing the number of the child's overnight visits with the plaintiff, (2) order that the child would attend kindergarten in Cheshire, and (3) order that the parties would continue to share joint legal custody, with the defendant's residence being designated as the child's primary residence.

On August 11, 2021, the court, *Price-Boreland*, *J.*, held an evidentiary hearing on the March 30, 2021 modification motions, during which the plaintiff and the defendant testified. At the conclusion of the hearing, the court orally denied the March 30, 2021 modification motions. The same day, the court issued a written order stating that, in denying the March 30, 2021 modification motions, it

determined that "there has been no material or substantial change in circumstances since September 1, 2020, when [the final orders were] entered."

A

The defendant first contends that the court applied the wrong legal standard in denying her March 30, 2021 modification motions. The defendant maintains that the court should have considered whether there had been a material change in circumstances since February or March, 2020,[17] rather than September 1, 2020, when the final orders were issued. We are not persuaded.

Whether the court applied the correct legal standard is a question of law subject to plenary review. See *In re Paulo T.*, supra, 213 Conn. App. 867. The defendant acknowledges the well established legal principles requiring courts, when entertaining motions to modify custody, to compare the current circumstances to those that existed at the time of the prior court orders. See *Petrov* v. *Gueorguieva*, supra, 167 Conn. App. 511–12. The defendant posits, however, that the "exigent circumstances" of this case require us to recognize an exception to the settled rule governing modifications of custody orders and to conclude that the court committed error by not examining the circumstances that existed prior to the final

[17] The defendant proposes four different dates as starting points from which the court should have considered whether a material change in circumstances had occurred: (1) February 6, 2020, when the evidentiary record closed as to the initial modification motions; (2) February 26, 2020, when the court issued the interim orders; (3) March 10, 2020, when Governor Ned Lamont declared a public health emergency and a civil preparedness emergency regarding the COVID-19 pandemic throughout the state; see *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 635, 273 A.3d 252, cert. denied, 343 Conn. 922, 275 A.3d 212 (2022); or (4) March 18, 2020, when the chief court administrator issued a statement providing that, effective March 19, 2020, Superior Court operations were limited to "Priority 1 functions" in certain designated buildings. Statement from Judge Patrick L. Carroll III, Chief Court Administrator (March 18, 2020), available at https://jud.ct.gov/HomePDFs/JudgeCarrollStatement.pdf (last visited October 3, 2022).

orders. The defendant cites "numerous impediments" that arose between February, 2020, and September, 2020, that deprived her of "an 'adequate opportunity to litigate . . . fully" the initial modification motions. These "impediments" include (1) emergency orders issued by the executive and judicial branches in response to the COVID-19 pandemic affecting court operations, (2) the court's denial on August 19, 2020, of a motion that she filed on March 16, 2020, seeking to open the evidence as to the initial modification motions,[18] and (3) the court's failure to conduct an evidentiary hearing prior to denying her May 8, 2020 modification motion.[19] The defendant further argues that the evidentiary record vis-à-vis the final orders contained no evidence regarding the effects of the COVID-19 pandemic, such that, by not considering circumstances that existed prior to the final orders, the court "forever overlook[ed] seven of the most tumultuous months in the history of parenting."

The defendant's arguments are unavailing. In essence, the defendant is attempting to use her March 30, 2021 modification motions to mount a collateral attack on the final orders, which is a maneuver that cannot be countenanced. See *Borkowski* v. *Borkowski*, supra, 228 Conn. 738 ("[t]he power of the trial court to modify the existing order does not . . . include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal" (citation omitted)). The March 30, 2021 modification motions sought to modify portions of the final orders issued on September 1, 2020, and the court, in accordance with the law, correctly compared the current circumstances with those existing as of September 1, 2020. Notwithstanding the unique conditions

[18] The defendant's motion to open the evidence stated that there was "newly discovered evidence concerning the plaintiff's ability to care for the child . . . ." The defendant has not raised a claim on appeal challenging the court's denial of the motion to open the evidence.

[19] We address the defendant's separate claim as to the denial of the May 8, 2020 modification motion in part III of this opinion.

created by the onset of the COVID-19 pandemic, it would strain logic for us to conclude that, in deciding whether to modify the final orders issued on September 1, 2020, the court committed error by failing to analyze the circumstances that existed prior to September 1, 2020.

In sum, we conclude that the court applied the correct legal standard in denying the March 30, 2021 modification motions.

B

In the alternative, the defendant asserts that the court improperly determined that she failed to demonstrate that a material change in circumstances had occurred since the issuance of the final orders. The defendant argues that "[t]he record shows the onset of [the COVID-19] pandemic, disputes over health and safety of the minor child, school closings, and the parties using self-help because existing orders were insufficient," such that the court could not reasonably have determined that there had been no material change in circumstances. We disagree.

The following additional facts and procedural history are relevant. The defendant offered testimony during the August 11, 2021 evidentiary hearing. As to the parties' child, who was five years old at the time of the hearing, the defendant testified that (1) the child was experiencing difficulties with respect to transitions from the defendant's home to the plaintiff's home, feeling "stressed," "upset," and "traumatized" the day before the start of the plaintiff's parenting time and "beg[ging]" to stay home with her, (2) the child was struggling to sleep at the plaintiff's home, (3) the plaintiff oftentimes left the child with his girlfriend or others during his parenting time, and (4) the plaintiff, who is employed as a firefighter and a landscaper, had started working more hours, and the defendant anticipated that, as a result of his increased work schedule, the plaintiff would have future availability

issues, thereby creating inconsistencies in the parties' parenting schedule. With respect to the school issue, the defendant testified that (1) her research indicated that Cheshire had a better school system than Southington, (2) the child expressed a desire to attend school in Cheshire, and (3) all of the child's friends in Cheshire were attending kindergarten in Cheshire. The defendant further testified that the child participated in various extracurricular activities in Cheshire. With regard to the COVID-19 pandemic, the defendant testified that she was concerned about the child's well-being in light of potential disruptions in the parties' parenting schedule stemming from the pandemic, particularly if the child had to attend school part-time or be subject to remote learning in the fall of 2021. The defendant further testified that, during the pandemic, while the plaintiff continued to work full-time, she worked from home and watched the child when the child's daycare was closed.

The plaintiff, who also testified during the evidentiary hearing, disputed most of the defendant's testimony. He testified that neither his career nor his work schedule had changed since the issuance of the final orders. He further testified that he never left the child with strangers and that, although on occasion his sisters watched the child if he had to "run out . . . for an hour or two," he did not routinely leave the child with his significant other or family members. As to the child, he testified that the child was not a heavy sleeper in general but that the child was "always . . . happy when [he woke the child] up," and he disagreed with the defendant's characterization of the child being "traumatized" to go to his home. With respect to the school issue, the defendant testified that he was not concerned about the child making friends in Southington, that he lived one quarter of a mile from the school that he planned for the child to attend, and that he had no intent to relocate. As to the COVID-19 pandemic, the plaintiff testified that there was a time when the child's

daycare was closed as a result of the pandemic but that the parties "just worked it out amongst [themselves] and kind of co-parented . . . ."

At the conclusion of the evidentiary hearing, the court stated: "The court has listened to the testimony and considers some, but not all, of the testimony to be credible. The court takes into consideration that there was a trial held for a four day period [on the initial modification motions] in which the court made some decisions after some significant consideration of the circumstances. At that point [the court] had the opportunity to hear extensive testimony, view the witnesses, and come to some final decision. I think at that time the court took into consideration that the [plaintiff] does live in Southington and is employed as a firefighter and a landscaper. And to the degree that the landscaping business . . . has expanded . . . the reality is that that sometimes happens as parents and we make the necessary judgment about how we ensure that our child continues to be appropriately cared for." In its written order denying the March 30, 2021 modification motions, the court concluded that there had been no substantial or material change in circumstances since the issuance of the final orders.

On the basis of the record before us, we conclude that the court reasonably determined that the defendant failed to demonstrate a material change in circumstances since the issuance of the final orders warranting modification. Faced with conflicting testimony from the parties, "the court was free to credit or reject all or part of the testimony [presented] . . . . On review, we do not reexamine the court's credibility assessments." *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 489, 144 A.3d 447 (2016). Thus, we conclude that the court did not abuse its discretion in denying the March 30, 2021 modification motions.

III

Last, we address the defendant's claim that the trial court improperly denied her May 8, 2020 modification

motion. The defendant's sole argument is that the court failed to hold an evidentiary hearing before denying the motion. The plaintiff, in addition to disagreeing with the merits of the defendant's claim, argues that this claim has been rendered moot, inter alia, by virtue of the August 11, 2021 evidentiary hearing held on the defendant's March 30, 2021 modification motions. We agree with the plaintiff that the claim is moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 753, 269 A.3d 790 (2022).

The following additional facts and procedural history are relevant. In the May 8, 2020 modification motion, the defendant requested that the plaintiff temporarily be denied visitation with the child because he allegedly had been "continu[ing] to put the health and safety of the child at risk daily." In the affidavit accompanying her corresponding application for an ex parte order of custody, the defendant averred in relevant part that (1) the plaintiff was not abiding by guidelines issued at the time by the Centers for Disease Control and Prevention in relation to the COVID-19 pandemic in that he was not social distancing or wearing masks or gloves when in the company of others, thus putting himself and the child at

risk, and (2) the plaintiff was leaving the child with third parties for extended periods of time during his parenting time. In conjunction with its denial of the defendant's request for ex parte relief, the court, *Price-Boreland*, *J.*, ordered a hearing to be held on June 5, 2020, on the application as well as the May 8, 2020 modification motion; however, as a result of the pandemic, that hearing was postponed and never rescheduled. On September 1, 2020, the court, *Klau*, *J.*, denied the May 8, 2020 modification motion without conducting a hearing.

While the original appeal filed on October 6, 2020, was pending, the defendant filed the March 30, 2021 modification motions. One of those motions sought to modify the parties' parenting schedule on the basis of (1) the COVID-19 pandemic and (2) assertions that the plaintiff regularly was leaving the child in the care of his girlfriend or family members during his parenting time. On August 11, 2021, the court held an evidentiary hearing on the March 30, 2021 modification motions and denied both motions on the same day.

With respect to the defendant's claim vis-à-vis the denial of the May 8, 2020 modification motion, the only practical relief that we could afford her is a remand to the trial court with direction to conduct an evidentiary hearing. Under the circumstances of this case, however, we conclude that such relief would be superfluous. The defendant's March 30, 2021 modification motion concerning the parties' parenting schedule raised the same issues encompassed by the May 8, 2020 modification motion, namely, whether modification was warranted in light of (1) the COVID-19 pandemic, in particular its effect on the health and safety of the child, and (2) assertions that the plaintiff was leaving the child with third parties during his parenting time. The court conducted an evidentiary hearing on the March 30, 2021 modification motion, thereby giving the defendant an opportunity to be heard and to submit evidence as to those issues. Put simply, in

effect, the defendant has received the relief that she seeks as to the denial of her May 8, 2020 modification motion, thereby rendering her claim moot.[20] See, e.g., *Wilkens* v. *Wilkens*, 10 Conn. App. 576, 579–80, 523 A.2d 1371 (1987) (claim raised challenging "correctness of" evidentiary hearing held on defendant's first motion to modify pendente lite unallocated alimony and support order was deemed moot because defendant had been afforded relief by virtue of evidentiary hearing held, during pendency of appeal, on second motion to modify).

The portions of the appeal taken from the court's February 26, 2020 decision issuing the interim orders and the court's September 1, 2020 denial of the defendant's May 8, 2020 postjudgment motion for modification are dismissed as moot; the decisions are affirmed in all other respects.

In this opinion the other judges concurred.

CAPITAL FOR CHANGE, INC. *v.* BOARD OF ASSESSMENT APPEALS OF THE TOWN OF WALLINGFORD
(AC 44404)

Alvord, Prescott and DiPentima, Js.

Syllabus

The plaintiff appealed to the trial court from the decision by the defendant board of assessment appeals upholding the denial of the plaintiff's application for a charitable organization real property tax exemption pursuant

[20] In her principal appellate brief, the defendant suggests that she is not certain that a hearing on the May 8, 2020 modification motion is necessary. As the defendant states, "[b]y the time this appeal is resolved, perhaps mask wearing and social distancing will be a concern of the past, *and maybe there will be no present reason for a hearing on the* [*May 8, 2020 modification motion*]. . . . [If the matter is remanded for a hearing, she] can decide at that time whether or not she still wants to proceed based on present circumstances." (Citation omitted; emphasis added; footnote omitted.)

to statute (§ 12-81 (7)). The plaintiff, a tax-exempt charitable organization for federal tax purposes, used the subject property to engage in commercial lending, consumer lending, loan servicing and third-party contract administration. The plaintiff provided to developers and homeowners financial services, inter alia, to improve and increase the supply of affordable housing and, through a subsidiary, contracted with utility companies to administer energy efficient loan programs. The trial court rendered judgment dismissing the appeal from the board's decision, and the plaintiff appealed to this court, claiming that the trial court improperly concluded that, because it is not organized exclusively and the property is not used exclusively for charitable purposes, the property is not tax-exempt pursuant to § 12-81 (7). *Held* that the trial court properly dismissed the plaintiff's appeal from the board's decision: pursuant to § 12-81 (7) and as required by the test set forth in *Isaiah 61:1*, *Inc.* v. *Bridgeport* (270 Conn. 69), and further explicated in *St. Joseph's Living Center*, *Inc.* v. *Windham* (290 Conn. 695), for a property to receive a charitable tax-exempt status, it must be owned by or be held in trust for a corporation organized exclusively for charitable purposes and used exclusively for carrying out one or more of such purposes, and the undisputed evidence demonstrated that the subject property was not used exclusively for charitable purposes as the plaintiff's activities involved in administering energy efficient loan programs at the subject property, including marketing, intake and processing of applications, reporting to investors, and collecting delinquent accounts for utility companies, benefited consumers, commercial entities and industrial customers without the imposition of income limitations and any demonstration of financial need and, thus, were not charitable.

Argued May 25—officially released October 11, 2022

Procedural History

Appeal from the decision of the defendant affirming the decision of the defendant's tax assessor denying the plaintiff's application for a charitable tax exemption with respect to certain real property, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Lori Welch-Rubin, with whom was *J. Michael Sulzbach*, for the appellant (plaintiff).

Janis M. Small, corporation counsel, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Capital for Change, Inc., appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant, the Board of Assessment Appeals of the Town of Wallingford (board), which upheld the denial of the plaintiff's application for a charitable organization real property tax exemption. On appeal, the plaintiff claims that the court improperly concluded that the plaintiff's property is not exempt pursuant to General Statutes § 12-81 (7) because its mission to support affordable housing for low and moderate income persons is not a charitable purpose and, therefore, it is not organized exclusively, and its property is not used exclusively, for carrying out charitable purposes. We affirm the judgment of the trial court on the ground that, regardless of whether the plaintiff's mission to support affordable housing is a charitable purpose, the undisputed evidence demonstrates that the plaintiff's property is not used *exclusively* for such a purpose, as required to qualify for the exemption.

The following facts, as stipulated by the parties or undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiff, a community development financial institution, is a tax-exempt charitable organization for federal tax purposes that owns real property located at 10 Alexander Drive (property) in Wallingford. The plaintiff uses the property to engage in commercial lending, consumer lending, loan servicing, and third-party contract administration. The plaintiff primarily provides its services to (1) developers and homeowners "to improve and increase the supply of housing affordable to Connecticut residents," (2) consumers, commercial entities and industrial customers, including utility companies, related to

the administration of energy efficiency loans, and (3) nonprofits, small businesses, and municipalities.[1]

The plaintiff provides "flexible financing" for the development of affordable housing through its social impact investment program. With that program, investors "are seeking to obtain not just a financial yield on their investment, but they want to see that the activity they're funding has . . . other social impact[s]." In addition to the return on their investments, therefore, the investors receive a report from the plaintiff on the different impacts associated with the plaintiff's lending activities. The investments are "[l]ow return to the investor" but also "[low] cost to [the plaintiff]." In addition, numerous banks lend money to the plaintiff. The plaintiff, in turn, makes loans to consumers and commercial entities to use toward the acquisition, construction and/or renovation of affordable housing.[2] Some of the banks require a direct assignment of the loans made by the plaintiff with their funds. In those circumstances, the plaintiff services the loan for the bank. The plaintiff's loan servicing for these banks, and other lenders, consists of payment processing, principal and interest disbursement, default management, and debt collection.[3]

In addition to its services related to the development of affordable housing, the plaintiff also is involved in providing financial services for certain energy efficiency loan programs. The plaintiff created its sole member subsidiary, CT Energy Efficiency Finance

[1] The plaintiff has "no defined eligibility" requirements for its services.

[2] Banks are incentivized to lend money to community development financial institutions such as the plaintiff because, in return, they receive Community Reinvestment Act credits, which are considered when the banks "seek approval for mergers, acquisitions and/or approval for additional branches."

[3] For loan servicing, the plaintiff charges the banks a fee ranging from $10 to $16 per loan per month in addition to a onetime fee to transfer and set up a portfolio.

Company (CEEF Co.), to "develop and finance clean energy, energy conservation and load management, and energy efficiency projects."[4] CEEF Co. contracts with utility companies, specifically, Eversource and Avangrid, to help oversee statutorily mandated programs such as Home Energy Solutions, the Energize CT Heat Loan program, and the Energy Conservation Loan program.[5] The programs are essentially "self funded revolving loan fund[s]," in that they are funded by the utility companies' customers, i.e., the ratepayers, through mandatory charges added to their utility distribution fees. The utility companies collect the mandatory ratepayer fees and forward them to CEEF Co. to administer the energy efficiency loan programs. The energy efficiency loans funded through these programs are made to consumers, commercial entities, and industrial customers.

"CEEF Co. . . . has no employees. They contract with [the plaintiff] to do the work. [The plaintiff] provides all administrative services to its sole member subsidiary in the execution of CEEF Co.'s contracted services to Eversource. Reimbursement is provided by scheduled, contracted fees for service. [The plaintiff] performs various duties in consumer lending, loan servicing and finance and administration for CEEF Co. These services are contracted under fee for services agreements executed by and between [the plaintiff],

[4] CEEF Co., also a tax-exempt charitable organization for federal tax purposes, operates its business at the same location as the plaintiff. As we explain subsequently in this opinion, CEEF Co. has no employees of its own and contracts with the plaintiff to provide its services.

[5] General Statutes § 16-245m (d) (1) provides in relevant part that "electric distribution companies . . . in coordination with the gas companies . . . shall submit to the Energy Conservation Management Board a combined electric and gas Conservation and Load Management Plan, in accordance with the provisions of this section, to implement cost-effective energy conservation programs, demand management and market transformation initiatives. . . ."

CEEF Co., Eversource and Avangrid. These services include marketing, intake and processing of applications, managing a contractor network to provide services, monitoring work completion, funding loans, receiving payments, reimbursing funding sources, reporting to funders, and collections of delinquent accounts. [The plaintiff] also provides on bill repayment (OBR) services to Eversource for these loans. OBR is shadow accounting of loan payments invoiced through the utility's distribution bills and collected by the utilities. Current agreement terms provide a closed loan origination fee, a monthly per loan servicing fee, and an annual fee to administer periodic financial reporting, audits, obtain insurances, and other required administrative services." The plaintiff is compensated for its services to CEEF Co. "under fee for services agreements that stipulate either per item charges (e.g., closed/funded loan, serviced loan/month) or set amounts for monthly administrative costs/reimbursements (e.g., accounting/reporting, insurances, audit)."

Apart from its services related to affordable housing and energy efficiency loans, the plaintiff also provides certain financial services to small businesses, nonprofits, and municipalities. For small businesses, the plaintiff "work[s] with all the micro lenders around the state to have accelerator training programs for early stage businesses to help grow them and . . . to provide them capital to be able to help those businesses get launched . . . and to grow."[6] For nonprofits, the plaintiff offers "bridge loans to provide interim capital where there's . . . a funding obligation [from a third party] that's going to be delivered at some point in time," which "help[s] smooth the operational expenses of the nonprofits." The plaintiff offers loan servicing to nonprofits

[6] According to Calvin Vinal, the plaintiff's president and chief executive officer, the plaintiff "help[s] mostly lower income, minority, and women . . . to develop . . . the [economic] capacity . . . to own and operate or develop a business . . . ."

such as Habitat for Humanity and other neighborhood housing services "that are smaller [and] do some lending [but] don't have the ability . . . to do debt collection and don't have the adequate systems to do it accurately so they outsource it to [the plaintiff]." The plaintiff also provides loan servicing to municipalities such as the towns of Rocky Hill, Enfield, West Hartford, and the city of Norwalk.

In 2018, the plaintiff filed an application for a tax exemption with respect to the property pursuant to § 12-81 (7). The assessor for the town of Wallingford denied the plaintiff's application, and the plaintiff filed an appeal with the board. The board denied the plaintiff's appeal, and the plaintiff subsequently filed the present action in the Superior Court, appealing from the board's decision.

During a trial to the court, the plaintiff presented testimony from its president and chief executive officer, Calvin Vinal. The parties stipulated to certain undisputed facts and offered several documents as exhibits, including the plaintiff's and CEEF Co.'s foundational documents, certain federal tax forms, and summaries of the plaintiff's loan products, which the court admitted into evidence.

On November 2, 2020, the court issued a memorandum of decision dismissing the plaintiff's appeal from the board's decision. At the outset, the court recognized that "[t]here is no genuine issue as to any material fact. The parties differ on the proper characterization of that evidence and the application of . . . § 12-81 (7) to the facts established by the evidence."

In its analysis, the court first focused on certain language set forth in § 12-81 (7) (B),[7] specifically, that

[7] General Statutes § 12-81 provides in relevant part: "The following-described property shall be exempt from taxation . . . (7) . . . (B) On and after July 1, 1967, housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section. As

"housing for persons or families of low and moderate income shall not constitute a charitable purpose under this section." [8] The court explained its view that "[s]ubsection (B) makes the statutory term 'charitable purposes' a term of art for purposes of . . . § 12-81. No matter how 'charitable' a purpose might be in common parlance—or, for that matter, for purposes of the Internal Revenue Code—'housing for persons or families of low and moderate income shall not constitute a charitable purpose *under this section*.' . . . The term 'section' facially applies to the entire text of [§] 12-81. A fortiori, it applies to subsection (7), paragraph (A) of that section. The statutory text is unambiguous." (Emphasis in original.)

The court then focused on the following relevant language set forth in § 12-81 (7) (A): "[T]he real property of . . . a corporation organized exclusively for . . . charitable purposes or for two or more such purposes and used exclusively for carrying out one or more of

used in this subdivision, 'housing' shall not include real property used for temporary housing belonging to, or held in trust for, any corporation organized exclusively for charitable purposes and exempt from taxation for federal income tax purposes, the primary use of which property is one or more of the following: (i) An orphanage; (ii) a drug or alcohol treatment or rehabilitation facility; (iii) housing for persons who are homeless, persons with a mental health disorder, persons with intellectual or physical disability or victims of domestic violence; (iv) housing for ex-offenders or for individuals participating in a program sponsored by the state Department of Correction or Judicial Branch; and (v) short-term housing operated by a charitable organization where the average length of stay is less than six months. The operation of such housing, including the receipt of any rental payments, by such charitable organization shall be deemed to be an exclusively charitable purpose . . . ."

[8] In its pretrial brief, the board questioned: "[G]iven that the actual affordable housing property is not a charitable purpose under § 12-81 (7) (B), how can it be that loaning money for the creation of such noncharitable purpose is charitable under § 12-81 (7) (A)?" The board also acknowledged, however, that its argument "is somewhat a simplistic view of the question," and "assert[ed] that such facts are relevant to framing [the] issue but not to deciding the case."

such purposes . . . .'' The court determined that ''[t]he repeated use of the word 'exclusively' in subsection [7] (A) has independent significance. For its property to be exempt from taxation, a corporation must be 'organized exclusively' for 'charitable purposes.' The property must also be 'used exclusively' for charitable purposes. This means that if a corporation is organized exclusively for multiple charitable purposes (in the common parlance), but one of those purposes is housing for persons or families of low and moderate income, the corporation is not 'organized exclusively' for 'charitable purposes' within the meaning of subsection [7] (A). Similarly, if real property is used exclusively for charitable purposes (in the common parlance), but one of those purposes is housing for families of low and moderate income, the real property is not 'used exclusively' for 'charitable purposes' within the meaning of subsection [7] (A).''

On the basis of its interpretation of § 12-81 (7), the court determined that the plaintiff failed to meet the first two prongs of the test first set forth by our Supreme Court in *Isaiah 61:1, Inc.* v. *Bridgeport*, 270 Conn. 69, 851 A.2d 277 (2004) (*Isaiah 61:1*), and further elucidated in *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 966 A.2d 188 (2009) (*St. Joseph's*), utilized to determine entitlement to a charitable organization property tax exemption, and, accordingly, dismissed the plaintiff's appeal.[9] The plaintiff filed a motion

[9] As we explain subsequently in this opinion, in order for property to qualify for tax exemption under § 12-81 (7), it must ''(1) belong to or be held in trust for a corporation organized exclusively for charitable purposes; (2) be used exclusively for carrying out such charitable purposes; (3) not be leased, rented or otherwise used for a purpose other than the furtherance of its charitable purposes; (4) not be housing subsidized by the government; and (5) not constitute low or moderate income housing.'' *Isaiah 61:1, Inc.* v. *Bridgeport*, supra, 270 Conn. 77.

Despite its statutory construction of § 12-81 (7), the trial court determined that the fourth and fifth prongs are ''clearly inapplicable'' in the present case because ''[t]here is no claim that the property is housing as that term is ordinarily understood, nor does the record support such a characterization.''

to reargue, which the court summarily denied. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. "The scope of the charitable exemption in § 12-81 (7) is a question of statutory construction, over which we exercise plenary review."[10] *Rainbow Housing Corp.* v. *Cromwell*, 340 Conn. 501, 511, 264 A.3d 532 (2021). Our review of the plaintiff's claim also is informed by the "rule of strict construction applicable to statutory provisions granting tax exemptions." Id., 511–12. "It is . . . well established that in taxation cases . . . provisions granting a tax exemption are to be construed strictly against the party claiming the exemption, who bears the burden of proving entitlement to it. . . . Exemptions, no matter how meritorious, are of grace . . . . [Therefore] [t]hey embrace only what is strictly within their terms. . . . We strictly construe such statutory exemptions because [e]xemption from taxation is the equivalent of an appropriation of public funds, because the burden of the tax is lifted from the back of the potential taxpayer who is exempted and shifted to the backs of others. . . . [I]t is also true, however, that such strict construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used." (Citations omitted; internal quotation marks omitted.) *St.*

(Internal quotation marks omitted.) The court also determined that the third prong is not applicable to this case and, therefore, that its analysis was confined to the first two prongs.

[10] The parties agree that our standard of review over the trial court's decision is plenary. Although we occasionally "review the trial court's conclusion in a tax appeal pursuant to the well established clearly erroneous standard of review"; (internal quotation marks omitted) *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 706; the issue in the present case involves application of the law to the undisputed facts. See, e.g., *Jeweler* v. *Wilton*, 199 Conn. App. 842, 847, 237 A.3d 800 (2020) (where "issue concerns the proper application of [the statute at issue] to undisputed facts, our review of that legal question is plenary").

Joseph's Living Center, Inc. v. *Windham*, supra, 290 Conn. 707.

In order to qualify for an exemption under the relevant portions of § 12-81 (7) (A), the property must be owned by, or held in trust for, "a corporation organized exclusively for scientific, educational, literary, historical or charitable purposes or for two or more such purposes and used exclusively for carrying out one or more of such purposes," and no "officer, member or employee" may "receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes . . . ." General Statutes § 12-81 (7) (A). Subdivision (B) of § 12-81 (7) "creates an exclusion to this tax exemption for housing subsidized, in whole or in part, by federal, state or local government and housing for persons or families of low and moderate income" by providing that such housing "shall not constitute a charitable purpose under this section," but it also "carves out an exception to this exclusion for five specified categories of temporary housing." (Internal quotation marks omitted.) *Rainbow Housing Corp.* v. *Cromwell*, supra, 340 Conn. 513; see footnote 7 of this opinion.

On the basis of the foregoing statutory language, our Supreme Court set forth a five-pronged test in *Isaiah 61:1* that must be satisfied in order for property to qualify for tax exemption under § 12-81 (7). "[T]he property must: (1) belong to or be held in trust for a corporation organized exclusively for charitable purposes; (2) be used exclusively for carrying out such charitable purposes; (3) not be leased, rented or otherwise used for a purpose other than the furtherance of its charitable purposes; (4) not be housing subsidized by the government; and (5) not constitute low or moderate income housing." *Isaiah 61:1, Inc.* v. *Bridgeport*, supra, 270 Conn. 77.

In the present case, like the trial court, we confine our analysis to the first two prongs of *Isaiah 61:1*, which "precisely track the statutory language"; *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 709; and were further explicated by our Supreme Court in *St. Joseph's*.[11] We address each prong in turn.

I

The first prong set forth in *Isaiah 61:1* for a property to receive tax-exempt status under § 12-81 (7) is that the property must "belong to or be held in trust for a corporation organized exclusively for charitable purposes . . . ." *Isaiah 61:1, Inc.* v. *Bridgeport*, supra, 270 Conn. 77. In *St. Joseph's*, our Supreme Court explained: "We consider three factors in making this determination. The first, and most important, factor requires an examination of the corporate entity itself to determine if it is organized to carry out an exclusively charitable purpose. The second factor that we previously have considered, to a lesser extent, is whether an entity claiming charitable status for tax exemption purposes is self-supporting. The third factor asks whether an organization's activities serve to relieve a burden on the state."[12] *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 713.

"The first [factor]—whether a corporation is organized exclusively for charitable purposes—can be bro-

[11] Because in our consideration of the first two prongs, we dispose of the plaintiff's appeal under prong two, we do not reach the question of whether the remaining prongs are satisfied, or even applicable, in this case. See *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 709 (concluding that third, fourth, and fifth prongs of *Isaiah 61:1* test were inapplicable to that case).

[12] "[O]nly the first factor, i.e., whether the purpose expressed in the organization's fundamental documents, is the sine qua non of a charitable organization. Once a court determines that an organization has an exclusively charitable purpose, the other factors should be considered under the totality of the circumstances to determine whether the organization is, in fact, fulfilling its charitable purpose." *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 713 n.27.

ken into two parts." Id. "First, we must determine for what purposes a particular corporation has been 'organized' . . . by examining the entity's foundational documents," such as its charter, certificate of incorporation, or bylaws. (Footnote omitted.) Id., 713–14; see also *Rainbow Housing Corp.* v. *Cromwell*, supra, 340 Conn. 518 n.9. "We then must decide whether that purpose is, in fact, 'charitable.' " *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 713.

"The modern approach to defining a charitable use or purpose is rather broad and liberal." Id., 715. "The definition of a charitable use or purpose is not restricted to mere relief of the destitute or the giving of alms but comprehends activities, not in themselves self-supporting, which are intended to improve the physical, mental and moral condition of the recipients and make it less likely that they will become burdens on society and more likely that they will become useful citizens. . . . Thus, [c]harity embraces anything that tends to promote the well-doing and the well-being of social man." (Citation omitted; internal quotation marks omitted.) *Rainbow Housing Corp.* v. *Cromwell*, supra, 340 Conn. 513.

Under the second factor set forth in *St. Joseph's*, we consider whether the plaintiff is self-supporting. "[I]n order to serve a charitable purpose, an organization must not be completely self-supporting." *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 721. "In other words, to constitute a charitable organization, the entity must be structured in such a way that it is intended to function with the aid of at least some private charitable support and must, in fact, seek out and receive such support." Id., 723.

The third factor requires that we consider "whether the organization's activities relieve the state of a burden it otherwise would be compelled to bear." Id., 729–30.

"[Exemptions] are granted in aid of the accomplishment of a public benefit and for the advancement of the public interest. It is in recognition of their position as an agency in the doing of things which the public, in the performance of its governmental duties, would otherwise be called upon to do at its own expense, or which ought to be done in the public interest and without private intervention would remain undone. . . . This requirement compels an organization . . . to give something to the state in return for the privilege, either by relieving it of a financial burden or by pursuing a publicly mandated moral obligation." (Citations omitted; internal quotation marks omitted.) Id., 730–31.

Turning to the facts of the present case, the plaintiff's purpose, as set forth in its restated certificate of incorporation and repeated in its bylaws, is: "a. To provide financial products and services to support activities that primarily benefit low and moderate income persons and geographies, and minority and otherwise underserved individuals and businesses;

"b. To promote economic and community development, improve economic conditions and economic opportunities, increase and preserve affordable housing options, promote energy efficiency and use of alternative energy, and improve access to health, food and educational resources and other services benefitting low-and moderate-income persons and geographies;

"c. To lessen the burdens of local, state and federal governments, generally;

"d. To solicit, accept, hold, invest, reinvest and administer any contributions, grants, investments, donations, gifts, bequests, devises, benefits of trusts (but not act as trustee of any trust), and property of any sort, without limitation as to amount or value, and to use, disburse or donate the income or principal thereof for exclusively charitable, scientific and educational purposes in such

manner as, in the judgment of the Board of Directors of the Corporation (the 'Board') will best promote the purposes of the Corporation; and

"e. To contract for, purchase, receive, develop, own, manage, operate or lease property, real, personal and mixed, to employ or otherwise retain such persons and to borrow funds as may be necessary to promote and further the purposes and objectives of the Corporation." (Emphasis omitted.)

The trial court, in considering whether the plaintiff is "a corporation organized exclusively for charitable purposes" under *Isaiah 61:1*'s first prong, examined the plaintiff's foundational documents and found that "an important foundational purpose of [the plaintiff] is to provide housing for persons or families of low and moderate income." The court determined that "[the plaintiff] is not self-supporting and . . . its activities serve to relieve a burden on the state" but that, on the basis of its interpretation of the "housing" exclusion set forth in § 12-81 (7) (B), "the first *St. Joseph's* factor is not established by the evidence. [The plaintiff] is not organized to carry out an *exclusively* charitable purpose." (Emphasis in original.) Accordingly, it concluded that the plaintiff did not satisfy the first prong of *Isaiah 61:1*.

On appeal, the plaintiff contends that the trial court erred in determining that its "mission to provide affordable housing" fell within the exclusion to the exemption set forth in § 12-81 (7) (B), and, therefore, improperly concluded that it was not organized exclusively for charitable purposes under the first prong of the *Isaiah 61:1* test. The plaintiff argues that the statutory language is ambiguous and that the legislative history supports its view that there is a distinction between residential properties used for actually "housing" low and moderate income persons, to which it contends

the exclusion applies,[13] and its property, which simply "helps facilitate the funding and development of affordable housing," without being a residential facility. The plaintiff further argues that the court, in its interpretation of the statute, improperly applied the language set forth in subdivision (B) of § 12-81 (7) to the language of subdivision (A) of § 12-81 (7), and, in doing so, effectively eliminated the fourth and fifth prongs of the *Isaiah 61:1* test.

The board, in response, contends that the trial court properly interpreted § 12-81 (7) and correctly concluded that the plaintiff's property was excluded from the exemption pursuant to the unambiguous language of § 12-81 (7) (B).[14] The board also argues, however, that, regardless of whether the plaintiff's mission to support affordable housing is a charitable purpose, the undisputed evidence demonstrates that the property is not *used exclusively* for charitable purposes as required under the second prong of *Isaiah 61:1*. Because we agree with the board's contention that the requirement under the second prong of *Isaiah 61:1* is not met, which

[13] Notably, § 12-81 (7) (B) does not exclude *all* housing for persons or families of low and moderate income from receiving the exemption. Our Supreme Court's recent decision in *Rainbow Housing Corp.* v. *Cromwell*, supra, 340 Conn. 501, makes clear that such housing may still "[fall] within the scope of the charitable exemption . . . if it is 'temporary' and primarily used for one of the five . . . charitable purposes [enumerated in § 12-81 (7) (B) (i) through (v)]." Id., 514. Nevertheless, because we affirm the trial court's judgment pursuant to *Isaiah 61:1*'s second prong, we need not address how, if at all, the exclusion to the exemption set forth in § 12-81 (7) (B) applies to the present case.

[14] The board does not challenge the trial court's determination, under *St. Joseph's* second factor, that the plaintiff is not self-supporting, and that conclusion is supported by the undisputed evidence. The board also does not challenge the trial court's determination, under *St. Joseph's* third factor, that the plaintiff's corporate documents express a purpose which would relieve a burden on society. Instead, the board argues that, in looking at how the property is *used*, pursuant to the second prong of *Isaiah 61:1*, the plaintiff failed to prove that the work it performs for CEEF Co. relieves any burden on the state, which we address in part II of this opinion.

is dispositive of this appeal, we do not reach the question of whether the plaintiff's mission to support affordable housing is a "charitable purpose" under § 12-81 (7).

II

Whether the property for which an exemption is claimed is "actually and exclusively used for [charitable] purposes" is "an intensely fact-bound inquiry." (Internal quotation marks omitted.) *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 741. In order to satisfy the "exclusive use" requirement of § 12-81 (7), "[a]n institution must be exclusively charitable, not only in the purposes for which it is formed and to which its property is dedicated, but also in the *manner and means* it adopts for the accomplishment of those purposes." (Emphasis in original; internal quotation marks omitted.) Id. A charitable organization must "use its property in such a manner that its activities are *entirely* dedicated to serving its stated charitable purpose." (Emphasis added.) Id., 745.

The following additional undisputed facts provide context for our resolution of this issue. The plaintiff first became involved in energy efficiency loan programs when it provided loan servicing for the Energy Conservation Loan program, which was run by the state and "was income targeted at that point."[15] The purpose of the program was "to decrease energy costs, but more importantly to help homeowners who needed to conduct energy related repairs to their homes to . . . have a source of lower cost capital to be able to do that." There were "very high energy costs . . . [and] the state's concern was that there were people who didn't

[15] The plaintiff was operating at the time as CT Housing Investment Fund, Inc. (CHIF). CHIF was incorporated in 1967 and changed its name to Capital for Change, Inc., in 2016, following its merger with the Greater New Haven Community Loan Fund, Inc.

have access to resources to be able to alleviate some of those costs . . . and needed repairs."

In 2011, the plaintiff created a subsidiary, CEEF Co., "to support energy conservation and load management and clean energy and energy efficiency projects by developing and administering the financing of loans to consumers." The energy efficiency loan programs that the plaintiff currently is involved in, through CEEF Co., support the state's energy conservation plan and are operated under the approval of, or in partnership with, the utility companies and several state agencies and regulatory bodies, including the Department of Energy and Environmental Protection, the Public Utilities Regulatory Agency, the Connecticut Green Bank, and the Connecticut Energy Efficiency Board.

Vinal testified at trial and during his deposition that the plaintiff became involved in administering the statutorily mandated programs after being contacted by Eversource. Eversource initially had selected an out-of-state for-profit bank to run the Home Energy Solutions program, but "the state said to Eversource you need to find a lower cost local source because it was very expensive. The ratepayer money was being exhausted very rapidly." The plaintiff subsequently submitted a proposal and, through a competitive bidding process, a regulatory agency selected CEEF Co. to administer the program. Vinal further testified during his deposition that the plaintiff provided "a very cost effective solution to be able to . . . create the opportunity to meet the state's energy conservation goals and support the companies in doing that."

Currently, the plaintiff, through CEEF Co., is involved in five different energy efficiency loan programs. The utility companies contract with CEEF Co. to provide program administration, marketing, contract network,

underwriting and funding of loans. CEEF Co. then contracts with the plaintiff "to do the work," i.e., to provide loan servicing and third-party contract administration for those companies. The plaintiff provides services such as marketing, intake and processing of applications, managing a contractor network to provide services, monitoring work completion, funding loans, receiving payments, reimbursing funding sources, reporting to funders, and collections of delinquent accounts. Vinal testified that the plaintiff's loan servicing is "really debt collection" and consists of "the collection of required payments from borrowers for loans and then the recordation of that and the distribution of the proceeds to the appropriate sources, whether it's principal and interest, and to the original lender or owner of the loan. It also includes collections or default management which is if they don't make a payment, you have to pursue payment, so you become a debt collector and those are the primary functions."

The energy efficiency loans funded through these programs are made to consumers, commercial entities, and industrial customers. According to Vinal, the plaintiff is essentially a "clearinghouse" that "help[s] people . . . get the best price for the best product that they have." Only one of the programs, the Energy Conservation Loan program, has an income limitation for its loan recipients. The Energize CT Heat Loan program also reserves a portion of its loans to assist persons or families of low and moderate income. For example, during the fiscal year ending March 31, 2020, the plaintiff distributed approximately $17.4 million in loans directed toward the Energize CT Heat Loan program, and only 40 percent of that amount, or approximately $7 million, was intended to assist persons or families of low and moderate income. Otherwise, the programs do not limit income in their eligibility requirements.

On appeal, the board contends, among other things, that the work that the plaintiff does for CEEF Co. related to the energy efficiency loan programs is not charitable. Specifically, the board argues that "[t]he work [the plaintiff] performs is paid by CEEF Co. through those contracts with ratepayer funds. With the exception of one program, there are no limits on income eligibility for these loans. In fact, the loan programs developed under [General Statutes] § 16-245m (d) (1) require the program to be available to all customers of the electric and gas companies. There is nothing charitable about these services." We agree with the board.[16]

We are guided by our Supreme Court's analysis in *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 740–50. In *St. Joseph's*, the plaintiff was a nonprofit skilled nursing facility organized to provide long-term health care to the elderly, without regard to individual financial circumstances. Id., 702, 715–18. Our Supreme Court determined that such a purpose was charitable, and that the plaintiff satisfied the first prong

[16] The trial court, in evaluating the second prong of *Isaiah 61:1*, again relied on its interpretation of the exclusion set forth in § 12-81 (7) (B). The court considered Vinal's testimony about the amount of commercial loan funds dedicated to "provide housing for persons or families of low or moderate income" and the energy efficiency loans "specifically intended to assist persons or families of low and moderate income in providing energy efficient heating systems for their homes." The court concluded: "Vinal's credible testimony is dispositive of the case. Loans made for the purpose of providing housing for persons of low and moderate income are not 'peripheral activities' of [the plaintiff]. . . . Such loans are central to its foundational purpose of providing 'housing options' that primarily 'benefit low and moderate income persons.' . . . Under these circumstances, [the plaintiff's property] is not 'used exclusively' for carrying out 'charitable purposes' as that term is defined in . . . § 12-81 (7)." (Citations omitted.) Our determination that the requirements of prong two were not met rests on different grounds. *Lewis* v. *Freedom of Information Commission*, 202 Conn. App. 607, 616 n.9, 246 A.3d 507 (2021) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)).

of *Isaiah 61:1*. Id., 718, 739–40. In an attempt to expand its patient base, however, the plaintiff also offered short-term rehabilitative care to the general public. Id., 706, 741. Our Supreme Court determined that such a use of the property was outside the scope of the plaintiff's charitable purpose and, therefore, defeated the plaintiff's claim for a property tax exemption under the "exclusive use" requirement of § 12-81 (7), as reflected in *Isaiah 61:1*'s second prong. Id., 746–47.

Our Supreme Court reasoned: "[W]e agree with the trial court that the [plaintiff's] provision of short-term rehabilitative services to patients of all ages, drawn from the community at large, is outside the scope of the [plaintiff's] stated purpose . . . . Providing short-term rehabilitative care to the general public, although a necessary service and surely helpful to the [plaintiff's] bottom line, simply cannot be characterized as falling within the [plaintiff's] charitable purpose." Id. The court noted, "[b]y way of example . . . that the [plaintiff] would presumably provide rehabilitative services to a sports superstar, such as Tiger Woods, working to overcome an injury or to recover from surgery. Such services simply cannot be considered charitable in any sense of the word." Id., 747 n.49. Our Supreme Court further explained: "If the [plaintiff] limited its provision of rehabilitative care to its existing population of elderly, long-term residents, we would be inclined to conclude that such services are within the scope of its charitable purpose as expressed in its corporate charter. Alternatively, the [plaintiff] could amend its charter to broaden the availability of rehabilitative services for those elderly persons who are not part of its long-term patient population but who are drawn from the community at large. In such a case, the use of the [plaintiff's] facility in furtherance of that charitable purpose would not defeat a claim for property tax exemption under the exclusive use requirement of § 12-81 (7). The record,

however, does not support such a characterization of the [plaintiff's] operation with respect to the rehabilitative services that it advertises and promotes. These services are neither indispensable nor incidental to the [plaintiff's] stated charitable purpose. We conclude, therefore, that the trial court properly determined that the [plaintiff's] property is not used exclusively for its charitable purpose." (Footnote omitted.) Id., 747.[17]

In the present case, the undisputed evidence demonstrates that most of the energy efficiency loan programs administered by the plaintiff benefit consumers, commercial entities, and industrial customers, without the imposition of income limitations or demonstration of financial need. Indeed, at oral argument before this court, counsel for the plaintiff acknowledged that a privately owned, for-profit real estate holding company would be eligible to participate in these energy efficiency programs. Just as the plaintiff in *St. Joseph's* exceeded the scope of its charitable purpose by offering

[17] Our Supreme Court's conclusion in *St. Joseph's* was indirectly supported by its decision in *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 783 A.2d 993 (2001). See *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 743–44. The plaintiff in *H.O.R.S.E. of Connecticut, Inc.*, was an organization dedicated to "the care of all abused, neglected, unwanted and lost domestic hoofed animals; to provide education and training pertinent to the care of hoofed animals for employees, members and officers, and the community as a whole; and to safeguard, advance and promote the safety and well-being of domestic hoofed animals by political, educational and other community activity." (Internal quotation marks omitted.) *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, supra, 556. Although the plaintiff used the subject property, at least in part, to board and to rehabilitate abused, neglected or abandoned horses, certain evidence indicated that at least some of the plaintiff's boarders were "healthy and were not, and never ha[d] been, in need of the special care, treatment or rehabilitation that the plaintiff afford[ed] abused, neglected or abandoned horses in accordance with its charitable purpose." Id., 564. Accordingly, our Supreme Court remanded the case to the trial court, which had granted the plaintiff's motion for summary judgment, to resolve this factual dispute and to determine whether the plaintiff's use of its property was, in fact, dedicated exclusively to its charitable purpose. Id., 565–66.

services to "the general public" and "to patients of all ages, drawn from the community at large," rather than just to the elderly; *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 746–47; that aspect of the plaintiff's business in the present case that focuses on energy efficiency loan programs with no income limitations is distinct from its purpose of providing "financial products and services to support activities that primarily benefit *low and moderate income persons and geographies*," and "promot[ing] energy efficiency and use of alternative energy . . . and other services *benefitting low-and moderate-income persons and geographies*." (Emphasis added.)

The plaintiff nevertheless contends that its work for CEEF Co. related to the energy efficiency loan programs is charitable because it "lessen[s] the burdens of [the] government" by assisting the state in achieving its energy goals and promoting energy efficiency which, in turn, combats climate change. We are not persuaded.

First, although the programs themselves may be designed, at least in part, to promote the state's energy conservation goals and to positively impact the environment, the plaintiff's involvement in the energy efficiency programs is limited to fulfilling financial and administrative needs, as confirmed by Vinal's testimony about the plaintiff's role in providing lower cost capital for the energy efficiency projects and helping program participants "get the best price for the best product that they have." Accordingly, we reject the plaintiff's attempt to broaden the scope of its purpose to encompass governmental climate change initiatives. See *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 740–41 (rejecting plaintiff's attempt to take "a broad view" of its charitable purpose by urging court to conclude that providing short-term rehabilitative care to general public was within charitable purpose of "provid[ing] [health] care" (internal quotation marks omitted)).

Second, although the energy efficiency loan programs are statutorily mandated and state agencies are involved in their regulation, the plaintiff's activities include, among other things, marketing, intake and processing of applications, reporting to investors, and the collection of delinquent accounts for the utility companies. In other words, the plaintiff's services relieve a burden that would otherwise be borne by *the utility companies*, not by the state itself.[18] Indeed, the evidence demonstrates that the plaintiff does not undertake *any* financial burden, given that the loans distributed through these programs are fully funded by the ratepayers themselves. The plaintiff contends that, "without [its] activities, the government could not continue its present program, unless it undertook to [employ] workers itself given that the state has not found any other cost-effective option over the years." Even if the plaintiff provides a more "cost-effective" servicing option for the utility companies, however, nothing in the record indicates that the programs would no longer be available, especially considering that such programs are statutorily mandated; see General Statutes § 16-245m (d) (1); or that any financial burden would fall on the state, rather than on the utility companies, to administer the programs.

In summary, the plaintiff simply has not demonstrated how the financial services it sells to utility companies, services which include debt collection and the facilitation of loans to consumers, commercial entities, and industrial customers that do not have any income

[18] We also note that providing a service to the government, or relieving a state burden, does not, in and of itself, make an activity "charitable." Instead, the question of whether an organization's activities relieve the state of a burden it would otherwise be compelled to bear is just one factor that "should be considered under the totality of the circumstances to determine whether the organization is, in fact, *fulfilling* its charitable purpose." (Emphasis added.) *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 713 n.27.

limitations or financial need, are charitable. See *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 730 (exemptions to charitable institutions can be granted only to aid in "the accomplishment of a *public benefit* and for the advancement of the *public interest*" (emphasis added; internal quotation marks omitted)). In addition, the plaintiff failed to demonstrate that these services are indispensable or incidental to its stated purpose.[19] Accordingly, the plaintiff's property is not used *exclusively* for charitable purposes, as required under *Isaiah 61:1*'s second prong. The trial court, therefore, properly dismissed the plaintiff's appeal from the board's decision.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID PANICCIA *v.* SUCCESS VILLAGE APARTMENTS, INC., ET AL.
(AC 44322)

Prescott, Suarez and Bishop, Js.

Syllabus

The plaintiff, P, sought to recover damages from the defendant, S Co., for S Co.'s breach of the parties' employment contract in connection with S Co.'s termination of P's employment. P was hired by S Co. in 2012, pursuant to an employment contract for a term of two years, and his contract was renewed in 2013 for an additional term of two years. In

[19] The plaintiff asserts, in a conclusory fashion, that its activities for CEEF Co. are "necessary for the primary, tax-exempt purpose." Activities that are " 'necessary for' " the accomplishment of an organization's charitable purpose, or "merely incidental to" such a purpose, do not defeat a claim for tax exemption. (Emphasis omitted.) *St. Joseph's Living Center, Inc.* v. *Windham*, supra, 290 Conn. 745–46. The plaintiff, however, has failed to explain how its financial services for utility companies, which ultimately benefit consumers, commercial entities, and industrial customers without financial limitations, are necessary for, or "indispensable"; id., 743; to the accomplishment of its goal to provide financial products and services to support activities that primarily benefit low and moderate income persons.

October, 2015, S Co. approved and executed a new employment contract with P for an additional term of two years, to begin on January 25, 2016. Although the 2015 contract was dated October 12, 2015, the board of S Co. approved the contract on October 13, 2015, at a special meeting. In December, 2015, S Co. notified P that his employment would be terminated as of January 25, 2016, the date his 2015 contract was to begin. Following a bench trial, the parties executed a joint stipulation providing for an extension of the statutory (§ 51-183b) 120 day deadline for the trial court to render a decision. The trial court issued its memorandum of decision past the agreed upon extended deadline, rendering judgment for S Co. P moved to open and vacate the judgment and for a new trial, which the trial court granted. A new bench trial was held, and the trial court rendered judgment for P. On S Co.'s appeal to this court, *held*:

1. The trial court properly granted P's motion to open and vacate the judgment rendered in the first trial as that court's finding that P did not waive his right to object to the untimely decision was not clearly erroneous: P was under no duty to speak or to protest after the court failed to issue a decision by the agreed upon deadline, prejudgment silence alone was not sufficient to support a finding of waiver under § 51-183b, as there must have been some other act or conduct that either delayed the start of the deadline, created a duty to protest in the silent party or served as an affirmative act of waiver or consent, and S Co. was unable to identify any such act or conduct by P that supported a finding of waiver; moreover, S Co.'s attempt to draw a distinction between a party's silence after the statutory 120 day deadline had passed and after an agreed upon extension of that deadline had passed was unpersuasive, as the same considerations applied in either situation.
2. S Co. could not prevail on its claim that the trial court violated the parol evidence rule by relying on the testimony of witnesses rather than the written employment contract in finding that the 2015 contract was executed on October 13, 2015, and was valid and enforceable; because a party may use extrinsic evidence to prove that a purported contract never came into existence, it followed that a party may do so to prove that a contract, in fact, existed, and, because the date on which the contract was approved and executed was not a negotiated term of the contract, the evidence admitted was not used to vary or contradict any terms of the contract.
3. S Co. could not prevail on its claim that the trial court improperly awarded prejudgment interest on P's award for back pay under the statutory (§ 37-3a) provision providing for an award of interest for the wrongful detention of money: S Co. breached the contract for the payment of wages by preventing P from performing fully under the contract, the damages awarded here were ascertainable at the time of S Co.'s breach pursuant to the terms of the 2015 contract, and, therefore, contrary to S Co.'s claim, the damages sought were not akin to damages in a personal injury action; moreover, although S Co. emphasized that P was not

seeking liquidated damages under the contract and therefore § 37-3a did not apply, much like liquidated damages, the award for unpaid wages was determined by the terms of the contract governing the amount of P's salary, and the court awarded interest on P's weekly salary as each payment would have become due under the terms of the 2015 contract if P had been allowed to perform under it.

Argued May 10—officially released October 11, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the matter was tried to the court, *Arnold, J.*; judgment for the defendants; thereafter, the court, *Arnold, J.*, granted the plaintiff's motion to open and vacate the judgment; subsequently, the matter was withdrawn as to the defendant Tyreke Bird et al.; thereafter, the matter was tried to the court, *Jacobs, J.*; judgment for the plaintiff; subsequently, the court, *Jacobs, J.*, denied in part the named defendant's motion for reargument, and the named defendant appealed to this court; thereafter, the court, *Jacobs, J.*, issued a memorandum of decision on the named defendant's motion for reargument, affirming its award of prejudgment interest, and the named defendant filed an amended appeal. *Affirmed.*

Megan E. Bryson, for the appellant (named defendant).

Richard E. Hayber, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this breach of contract action, the named defendant, Success Village Apartments, Inc.,[1] appeals from the judgment of the trial court, rendered after a second court trial, in favor of the plaintiff, David

[1] The plaintiff also named as defendants eight individuals who served on the defendant's board of directors, but he withdrew the complaint as to those defendants before the second trial. All references herein to the defendant are to the named defendant.

Paniccia, the defendant's former employee. In 2018, following the first court trial of this matter, the court, *Arnold*, *J.*, rendered judgment for the defendant on the plaintiff's claims for breach of an employment contract, violations of General Statutes §§ 31-71b and 31-72,[2] and breach of the implied duty of good faith and fair dealing. Thereafter, however, Judge Arnold granted the plaintiff's motion to open and vacate the judgment because his judgment was rendered untimely pursuant to General Statutes § 51-183b, which requires that a trial court render a decision within 120 days after the completion of a civil trial.[3] After conducting a second court trial in 2019, the court, *Jacobs*, *J.*, rendered judgment for the plaintiff and awarded him $172,969.90 in damages, which included $11,672.46 in prejudgment interest on back wages.

On appeal, the defendant claims that Judge Arnold improperly granted the plaintiff's motion to open and vacate the 2018 judgment for the defendant. In the alternative, the defendant claims that Judge Jacobs improperly (1) relied on parol evidence rather than the employ-

[2] General Statutes (Rev. to 2015) § 31-71b (a) (1) provides in relevant part: "[E]ach employer . . . shall pay weekly all moneys due each employee on a regular pay day, designated in advance by the employer . . . ."

All references herein to § 31-71b are to the 2015 revision of the statute.

General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

[3] General Statutes § 51-183b provides: "Any judge of the Superior Court and any judge trial referee who has the power to render judgment, who has commenced the trial of any civil cause, shall have power to continue such trial and shall render judgment not later than one hundred and twenty days from the completion date of the trial of such civil cause. The parties may waive the provisions of this section."

ment contract in finding that the contract was valid and enforceable and (2) awarded the plaintiff prejudgment interest pursuant to General Statutes § 37-3a. We affirm the judgment of the trial court.

The following facts, as found by Judge Jacobs or that are otherwise undisputed in the record, and procedural history are relevant to the defendant's claims. The defendant is a nonprofit residential community association registered with the state of Connecticut. In January, 2012, pursuant to a written employment contract, the defendant, through its board of directors (board), hired the plaintiff as its property manager for a term of two years, beginning on January 25, 2012 (2012 contract). Under the 2012 contract, the plaintiff earned a yearly salary of $85,000 and received health and dental insurance. The contract included a termination provision, which provided: "Employee shall receive sixty ([6]0) days advance written notice of the Employer's decision to terminate. Prior to termination, Employee shall receive a written complaint detailing the issue(s) needing attention or correction and will be given a ninety (90) day period to cure, resolve and/or correct such listed issue(s)." In October, 2013, the board executed an option to renew the 2012 contract for an additional term of two years, beginning on January 25, 2014 (2013 renewal).

On October 13, 2015, the board approved and executed a new employment contract with the plaintiff, pursuant to which the plaintiff was hired as the defendant's community association manager for a term of two years, beginning on January 25, 2016 (2015 contract). Although the contract was dated October 12, 2015, the court found, on the basis of testimony from members of the board, that the board approved the contract on October 13, 2015, at a special meeting. The 2015 contract provided that the plaintiff would earn a yearly salary

of $90,000 with various benefits, including health, dental, and disability insurance.

On December 30, 2015, the defendant notified the plaintiff that his employment would be terminated as of January 25, 2016. In May, 2016, the plaintiff commenced the underlying action against the defendant.[4] In the operative three count amended complaint dated July 13, 2017, the plaintiff alleged that the defendant, by preventing him from performing under the 2015 contract and by failing to pay him pursuant to the terms of the 2015 contract, (1) breached the 2015 contract, (2) violated §§ 31-71b and 31-72, which require that an employer pay an employee's wages weekly and provide for penalty damages in a civil action brought to recover such wages, and (3) breached the implied covenant of good faith and fair dealing. In his prayer for relief, the plaintiff sought "back pay, front pay, and the value of benefits," interest, and costs, as well as penalty damages and attorney's fees pursuant to § 31-72.

The defendant denied the material allegations in the complaint and alleged the following seven special defenses: (1) The plaintiff obtained the 2012 contract by fraud; (2) the plaintiff's employment contracts are invalid and/or unenforceable pursuant to statute; (3) the 2013 renewal is invalid and unenforceable because the 2012 contract was obtained by fraud; (4) the board's approval of the 2015 contract was invalid; (5) the plaintiff's termination was as of right under the employment contracts; (6) the plaintiff was paid for his services through the end of the 2013 renewal, inclusive of benefits; and (7) the plaintiff failed to mitigate his damages.[5]

[4] On February 22, 2016, the plaintiff filed an application for prejudgment remedy and a proposed summons and complaint. After a hearing on April 27 and 28, 2016, the court, *Radcliffe, J.*, granted the plaintiff a prejudgment remedy in the amount of $62,500. See General Statutes § 52-278d (a) (1).

[5] The defendant also asserted an eighth special defense claiming that it was entitled to a setoff, but the defendant withdrew that special defense before trial.

As previously stated, the case initially was tried to Judge Arnold. The trial began on July 25, 2017, and was completed on September 25, 2017, when Judge Arnold received the parties' posttrial briefs.[6] On January 16, 2018, the parties filed a joint stipulation providing that they "agree that Judge Arnold will have until March 14, 2018, to issue a ruling." Judge Arnold issued his memorandum of decision on April 16, 2018, rendering judgment for the defendant on all counts of the complaint. Judge Arnold found that the board approved and signed the 2015 contract during an executive session on October 12, 2015, in violation of General Statutes § 47-250 (b) (1), which provides in relevant part: "No final vote or action may be taken during an executive session. . . ." Accordingly, Judge Arnold held that the 2015 contract was void and unenforceable.

On April 26, 2018, the plaintiff moved to open and vacate the judgment and for a new trial, claiming that the court's decision was untimely under § 51-183b. On October 3, 2018, Judge Arnold granted the motion over the defendant's objection, and Judge Jacobs held a new trial over the course of three days in December, 2019.

The parties submitted posttrial briefs in January, 2020, and Judge Jacobs issued a memorandum of decision on June 16, 2020, rendering judgment for the plaintiff on all counts of his complaint. Although the court found that the defendant had proven its sixth special defense regarding payment of the plaintiff's full salary and benefits under the 2013 renewal, it rejected the

[6] Our Supreme Court has construed "completion date" under § 51-183b as including the filing of posttrial briefs. See *Frank* v. *Streeter*, 192 Conn. 601, 605, 472 A.2d 1281 (1984) ("When litigation raises difficult questions of law, a trial court is well-advised to request briefs and to defer its written decision until such time as the court has had the opportunity to deliberate and to reach a thoughtful, reasoned conclusion. . . . Delay in the trial courts is not remedied by affording disappointed litigants automatic access to new trials whenever the just resolution of their cases requires time for study and reflection." (Citation omitted.)).

defendant's remaining special defenses. Contrary to Judge Arnold's conclusion regarding the 2015 contract, the court found that the 2015 contract was valid and enforceable. The court found that the defendant breached the 2015 contract by preventing the plaintiff from performing under the contract and by failing to pay him pursuant to the contract. The court also found that the defendant's failure to pay the plaintiff his salary violated § 31-71b and that the plaintiff was entitled to penalty damages on the unpaid wages pursuant to § 31-72 because the defendant neither pleaded nor presented evidence in support of the good faith exception under the statute.[7] See General Statutes § 31-72 (2) (plaintiff not entitled to twice full amount of unpaid wages "if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law"). The court awarded the plaintiff $172,969.90 in damages, which included: $69,176.85 for back wages; $11,672.46 in interest on back wages at a rate of 5 percent;[8] $69,176.85 as penalty damages under § 31-72; and $22,981.63 for the value of lost health insurance.

[7] On appeal, the defendant does not challenge the applicability of §§ 31-71b and 31-72 to the circumstances of the present case, in which the employee's claim for unpaid wages was not based on services he actually performed. See, e.g., *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 172, 2 A.3d 873 (2010) (defendant claimed that plaintiff's claim was for bonuses under employment agreement, not wages under General Statutes § 31-71a (3)). Because that issue has not been raised in the present case, we leave it for another day.

[8] Although the court did not explain how it calculated the prejudgment interest on the back wages, it appears that the court adopted the plaintiff's methodology for calculating prejudgment interest. Under the plaintiff's methodology, interest at a rate of 10 percent accrued on the plaintiff's weekly salary as it became due, beginning with the week ending January 29, 2016. As of the week ending August 5, 2016, interest accrued on the difference between the plaintiff's weekly salary under the 2015 contract and the amount he earned from his new job. In his posttrial brief, the plaintiff sought $23,344.93 in prejudgment interest at a rate of 10 percent per annum pursuant to § 37-3a, and the court awarded him one half of that amount, $11,672.46 at a rate of 5 percent per annum.

On July 6, 2020, the defendant filed a motion to reargue and a supporting memorandum of law, claiming that the court improperly: (1) relied on witness testimony to alter the execution date of the 2015 contract in violation of the parol evidence rule; (2) determined that the plaintiff's failure to obtain a certificate for "association management services" while providing "community association manager" services, as required under General Statutes (Rev. to 2011) § 20-457,[9] did not render the 2012 contract and 2013 renewal unenforceable under General Statutes (Rev. to 2011) § 20-458;[10] and (3) awarded prejudgment interest "without any basis in law." The plaintiff filed a memorandum of law in opposition to the defendant's motion on July 9, 2020, arguing that the issues raised by the defendant were not proper for reargument. On July 17, 2020, the defendant filed a reply memorandum, and Judge Jacobs heard oral argument on the motion on September 8, 2020.

[9] General Statutes (Rev. to 2011) § 20-457 (b) provides: "No person shall: (1) Present or attempt to present, as his own, the certificate of another, (2) knowingly give false evidence of a material nature to the commission or department for the purpose of procuring a certificate, (3) represent himself falsely as, or impersonate, a registered community association manager, (4) use or attempt to use a certificate which has expired or which has been suspended or revoked, (5) offer to provide association management services without having a current certificate of registration under sections 20-450 to 20-462, inclusive, (6) represent in any manner that his registration constitutes an endorsement of the quality of his services or of his competency by the commission or department. In addition to any other remedy provided for in sections 20-450 to 20-462, inclusive, any person who violates any provision of this subsection shall be fined not more than five hundred dollars or imprisoned for not more than one year or be both fined and imprisoned. A violation of any of the provisions of sections 20-450 to 20-462, inclusive, shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b."

[10] General Statutes (Rev. to 2011) § 20-458 provides in relevant part: "(a) No contract between a person contracting to provide association management services and an association which provides for the management of the association shall be valid or enforceable unless the contract is in writing and: (1) Provides that the person contracting to provide management services shall be registered as provided in sections 20-450 to 20-462, inclusive, and shall obtain a bond as provided in section 20-460 . . . ."

On September 24, 2020, the court issued a memorandum of decision denying the motion as to the defendant's first two claims but granting reargument as to the defendant's claim that the court improperly awarded prejudgment interest without statutory citation. Judge Jacobs noted that "[r]eargument shall be scheduled by the court clerk." On October 13, 2020, the defendant filed the present appeal.

On November 27, 2020, the defendant filed a motion for articulation, requesting that Judge Jacobs articulate her factual findings and legal conclusions regarding the applicability of the parol evidence rule with respect to the execution of the 2015 contract. Judge Jacobs denied the motion for articulation on January 19, 2021, and the defendant filed a motion for review of that ruling. On March 17, 2021, this court granted review but denied the relief requested.

On December 21, 2021, this court marked over the scheduled argument in the appeal and ordered, sua sponte, the parties to file memoranda on or before January 13, 2022, limited to two issues: "(1) [Whether] the rationale of *Gardner* v. *Falvey*, 45 Conn. App. 699, [697 A.2d 711] (1997), requires dismissal of this appeal for lack of a final judgment because the trial court granted reargument, but the motion to reargue had not been decided at the time the appeal was filed [and] (2) [i]f *Gardner* controls, [whether] this court [should] consider the case en banc and overrule *Gardner*."

On February 17, 2022, after the parties filed their memoranda, this court ordered, sua sponte, Judge Jacobs to "fully resolve the merits of the defendant's July 6, 2020 motion to reargue in light of the court's September 25, 2020 order stating: 'As to the defendant's third claim of error, i.e., the court's awarding of interest without statutory citation, the defendant's request for reargument and for reconsideration is granted.' "

After hearing reargument on the award of interest on February 28, 2022, Judge Jacobs issued a memorandum of decision resolving the defendant's motion to reargue on March 2, 2022. The court declined to alter its award of interest, concluding that the defendant's failure to pay the plaintiff his wages as required under the 2015 contract constituted the wrongful detention of money after it became payable under § 37-3a. On March 15, 2022, the defendant amended this appeal to challenge the court's ruling affirming its award of prejudgment interest and sought permission to file a supplemental brief and appendix addressing that issue. On March 24, 2022, this court ordered that the parties may file supplemental briefs limited to the issue raised in the defendant's amended appeal.[11] Additional facts and procedural history will be set forth as necessary.

[11] We briefly address the jurisdictional issue raised by this court—whether the rationale of *Gardner* v. *Falvey*, supra, 45 Conn. App. 699, requires dismissal of the defendant's appeal for lack of a final judgment because the trial court granted reargument but had not heard reargument at the time the appeal was filed.

In *Gardner*, which involved an action for adjudication of paternity and visitation rights, the defendant mother appealed from an order of the trial court granting unsupervised visitation to the plaintiff, claiming that the trial court abused its discretion by denying her motion to appoint an attorney for the minor child. Id., 700. The day after the defendant appealed, she filed a motion for reargument as to her motion for appointment of counsel for the minor child. Id. The trial court granted the defendant's motion but never heard reargument. Id. This court concluded "that, because the trial court granted a motion for reargument filed by the defendant on [the sole] issue [raised by the defendant on appeal], but never heard the reargument, the appeal must be dismissed for lack of a final judgment." Id. This court further stated: "[Because] there was no disposition of the reargument, the controversy is not ripe for our review, and there is no final judgment." Id., 702. Since *Gardner* was decided, this court has cited the opinion for this finality principle only once. See *Lambert* v. *Donahue*, 69 Conn. App. 146, 149, 794 A.2d 547 (2002).

In the present case, because the trial court subsequently resolved the defendant's motion for reargument and because the defendant amended its appeal to challenge that ruling, the rationale of *Gardner* does not require the dismissal of the appeal. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original

I

The defendant first claims that the court improperly granted the plaintiff's motion to open and vacate judgment. The defendant argues that the court's finding that the plaintiff did not waive the right to object to a late

appeal properly could have been filed"). Nevertheless, we note that *Gardner*'s finality principle—that a pending motion for reargument renders the underlying judgment nonfinal for purposes of appeal—has been overruled sub silentio by our Supreme Court in *RAL Management, LLC* v. *Valley View Associates*, 278 Conn. 672, 899 A.2d 586 (2006).

In *RAL Management, LLC*, the court noted that "a trial court properly may open a judgment while an appeal is pending, even to address the issue raised on appeal"; id., 682; and that, "[w]hen a timely appeal has been filed before a motion to open has been filed, however, there is an effective, final judgment at the time of the appeal, and thus [an appellate] court has jurisdiction to consider the appeal." Id., 686. Thus, the court explained, "[b]ecause we may suspend the exercise of our jurisdiction while a trial court resolves a matter necessary to the proper resolution of the appeal, the granting of a motion to open while the appeal is pending does not divest us of jurisdiction to consider the appeal upon the resolution of that motion." Id., 687. Although *RAL Management, LLC*, involved a motion to open, the same principles apply to a motion to reargue.

In fact, these principles arguably apply with even greater force to a motion to reargue because, unlike the granting of a motion to open, the granting of a motion to reargue a judgment does not alter the judgment. See, e.g., *Governors Grove Condominium Assn., Inc.* v. *Hill Development Corp.*, 187 Conn. 509, 510 n.2, 446 A.2d 1082 (1982) ("[t]he fact that the trial court has the power to open a judgment . . . does not mean that the judgment is not final for purposes of appeal" (citations omitted)), overruled on other grounds by *Morelli* v. *Manpower, Inc.*, 226 Conn. 831, 628 A.2d 1311 (1993). Indeed, Practice Book § 11-12 (c) provides in relevant part that, "[i]f the judge grants the motion [to reargue], the judge shall schedule the matter for hearing on the relief requested." Practice Book § 11-12 (c). Of course, a court is not required to hold a hearing upon granting a motion to reargue a decision that is a final judgment because such motions are governed by Practice Book § 11-11. See *Disturco* v. *Gates in New Canaan, LLC*, 204 Conn. App. 526, 536, 253 A.3d 1033 (2021) ("provisions of Practice Book § 11-11 do not require the court to schedule a hearing upon granting a movant's motion to reargue"). Nevertheless, after granting reargument, a court still must determine whether to grant the relief sought, i.e., to alter the judgment. In other words, although the granting of reargument establishes that the judgment *may* change, the judgment is neither vacated nor modified unless the court grants additional relief upon reargument. For this reason, a court's decision to allow reargument does not affect the finality of the judgment.

decision under § 51-183b was clearly erroneous. The plaintiff responds that he never waived his right to receive a ruling by March 14, 2018, or to object to an untimely decision. We agree with the plaintiff.

We begin with the applicable standard of review. Ordinarily, we review a trial court's ruling on a motion to open a judgment for an abuse of discretion. See *Acadia Ins. Co.* v. *O'Reilly*, 138 Conn. App. 413, 417, 53 A.3d 1026 (2012), cert. denied, 308 Conn. 904, 61 A.3d 1097 (2013). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) Id. In the present case, however, the defendant claims that the court improperly failed to find that the plaintiff waived his right to object to the late judgment. "Whether conduct constitutes a waiver is a question of fact. . . . Our review therefore is limited to whether the judgment is clearly erroneous or contrary to law." (Internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, 125 Conn. App. 296, 302, 8 A.3d 524 (2010). "A finding is clearly erroneous 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.) *Franklin Credit Management Corp.* v. *Nicholas*, 73 Conn. App. 830, 836, 812 A.2d 51 (2002), cert. denied, 262 Conn. 937, 815 A.2d 136 (2003).

The following legal principles regarding § 51-183b are relevant to the defendant's claim. "[I]n order to reduce delay and its attendant costs, [§ 51-183b] imposes time limits on the power of a trial judge to render judgment in a civil case." *Waterman* v. *United Caribbean, Inc.*, 215 Conn. 688, 691, 577 A.2d 1047 (1990). A late judgment in violation of § 51-183b "implicates the trial

court's power to continue to exercise jurisdiction over the parties before it. . . . [Our Supreme Court has] characterized a late judgment as voidable rather than as void . . . and [has] permitted the lateness of a judgment to be waived by the conduct or the consent of the parties. . . . Thus, if both parties simultaneously expressly consent to a late judgment, either before the judgment is issued, or immediately thereafter, the judgment is valid and binding upon both parties, despite its lateness. Express consent, however, is not required. If a late judgment has been rendered and the parties fail to object seasonably, consent may be implied." (Citations omitted.) Id., 692.

Accordingly, "an unwarranted delay in the issuance of a judgment does not automatically deprive a court of personal jurisdiction. Even after the expiration of the time period within which a judge has the power to render a valid, binding judgment, a court continues to have jurisdiction over the parties until and unless they object. It is for this reason that a late judgment is merely voidable, and not void. It is for this reason as well that the issues arising under § 51-183b have focused on the question of waiver." Id., 692–93.

This court has distilled these principles into the following syllogism: "(1) a late judgment is voidable, not void, (2) a court maintains personal jurisdiction over the parties *until* and unless they object, (3) but a late judgment may be waived by conduct or consent, (4) therefore, absent waiver, a voidable judgment becomes void upon objection." (Emphasis in original.) *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 301.

In the present case, the 120 day deadline under § 51-183b, as extended by the parties' joint stipulation, required that Judge Arnold render a decision by March 14, 2018. When Judge Arnold issued his decision on

April 16, 2018, the plaintiff objected to the court's untimely decision by filing a motion to open and vacate the judgment ten days later on April 26, 2018. Accordingly, the dispositive issue is whether the plaintiff waived his right to object to the untimely decision by entering into the joint stipulation and then failing to object to a late decision between March 14 and April 16, 2018.

"Waiver is the intentional relinquishment of a known right. . . . Intention to relinquish [must] appear, but acts and conduct inconsistent with intention [to assert a right] are sufficient. . . . Thus, [w]aiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so. . . .

"[A] waiver is not ordinarily to be inferred from the mere inaction of a party prior to the time the judge files with the clerk his memorandum of decision. . . . Implications from silence or inaction . . . import some duty or occasion to speak or act, and in order to imply consent that rendition of judgment . . . might be deferred beyond the limit of time imposed by statute, there must be found to exist some obligation on the part of the [parties] or their counsel either seasonably to admonish the trial judge that the statute must be complied with or, after the [time limit imposed by statute] and before judgment, to interpose objection to its entry thereafter. We find no justification for so far extending the duty of a party or his counsel. The impracticability, if not the impropriety, of the first course is obvious; as to the second, it seems that *the most that can reasonably be required is objection seasonably made after the filing of the decision*. . . . Therefore, [u]nless some situation develops which in reason requires the party to protest and he does not protest, or unless he consents to the delay either expressly or

impliedly, as by agreeing to an additional hearing or by a tardy filing of his brief, no waiver will be spelled out. . . .

"[In cases in which waiver has been found], waiver was not based on silence per se but on some other act or conduct that either delayed the start of the 120 day deadline, created a duty to protest in the silent party or served as an affirmative act of waiver or consent. See, e.g., *O.J. Mann Electric Services, Inc.* v. *Village at Kensington Place Ltd. Partnership*, 99 Conn. App. 367, 374–75, 913 A.2d 1107 (2007) (plaintiff failed to object to court issued letter giving alleged erroneous 120 day deadline and plaintiff thereafter submitted brief beyond 120 day deadline he had claimed); *Rowe* v. *Goulet*, 89 Conn. App. 836, 845–46, 875 A.2d 564 (2005) (after 120 days but prior to rendition of late judgment plaintiff participated in hearing on damages and failed to object seasonably after late judgment rendered); *Franklin Credit Management Corp.* v. *Nicholas*, [supra, 73 Conn. App. 836] (plaintiff failed to object to unsolicited trial brief submitted by defendant) . . . ; *Dichello* v. *Holgrath Corp.*, [49 Conn. App. 339, 351–52, 715 A.2d 765 (1998)] (after untimely judgment rendered, plaintiff filed motion to open judgment to submit additional evidence and thereafter failed to file seasonable objection to untimely decision); *Ippolito* v. *Ippolito*, 28 Conn. App. 745, 749, 612 A.2d 131 (start of 120 day deadline delayed by lack of objection to defendant's unsolicited brief), cert. denied, 224 Conn. 905, 615 A.2d 1047 (1992). . . .

"[T]hese observations are consistent with the clear intent of [§ 51-183b, which is] to place the onus on judges to decide cases in a timely fashion." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 302–304.

In *Foote*, neither party objected before the habeas court issued its decision denying the habeas petition 200 days after the completion of the trial. Id., 299. Nine days after the judgment had been rendered, however, the petitioner filed a motion to set aside the judgment pursuant to § 51-183b. Id. The habeas court denied the motion, and the petitioner appealed. Id. On appeal, this court reversed the judgment of the habeas court, concluding that the court's implicit finding of waiver was clearly erroneous. Id., 305. This court explained: "Our careful review of the record reveals that the only evidence on which the habeas court made its implicit finding of waiver was the petitioner's silence. *Prior to rendition of judgment, however, the petitioner was under no duty to object.* After judgment was rendered, the petitioner was under a duty to protest, and he did so by seasonably filing his motion to set aside the judgment nine days later. Under such circumstances, we cannot conclude that the petitioner's silence was the intentional relinquishment or abandonment of a known right or privilege, which is the cornerstone of a claim of waiver." (Emphasis added; internal quotation marks omitted.) Id., 306–307.

In the present case, Judge Arnold relied on this court's decision in *Foote* in finding that the plaintiff did not waive his right to object to the late decision. The court determined "that the mere silence of the plaintiff upon the expiration of the joint stipulated extension is not fatal to the plaintiff. The plaintiff filed his motion to open and vacate the judgment and motion for new trial ten days after the court filed its memorandum of decision on April 16, 2018, due to the trial court's health issues. The memorandum of decision was [filed] beyond the parties' agreed upon extension date of March 14, 2018."

On appeal, the defendant argues that the plaintiff impliedly waived the right to object to the late decision

by remaining silent during the thirty-one days after the expiration of the agreed upon deadline but before the judgment was rendered. The defendant contends that *Foote* is distinguishable from the present case because the parties in *Foote* did not expressly waive the provisions of § 51-183b. According to the defendant, where the parties initially have agreed to waive § 51-183b's 120 day deadline, a party has a duty to protest prior to the rendition of judgment after the agreed upon extension date. The defendant suggests that "several cases have held the provisions of § 51-183b waived [when the] parties have provided waivers of the statute, even if limited in duration, and thereafter failed to challenge a court's failure to timely issue a decision . . . prior to the issuance of a memorandum of decision." (Emphasis omitted.) The defendant identifies three such cases, two of which are Superior Court cases decided before this court issued its opinion in *Foote*.

First, the defendant directs our attention to *Franklin Credit Management Corp.* v. *Nicholas*, supra, 73 Conn. App. 830. In that case, the trial was completed on February 20, 2001, when the parties filed simultaneous posttrial briefs. Id., 833. On April 11, 2001, the defendant filed an unsolicited supplemental brief, and the plaintiff did not object to the supplemental brief. Id. On July 12, 2001, the trial court rendered judgment for the defendant, and the plaintiff promptly filed a motion to set aside the judgment and for a mistrial on the ground that the court's decision was untimely under § 51-183. Id. The court denied the motion and later "articulated that it had utilized the unsolicited brief, at least, in determining when its decision was due." Id., 834.

On appeal, this court affirmed the judgment, explaining: "The facts of this case are controlled by *Ippolito* v. *Ippolito*, supra, 28 Conn. App. 748–50. Here, as in *Ippolito*, one of the parties submitted an unsolicited brief subsequent to the time the court established

for the submission of briefs after the close of evidence. In both cases, the opposing party did not object to the unsolicited brief or seek to strike the brief. Neither of the courts returned the briefs or asked the parties to agree to extend the time in which the decisions were to be rendered. In *Ippolito*, the failure of the opposing party to file an objection to the unsolicited brief constituted implied consent to extend the period of 120 days from the completion of evidence. . . .

"Here, we note that [the plaintiff] not only failed to object to the filing of the unsolicited brief, but also failed to object when the court had not rendered a decision 120 days after the simultaneous briefs were due, i.e., February 20, 2001. Rather, it appears that [the plaintiff] waited for the court's decision. When it received an unfavorable decision, [the plaintiff] filed a motion to set aside the judgment. By failing to raise a seasonable objection to the unsolicited brief or to the passage of 120 days from February 20, 2001, prior to the time the court rendered its judgment, [the plaintiff] by implication waived the time provision of § 51-183b." (Citation omitted; footnote omitted.) *Franklin Credit Management Corp.* v. *Nicholas*, supra, 73 Conn. App. 836–37.

Thus, in *Franklin Credit Management Corp.*, the finding of waiver was not based on the plaintiff's failure to object before the late judgment but, rather, on its failure to object to the filing of a supplemental brief, which delayed the start of the 120 day deadline. In the present case, aside from the plaintiff's prejudgment silence for thirty-one days after the agreed upon deadline had passed but before judgment was rendered, the defendant is unable to identify any act or conduct by the plaintiff that supports a finding of waiver. See *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 303 (waiver is not based on silence alone "but on some other act or conduct that either delayed the start of the

120 day deadline, created a duty to protest in the silent party or served as an affirmative act of waiver or consent").

The defendant also relies on *D'Amico* v. *Board of Alderman*, Superior Court, judicial district of Waterbury, Docket No. CV-98-0144154 (October 16, 2003) (35 Conn. L. Rptr. 627), and *McGlinchey* v. *Stonington*, Superior Court, judicial district of New London, Docket No. CV-04-0568887-S (June 19, 2006) (41 Conn. L. Rptr. 691). In *D'Amico*, the parties agreed to an extension of the 120 day deadline, providing an additional ninety days from March 20, 2002, for the court to render a decision. *D'Amico* v. *Board of Alderman*, supra, 627 n.1. The court, however, did not issue its decision until July 17, 2003, 394 days after the ninety day extension had passed. Id., 627. On August 21, 2003, the defendant moved to open and set aside the judgment as untimely under § 51-183b. Id. The court denied the motion to set aside, concluding that "[a] 'seasonable objection' under the circumstances of this case would have been one made after the additional [ninety] days had passed without a decision, and *before* the court rendered its decision. An objection raised, for the first time, by the party against whom the judgment entered, *after* that party has the benefit of knowing the decision, is unseasonable, and the court is not required to vacate or set aside the judgment as untimely under [§ 51-183b]." (Emphasis in original.) Id.

In *McGlinchey* v. *Stonington*, supra, 41 Conn. L. Rptr. 691, the plaintiffs initially provided a "blanket waiver" of the 120 day time limit, but one of the defendants consented to only a 30 day extension until December 26, 2005. On December 21, 2005, the court requested an additional extension of time until February 1, 2006, to issue its decision, and the plaintiffs again agreed to waive the 120 day deadline. Id. On March 30, 2006, the court notified the parties that it was ready to issue its

decision and requested a waiver of the 120 day deadline until April 10, 2006. Id. The defendants consented to the request, but the plaintiffs did not respond. Id. On April 13, 2006, during a conference call between the court and the parties, the plaintiffs' counsel informed the court that he was not able to agree to any further waiver of the deadline. Id. On April 17, 2006, one of the defendants sent a letter to the court discussing the law regarding waivers and urging the court to issue its decision. Id. The court issued its decision on April 19, 2006, and the plaintiffs sent a letter to the court on April 20, 2006, responding to the defendant's April 17 letter and objecting to the issuance of a decision. Id. On April 28, 2006, the plaintiffs moved to set aside the judgment as untimely under § 51-183b. Id.

The court denied the motion. Id., 693. The court first held that the plaintiffs had "provided the court with an unconditional waiver [of the 120 day deadline]. . . . Therefore, the plaintiffs' initial expressed waiver stands and cannot now be revoked." (Citation omitted; internal quotation marks omitted.) Id., 692. Having determined that the plaintiffs had expressly waived the provisions of § 51-183b, the court further "determined that the plaintiffs consented impliedly to the waiver of the 120 day time limit because the plaintiffs did not object to the passage of the February 1, 2006 time limit." Id. The court relied on *Franklin Credit Management Corp.* v. *Nicholas*, supra, 73 Conn. App. 836–37, and *D'Amico* v. *Board of Alderman*, supra, 35 Conn. L. Rptr. 627–28, in reasoning that "the plaintiffs failed to take timely and appropriate advantage of the two and a half months from February 1, 2006, to April 20, 2006. The plaintiffs' inaction is deemed an implied waiver of their rights to the provisions of § 51-183b." *McGlinchey* v. *Stonington*, supra, 41 Conn. L. Rptr. 693.

Notably, both *D'Amico* and *McGlinchey*, neither of which is binding on this court, were decided before

this court issued its decision in *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 296, in which this court rejected the reasoning employed by the trial courts in each case. In *Foote*, this court noted that "it has been stated that consent to a late judgment may be implied . . . *from the silence of the parties until the judgment has been rendered* . . . . On several occasions, however, our Supreme Court has clarified that silence may be implied consent only when the silent party is faced with a duty to speak or to protest." (Citations omitted; emphasis in original.) Id., 303 n.7.

Here, the defendant claims that the plaintiff had a duty to speak or to protest during the thirty-one days after the parties' deadline had passed but before judgment was rendered and, therefore, the plaintiff's prejudgment silence alone constituted implied consent to a late judgment. The defendant's attempt to draw a distinction between a party's silence after the statutory 120 day deadline has passed and a party's silence after an agreed upon extension of the deadline has passed is unpersuasive. The same considerations apply in either situation, and we reiterate that prejudgment silence alone is not sufficient to support a finding of waiver under § 51-183b. There must be "some other act or conduct that either delayed the start of the 120 day deadline, created a duty to protest in the silent party or served as an affirmative act of waiver or consent." Id., 303.

In sum, because the plaintiff in the present case was under no duty to speak or protest after the court failed to issue a decision by the agreed upon deadline, the court's finding that the plaintiff did not waive his right to object to the untimely decision was not clearly erroneous. Accordingly, the court properly granted the motion to open and vacate the judgment.

II

The defendant next claims that the court, *Jacobs*, *J.*, violated the parol evidence rule by relying on the

testimony of witnesses rather than the written contract in finding that the 2015 contract was executed on October 13, 2015. The defendant argues that the 2015 contract is fully integrated and, therefore, that the court improperly relied on parol evidence to contradict its terms. The plaintiff responds that the date on which the 2015 contract was executed is not a term of the contract subject to the parol evidence rule. We agree with the plaintiff.

We begin with the applicable standard of review. "Because the parol evidence rule is not an exclusionary rule of evidence . . . but a rule of substantive contract law . . . the [defendant's] claim involves a question of law to which we afford plenary review." (Internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 728, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021).

The following legal principles govern our resolution of the defendant's claim. "[I]t is well established that the parol evidence rule is . . . a substantive rule of contract law that bars the use of extrinsic evidence to vary the terms of an otherwise plain and unambiguous contract. . . . The rule does not prohibit the use of extrinsic evidence for other purposes, however, such as to prove mistake, fraud or misrepresentation in the inducement of the contract. . . .

"The rule also does not prevent a party from using extrinsic evidence to establish the existence of a condition precedent to the formation of a contract. . . . As [our Supreme Court] explained long ago, [t]he rule . . . is, that [one] may show that a writing purporting to be a contract never came into existence as a contract, or has ceased to be a contract, and [this] may [be] show[n] . . . by evidence outside of the writing. This . . . rule is not an exception to the [parol evidence rule or] an infringement of it. . . . The practical distinction

between the two rules . . . is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." (Citations omitted; internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 620–22, 223 A.3d 775 (2020).

In the present case, the defendant claimed in its pretrial memorandum that "despite the plaintiff's efforts to establish that the 2015 contract was executed by the then board of directors on October 13, 2015, the evidence will bear out that same was executed on October 12, 2015, during an executive session of the board of directors, in violation of . . . § 47-250 (b) (1), which statute prohibits the taking of a final vote or action during an executive session." Given that a party may use extrinsic evidence to prove that a purported contract "never came into existence"; (internal quotation marks omitted) *Zhou* v. *Zhang*, supra, 334 Conn. 621; it follows that a party may do so to prove that a contract, in fact, exists. See id.

The defendant relies on our Supreme Court's decision in *Alstom Power, Inc.* v. *Balcke-Durr, Inc.*, 269 Conn. 599, 612–13, 849 A.2d 804 (2004), in which the court concluded that the trial court properly determined that extrinsic evidence was inadmissible to vary the *effective date* of the parties' agreement. In the present case, however, the effective date of the 2015 contract is not varied or contradicted by the court's finding that it was executed on October 13, 2015.

Moreover, because the date on which the contract was approved and executed is not a negotiated term of the contract, the evidence admitted in the present case was not used to vary or contradict any terms of the contract. Consequently, the court properly considered

parol evidence in determining whether the 2015 contract was valid and enforceable.[12] See *Zhou* v. *Zhang*, supra, 334 Conn. 622.

III

Finally, the defendant claims that the court improperly awarded prejudgment interest under § 37-3a on the plaintiff's award for back pay because § 37-3a does not apply in the present case.[13] We disagree.

[12] On appeal, the defendant also claims that the court improperly found that the 2012 contract and the 2013 renewal were enforceable despite the fact that neither contract complied with General Statutes (Rev. to 2011) § 20-458. The defendant argues that this court "should hold, because *the 2012 contract* and *the 2013 renewal* were invalid as a matter of statute under General Statutes (Rev. to 2011) § 20-458, that the defendant was not bound by any of the terms therein, including the termination provisions, and therefore could not have breached [the] same as a matter of law, such that judgment should enter for the defendant on all counts of the plaintiff's complaint." (Emphasis added.)

For his part, the plaintiff notes that the court found that the defendant breached *the 2015 contract* and that the defendant "never argues . . . that the 2015 contract was affected somehow by the alleged invalidity of the 2012 or 2013 contracts, nor does it explain why invalidation of the 2012 or 2013 contracts would result in invalidation of the 2015 contract." In its reply brief, the defendant explained that, because the 2012 contract and the 2013 renewal were invalid pursuant to General Statutes (Rev. to 2011) § 20-458 and "because [the] 2015 contract was void ab initio as entered into in violation of . . . § 47-250 (b) (1) and unenforceable . . . as a matter of law," judgment should enter for the defendant on all counts of the complaint.

Because the court found that the defendant breached *the 2015 contract*, which was the sole basis for all counts of the plaintiff's complaint, whether the 2012 contract and 2013 renewal were invalid is simply irrelevant to the judgment on appeal. See *In re Jaccari J.*, 153 Conn. App. 599, 609, 101 A.3d 961 (2014) ("Errors of law constitute no ground of reversal if they are immaterial or such as have not injuriously affected the appellant. . . . It is axiomatic that to require reversal, error must be harmful." (Citation omitted; internal quotation marks omitted.)). Consequently, because the court's judgment does not depend on the validity of the 2012 contract or the 2013 renewal and because the defendant fails to demonstrate how the court's finding as to those contracts was harmful, we decline to consider the merits of this claim.

[13] The defendant does not challenge the court's calculation of prejudgment interest; see footnote 8 of this opinion; but rather the court's authority to award prejudgment interest in any amount under § 37-3a.

We begin with the applicable standard of review. "The decision of whether to grant interest under § 37-3a is primarily an equitable determination and a matter lying within the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . To the extent that the defendant is challenging the applicability of § 37-3a under the circumstances, however, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 99–100, 952 A.2d 1 (2008).

The following additional facts are relevant to the defendant's claim. On March 2, 2022, after allowing reargument on its award of prejudgment interest under § 37-3a, the court issued a memorandum of decision declining to alter its award. The court concluded that the defendant's failure to pay the plaintiff's wages under the 2015 contract constituted the wrongful detention of money after it became payable and, therefore, that an award of prejudgment interest pursuant to § 37-3a was warranted under the circumstances. The court awarded the plaintiff $11,672.46 in interest on back wages at a rate of 5 percent. See footnote 8 of this opinion.

On appeal, the defendant argues that § 37-3a does not apply in the present case because the plaintiff's claim "is not that he performed duties for which he was never compensated, but rather that his contract was rescinded such that he was never able to perform his duties." The plaintiff argues that the court properly awarded prejudgment interest on his back wages because the defendant wrongfully withheld his wages after they became payable and because the amount due is a liquidated sum under the terms of the 2015 contract. We conclude that the court properly awarded prejudg-

ment interest on the plaintiff's back wages under § 37-3a.

Section 37-3a provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ." "Although § 37-3a does not use the word 'wrongful' to describe a compensable detention of money under the statute, [our Supreme Court] has long employed that term to describe such a detention. . . . [The] earliest cases interpreting § 37-3a reveal that the term 'wrongful' invariably was used interchangeably with 'unlawful' to describe the narrow category of claims for which prejudgment interest was allowed under the statute, namely, claims to recover money that remained unpaid after it was due and payable. . . . Consistent with this precedent, [our Supreme Court] . . . clarified that, under § 37-3a, proof of wrongfulness is not required 'above and beyond proof of the underlying legal claim.' . . . In other words, the wrongful detention standard of § 37-3a is satisfied by proof of the underlying legal claim, a requirement that is met once the plaintiff obtains a judgment in his favor on that claim. . . .

"In fact, an award of interest under § 37-3a . . . is discretionary with the trial court. Interest is awarded under [§ 37-3a] when the court determines that such an award is appropriate to compensate the plaintiff for the loss of the use of his or her money. 'Basically, the question is whether the interests of justice require the allowance of interest as damages for the loss of use of money.' " (Citations omitted; footnotes omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 50–54, 74 A.3d 1212 (2013).

"It is well established that [§] 37-3a provides a substantive right [to prejudgment interest] that applies only

to certain claims. . . . As early as 1814, [our Supreme Court] stated that [prejudgment] interest [under § 37-3a should] be allowed only . . . where there is a written contract for the payment of money on a day certain, as on bills of exchange, and promissory notes; or where there has been *an express contract*; or where a contract can be presumed from the usage of trade, or course of dealings between the parties; or where it can be proved that the money has been used, and interest actually made. . . . Section 37-3a also authorizes prejudgment interest in cases involving tortious injury to property when the damages were capable of being ascertained on the date of the injury. . . . Prejudgment interest is permitted in such cases on the theory that [a] loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. . . . Thus, [§ 37-3a] does not allow prejudgment interest on claims that are not yet payable, such as awards for punitive damages . . . or on claims that do not involve the wrongful detention of money, such as personal injury claims . . . . Prejudgment interest is not permitted on such claims for the simple reason that, until a judgment is rendered, the person liable does not know what sum he owe[s], and therefore cannot be in default for not paying." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 49–50 n.11.

"Prejudgment interest pursuant to § 37-3a is appropriate only [if] the essence of the action itself involves the wrongful withholding of money due and payable to the plaintiff. The prejudgment interest statute does not apply when the essence of the action is the recovery of damages to compensate a plaintiff for injury, damage or costs incurred as a result of a defendant's negligence. It ordinarily does not apply to contract actions in which the plaintiff is not seeking the recovery of liquidated

damages or the recovery of money advanced under a contract and wrongfully withheld after a breach of that contract. The prejudgment interest statute does not apply to such actions because they do not advance claims based on the wrongful withholding of money, but rather seek damages to compensate for losses incurred as a result of a defendant's negligence. Moreover, such damages are not considered due and payable until after a judgment in favor of the plaintiff has been rendered." *Tang* v. *Bou-Fakhreddine*, 75 Conn. App. 334, 349, 815 A.2d 1276 (2003).

Thus, a "court's determination [as to whether interest should be awarded under § 37-3a] should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 229, 14 A.3d 307 (2011); see also *Ceci Bros., Inc.* v. *Five Twenty-One Corp.*, 81 Conn. App. 419, 427, 840 A.2d 578 ("Connecticut case law establishes that prejudgment interest is to be awarded if, in the discretion of the trier of fact, equitable considerations deem that it is warranted" (internal quotation marks omitted)), cert. denied, 268 Conn. 922, 846 A.2d 881 (2004).

In the present case, the plaintiff sought his salary pursuant to the 2015 contract. At its core, his claim is that the defendant unlawfully detained his wages after January 25, 2016, pursuant to the 2015 contract. Thus, the plaintiff sought to recover money that remained unpaid after it was due, and the court found that the defendant's breach of the 2015 contract, i.e., preventing the plaintiff from performing under the 2015 contract and refusing to pay the plaintiff's salary, constituted the wrongful detention of money under § 37-3a. See

DiLieto v. *County Obstetrics & Gynecology Group, P.C.*, supra, 310 Conn. 48 ("a wrongful detention of money, that is, a detention of money without the legal right to do so, is established merely by a favorable judgment on the underlying legal claim"). Under these circumstances, where there is no question that the failure to pay the plaintiff his wages deprived the plaintiff of the use of that money, it follows that interest may be awarded under § 37-3a "to compensate the plaintiff for the loss of the use of his . . . money." Id., 54. Indeed, this is the primary purpose of the statute. See *Sosin* v. *Sosin*, supra, 300 Conn. 230 ("primary purpose of § 37-3a . . . is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money"). Such compensation "reimburses plaintiffs for the interest they could have earned on the money that was rightfully theirs, but that was not paid when it became due." *Flynn* v. *Kaumeyer*, 67 Conn. App. 100, 105, 787 A.2d 37 (2001).

The defendant nevertheless claims that the damages awarded in the present case are akin to damages in a personal injury action. It argues that the plaintiff "seeks damages that will place him in the same position that he would have been in had the contract been performed, which such claims have previously been found not to set forth claims for liquidated damages satisfying the legal prerequisite for the imposition of prejudgment interest . . . ." (Internal quotation marks omitted.) In support of its argument, the defendant relies on *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 742, 682 A.2d 1026, cert. denied, 239 Conn. 931, 683 A.2d 397 (1996), for the proposition that prejudgment interest under § 37-3a is not warranted in an action for breach of contract when the damages "are similar to damages in a personal injury claim in negligence where a party is seeking to be made whole for the loss caused by

another." Although we agree with this proposition, we are not persuaded by the defendant's argument and conclude that *Foley* is distinguishable from the present case.

In *Foley*, the plaintiff claimed that the defendant breached a contract for the sale of a nursing home facility. Id., 715–16. A jury returned a plaintiff's verdict, awarding him $938,000 on the breach of contract claim, but the trial court reserved for itself whether to award prejudgment interest on the breach of contract damages. Id., 720, 737. In finding that there was sufficient evidence to support the jury's award of $938,000, the trial court noted that the "plaintiff provided expert testimony that valued the property at $7 million as of the time for performance of the contract. The price fixed in the contract was $5.25 million. The difference between the two figures was the range for damages." Id., 722. The trial court determined that the plaintiff was not entitled to prejudgment interest under § 37-3a on the breach of contract damages. Id., 737.

On appeal, this court first determined that the trial court incorrectly concluded that whether to award interest under § 37-3a is a legal question for the court and held that "the determination of whether interest pursuant to § 37-3a should be awarded is a question for the trier of fact." Id., 738. The court then considered whether § 37-3a applied to the breach of contract damages, concluding that "[t]he damages for the breach of contract in this case are similar to damages in a personal injury claim in negligence where a party is seeking to be made whole for the loss caused by another. The damages claimed and awarded to the plaintiff were for the loss of the benefit of his bargain. In this case, neither party claimed to have performed fully or substantially under the contract so as to invoke the other's obligation to pay a liquidated sum or to provide services under the contract." Id., 742.

In the present case, the defendant breached the contract for the payment of wages by preventing the plaintiff from performing fully under the contract, and, unlike the damages awarded in *Foley*, the determination of which required expert testimony regarding the valuation of property, the damages awarded in the present case were ascertainable at the time of the defendant's breach pursuant to the terms of the 2015 contract.[14] Cf. *Whitney* v. *J.M. Scott Associates, Inc.*, 164 Conn. App. 420, 438–39, 137 A.3d 866 (2016) ("[T]he damages at issue . . . are not liquidated damages that fall within the scope of § 37-3a. These damages were uncertain at the time of the breach, and the defendants could not know the amount owed until the court determined them."). Further, although the defendant emphasizes that the plaintiff is not seeking liquidated damages under the contract and argues that, therefore, § 37-3a should not apply, much like liquidated damages, the award for unpaid wages here was determined by the terms of the contract governing the amount of the plaintiff's salary. See *Foley* v. *Huntington Co.*, supra, 42 Conn. App. 740 ("[p]rejudgment interest pursuant to § 37-3a has been applied to breach of contract claims for liquidated damages, namely, where a party claims that a specified sum under the terms of the contract, or a sum to be determined by the terms of the contract, owed to that party has been detained by another party"). Indeed, the court awarded interest on the plaintiff's weekly salary, as each payment would have become

[14] Although we recognize that the damages awarded in the present case were reduced because the plaintiff mitigated his damages by finding a new job in July, 2016, at the time that the defendant breached the 2015 contract, the amount of the plaintiff's salary was fixed by the terms of that contract. We are not persuaded that the plaintiff should lose his entitlement to prejudgment interest simply because he took steps that reduced the defendant's liability to him for breach of the 2015 contract. Moreover, the manner in which the court calculated the prejudgment interest results in the defendant only paying interest on funds that the plaintiff did not have available to him when they should have been paid by the defendant.

due under the terms of the 2015 contract if the plaintiff had been allowed to perform under the contract. See footnote 8 of this opinion. Accordingly, we are not persuaded that the damages sought in the present case are akin to damages in a personal injury action. Rather, we conclude that the primary purpose of the statute supports the court's award of interest on the plaintiff's unpaid wages.

The judgment is affirmed.

In this opinion the other judges concurred.

V. V. *v.* V. V.*
(AC 44752)

Prescott, Cradle and Clark, Js.

Syllabus

The defendant, against whom an order of protection had been issued as to her minor child, appealed to this court from certain postjudgment orders of the trial court. *Held* that this court lacked subject matter jurisdiction over the appeal and, accordingly, the appeal was dismissed; the defendant was not aggrieved by the trial court's orders, as her personal and legal interests were not specially and injuriously affected by the orders, the first of which mistakenly characterized the defendant's withdrawal of her pending motions as a withdrawal of the plaintiff's underlying action and was later vacated by the court and the second of which reflected the fact that the defendant's counsel withdrew all of the defendant's pending motions at a hearing on the same day.

Argued April 11—officially released October 11, 2022

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of New Haven,

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

where the court, *M. Murphy*, *J.*, granted the application and issued an order of protection; thereafter, the court, *Goodrow*, *J.*, issued a postjudgment order accepting the withdrawal of the action; subsequently, the court, *Goodrow*, *J.*, issued a postjudgment order vacating its previous order as to the withdrawal of the action and accepting the defendant's withdrawal of all of her pending motions, and the defendant appealed to this court. *Appeal dismissed.*

V. V., self-represented, the appellant (defendant).

Gayle A. Sims, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, V. V., appeals from the trial court's May 20, 2021 postjudgment orders, one of which was vacated by the court and one of which reflected that the defendant's counsel withdrew all of her pending motions on the record at a hearing that same day.[1] Because the defendant was not aggrieved by either order, we dismiss the appeal for lack of jurisdiction.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On December 11, 2020, the father of the plaintiff, V. V., a minor child, filed an application for relief from abuse on behalf of the plaintiff, claiming that the defendant, who suffers from bipolar disorder with psychosis, had attempted to abduct the plaintiff. The trial court, *M. Murphy*, *J.*, issued a temporary ex parte restraining order on December 11, 2020, and a hearing was thereafter scheduled for December 23, 2020. Following the

[1] Following appellate briefing and oral argument, this court issued a supplemental briefing order asking the parties to address the jurisdictional question of whether the defendant was aggrieved by the trial court's May 20, 2021 orders from which she appeals. The defendant filed a supplemental brief on August 12, 2022. The plaintiff did not file a response.

December 23, 2020 hearing, the court denied the defendant's motion to dismiss the application and extended the December 11, 2020 ex parte restraining order for one year. Judgment entered on December 23, 2020.

On March 1, 2021, more than two months after the court rendered judgment on the restraining order, the defendant filed with the trial court both a motion for extension of time to appeal the December 23, 2020 judgment and an application for waiver of fees. The trial court, *M. Murphy, J.*, granted the fee waiver on March 2, 2021, but denied the motion for extension of time to appeal on March 4, 2021, as the time to file an appeal had expired. On March 16, 2021, the defendant filed an appeal with this court from the trial court's order denying her motion for extension of time to appeal. This court dismissed her appeal for failure to comply with Practice Book § 63-4.

The defendant thereafter filed numerous motions in the Superior Court, including motions for contempt, to set aside the restraining order, and for a guardian ad litem to be appointed. A remote hearing was held on the defendant's pending motions on May 20, 2021. At that hearing, the defendant was represented by Attorney Alexander H. Schwartz. Although Attorney Schwartz indicated that he was withdrawing all of the defendant's pending motions, he mistakenly characterized the withdrawals as a withdrawal of the restraining order. Consequently, the trial court, *Goodrow, J.*, issued a written order on May 20, 2021, stating that it had accepted "the applicant's oral withdrawal of this action" on the record. The court, however, promptly recognized its mistake and issued a second order on that same date, which vacated its original order and clarified that (1) it had accepted the defendant's withdrawal of all of her pending motions on the record and (2) the restraining order that had entered on December 23,

2020, remained in full force and effect.[2] This appeal followed.

The following legal principles guide our inquiry into whether the defendant has been aggrieved by the trial court's May 20, 2021 orders. General Statutes § 52-263 grants the right of appeal to a party who is "aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . ." "Aggrievement, in essence, is appellate standing." *In re Ava W.*, 336 Conn. 545, 554, 248 A.3d 675 (2020). "It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features." (Internal quotation marks omitted.) *Perry* v. *Perry*, 312 Conn. 600, 620, 95 A.3d 500 (2014). "The test for determining [classical] aggrievement encompasses a well settled twofold determination: first, the party claiming aggrievement must demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest shared by the community as a whole; second, the party claiming aggrievement must establish that this specific personal and legal interest has been specially and injuriously affected by the decision." (Internal quotation marks omitted.) *Avon* v. *Freedom of Information Commission*, 210 Conn. App. 225, 234, 269 A.3d 852 (2022).

[2] The order provided: "[The previous order] is vacated. The restraining order entered on [December 23, 2020] . . . remains in full force and effect. At the remote hearing on [May 20, 2021] on [the defendant's] motions, [the defendant's] counsel withdrew on the record all pending motions filed by [the defendant]. The court accepted the withdrawal. The court . . . erroneously stated on the record that this action was withdrawn; in fact, [the defendant's] motions were withdrawn, not this action. Unless otherwise modified by the court, the restraining order . . . remains in full force and effect."

On June 1, 2021, the self-represented defendant filed this appeal. The notice of appeal indicates that she seeks to challenge the court's May 20, 2021 orders. It is clear, however, that the defendant's personal and legal interests have not been specially and injuriously affected by those orders. The first order, which mistakenly characterized the defendant's withdrawal of her pending motions as a withdrawal of the plaintiff's underlying action, was vacated by the second order. The second order simply reflected the fact that the defendant's counsel withdrew all of the defendant's pending motions at a hearing earlier that day.[3] See *In re Allison G.*, 276 Conn. 146, 158, 883 A.2d 1226 (2005) ("[a] party cannot be aggrieved by a decision that grants the very relief sought" (internal quotation marks omitted)). Accordingly, this court lacks subject matter jurisdiction over the appeal.

The appeal is dismissed.

RETAINED REALTY, INC. *v.* DENISE E.A. LECOMTE ET AL.
(AC 44515)

Alvord, Elgo and Palmer, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the named defendant, L. Following the trial court's rendering of a judgment of foreclosure by sale, L filed, with the consent of the plaintiff, a motion to open the judgment to convert it to a judgment of strict foreclosure pursuant to certain terms and conditions set forth in a

[3] Because the defendant's prior appeal from the court's December 23, 2020 judgment granting the application for relief from abuse was dismissed, we decline to construe the present appeal as an appeal from that judgment. Moreover, the defendant's supplemental brief in response to this court's order asking the parties to address the jurisdictional question of whether the defendant was aggrieved by the trial court's May 20, 2021 orders makes clear that the defendant appealed from the May 20, 2021 orders, not the December 23, 2020 judgment granting the application for relief from abuse.

stipulation filed by the parties with the court. The court granted the motion to open, approved the stipulation, and rendered a judgment of strict foreclosure. After the law days had passed without redemption and title to the property vested in the plaintiff, the plaintiff filed an application for an execution of ejectment, naming L and her two adult children as the persons in possession of the property. The court clerk issued an order rejecting the application on the ground that it included persons who were not named as parties in the foreclosure action. The plaintiff filed a motion to reargue the clerk's rejection of its application, which the court denied, concluding, inter alia, that permitting the ejectment to proceed against L's adult children would deprive them of due process. The plaintiff subsequently appealed to this court, claiming that the trial court erred in denying its motion to reargue the clerk's rejection of its application for an execution of ejectment. Following oral argument before this court but before this court rendered its judgment, the plaintiff obtained from the trial court an execution of ejectment in this action as to L and an execution of ejectment in an omitted party action as to L's adult children. This court thereafter ordered supplemental briefing on the issue of mootness. *Held* that the plaintiff's claim was moot, and its appeal was dismissed for lack of subject matter jurisdiction: because, during the pendency of this appeal, the plaintiff obtained the very relief it requested in its appeal, there was no practical relief that could be afforded to the plaintiff; moreover, the plaintiff's case did not fall within the capable of repetition, yet evading review exception to the mootness doctrine because the challenged action, namely, the trial court's declining to eject nonparties from the subject property, was not, by its very nature, of limited duration, as the plaintiff's appeal was rendered moot not due to the inherently limited duration of the proceeding but due to the plaintiff's actions in pursuing its requested relief through the alternative avenue of an omitted party action.

Argued February 9—officially released October 11, 2022

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Randolph*, *J.*, rendered a judgment of foreclosure by sale; thereafter, the court, *Genuario*, *J.*, granted the named defendant's motion to open the judgment of foreclosure by sale and rendered a judgment of strict foreclosure in accordance with the parties' stipulation; subsequently, the court, *Spader*, *J.*, denied the plaintiff's motion to reargue the

court clerk's rejection of its application for an execution of ejectment, and the plaintiff appealed to this court. *Appeal dismissed.*

Taryn D. Martin, for the appellant (plaintiff).

John L. Cesaroni, for the appellee (named defendant).

Opinion

ALVORD, J. In this foreclosure action, the plaintiff, Retained Realty, Inc., appeals from the judgment of the trial court denying its motion to reargue the court clerk's rejection of its application for an execution of ejectment, which sought to eject the defendant Denise E.A. LeComte[1] and her adult children, Nichols[2] L. LeComte and Alysia A. LeComte (adult children),[3] both of whom are nonparties to this action. The plaintiff claims on appeal that the court erred in denying its motion to reargue the clerk's rejection of its application for an execution of ejectment. Following oral argument before this court, but before this court rendered its judgment, the plaintiff obtained from the trial court an execution of ejectment in this action, as to the defendant, and an execution of ejectment in an omitted party action, as to the adult children. We ordered the parties to submit supplemental briefs on the issue of mootness. Having reviewed the parties' supplemental briefs, we conclude that the plaintiff's claim is moot, and we dismiss the appeal for lack of subject matter jurisdiction.

[1] The plaintiff also named as defendants Jonathan B. LeComte, the former husband of Denise E.A. LeComte, who filed an answer and disclosure of no defense, and Old World Ceramics, Inc., which was alleged to be in possession of the property and subsequently was defaulted for failure to appear. Neither Jonathan B. LeComte nor Old World Ceramics, Inc., is participating in this appeal. We therefore refer to Denise E.A. LeComte as the defendant.

[2] We note that Nichols is spelled differently throughout the record.

[3] See footnote 13 of this opinion.

The following facts and procedural history are relevant to our resolution of this appeal. The defendant is the borrower on a note and the mortgagor of a mortgage, which documents initially were executed in favor of the lender, Emigrant Mortgage Company, Inc., on property located at 1375 King Street in Greenwich (property). The mortgage and note subsequently were assigned to Emigrant Residential, LLC, formerly known as EMC, L.L.C., which assigned them to the plaintiff.

On June 12, 2017, the plaintiff commenced the present foreclosure action by service of process on the defendant, as the borrower, the defendant's former husband, Jonathan B. LeComte, and Old World Ceramics, Inc., of which the defendant was the agent for service. See footnote 1 of this opinion. The plaintiff filed a second amended complaint in April, 2018, in which it alleged, inter alia, that it was "the holder of the note and mortgage for the installment of principal and interest due on August 1, 2016, and each month thereafter which has not been paid and the plaintiff has exercised the option to declare the entire [amount] due on the note due and payable." The plaintiff alleged that the defendant, her former husband, and Old World Ceramics, Inc., were in possession of the premises.

The plaintiff filed a motion for summary judgment, which was granted by the court, *Genuario*, *J.*, on November 30, 2018. Thereafter, the plaintiff filed a motion for a judgment of strict foreclosure or, in the alternative, for a judgment of foreclosure by sale. The defendant filed an objection, arguing that there "appear[ed] to be substantial equity" in the property. Thus, the defendant requested that the motion for a judgment of strict foreclosure be denied or, in the alternative, that a judgment of foreclosure by sale be rendered. On January 2, 2019, the court, *Randolph*, *J.*, rendered a judgment of foreclosure by sale, setting a sale date of June 29, 2019.

On May 7, 2019, the defendant filed a motion to open the judgment and extend the sale date until the conclusion of the trial in the defendant's contested marital dissolution proceeding and the issuance of the court's decision in that action. Over the objection of the plaintiff, the court, *Povodator*, *J.*, granted the defendant's motion and extended the sale date to January 11, 2020.

On January 8, 2020, the defendant filed, with the consent of the plaintiff, a motion to open the judgment, in which she requested that the court open the judgment of foreclosure by sale and "convert [it] to a judgment of strict foreclosure, with a law day of April 7, 2020, pursuant to a stipulation . . . negotiated by the parties to be filed with the court." Also on January 8, the defendant filed with the court the stipulation, which was executed by the defendant[4] and counsel for the plaintiff on the same date.

In the stipulation, the parties requested that the court render a judgment of strict foreclosure on the following terms and conditions: "1. As of the date hereof, the defendant . . . has obtained title, possession and equity of any and all interests that . . . Jonathan B. LeComte has or ever had in and to [the property] by and through a dissolution of marriage judgment . . . . 2. The defendant . . . is in sole possession and title of the property. 3. The parties acknowledge that the original judgment entered a year ago on January 2, 2019, and as of the date hereof, the defendant . . . has been unable to sell the property, refinance the subject mortgage or to reinstate. 4. The plaintiff and the defendant agree that a judgment of strict foreclosure shall enter in the subject action and the first law day shall be April 7, 2020. 5. The defendant agrees to waive her rights to

[4] The defendant has been represented by counsel at all relevant times, including at the time the stipulation was executed by the defendant and filed with the court.

further reopen the foreclosure action and/or judgment of foreclosure and agrees that as of April 8, 2020, the plaintiff shall be entitled to title and possession of the property. 6. The defendant agrees to waive any and all of her rights to appeal or challenge the judgment and agrees that as of April 8, 2020, the plaintiff shall be entitled to title and possession of the property. 7. The defendant shall have through April 7, 2020, to vacate the property, time being of the essence. 8. The defendant agrees that any personal property remaining at the property after midnight on April 7, 2020, is deemed abandoned. 9. The defendant acknowledges that this is a final stay of execution and she cannot request additional time of this court or file and/or request any appellate relief. 10. The defendant shall continue to maintain the property until she vacates, which includes, but is not limited to, being solely responsible for the snow removal, maintenance and utilities. 11. On April 7, 2020, at midnight, the plaintiff shall be entitled to title and possession of [the property]. 12. Should the defendant not have vacated the property, the plaintiff shall apply for ejectment on April 8, 2020, which shall be granted by the court, without delay. 13. [The] [d]efendant waives any and all rights to seek extension of the ejectment. 14. [The] [d]efendant waives any and all rights of appeal as to the ejectment order(s). 15. Should the defendant not have vacated the premises by April 7, 2020, the [s]tate [m]arshal will execute upon the ejectment upon timely receipt of the ejectment signed by the court. 16. [The] [d]efendant agrees that any and all personal property not removed from the property at the time of the ejectment is deemed abandoned. 17. The defendant states that there are no other persons in possession of the property. Further, the defendant agrees not to allow any other individual to gain possession of the premises from this date forward."

On January 10, 2020, the court, *Genuario*, *J.*, on the record, granted the "consent motion to open judgment of foreclosure by sale," approved the stipulation, rendered a judgment of strict foreclosure, and set law days to commence on April 7, 2020. Because of the foreclosure moratorium precipitated by the COVID-19 pandemic, the court automatically opened and extended the law days several times until October 6, 2020. The law days passed without redemption, and the plaintiff took title to the property on October 7, 2020.

On December 10, 2020, the plaintiff filed an application for an execution of ejectment, naming the defendant and her two adult children as the persons in possession of the property. That same day, the clerk[5] rejected the application for an execution of ejectment, issuing an order stating: "Motion for ejectment includes parties that are not listed in the action. Plaintiff should file a[n] action in housing."

On December 15, 2020, the plaintiff filed a motion to reargue the clerk's rejection of its application for an execution of ejectment. It represented therein that the defendant had stipulated that she was in sole possession of the property and would vacate the property by midnight on the law day of April 7, 2020, which law day was postponed due to the pandemic until October 6, 2020. In support of its motion, the plaintiff argued that the defendant's two adult children were believed to be residing at the property and were subject to ejectment on the basis, inter alia, that they had no independent right of possession. Specifically, the plaintiff argued that the defendant's adult children are not bona fide tenants under the federal Protecting Tenants at Foreclosure Act of 2009,[6] which provides certain protections

[5] Pursuant to General Statutes § 51-52 (a), "[c]lerks shall . . . issue executions on judgments . . . ."

[6] See Title VII of the Helping Families Save Their Homes Act of 2009, known as the Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, § 702, 123 Stat. 1632, 1660–61.

to bona fide tenants of foreclosed properties, including protection from immediate ejectment.[7] The plaintiff further argued that the term "person" contained in General Statutes § 49-22 (a),[8] providing that "no execution shall issue against any person in possession who is not a party to the action except a transferee or lienor who is bound by the judgment by virtue of a lis pendens," does not extend to adult family members of the mortgagor but, rather, includes only tenants.

On January 7, 2021, the defendant filed an objection to the motion to reargue, in which she argued that,

[7] Connecticut has enacted a similar statutory provision, General Statutes § 49-31p, which provides in relevant part: "(a) In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property that has a return date on or after July 13, 2011, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to (1) the provision, by such successor in interest, of a notice to vacate to any bona fide tenant not less than ninety days before the effective date of such notice; and (2) the rights of any bona fide tenant, as of the date absolute title vests in such successor in interest (A) under any bona fide lease entered into before such date to occupy the premises until the end of the remaining term of the lease . . . .

"(b) For purposes of this section, a lease or tenancy shall be considered bona fide only if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant, (2) the lease or tenancy was the result of an arms-length transaction, and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state or local subsidy. . . ."

[8] General Statutes § 49-22 (a) provides: "In any action brought for the foreclosure of a mortgage or lien upon land, or for any equitable relief in relation to land, the plaintiff may, in his complaint, demand possession of the land, and the court may, if it renders judgment in his favor and finds that he is entitled to the possession of the land, issue execution of ejectment, commanding the officer to eject the person or persons in possession of the land no fewer than five business days after the date of service of such execution and to put in possession thereof the plaintiff or the party to the foreclosure entitled to the possession by the provisions of the decree of said court, provided no execution shall issue against any person in possession who is not a party to the action except a transferee or lienor who is bound by the judgment by virtue of a lis pendens. The officer shall eject the person or persons in possession and may remove such person's possessions and personal effects and deliver such possessions and effects to the place of storage designated by the chief executive officer of the town for such purposes."

because her adult children "were never parties to this action, ejectment is improper, and the plaintiff must commence a summary process action in the housing court." The defendant argued that the term "person" in § 49-22 (a) is not limited to a tenant. In further support of that argument, the defendant cited General Statutes §§ 49-31p and 49-31q, in which the "legislature used the term tenant when it intended to limit [the] provision to tenants." The defendant also relied on the legislative history of § 49-22 (a), as recited in our Supreme Court's decision in *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 757, 830 A.2d 711 (2003). Specifically, the defendant pointed to a statement by Senator Howard T. Owens, Jr., during the introduction of the bill, in 1984, that "it would prohibit ejectment of any person who is in possession of real estate *such as a tenant* unless such person is named as a party to the foreclosure lawsuit." (Emphasis added; internal quotation marks omitted.) Id.

In her objection, the defendant acknowledged that she had agreed in the court-approved stipulation to vacate the property by midnight on April 7, 2020. The defendant argued, however, that the stipulation did not prohibit the court from exercising its discretion not to order ejectment and argued further that her compliance with the stipulation had been rendered impracticable.[9]

[9] Specifically, the defendant argued: "While the stipulation provided that [the defendant] would vacate the property as of April 8, 2020 (the day after the law day), events since the entry of the stipulation have made compliance impracticable. [The defendant] is sixty-six (66) years old. Older adults like her are at a greater risk of dying or being hospitalized. . . . In addition, [the defendant] suffers from heart disease, which increases the risk of severe illness from COVID-19 in people of any age. . . . Thus, moving in compliance with the stipulation, which could expose [the defendant] to greater risk of contracting COVID-19, was impracticable under the circumstances. In addition, while she has attempted to find a rental property, this has become difficult, in part, because of the skyrocketing rental market in Fairfield County." (Citations omitted.)

The court, *Spader*, *J.*, heard argument on the plaintiff's motion to reargue the clerk's rejection of its application for an execution of ejectment on January 12, 2021. In its memorandum of decision issued on January 15, 2021, the court denied the plaintiff's motion to reargue. The court prefaced its decision with the concern that, "[a]lthough this has been an issue of constant discussion among clerks seeking guidance on ejectments," there was no controlling appellate authority.

After noting Superior Court cases in which courts had permitted the ejectment of nonparty adult family members, the court stated that the present case involved an additional issue—that the defendant had "proactively advised the court that there were no other adults in possession of the premises nor would she allow any adults to gain possession of the premises." The court stated that it had relied on the representations the defendant made in the stipulation when rendering the judgment.

The court then turned to equitable considerations with respect to the plaintiff, the defendant, and the nonparty adult children. The court first stated that the plaintiff had alleged that the defendant had not paid the mortgage in four years and that the plaintiff has paid the property taxes and insurance while the defendant resides on the property. The court observed: "Eventually, however, the plaintiff will recover possession of the property and will be able to recoup its investment." The court noted that the plaintiff had named the defendant's former husband and his business as defendants in the foreclosure action on the basis of only their possession of the property and that it could have added all adults in possession at the time of commencement of the action. The court stated that it "ha[d] to consider equity to [the adult children], as well." With respect to the defendant, the court found that she was "in a

heightened risk group for COVID-19" and considered her failure to advise the plaintiff and the court that her adult children were still residing on the property.

The court determined that permitting the ejectment to proceed against the defendant's adult children would deprive them of due process, as they are not parties to the action and there is no judgment against them. The court reasoned: "While the adult children may not have independent rights to possession from their mother's rights, they still have due process rights to be heard before the court sends a state marshal to their house to dispossess them. The plaintiff has not made them parties to this case, nor have they, themselves, applied to become parties. They are adults and they are not represented by their mother nor her attorney."

The court then stated: "There also has to be a bright line to protect clerks statewide that are processing ejectments. When persons are included on ejectment applications that are not parties to the action, it should not be the clerk's responsibility to independently guess whether they are children, spouses or parents of the parties to the case—they should only be subject to an ejectment if they are actually named and served parties to the specific case in which the judgment was rendered. This court believes that clerks properly reject ejectments that are not in compliance with this bright-line rule."

The court concluded: "Again, [the defendant's adult children] no longer have a right to possess the premises. They are not bona fide tenants, but this court will not cause their dispossession without due process because it has no jurisdiction to do so. They will have no defense to the cause of action if they are made parties to the foreclosure or if a summary process action is commenced, but they cannot be subject to ejectment until

the court is assured that they received due process."[10] (Footnote omitted.) This appeal followed.

On appeal, the plaintiff claims that the court erred in denying its motion to reargue the clerk's rejection of its application for an execution of ejectment. Specifically, it presents a matter of first impression for the appellate courts of this state—whether § 49-22 (a) offers protection from ejectment to a mortgagor's adult children possessing the property following a judgment of foreclosure and the passing of title, when such adult family members had not been made parties to the foreclosure action.

After filing this appeal, the plaintiff commenced an omitted party action against the defendant's adult children pursuant to General Statutes § 49-30 (omitted party action).[11] See *Retained Realty, Inc.* v. *LeComte*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-21-6050336-S. On December 14, 2021, the court, *Spader*, *J.*, rendered a judgment of strict foreclosure in the omitted party action, and the court set a law day for the adult children of January 11, 2022. Id. That law day passed. On January 12, 2022, the plaintiff filed in the omitted party action an application for

[10] The court noted that, pursuant to Governor Ned Lamont's Executive Order No. 9T issued on December 23, 2020, the plaintiff was prohibited, at that time, from commencing a summary process action on or before February 9, 2021.

[11] General Statutes § 49-30 provides: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in or holding an encumbrance on such real estate subsequent or subordinate to such mortgage or lien has been omitted or has not been foreclosed of such interest or encumbrance because of improper service of process or for any other reason, all other parties foreclosed by the foreclosure judgment shall be bound thereby as fully as if no such omission or defect had occurred and shall not retain any equity or right to redeem such foreclosed real estate. Such omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

an execution of ejectment, naming the adult children as persons in possession.[12] Id. On January 13, 2022, the adult children filed an objection, arguing that the appeal in the present case had resulted in a stay of execution of the foreclosure judgment, and granting the application for an execution of ejectment in the omitted party action would violate that stay. Id. On January 26, 2022, the plaintiff withdrew its application for an execution of ejectment, and, the next day, the objection thereto also was withdrawn. Id. No appeal was taken in the omitted party action.

On January 28, 2022, the plaintiff filed in the present action a motion for termination of the stay. It argued that the court, in the due administration of justice, should terminate the automatic stay of execution while it prosecutes its appeal, given that the "trial court has now entered separate, final judgments of strict foreclosure where the law days have passed against each of the three individuals who claim possession of the property." The plaintiff further argued that the outcome of the present appeal "has no bearing on whether [the defendant] or her children may retain possession of the property." The defendant filed an objection.[13] On April 1, 2022, the court, *Spader*, *J.*, granted the motion for termination of the stay, describing it as a request to terminate the stay to issue an ejectment as to the defendant, which "is not contested as to the plaintiff's right to that relief, nor is an issue on appeal." The court

[12] Also on January 12, 2022, the plaintiff filed, in the present action, a second application for an execution of ejectment, naming only the defendant as the person in possession. On January 13, 2022, the defendant filed an objection thereto, arguing that the automatic appellate stay applies to prevent execution on the judgment. On January 26, 2022, the plaintiff withdrew the second application for an execution of ejectment and, the next day, the defendant withdrew her objection thereto.

[13] In her objection to the motion for termination of the stay, the defendant represented that her adult child Alysia A. LeComte was no longer residing at the property.

ordered that, "to the extent that any stay exists to that specific, nonappealed issue, the stay is properly terminated for the due administration of justice. The court notes that the plaintiff brought a separate action against the nonparties and an ejectment is properly issued in that matter."

On April 11, 2022, the defendant filed with this court a motion for review of the court's order terminating the stay. The defendant requested that this court reverse the termination order and order that the appellate stay remain in effect for the pendency of this appeal. The plaintiff filed an objection to the motion for review and a motion to expedite this court's ruling on the motion for review. On April 27, 2022, this court issued an order granting review but denying the relief requested and an order stating that no action was necessary with respect to the motion to expedite.

On May 9, 2022, the plaintiff filed, in the omitted party action, an application for an execution of ejectment seeking to eject the adult children. *Retained Realty, Inc.* v. *LeComte*, supra, Superior Court, Docket No. CV-21-6050336-S. On May 17, 2022, the plaintiff filed, in the present action, an application for an execution of ejectment seeking to eject the defendant.[14] The clerk granted both applications on May 27, 2022, and issued both executions of ejectment that same day. See id.

Following the issuance of both executions of ejectment, this court, sua sponte, ordered the parties to file memoranda "giving reasons, if any, why the appeal should not be dismissed as moot in light of the issuance of the execution of ejectment as it does not appear that there is any practical relief that can be given to the appellant in this case." On August 15, 2022, the parties

[14] The plaintiff previously had filed, also in the present action, an application for an execution of ejectment on May 9, 2022. The clerk rejected that application on the basis that it failed to list all dates of judgment.

filed their supplemental memoranda. The defendant submits that the appeal should be dismissed as moot, while the plaintiff urges this court to consider the merits of the appeal because its claim satisfies the "capable of repetition, yet evading review" exception to the mootness doctrine.

With these facts and procedural history in mind, we turn to whether the plaintiff's claim is reviewable by this court. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 685–86, 168 A.3d 530 (2017). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Wendy V.* v. *Santiago*, 319 Conn. 540, 545, 125 A.3d 983 (2015).

In the present case, the plaintiff, in its appellate brief, requested as relief that this court "reverse the trial court's decision denying the application for ejectment and remand the matter with orders to approve the application for ejectment with no additional stays to enter in accordance with the stipulation/judgment." During

the pendency of this appeal, the plaintiff was afforded that relief, in that the applications for executions of ejectment were granted, and the executions of ejectment were issued. Thus, no practical relief can be afforded to the plaintiff.

We note, however, that "an otherwise moot question may qualify for review under the capable of repetition, yet evading review exception. To do so . . . it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, [the appeal] must be dismissed as moot." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 800–801, 266 A.3d 921 (2021).

"The first requirement of the foregoing test reflects the functionally insurmountable time constraints present in certain types of disputes. . . . Paradigmatic examples are abortion cases and other medical treatment disputes. . . . The basis for the first requirement derives from the nature of the exception. If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced. Thus, there is no reason to reach

out to decide the issue as between parties who, by hypothesis, no longer have any present interest in the outcome." (Citation omitted; internal quotation marks omitted.) *Wendy V.* v. *Santiago*, supra, 319 Conn. 546; see also *Ruffin* v. *Commissioner of Correction*, 89 Conn. App. 724, 728, 874 A.2d 857 (2005) ("the evading review concept implicates the notion of time and its likely effect on a court's ability to review an action or claim" (internal quotation marks omitted)).

We conclude that this case does not meet the first requirement under the capable of repetition, yet evading review exception, in that the action is not of inherently limited duration. The plaintiff is challenging the court's denial of its motion to reargue the clerk's rejection of its application for an execution of ejectment because, in that application, it sought to eject nonparties to the foreclosure. The challenged action, namely, the court's declining to eject nonparties from the property, is not, by its very nature, of limited duration. See *Wendy V.* v. *Santiago*, supra, 319 Conn. 546–47. This case would not have become moot before appellate litigation could have concluded had the plaintiff not availed itself of the alternative avenue of an omitted party action, through which it ultimately obtained the relief it sought in this appeal.[15] Thus, the plaintiff's appeal was rendered moot

[15] The plaintiff argues in its supplemental brief that "[t]he question of whether the intended interpretation of the term 'person' in . . . § 49-22 (a) encompasses a mortgagor's family members and whether those family members are subject to ejectment without having been named as parties to the foreclosure action is an issue that is capable of repetition yet evading judicial review. It is not likely this question, or the ejectment itself will ever reach appellate review before becoming moot due to the pursuit of alternate avenues such as summary process or like here, an omitted party action concludes before [a] decision is rendered on appeal. While an appeal on an ejectment is pending, like here an omitted party action can proceed, or even a summary process action could be instituted. Given the length and cost of an appeal, a mortgagee will more likely than not attempt another avenue altogether or while an appeal is pending."

We disagree with the plaintiff. The availability of alternative avenues, and the plaintiff's decision to take advantage of one such avenue, does not assist with the conclusion that the challenged action is of limited duration. This

not due to the "inherently limited duration" of the proceeding but due to the plaintiff's actions in pursuing its requested relief through the alternative avenue of an omitted party action. See *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, supra, 208 Conn. App. 802 ("appeal was rendered moot not due to the 'inherently limited duration' of the proceeding before the trial court but due to [the] failure [of the appellants] to seek the appropriate remedy from this court").

In sum, this case involves no functionally insurmountable time constraints. Rather, it presents a challenge to an "action [that] can be reviewed the next time it arises, when it will present an ongoing live controversy." *Loisel* v. *Rowe*, 233 Conn. 370, 384, 660 A.2d 323 (1995). Accordingly, this case does not fall within the capable of repetition, yet evading review exception to the mootness doctrine.

The appeal is dismissed.

In this opinion the other judges concurred.

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case became moot only because the plaintiff chose a separate course of action to pursue and obtained the executions of ejectment it sought.