GORDON RANDOLPH *v.* DONNA MAMBRINO ET AL. (AC 42742)

Alvord, Elgo and Palmer, Js.

Syllabus

Pursuant to statute (§ 52-595), if a person fraudulently conceals the existence of a cause of action, that cause of action shall be deemed to accrue against such person when the person entitled to bring an action thereon first discovers its existence.

The petitioner, who had been convicted, on a guilty plea, of various crimes in connection with his role in an armed robbery, filed a petition for a new trial, claiming that he was entitled to a new trial because several newly discovered letters written by an individual named "Iris S." contained evidence establishing his innocence and that the respondents, a senior assistant state's attorney and the state of Connecticut, had possession of the letters and knowledge of their contents at the time of his guilty plea but purposefully failed to disclose them to him. The respondents asserted as a special defense that the petition was time barred because it was not filed within the applicable three year statute of limitations (§ 52-582). The petitioner filed an amended petition for a new trial claiming, inter alia, that the limitation period was tolled by § 52-595 as a result of the respondents' fraudulent concealment of the letters. Thereafter, the respondents filed a motion for summary judgment, arguing that there was no dispute between the parties that the petition was untimely under § 52-582 and that the petitioner's tolling claim failed as a matter of law because he had not adduced facts sufficient to permit a finding of fraudulent concealment. The trial court granted the motion and rendered summary judgment in favor of the respondents. In reaching its decision, the court, relying on *Turner* v. *State* (172 Conn. App. 352), and *Fichera* v. *Mine Hill Corp.* (207 Conn. 204), concluded that the limitation period set forth in § 52-582 is jurisdictional in nature and, therefore, not subject to the tolling provision of

§ 52-595. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. Contrary to the trial court's conclusion, the tolling provision of § 52-595 applies to the three year limitation period of § 52-582, and, therefore, that limitation period may be tolled by proof of fraudulent concealment: this court concluded that the trial court's reliance on *Turner* and *Fichera* was misplaced, as the principal issue in this case, namely, whether the legislature intended that the limitation period of § 52-582 may be tolled by proof of fraudulent concealment pursuant to the tolling provision of § 52-595, was not addressed in *Turner*, and our Supreme Court's decision in *Fichera* had no bearing on that issue; moreover, given the plain and encompassing language of § 52-595, it must be deemed to apply to any limitation period that does not expressly disclaim its applicability, and, because § 52-582 contains no such disclaimer, its limitation period may be tolled upon a showing of fraudulent concealment pursuant to § 52-595; furthermore, this court could discern no policy consideration that would prompt the legislature to deny the petitioner the benefit of that tolling provision and to conclude otherwise would be to impute to the legislature an intent to countenance such fraudulent concealment, a bizarre and wholly inequitable result that should not be attributed to that body.
2. The judgment of the trial court was affirmed on the alternative ground that the respondents were entitled to summary judgment because the petitioner failed to present evidence sufficient to demonstrate that there was a genuine issue of material fact with respect to his claim that the limitation period of § 52-582 was tolled by the respondents' fraudulent concealment of the letters: the petitioner inadequately briefed the issue of the sufficiency of his showing of fraudulent concealment, as he relied entirely on a patently meritless, if not frivolous, legal argument, the substance of which was set forth in two sentences, and, although he had a second opportunity to address the issue in a reply brief, he failed to do so; moreover, it was apparent that the evidence proffered by the petitioner in opposition to the respondents' motion for summary judgment, namely, the letters, was inadequate for that purpose, as the letters were not authenticated and, therefore, could not be relied on as probative evidence, the petitioner never identified the author of the letters with any particularity, there was nothing in the record to corroborate the content of the letters, and there was no proof that the respondents received the letters or, if they did, that they concealed them from the petitioner for the purpose of preventing him from seeking a new trial.

Argued February 9—officially released October 25, 2022

Procedural History

Amended petition for a new trial following the petitioner's conviction of the crimes of robbery in the first

degree, conspiracy to commit robbery in the first degree and kidnapping in the second degree with a firearm, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. John F. Mulcahy, Jr.*, judge trial referee, granted the respondents' motion for summary judgment and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Gordon Randolph, self-represented, the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Debra A. Collins*, senior assistant state's attorney, for the appellees (respondents).

Opinion

PALMER, J. The self-represented petitioner, Gordon Randolph, appeals from the summary judgment rendered by the trial court in favor of the respondents, Donna Mambrino and the state of Connecticut, and its subsequent dismissal of his petition for a new trial. On appeal, the petitioner claims that the trial court incorrectly concluded that General Statutes § 52-595,[1] which provides for the tolling of the statute of limitations applicable to a particular cause of action upon proof by the party bringing the action that the defendant fraudulently concealed the existence of the cause of action, does not toll the three year limitation period of General Statutes § 52-582[2] applicable to petitions for a

[1] General Statutes § 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

[2] General Statutes § 52-582 (a) provides in relevant part: "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 . . . ."

new trial brought under General Statutes § 52-270.[3] We agree with the petitioner that the trial court incorrectly determined that § 52-595 does not apply to § 52-582. We also conclude, however, that the respondents are entitled to summary judgment because the petitioner, who alleges that the respondents intentionally concealed exculpatory evidence from him in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), has failed to demonstrate that the facts, viewed most favorably to sustaining his claim under § 52-595, are sufficient to satisfy the stringent requirements of that tolling provision. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history regarding both the petitioner's underlying conviction and the present action are relevant to this appeal. With respect to the petitioner's conviction, the trial court explained: "On August 24, 2012, Hartford police responded to an armed robbery in progress at [a restaurant] on Brainard Road. Upon arrival, a vehicle was observed leaving the area, it was followed by the police across local streets, it proceeded on to the highway, and the vehicle crashed while exiting the interstate. The petitioner was the driver; a passenger in the vehicle subsequently implicated the petitioner in the armed robbery. Inculpatory items of evidence were found in the vehicle. The petitioner was arrested on August 24, 2012, and charged with robbery in the first degree, conspiracy [to commit robbery in the first degree], and kidnapping [in the] second degree with a firearm. [On July 11, 2013, the petitioner] pleaded guilty [pursuant to a plea agreement] to all counts . . . [following] an exhaustive canvass [and a presentence investigation report] was ordered . . . ." He was sentenced on October 17, 2013,

[3] General Statutes § 52-270 (a) provides in relevant part: "The Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . ."

in accordance with that agreement to a total effective term of imprisonment of twenty-two years. The petitioner was represented, at all relevant times, by a public defender, R. Bruce Lorenzen. Mambrino, a senior assistant state's attorney, was involved in the prosecution of the case for the state.

The petitioner then filed a petition for a new trial dated October 7, 2016, alleging that several letters written by someone named "Iris S." contained evidence establishing his innocence in his criminal case and that the respondents had possession of the letters and knowledge of their contents at the time of his guilty plea but purposefully failed to disclose them to him. In their amended answer to the petition, the respondents asserted that the petitioner had "failed to allege anything identifiable that could not have been discovered earlier by the exercise of due diligence, that would be material on a new trial, that is not merely cumulative nor is likely to produce a different result in a new trial," thereby failing to satisfy any of the requirements for a petition for a new trial enumerated by our Supreme Court in *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). The respondents also alleged, by way of a special defense, that the petition was time barred because it was not filed within three years from the date of the petitioner's sentencing as required under § 52-582.[4] In an amended petition for a new trial, the petitioner maintained that § 52-582 was tolled by § 52-595 as a result of the respondents' fraudulent concealment of the "Iris S." letters, which, he further claimed, violated his constitutional rights under *Brady*.

[4] "The three year period [of § 52-582] begins to run from the date of rendition of judgment by the trial court; *Varley* v. *Varley*, 181 Conn. 58, 61, 434 A.2d 312 (1980); which, in a criminal case, is the date of imposition of the sentence by the trial court. *State* v. *Coleman*, 202 Conn. 86, 89, 519 A.2d 1201 (1987)." *Holliday* v. *State*, 111 Conn. App. 656, 663, 960 A.2d 1101 (2008), cert. denied, 291 Conn. 902, 967 A.2d 112 (2009).

The respondents subsequently filed a motion for summary judgment, arguing that there was no dispute between the parties that the petitioner had not served the respondents within the time frame mandated by § 52-582. The respondents further argued that the petitioner's tolling claim failed as a matter of law because he had not adduced facts sufficient to permit a finding of fraudulent concealment.

At a hearing on the respondents' motion, the court voiced concerns over whether the question of the court's subject matter jurisdiction had been properly addressed. The court then noted that it had provided the parties with several cases to review on that point, including *Fichera* v. *Mine Hill Corp.*, 207 Conn. 204, 541 A.2d 472 (1988), and *Turner* v. *State*, 172 Conn. App. 352, 160 A.3d 398 (2017). At the hearing, the respondents maintained that the court in *Turner* "was very explicit in . . . conclud[ing] that the [three year] limitation period set forth in [§] 52-582 . . . is jurisdictional in nature," such that the trial court in the present case lacked jurisdiction to consider the petitioner's untimely petition for any reason after the expiration of that period. The petitioner countered that neither *Fichera* nor *Turner* mandated the conclusion that § 52-582 cannot be tolled by proof of fraudulent concealment under § 52-595.

On September 27, 2018, the court granted the respondents' motion for summary judgment. The court relied in large part on this court's determination in *Turner* that § 52-582 is jurisdictional in nature and not subject to equitable tolling. See *Turner* v. *State*, supra, 172 Conn. App. 370. The court also noted that, although *Turner* did not rule on whether § 52-595 applies to § 52-582, it "provide[d] guidance" by citing to *Fichera*, in which our Supreme Court concluded, under the facts of that case, that § 52-595 was unavailable to the plaintiff as a matter of law to toll General Statutes § 42-110g (f),

the three year statute of limitations for claims under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[5] See *Fichera* v. *Mine Hill Corp.*, supra, 207 Conn. 216–17. The court therefore concluded that the petitioner's failure to bring his petition within three years of his sentence operated as a jurisdictional bar to consideration of his petition for a new trial. The court thus dismissed the petition, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the petitioner claims that the trial court incorrectly concluded that the three year limitation period of § 52-582 cannot be tolled by application of § 52-595. In response, the respondents contend that the trial court properly held that the limitation period of § 52-582 is jurisdictional in nature and therefore not subject to tolling under § 52-595.[6] Specifically, the respondents, relying on the analyses in *Turner* and *Fichera*, argue that there is "a clear legislative intent not to have § 52-595 apply to toll the statute of limitations for a petition for a new trial." We agree with the petitioner and, accordingly, conclude that the three year limitation period of § 52-582 may be tolled by a showing of fraudulent concealment pursuant to § 52-595.

We begin by noting that "[t]his court's standard of review for a motion for summary judgment is well established. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there

[5] We discuss both *Fichera* and *Turner* at greater length in part I of this opinion.

[6] The respondents also contend, as an alternative ground for affirming the judgment of the trial court, that, even if § 52-595 applies to § 52-582, the petitioner has failed to present facts sufficient to establish a genuine issue of material fact with respect to his claim of fraudulent concealment under § 52-595. We discuss that alternative ground in part II of this opinion.

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *50 Morgan Hospitality Group, LLC*, 211 Conn. App. 724, 730–31, 273 A.3d 726 (2022).

"Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996). "Typically, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant . . . meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . Then, if the plaintiff claims the benefit of a provision that operates to extend the limitation period, the burden . . . shifts to the plaintiff to establish a disputed issue of material fact in avoidance

of the statute. . . . In these circumstances, it is incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact [as to the timeliness of the action] exists." (Citations omitted; internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 192, 177 A.3d 1128 (2018).

It is also necessary to set forth certain legal principles concerning §§ 52-270 and 52-595. A petition for a new trial brought in accordance with § 52-270 is governed by the standard set forth by our Supreme Court in *Asherman* v. *State*, supra, 202 Conn. 434, pursuant to which "a court is justified in granting [such] a petition . . . when it is satisfied that the evidence offered in support thereof: (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial." *Shabazz* v. *State*, 259 Conn. 811, 820–21, 792 A.2d 797 (2002). In addition to these specific elements, our Supreme Court has observed that "a court's decision on the petition should be guided by the more general principle that a new trial will be warranted on the basis of newly discovered evidence only where an injustice was done . . . ." (Internal quotation marks omitted.) Id., 821. Although a petition for a new trial "does not furnish a substitute for, or an alternative to, an ordinary appeal," it is available to remedy an injustice when, in light of "newly discovered evidence . . . that . . . could not have been discovered and produced at the former trial by the exercise of proper diligence," considerations of "equity and good conscience" demand that "relief against [the] judgment . . . be granted." *State* v. *Grimes*, 154 Conn. 314, 325, 228 A.2d 141 (1966); see also *Rizzo* v. *Pack*, 15 Conn. App. 312,

315–16, 544 A.2d 252 (1988). "The salutary purpose of [a petition for a new trial] is that if a party has a meritorious defense and has been deprived of [a] reasonable opportunity to present it, he ought to be permitted to make it upon another trial." (Internal quotation marks omitted.) *State* v. *Grimes*, supra, 325. This "opportunity for a new trial when new evidence comes to light provides a [criminal] defendant [a] . . . critical procedural mechanism for remedying an injustice." *Seebeck* v. *State*, 246 Conn. 514, 531, 717 A.2d 1161 (1998); see also *Holliday* v. *State*, 111 Conn. App. 656, 662–63, 960 A.2d 1101 (2008) (same), cert. denied, 291 Conn. 902, 967 A.2d 112 (2009).

With respect to the limitation period applicable to a petition for a new trial, our Supreme Court has explained: "[T]he scope of review of a trial court's decision to grant a new trial on the basis of newly discovered evidence is limited to whether the trial court abused its discretion. . . . A critical limitation on the exercise of the trial court's discretion in passing upon such a petition for a new trial, however, is the statute of limitations [set forth in § 52-582]. . . .

"The three year statute of limitations on a petition for a new trial based on newly discovered evidence is the product of the legislature's balancing of the interests of the petitioner against the interests of the public and the state. The petitioner's interest is in attempting to establish that he is probably not guilty and that, therefore, the verdict in his criminal trial should be overturned. The state's interests are in preserving the finality of judgments, in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility, and in the fact that in many cases an order for a new trial may in reality reward the accused with complete freedom from prosecution because of

the debilitating effect of the passage of time on the state's evidence. . . .

"Indeed, one of the principal purposes of any statute of limitations is to enhance the reliability of fact-finding, based upon the common sense notions that the unreliability of fact-finding increases with the passage of time . . . and that it is wise public policy to minimize that degree of unreliability by barring the fact-finding process after the applicable limitations period. . . .

"Thus, for a petition for a new trial, within the three year limitations period, the petitioner's interests trump those of the public and the state. Beyond that period, however, the interests of the public and the state trump those of the petitioner." (Citations omitted.) *Summerville* v. *Warden*, 229 Conn. 397, 426–27, 641 A.2d 1356 (1994).[7]

With respect to fraudulent concealment under § 52-595, "[t]he question before us is whether the [petitioner] [has] adduced any credible evidence that [the respondents] fraudulently concealed the existence of the [petitioner's] cause of action. To meet this burden, it was not sufficient for the [petitioner] to prove merely that it was more likely than not that the [respondents] had concealed the cause of action. Instead, the [petitioner] had to prove fraudulent concealment by the more exacting standard of clear, precise, and unequivocal evidence. . . . Under our case law, to prove fraudulent concealment, the [petitioner] [was] required to show:

[7] Although the court in *Summerville* spoke in terms of the filing of a petition for a new trial in the context of a challenge to a judgment of conviction following a trial, there is no dispute that such a petition may be brought, as it was here, in the context of a claim challenging a judgment of conviction rendered after a guilty plea. Moreover, although *Summerville* was decided in the context of a petition for a new trial in a criminal case, such a petition may also be brought in a civil case. See, e.g., *Rizzo* v. *Pack*, supra, 15 Conn. App. 315 ("[t]he procedure for procuring a new trial by petition, whether in a civil or criminal case, is authorized by § 52-270").

(1) [the respondents'] actual awareness, rather than imputed knowledge, of the facts necessary to establish the [petitioner's] cause of action; (2) the [respondents'] intentional concealment of these facts from the [petitioner]; and (3) the [respondents'] concealment of the facts for the purpose of obtaining delay on the [petitioner's] part in filing a complaint on [his] cause of action." (Internal quotation marks omitted.) *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 745–46, 264 A.3d 130, cert. denied, 340 Conn. 911, 264 A.3d 94 (2021). "[Additionally], the [respondents'] actions must have been directed to the very point of obtaining the delay [in filing the action] of which [the respondents] afterward [seek] to take advantage by pleading the statute." (Internal quotation marks omitted.) Id., 746.

The rationale underlying § 52-595 is readily apparent, namely, to prevent a party from engaging in fraud to conceal a cause of action until the statute of limitations applicable to that action has expired. As the United States Supreme Court explained in the seminal case of *Bailey* v. *Glover*, 88 U.S. 342, 22 L. Ed. 636 (1874), the fraudulent concealment doctrine "is founded in a sound and philosophical view of the principles of statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence from which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud . . . until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." Id., 349. In general terms, then, the fraudulent concealment doctrine, like other related doctrines, is based on the equitable principle that "no man may take advantage of his

own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232, 79 S. Ct. 760, 3 L. Ed. 2d 770 (1959); see also *General Stencils, Inc.* v. *Chiappa*, 18 N.Y.2d 125, 127, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966) ("[t]he principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism").

Of course, ascertaining the interrelationship between §§ 52-582 and 52-595 gives rise to a question of the intent of the legislature. See, e.g., *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 731–32, 780 A.2d 1 (2001) (interpretation of two interrelated statutory provisions requires determination of legislative intent). More specifically, we must determine whether the legislature intended that the limitation period of the former is subject to the tolling provision of the latter.

With these principles in mind, we turn to the trial court's decision in the present case. In concluding that proof of fraudulent concealment under § 52-595 does not apply to the three year limitation period of § 52-582, the trial court relied largely on *Turner* v. *State*, supra, 172 Conn. App. 352, in which this court held that § 52-582 erects a subject matter jurisdictional bar to consideration of a petition for a new trial that has not been filed within that three year period. Id., 370. We further explained in *Turner* that, for purposes of an untimely petition, the jurisdictional nature of § 52-582 deprives a trial court of the authority to entertain a claim of equitable tolling; id., 359–60; which we characterized therein "as a doctrine that includes notions of 'waiver, consent, or estoppel, that is, as an equitable principle to excuse untimeliness.' " Id., 360 n.8, quoting *Williams* v. *Commission on Human Rights & Opportunities*, 67 Conn. App. 316, 320 n.9, 786 A.2d 1283 (2001). As the court in *Turner* expressly recognized, however, it was *not* deciding whether proof of fraudulent concealment

under § 52-595 would suffice to toll the limitation period of § 52-582, a question that we decided to "leave . . . for another day when the issue is squarely before us"; *Turner* v. *State*, supra, 358 n.6; because the petitioner in that case had not alleged fraudulent concealment. Id.

Although acknowledging that the court in *Turner* explicitly declined to address the issue of whether § 52-595 applies to § 52-582, the trial court concluded that the consideration that was deemed determinative in *Turner* with respect to equitable tolling, namely, the jurisdictional nature of § 52-582, is also the critical consideration with respect to the applicability of § 52-595 to § 52-582. In support of its reasoning in this regard, the trial court noted that, in *Turner*, this court "provide[d] guidance" by citing to *Fichera* v. *Mine Hill Corp.*, supra, 207 Conn. 216, which held that reaching the merits of a fraudulent concealment claim brought outside the statute of limitations, in the context of a CUTPA claim, "would defeat the legislative intention expressed in § 42-110g (f) to bar actions for CUTPA violations after the lapse of more than three years from their occurrence." The trial court viewed that statute, which the court in *Fichera* held could not be tolled by § 52-595, as jurisdictional and "textually comparable" to § 52-582, and ultimately determined that this court's conclusion in *Turner*—that the three year limitation period of § 52-582 is jurisdictional in nature and, therefore, principles of *equitable* tolling do not operate to toll that provision—is equally applicable to the *statutory* tolling available for fraudulent concealment under § 52-595.

We are not persuaded that *Turner* controls the outcome of this case. Although it is true that, in *Turner*, this court held that § 52-582 is subject matter jurisdictional, the court found that factor determinative only with respect to the applicability of equitable tolling, that is, tolling predicated on the equitable common-law authority of the court itself. See *Turner* v. *State*, supra,

172 Conn. App. 360–61. In such cases, involving a legislatively created jurisdictional time limitation, the court does not have the power to permit the tolling of the limitation provision under its equitable or discretionary authority. See id., 360 ("[o]ur Supreme Court [in *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 269, 777 A.2d 645 (2001)] has made clear that a court lacks the authority to apply the doctrine of equitable tolling or otherwise exercise discretionary authority to extend a limitations period if the applicable statute of limitations constitutes a limit on the court's subject matter jurisdiction"). That constraint on the court's authority, however, is not at issue when, as here, the question presented is not whether the court itself has the power to authorize the tolling or extension of a statute of limitations, but, rather, whether a broadly applicable tolling provision promulgated by the legislature operates to toll the limitation period. In other words, the fact that the three year limitation period of § 52-582 is jurisdictional in nature reflects an intent by the legislature that *a court* shall not have the power to allow for the tolling of that period in the exercise of its equitable authority. Although that three year period no doubt operates as an important limitation on the availability of a petition for a new trial, we must decide, as a matter of statutory interpretation, whether the legislature intended that the limitation period may be tolled by proof of fraudulent concealment under § 52-595, an issue not addressed in *Turner*.

We also conclude that the trial court's reliance on *Fichera* was misplaced. *Fichera* involved a claim of, inter alia, fraudulent concealment under § 52-595 in the context of an alleged CUTPA violation. *Fichera* v. *Mine Hill Corp.*, supra, 207 Conn. 213. In rejecting the plaintiff's claim that § 52-595 tolled § 42-110g (f),[8] the three

[8] This court has concluded that § 42-110g (f) is jurisdictional in nature. *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688, 700, 719 A.2d 66, cert. denied, 247 Conn. 946, 723 A.2d 320 (1998), and cert. denied, 247 Conn. 946, 723 A.2d 320 (1998).

year statute of limitations applicable to CUTPA claims, the court concluded only that the tolling claim was unavailable under the particular facts of that case because the deceptive or fraudulent practice alleged in support of that tolling claim was the very same conduct that comprised the alleged CUTPA violation. Id., 216–17. The court explained that, under such facts, "[w]e are convinced that . . . application [of § 52-595] here would defeat the legislative intention expressed in § 42-110g (f) to bar actions for CUTPA violations after the lapse of more than three years from their occurrence. Since CUTPA violations are defined in General Statutes § 42-110b to include 'deceptive acts or practices in the conduct of any trade or commerce,' it is evident that the legislature intended that the perpetrators of such fraudulent practices, as well as other CUTPA violators, should be permitted to avail themselves of the statute of limitations defense provided by § 42-110g (f). . . . We conclude, therefore, that those who violate CUTPA by committing 'deceptive acts,' as the trial court found the defendants to have done, were intended by the legislature to have the same protection that § 42-110g (f) affords to other CUTPA violators, such as those who engage in 'unfair methods of competition' and 'unfair . . . practices in the conduct of any trade or business.' General Statutes § 42-110b (a)." *Fichera* v. *Mine Hill Corp.*, supra, 216–17. No such potential conflict exists between §§ 52-582 and 52-595. Moreover, although the trial court was guided by *Fichera* because, like § 52-582, § 42-110g (f) is jurisdictional, the court in *Fichera* never even referred to § 42-110g (f) as jurisdictional in nature, let alone did its analysis depend on any such characterization.[9] Thus, *Fichera* has no bearing on

[9] Indeed, in 1988, when *Fichera* was decided, no appellate court of this state had held that § 42-110g (f) is jurisdictional in nature. As we have indicated, subsequently, in 1998, this court determined that it is. See footnote 8 of this opinion.

whether proof of fraudulent concealment under § 52-595 tolls the limitation period of § 52-582.[10]

Nevertheless, the respondents argue that, if the legislature had intended for § 52-582 to be tolled by fraudulent concealment, it could have said so in § 52-582. The respondents borrow this argument from *Turner*, in which the court reasoned that the legislature could have included express exceptions for equitable tolling in § 52-582 if it intended for such exceptions to apply to that three year limitation provision. See *Turner* v. *State*, supra, 172 Conn. App. 364–65. The flaw in the respondents' argument is that the legislature *already* has enacted a tolling provision for fraudulent concealment, § 52-595, which contains no limiting language and, therefore, by its plain terms is applicable generally to all statutes of limitations. Consequently, there would be no reason for the legislature to amend § 52-582 to include an exception for fraudulent concealment because there already is such a provision in the General Statutes. Thus, no inference that § 52-595 is inapplicable to § 52-582 may by drawn merely because the legislature has not amended § 52-582 to add a tolling provision for fraudulent concealment.

Contrary to the respondents' contention, the intent of the legislature that § 52-595 applies to § 52-582 is

[10] In this connection, it bears noting that our Supreme Court has expressly reserved the question of whether CUTPA's three year limitation period of § 42-110g (f) may be *equitably* tolled. See *Normandy* v. *American Medical Systems, Inc.*, 340 Conn. 93, 112 n.18, 262 A.3d 698 (2021) ("[h]ere, we again do not need to reach the issue of whether the CUTPA limitation period may be tolled by the continuing course of conduct doctrine because we conclude that there is no factual predicate for the application of that doctrine"). If our Supreme Court were of the view that, under *Fichera*, statutory tolling for fraudulent concealment is unavailable for CUTPA claims generally, it seems apparent that the court in *Normandy* would have had no difficulty in concluding that equitable tolling is also jurisdictionally barred under CUTPA. No doubt the court has not done so because *Fichera* did not hold that § 52-595 is inapplicable for purposes of CUTPA, only that that tolling provision did not apply under the specific facts of that case.

apparent from the straightforward language and evident purpose of those statutory sections.[11] As stated previously, there is no language in § 52-595 to indicate that its application is restricted only to certain statutes of limitations and not to others. Rather, § 52-595 provides, in broadly applicable terms, for the tolling of the limitation period applicable to a cause of action "[i]f *any* person" who is liable to such an action by another "fraudulently conceals from him the existence of" that cause of action. (Emphasis added.) Moreover, there is nothing in the wording of § 52-582 to indicate that the legislature intended to exempt that limitation period from the operation of § 52-595 and thereby reward a respondent for his own misconduct in fraudulently concealing evidence that would warrant a new trial. It is axiomatic that "[w]e will not read into a [statute] words or limitations that are not there"; *Putnam Park Apartments, Inc.* v. *Planning & Zoning Commission*, 193 Conn. App. 42, 51, 218 A.3d 1127 (2019); see also *Tower* v. *Miller Johnson, Inc.*, 67 Conn. App. 71, 78, 787 A.2d 26 (2001) ("[w]e will not read into clearly expressed legislative provisions which do not find expression in its words" (internal quotation marks omitted)); because "[w]e are bound to interpret legislative intent by referring to what the legislative text contains, not what it might have contained." (Internal quotation marks omitted.) *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 274, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012). There is no justification for deviating from this well established principle in the present case.

Indeed, our Supreme Court made this very point with respect to § 52-595 in *Connell* v. *Colwell*, 214 Conn. 242, 571 A.2d 116 (1990), wherein the court addressed a claim brought by the plaintiff, the administratrix of the

[11] We note that there is no reported legislative history for the fraudulent concealment statute, which first was enacted in 1874. See General Statutes (1875 Rev.) tit. 19, c. 18, § 20.

estate of her late husband, alleging that the defendant physician had committed malpractice in failing to diagnose her husband's cancer. Id., 243–44. The trial court granted the defendant's motion for summary judgment, concluding that the action was time barred by the relevant statute of limitations, General Statutes § 52-584,[12] notwithstanding the plaintiff's contention that the applicable limitation period was tolled under § 52-595 by virtue of the defendant's fraudulent concealment of the cause of action. Id., 243. On appeal, our Supreme Court concluded that the trial court properly granted the motion on the basis of its determination, inter alia, that the evidence did not support the plaintiff's claim of fraudulent concealment. Id., 250. In doing so, however, the court rejected the defendant's contention, raised at oral argument, "that the fraudulent concealment exception to the statute of limitations, contained in . . . § 52-595, will not save actions brought beyond the three year repose period contained in . . . § 52-584." Id., 245–46 n.4. The court explained its conclusion as follows: "The defendant was unable, however, to articulate how the language of § 52-595 was to be construed to provide the selective application he suggests. We find no merit to the defendant's argument. Section 52-595 provides that causes of action fraudulently concealed by a defendant will '*accrue* against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.' . . . 'It is clear that, when the language of a statute is plain and unambiguous, we need look no further than the words themselves because we assume that the language expresses the

[12] General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . caused . . . by malpractice of a physician . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

legislature's intent.' *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 193, 530 A.2d 171 (1987). Since fraudulent concealment will cause an action to accrue upon the date of discovery rather than on 'the date of the act or omission complained of,' as specified in § 52-584, we conclude that *the exception contained in § 52-595 constitutes a clear and unambiguous general exception to any statute of limitations that does not specifically preclude its application.*" (Emphasis altered.) *Connell* v. *Colwell*, supra, 214 Conn. 246 n.4.

The court in *Connell* could not have been clearer: given the plain and encompassing language of § 52-595, it must be deemed to apply to *any* limitation period that does not expressly disclaim its applicability. Because § 52-582 contains no such disclaimer, its three year limitation period may be tolled upon a showing of fraudulent concealment in accordance with § 52-595.

This conclusion makes a great deal of sense when considered in light of the important purpose of a petition for a new trial and the rationale underlying the fraudulent concealment doctrine codified in § 52-595. As discussed previously, a petition for a new trial is available, within certain time limits, only when newly discovered evidence casts serious doubt on the legitimacy of a previous judgment. See, e.g., *Skakel* v. *State*, 295 Conn. 447, 468, 501 n.41, 991 A.2d 414 (2010). Indeed, in a criminal case, a petition for a new trial may be granted only when the petitioner has established that a second trial is necessary "to avoid an injustice," a standard that is not met unless evidence that is newly discovered—and which, despite the exercise of due diligence, could not have been discovered in time for its use in the original trial—"would be likely to result in the acquittal of the petitioner . . . ." Id., 468. Moreover, under § 52-582, a petitioner who can meet this demanding standard has only three years within which to file a petition, a time frame that reflects a legislative

judgment that, during that three year period, the convicted petitioner's interest in showing that he is probably not guilty on the basis of evidence that was unavailable at the time of trial trumps the state's interest in preserving the finality of the judgment and avoiding the adverse effect of the passage of time on the state's evidence. See *Summerville* v. *Warden*, supra, 229 Conn. 426–27. This balancing of interests lies at the heart of the legislative scheme providing for the filing of a petition for a new trial within three years of the original judgment.

When, however, a party engages in fraud to conceal evidence that would support a petition for a new trial—that is, evidence that likely would result in a different outcome following a second trial—the offending party has effectively skewed that legislative balance in his favor by curtailing or even eliminating the opportunity afforded a petitioner under § 52-582 to vindicate his right to seek a new trial for a period of three years following the original judgment. In such a case, it seems self-evident that it is manifestly unfair and unjust to permit that party to benefit from his own fraudulent conduct. It is that unfairness that § 52-595 was designed to thwart by affording the petitioner the right to file a petition for a new trial three years from the date of the discovery of the evidence, thereby negating the adverse effect of the fraudulent concealment. If a petitioner can establish the stringent elements of § 52-595—that is, he can prove by clear and convincing evidence that the party against whom the petition is brought, acting with actual knowledge of the facts necessary to establish the petitioner's cause of action, intentionally concealed those facts for the very purpose of subverting the petitioner's ability to file a timely petition—we can think of no policy consideration that would prompt the legislature to deny the petitioner the benefit of that tolling provision. In fact, to conclude otherwise would be to

impute to the legislature an intent to countenance—indeed, to encourage—such fraudulent concealment, a bizarre and wholly inequitable result that should not be attributed to that body; see, e.g., *State* v. *Rivera*, 250 Conn. 188, 200, 736 A.2d 790 (1999) ("[w]e decline to read statutes so as to reach bizarre or absurd results"); especially when, as here, the language and evident purpose of the relevant statutory provisions point decidedly in the opposite direction.

For the foregoing reasons, we conclude that the fraudulent concealment tolling provision of § 52-595 applies to the three year limitation period of § 52-582. Consequently, we must address the respondents' alternative ground for affirmance regarding the sufficiency of the petitioner's evidence to support a claim under § 52-595.

II

As an alternative ground to affirm the summary judgment rendered by the trial court in their favor, the respondents maintain that the petitioner has failed to demonstrate that, viewing the evidence in the light most favorable to the petitioner, there is a genuine issue of material fact in dispute that would entitle him to a trial on his claim under § 52-595. We agree with the respondents.

Some additional facts and procedural history are necessary to our resolution of this issue. With respect to the merits of the petitioner's claim under § 52-595, the memorandum of decision of the trial court granting the respondents' motion for summary judgment sets forth the following facts relevant to the evidence that the petitioner claims is newly discovered and was fraudulently concealed by the respondents. "The petitioner . . . an unrepresented litigant, filed a petition for a new trial . . . in two counts alleging, first, that [he] received a written statement from an 'Iris [S.],' which 'verifies'

that he is 'actually innocent' of the crimes with which he was charged, and to which he was 'forced' to plead guilty" and that "had the 'Iris [S.]' letter(s) been disclosed, the petitioner would not have entered pleas of guilty to the charges and would have opted for a trial, and second, that the respondents 'knew or should have known the facts of the case.' "

In his opposition to the respondents' motion for summary judgment, the petitioner, citing § 52-595, claimed that "the statute of limitations [relative to his petition for a new trial, § 52-582] was tolled due to fraudulent concealment of the 'Iris [S.] letters' by the respondents. Specifically, the petitioner claim[ed] that the 'letters' annexed to the opposition to a former motion to dismiss were unknown to him until November 15, 2015, which was roughly eleven months before the running of the [§] 52-582 time limitation." (Footnote omitted.)

In a footnote, the court added: "By way of background, certain undisputed facts serve to place the purported 'Iris [S.] letters' in perspective. . . . All five of the handwritten statements ('letters') attached to the petitioner's original opposition [to the respondents' motion to dismiss] are unsigned; four are undated. The first (in the order presented) bears an upper right hand corner notation: '6:30 P.M. 1/18/13.' It reads: 'To Prosecutor Donna Mambrino' and begins by reciting 'My name is Iris.' While the one page document contains certain details, and considerable hearsay, the portion claimed by the petitioner as particularly probative is the recitation that, on August 24, 2012, while she ('Iris') was in a car at a Brainard Road gas station, waiting to meet one Kelly Cooper, a vehicle pulled up in front of her 'real fast' and [Cooper's] friend 'Ty' exited the driver seat of that vehicle and entered her car. Somebody from a moving truck that was leaving the gas station, who she later learned was the petitioner, got into the vehicle

'Ty' had exited, and drove it until it 'crashed off the highway.'

"The four other unsigned statements or 'letters' are, as stated, undated, and do not contain the name 'Iris' or 'Iris [S.]'; they can be summarized . . . as follows: [1] follow-up letter to . . . Mambrino referring to the document dated January 18, 2013, and inquiring about what happened to . . . Cooper and his friend 'Ty'; it also states that the prosecutor has not called her back, expresses concern for her safety, and indicates [that] she is still living in Massachusetts; [2] 'letter' to Attorney . . . Lorenzen advising that the statement dated January 18, 2013, had been sent to . . . Mambrino and enclosing a copy thereof; [3] similar letter with enclosure (statement dated January 18, 2013) to Judge [Joan K.] Alexander; and [4] similar letter with enclosure (statement dated January 18, 2013) to the petitioner.

"The petitioner characterizes the Iris [S.] documents as 'exoneration' evidence; in [the court's] view, the Iris [S.] documents are of a decidedly inculpatory character: the purported author does not claim to have been an eyewitness to the armed robbery, her January 18, 2013 'letter' places the petitioner in proximity to the scene immediately following the robbery, and serves to confirm his participation in the alleged getaway."

Although describing the "Iris S." letters in its memorandum of decision in order to provide context for the petitioner's claim, the trial court did not reach the merits of the respondents' claim that those letters are insufficient to defeat their motion for summary judgment. The trial court concluded, rather, that the three year limitation period of § 52-582 had expired before the petitioner commenced his petition for a new trial because, as a matter of law, that limitation period could not be tolled by proof of fraudulent concealment under § 52-595. On appeal, however, the petitioner relies on

those letters to support his contention, made in response to the respondents' alternative ground for affirmance, that he is entitled to a trial on his fraudulent concealment claim. In his brief to this court, however, the petitioner fails to explain why those letters are sufficient to give rise to a genuine issue of material fact such that summary judgment is inappropriate. Instead, his sole argument—the sum total of which comprises less than one full page of his brief—is that the respondents are estopped from contesting the sufficiency of the letters because, in their motions to dismiss the petition for a new trial, the respondents did not "seek to introduce evidence outside of the record to controvert or contradict the facts [alleged in the] petitioner's complaint." This result is required, according to the petitioner, because "[a] motion to dismiss is a responsive pleading that admits all facts well pleaded especially when it does not seek to introduce evidence outside of the record to deny or rebut the facts of the allegations," and the respondents therefore must be deemed to have "admitted to all the facts of the allegations in the petitioner's amended petition for a new trial. Because of this, the trial court was not permitted to make a finding to the contrary."[13]

This argument is plainly lacking in merit because "[a] motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.

[13] The foregoing represents the entirety of the petitioner's argument as to why the letters are sufficient to require a trial on his fraudulent concealment claim.

. . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Pickard* v. *Dept. of Mental Health & Addiction Services*, 210 Conn. App. 788, 792–93, 271 A.3d 178 (2022). This is in marked contrast to a motion for summary judgment, which requires the production of evidence so that the court can determine whether there is a genuine issue of material fact in dispute. See, e.g., *Day* v. *Seblatnigg*, 341 Conn. 815, 825, 268 A.3d 595 (2022). Consequently, the failure of the respondents to dispute the allegations of the petition for a new trial in connection with their motions to dismiss does not constitute an admission of those facts for purposes of their motion for summary judgment, and there is nothing whatsoever in our law to support the petitioner's assertion otherwise.

Moreover, in the respondents' brief to this court, filed following the petitioner's submission of his brief, the respondents explained, with citation to case law, why they are not deemed to have admitted the petition's allegations merely because they elected not to challenge those allegations for purposes of their motions to dismiss, which did not depend on the veracity of the allegations of the petition. Nevertheless, the respondents also set forth the arguments as to why, in their view, the "Iris S." letters were insufficient from an evidentiary perspective to defeat their motion for summary judgment. Although he could have done so, the petitioner failed to file a reply brief addressing the respondents' arguments.

We recognize that the petitioner is a self-represented party and that, "[a]lthough self-represented parties are not excused from complying with relevant rules of procedural and substantive law, [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere

with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *Gutierrez* v. *Mosor*, 206 Conn. App. 818, 835, 261 A.3d 850, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021). Thus, "like the trial court, [this court] will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party." (Internal quotation marks omitted.) Id. Nonetheless, "[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law"; (internal quotation marks omitted) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022); and "[w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) Id.

In the present case, the petitioner's brief with respect to the sufficiency of his showing of fraudulent concealment is inadequate because he relies entirely on what fairly may be characterized as a patently meritless, if not frivolous, legal argument, the substance of which is set forth in two sentences. Although the petitioner had a second opportunity to address that sufficiency issue in a reply brief, he did not do so. Even if the

petitioner is afforded considerable leeway by virtue of his self-represented status, it cannot reasonably be said that he has adequately briefed this issue.

Moreover, it is apparent that the evidence proffered by the petitioner in support of his opposition to the respondents' motion for summary judgment, namely, the "Iris S." letters, is inadequate for that purpose. First, as the respondents point out, the letters have never been authenticated. "This court has made clear that [the] rules [of practice] would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment. . . . Therefore, before a document may be considered by the court [in connection with] a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. . . . Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to . . . the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 411–12, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019). In the absence of some kind of authentication, the letters cannot reasonably be relied on as probative evidence.[14]

Furthermore, the petitioner has never identified "Iris S." with any particularity, and there is nothing in the record to corroborate the content of the letters she

[14] The petitioner was granted permission by the trial court to subpoena "Iris S." Although the petitioner asserted that he received the letters from "Iris S." and not the respondents, it appears that he did not know her last name or address, thereby rendering him unable to secure her presence or testimony.

purportedly wrote. Indeed, there is no proof that the respondents received the letters, and the petitioner has made no showing that, if they did receive the letters, they concealed them from the petitioner for the purpose of preventing him from seeking a new trial. For all these reasons, the petitioner has failed to present evidence sufficient to establish a genuine issue of material fact with respect to his claim that the three year limitation period of § 52-582 was tolled by the respondents' fraudulent concealment of the letters.[15] Accordingly, the respondents are entitled to summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

THE METROPOLITAN DISTRICT COMMISSION *v.* MARRIOTT INTERNATIONAL, INC., ET AL.
(AC 44790)

Prescott, Elgo and Cradle, Js.

Syllabus

The plaintiff municipal water control authority sought to recover damages from the defendants, the state of Connecticut and M Co., a hotel franchisor, for breach of contract and unjust enrichment. The plaintiff entered

[15] As the respondents acknowledge, because the petitioner's fraudulent concealment claim regarding newly discovered evidence also gives rise to a *Brady* claim, the petitioner's right to a new trial may be vindicated by virtue of a petition for a new trial; see *State* v. *McCoy*, 331 Conn. 561, 598, 206 A.3d 725 (2019) ("newly discovered *Brady* claims may . . . be brought by way of a petition for a new trial up to three years after sentencing"); and via a petition for a writ of habeas corpus. In fact, while the present case was pending in the trial court, the petitioner filed a habeas petition based on the same alleged *Brady* violation that he has raised here. He subsequently withdrew that claim, however, without explanation. We express no view with respect to any aspect of any such habeas claim that the petitioner might seek to commence in the future.

Finally, it bears noting that, in cases that do not involve an alleged constitutional violation, a petition for a new trial will almost invariably be the only relief available to an individual seeking a new trial on the basis of newly discovered evidence. This is true, of course, with respect to both criminal and civil cases.

into a developer permit agreement with the state, which authorized the state to construct and install a new sanitary sewer main for a mixed-use development project in downtown Hartford. The state's subcontractors constructed the authorized sewer main along with a lateral sewer line that extended from the sewer main to a newly constructed hotel. Thirteen years after the hotel opened, the plaintiff commenced this action, claiming that the hotel's connection to the sewer main was performed without a permit or an inspection by the plaintiff, that, as a result, the state remained liable for all maintenance and repairs of the sewer main, and that the state had failed to pay the plaintiff for such repairs. The trial court granted the state's motion to dismiss all counts against it on the ground of sovereign immunity. Prior to the filing of any responsive pleading by M Co., the plaintiff elected to exercise its administrative prerogative pursuant to the applicable statute (§ 7-249) to levy a special benefit assessment on the hotel property, which was in an amount equal to the amount of the damages that it sought in the pending civil action. Neither M Co. nor any entity associated with the ownership or management of the hotel property exercised or attempted to exercise its right to appeal the assessment. The assessment went unpaid, and the plaintiff filed a lien on the hotel's land records. Thereafter, M Co. filed a motion for summary judgment in the civil action, which the trial court granted, finding that the plaintiff's claims were barred by the applicable statute of limitations (§ 52-576 (a)) and that the plaintiff had sued the wrong party, as M Co. did not own, manage or do business as the hotel, nor was it party to any written agreement involving the plaintiff. Following the trial court's judgment, the manager for the hotel sent a letter to the plaintiff asking it to release the sewer benefit assessment lien that it had filed against the hotel property in light of the court's decision. The plaintiff refused to release the lien, claiming that the lien did not have any relationship to the civil litigation. Thereafter, M Co. filed a postjudgment motion in the civil action, requesting that the trial court find the plaintiff in contempt and order the discharge of the lien. The trial court declined to hold the plaintiff in contempt but ordered the discharge of the lien, and the plaintiff appealed to this court. *Held* that the trial court acted in excess of its authority and abused its discretion by ordering the discharge of the sewer benefit assessment lien: the plaintiff had the authority both to bring the action seeking compensatory damages on the theory of breach of contract and unjust enrichment and to levy the sewer benefit assessment against the hotel property pursuant to § 7-249, those options were not mutually exclusive, and the relative merits of the civil action had no bearing on the validity of the plaintiff's decision to exercise its separate and distinct administrative authority to levy a sewer benefit assessment or on the validity of any resulting lien; moreover, the exclusive method to challenge the propriety of the sewer assessment lien was to file an appeal pursuant to the applicable statute (§ 7-250), and, because neither M Co. nor any other party associated

with the hotel property ever filed such an appeal, the assessment became final and presumptively valid after the appeal period passed without a challenge to it and that assessment could not be collaterally challenged in the civil action; furthermore, the trial court's discharge of the sewer assessment lien could not be construed as a proper exercise of its inherent authority to issue orders necessary to protect or vindicate its prior judgment or of its authority pursuant to statute (§ 49-51) because allowing the plaintiff to file the lien and potentially foreclose on it would not undermine the trial court's final judgment, as the only final judgment it had rendered was summary judgment on the complaint, that judgment did not reach the merits of the causes of action alleged, and the lien existed prior to the summary judgment ruling, and the trial court abused its discretion by considering whether to discharge the lien pursuant to § 49-51 without making the required findings thereunder regarding the validity of the lien, as nothing in the court's decision suggested that the lien was jurisdictionally defective, not in proper form, or not duly recorded; additionally, there was no merit to M Co.'s arguments that either res judicata or judicial estoppel provided an alternative basis on which to affirm the judgment of the trial court.

Argued March 9—officially released October 25, 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 Hartford and transferred to the Complex Litigation Docket, where the court, *Schuman*, *J.*, granted the motion to dismiss filed by the defendant state of Connecticut; thereafter, the court, *Schuman*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon; subsequently, the court, *Schuman*, *J.*, granted in part the named defendant's postjudgment motion for contempt and application to discharge lien and ordered the plaintiff to discharge a lien on certain real property, and the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

John W. Cerreta, with whom, on the brief, were *Hannah F. Kalichman* and *William J. Sweeney*, for the appellant (plaintiff).

John C. Pitblado, with whom, on the brief, was *Brendan N. Gooley*, for the appellee (named defendant).

Opinion

PRESCOTT, J. The plaintiff, the Metropolitan District Commission, a municipal water control authority, elected to pursue two separate and distinct legal avenues to recoup costs associated with the construction, connection, and use of certain sewer improvements that it authorized as part of the Adriaen's Landing development project in Hartford. First, it brought the civil action from which this appeal arises against the defendant Marriott International, Inc.,[1] in which it alleged breach of contract and unjust enrichment. Second, the plaintiff initiated a separate administrative proceeding pursuant to General Statutes §§ 7-249[2] and 7-254 (b),[3]

[1] The state of Connecticut also was named as a defendant in this action on the basis of an agreement between the plaintiff and the state regarding the construction of new sewer infrastructure. All counts against it were dismissed on sovereign immunity grounds, however, because there was no applicable statutory waiver of immunity nor had the plaintiff sought and received permission to sue the state from the Claims Commissioner. Accordingly, we refer to Marriott International, Inc., as the defendant in this opinion.

We further note that the case caption in the trial court reflects that the plaintiff initiated this action against the defendant "doing business as" the Marriott Hartford Downtown. That designation, however, appears to be a misnomer, as reflected in unchallenged findings of the trial court, discussed in more detail later in this opinion.

[2] General Statutes § 7-249 provides in relevant part: "At any time after a municipality, by its water pollution control authority, has acquired or constructed, a sewerage system or portion thereof, the water pollution control authority may levy benefit assessments upon the lands and buildings in the municipality which, in its judgment, are especially benefited thereby, whether they abut on such sewerage system or not, and upon the owners of such land and buildings, according to such rule as the water pollution control authority adopts, subject to the right of appeal as hereinafter provided. . . ."

[3] General Statutes § 7-254 (b) provides in relevant part: "Any unpaid [sewer benefit] assessment and any interest due thereon shall constitute a lien upon the real estate against which the assessment was levied from the date of such levy. Each such lien may be continued, recorded and released in the manner provided by the general statutes for continuing, recording and releasing property tax liens. . . ."

in which it imposed a sewer benefit assessment on the Marriott Harford Downtown property at 200 Columbus Boulevard. We are asked to decide in the present appeal whether the trial court in the civil action improperly ordered in a postjudgment proceeding the discharge of a sewer benefit assessment lien perfected against the Marriott Hartford Downtown property as a result of the contemporaneous and unchallenged administrative action.

The plaintiff appeals from the court's ruling on a combined motion for contempt and application to discharge lien that the defendant filed after the court had rendered summary judgment in favor of the defendant on the plaintiff's complaint in the underlying civil action. Although the court declined to hold the plaintiff in contempt, it ordered the discharge of a lien that the plaintiff had filed on the land records regarding the Marriott Hartford Downtown property during the pendency of the civil action to enforce an unpaid and unchallenged sewer benefit assessment levied by the plaintiff. The plaintiff claims on appeal that the trial court's order discharging the lien "exceed[ed] its jurisdiction" and constituted an "unlawful end run around [General Statutes] § 7-250,"[4] which, the plaintiff argues,

[4] General Statutes § 7-250 (a) provides in relevant part: "When the water pollution control authority has determined the amount of the assessment to be levied, it shall file a copy thereof in the office of the clerk of the municipality. Not later than five days after such filing, it shall cause a copy of such assessment to be published in a newspaper having a general circulation in the municipality, and it shall mail a copy of such assessment to the owner of any property to be affected thereby at such owner's address as shown in the last-completed grand list of the municipality or at any later address of which the water pollution control authority may have knowledge. Such publication and mailing shall state the date on which such assessment was filed and that any appeals from such assessment must be taken within twenty-one days after such filing. Except as provided in subsection (b) of this section, any person aggrieved by any assessment may appeal to the superior court for the judicial district wherein the property is located and shall bring any such appeal to a return day of said court not less than twelve nor more than thirty days after service thereof . . . ."

is the " 'exclusive remedy available' for challenging sewer benefit assessments," quoting *Vaill* v. *Sewer Commission*, 168 Conn. 514, 519, 362 A.2d 885 (1975).

The defendant responds that we should affirm the trial court's decision because the court had the jurisdiction and/or authority to order the lien discharged either pursuant to its continuing jurisdiction to effectuate its summary judgment decision rendered in favor of the defendant or pursuant to General Statutes § 49-51, which grants the Superior Court authority to discharge "*any* certificate of lien . . . ." (Emphasis added.) General Statutes § 49-51 (a).[5] Alternatively, the defendant argues that the court's action may be affirmed on the grounds of res judicata and/or judicial estoppel. We conclude that the trial court lacked authority to entertain in the civil action any challenge to the propriety of the sewer benefit assessment underlying the lien and that, even if we assume without deciding that the court had some limited authority to consider an application to discharge the lien, the court improperly did so under the facts and circumstances presented. Because we agree with the plaintiff that the court improperly ordered the lien discharged, we reverse in part the judgment of the court and remand the matter with direction to deny the defendant's postjudgment motion in its entirety.

The following procedural history and facts, which either are undisputed in the summary judgment record

[5] General Statutes § 49-51 (a) provides in relevant part: "Any person having an interest in any real or personal property described in any certificate of lien, which lien is invalid but not discharged of record, may give written notice to the lienor . . . to discharge the lien. Upon receipt of such notice, the lienor shall discharge the lien by sending a release sufficient under section 52-380d . . . to the person requesting the discharge. If the lien is not discharged within thirty days of the notice, that person may apply to the Superior Court for such a discharge, and the court may adjudge the validity or invalidity of the lien and may award the plaintiff damages for the failure of the defendant to make discharge upon request. . . ."

or found by the court in its ruling on the defendant's postjudgment motion, are relevant to our review of the plaintiff's claim on appeal. In 2001, the plaintiff entered into a developer permit agreement with the state of Connecticut, acting through the Office of Policy and Management (state). The agreement authorized the state to construct and install a new sanitary sewer main within Adriaen's Landing, a planned, mixed-use development project along the riverfront in downtown Hartford. The state, through one of its subcontractors, constructed the authorized sewer main, which included the construction of a lateral sewer line that extended from the newly constructed sewer main to the present site of the Marriott Hartford Downtown hotel. After the hotel was constructed, the hotel's sewer service pipe was connected to the lateral sewer line. The Marriott Hartford Downtown opened and began operating in August, 2005.[6]

In April, 2018, the plaintiff commenced the underlying civil action against the defendant and the state. The operative complaint contained four counts. Counts one and three sounded in breach of contract and unjust enrichment against the state. Counts two and four sounded in breach of contract and unjust enrichment against the defendant. According to the complaint, the Marriott Hartford Downtown's connection to the sewer main via the lateral line was performed without a permit or any inspection by the plaintiff, and, consequently, under the terms of the agreement between the plaintiff and the state, the state remained liable for all maintenance and repairs of the sewer main. The complaint further stated that, despite various attempts by the

[6] Although it appears from the record that no entity associated with the Marriott Hartford Downtown ever paid the plaintiff any sewer connection or construction charges, there is undisputed summary judgment evidence that the hotel routinely has paid all sewer *use* charges billed to it by the plaintiff since 2005, in direct contradiction to allegations in the plaintiff's complaint. See footnote 7 of this opinion.

plaintiff to collect outstanding charges and repairs totaling $312,885, the state had failed to pay the plaintiff. These same allegations formed the basis for the unjust enrichment count against the state.

With regard to the two counts brought against the defendant, the complaint, without referencing any specific agreement between the plaintiff and the defendant, alleged that the plaintiff provides "sanitary sewer services" to the Marriott Hartford Downtown and that the defendant "has never paid for sewer use charges," the fair value of which the plaintiff alleged totals $312,885. The complaint did not expressly allege that the defendant owed the plaintiff for charges or fees associated with the hotel's connection to the sewer main via the lateral line.[7]

The civil action was transferred to the complex litigation docket in June, 2018. For the next two years, the defendant, with the consent of all parties, sought and was granted numerous modifications to the court's initial scheduling order regarding the filing of responsive pleadings. Eventually, on July 13, 2020, the state filed a motion to dismiss all counts against it on sovereign immunity grounds,[8] and the defendant filed an answer to the complaint and special defenses. One of the special defenses asserted by the defendant alleged that the breach of contract and unjust enrichment counts against it were barred by General Statutes § 52-576, the applicable statute of limitations.[9]

[7] The trial court, in its memorandum of decision granting the defendant's motion for summary judgment, accurately characterizes the plaintiff's complaint as suffering from a lack of clarity. We agree with the court's assessment that the complaint "is riddled with vagueness and contradictions" and "is unclear about the identity of the contracting parties, the nature of the alleged breach of contract, and the date when it supposedly occurred."

[8] As indicated in footnote 1 of this opinion, the court granted the state's motion and dismissed all counts against it on September 24, 2020. Although the plaintiff initially appealed from the judgment of dismissal, it subsequently withdrew that appeal.

[9] In addition to the statute of limitations defense, the defendant asserted, inter alia, that the complaint failed to state a claim on which relief could

During this period of relative inactivity in the civil action, the plaintiff elected to exercise its administrative prerogative under § 7-249; see footnote 2 of this opinion; and levied a special benefit assessment on the Marriott Hartford Downtown property. More specifically, in February, 2020, before any responsive pleading had been filed in the civil action, the plaintiff issued a notice of public hearing and a schedule of assessment to the defendant as well as to several other entities that the plaintiff had identified as possibly having "an ownership interest in the real property or responsibility for any sewer assessment against the real property . . . ."[10]

The plaintiff held a public hearing on February 26, 2020, which was attended by counsel representing the defendant in the underlying civil action. In June, 2020,

be granted, the complaint failed to allege the existence of any contractual relationship between the plaintiff and the defendant, and a different party was responsible in whole or in part for the payment of any alleged sewer use charges owed to the plaintiff.

[10] The plaintiff identified the following parties in its notice of public hearing: Earth Technology, Inc.; Adriaen's Landing Hotel, LLC; HT-Adriaen's Landing Hotel TRS, LLC; Waterford Development, LLC; Capital Region Development Authority, formerly known as Capital City Economic Development Authority; and Marriott International, Inc., doing business as Hartford Marriott Downtown.

The record before us does not clearly reflect who owns the Marriott Hotel Downtown property, although any ambiguity regarding the ownership and management of the hotel does not affect our resolution of the claim before us. According to undisputed affidavits filed in support of summary judgment and other pleadings, the Marriott Hartford Downtown property "is directly owned by the company Adriaen's Landing Hotel, LLC. [Adriaen's Landing Hotel, LLC's] operations . . . are owned by HT-Adriaen's Landing Hotel TRS, LLC." In addition, "Waterford Hotel Group is [an] umbrella management company for a number of hotels . . . including the Marriott Hartford Downtown . . . through several wholly-owned subsidiaries, including Waterford Venue Services Hartford, LLC . . . ." Waterford Hotel Group "operates the Marriott Hartford [Downtown] as a franchisee of the Marriott International brand. . . . [The defendant] does not have a commercial interest in the Marriott Hartford [Downtown] other than the license fee it receives as a franchisor."

the plaintiff levied a sewer benefit assessment of $312,885 against the defendant, which was the same amount that it sought as damages in the pending civil action.

Significantly, neither the defendant nor any entity associated with the ownership or management of the Marriott Hartford Downtown property exercised or attempted to exercise its right to appeal the plaintiff's assessment pursuant to § 7-250. Thus, despite an opportunity to raise any challenge to the assessment at that time, the defendant elected to remain silent. Furthermore, neither party informed the trial court about the existence of the assessment proceedings. The assessment went unpaid, and a lien was filed on the land records regarding the Marriott Hartford Downtown property in accordance with § 7-254 (b) in the amount of $318,600.55.[11]

In October, 2020, the defendant filed a motion in the civil action seeking summary judgment on both counts of the complaint against it. It argued that the plaintiff's breach of contract and unjust enrichment counts were barred by the applicable statute of limitations and, alternatively, that the plaintiff, effectively, had sued the wrong party because no legal relationship on which to find liability existed between the plaintiff and the defendant. On January 29, 2021, the trial court, *Schuman, J.*, granted the defendant's motion and rendered summary judgment in favor of the defendant on both counts of the plaintiff's complaint asserted against it.

In its memorandum of decision, the court explained that the six year statute of limitations in § 52-576 (a) applied to both counts[12] and that the undisputed evidence presented by the defendant showed that any contractual or equitable obligation the defendant might

[11] This amount included the $312,885 assessment plus filing fees.

[12] Whether the court improperly applied the statute of limitations applicable to breach of contract actions to the unjust enrichment count in rendering summary judgment for the defendant; see *Reclaimant Corp.* v. *Deutsch*,

have had to pay a sewer connection charge accrued sometime before September, 2005, meaning that the plaintiff should have filed its civil action before September, 2011. The court principally relied on an affidavit that the defendant filed in support of the motion for summary judgment that was sworn by Raj Dansinghani, the chief financial officer of Waterford Group, LLC, an entity that Dansinghani averred manages the Marriott Hartford Downtown. As stated by the court in its summary judgment decision, "Dansinghani avers that, sometime between September, 2003, and August, 2005, construction of underground improvements took place at the site of the future Marriott Hartford [Downtown]. During this time period, a subcontractor for the state connected the sewer main to the piping underneath the Marriott Hartford [Downtown]. . . . The affidavit states that Marriott Hotel (although not Marriott International, Inc.) has paid the sewer usage bill regularly and that, prior to the filing of suit, the plaintiff never billed the defendant or even demanded payment for the sewer connection charge." (Citation omitted; internal quotation marks omitted.) The court concluded that the plaintiff's filing of the underlying action in 2018 was "obviously well beyond the statute of limitations."

The court also agreed with the defendant's argument that it "ha[d] no legal relationship with the plaintiff, that it did not breach a contract with the plaintiff, and that it was not the entity, if any, that was unjustly enriched." The court relied again on uncontested evidence submitted by the defendant in support of summary judgment that established that the defendant did not own, manage, or do business as the Marriott Hartford Downtown, nor was the defendant a party to any written agreement involving the plaintiff. The court concluded that the plaintiff had sued the wrong party and

332 Conn. 590, 613, 211 A.3d 976 (2019); is not an issue before us in the present appeal.

that the defendant's argument went "to the very merits of the case" and was "a proper basis for summary judgment." Because the plaintiff had not presented any contrary evidence, the court concluded that "the defendant is entitled to summary judgment on this ground as well." The court made no reference in its summary judgment decision to the existing sewer benefit assessment lien. The plaintiff did not file an appeal challenging the court's rendering of summary judgment against it, nor does it raise any challenge to this ruling in the present appeal.

After the court rendered summary judgment for the defendant, Dansinghani, acting in his managerial role for the Marriott Hartford Downtown, sent a letter to the plaintiff asking it to execute a release of the sewer benefit assessment lien that it had filed on the Marriott Hartford Downtown property in light of the court's summary judgment decision in favor of the defendant. The plaintiff sent a response indicating that the lien had no relationship to the civil litigation, and it did not execute the requested release of the lien.

On April 28, 2021, the defendant filed a postjudgment motion in the civil action that it captioned "a motion for contempt and application to discharge lien." It asked the court to find the plaintiff in contempt for having levied the sewer benefit assessment and filing the corresponding lien after nonpayment of the assessment because, according to the defendant, the lien was invalid in light of the court's subsequent summary judgment ruling. It also requested that the court order the discharge of the plaintiff's benefit assessment lien. The plaintiff filed an opposition to the defendant's postjudgment motion. The plaintiff argued that the lien was unrelated to the contractual obligations litigated in the civil action but, instead, was the result of the unpaid

sewer benefit assessment, which was levied in administrative proceedings that were legally and factually distinct from the underlying civil litigation. The plaintiff maintained that "the lien is valid and should have been challenged through the appeal process for the sewer assessment itself not as a motion in a separate contractual lawsuit."

The court issued a decision on June 2, 2021, in which it declined to hold the plaintiff in contempt but nevertheless ordered the discharge of the plaintiff's lien.[13] The court concluded that if it allowed the plaintiff to maintain the lien, it would somehow undermine the summary judgment it had rendered in favor of the defendant. Although the court acknowledged that the plaintiff's assessment and lien were imposed in a statutorily authorized proceeding that was separate from the underlying civil action, it found that the plaintiff's "efforts [in obtaining the lien] address precisely the same controversy." The court continued: "[The plaintiff] cannot and does not dispute that its assessment and lien seek the same principal sum of money from the same party for the same sewer connection and service. And, *although* [*the plaintiff*] *could have noticed the assessment* [*a*]*t any time under the statute*, it instead waited approximately nineteen years, until it faced the possibility of losing its Superior Court action concerning the same charge, to file *what otherwise would have been a routine sewer assessment.*

"Under these circumstances, allowing [the plaintiff] to file a lien, and possibly foreclose on it, would undermine the court's final judgment. [The plaintiff] gave the

[13] The court stated that it was declining the defendant's request for a finding of contempt "[b]ecause the court does not have evidence concerning the wilfulness or bad faith of [the plaintiff] in imposing the assessment and filing the lien . . . ." The defendant does not challenge this aspect of the court's ruling on appeal.

court no notice that it had instituted a parallel proceeding to collect the same charge. Had it done so, the court could have attempted to consolidate the two cases or at least make an informed decision as to the order in which they should proceed. As it stands now, however, it appears that the court's efforts on this case were a complete waste of judicial resources. The lien filed by [the plaintiff] potentially could render the court's final judgment meaningless.

"Courts are not powerless to protect their judgments. A trial court has continuing jurisdiction to effectuate prior judgments. . . . [A] trial court's continuing jurisdiction is not separate from, but, rather, derives from, its equitable authority to vindicate judgments . . . such equitable authority does not derive from the trial court's contempt power, but, rather, from its inherent powers." (Citation omitted; emphasis added; internal quotation marks omitted.)

The court stated that it was "exercis[ing] its inherent authority to vindicate its judgment" and ordered the discharge of the plaintiff's lien on the Marriott Hartford Downtown property. Although it expressly invoked its inherent authority, the court also included a citation to § 49-51 (a), presumably relying on the statute as an additional source of authority to discharge the lien. Finally, the court concluded that, "[b]ecause [it] does not have evidence concerning the wilfulness or bad faith of [the plaintiff] in imposing the assessment and filing the lien, the court . . . declines [the defendant's] request for a finding of contempt and an award of costs and attorney's fees."[14] This appeal followed.

[14] Although, "even in the absence of a finding of contempt, a trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order"; *O'Brien* v. *O'Brien*, 326 Conn. 81, 99, 161 A.3d 1236 (2017); it is clear from the court's decision that it was not invoking this remedial authority as a basis for its order discharging the lien.

The plaintiff claims on appeal that the trial court, in ruling on the defendant's postjudgment motion, improperly ordered the discharge of its sewer benefit assessment lien, which the plaintiff argues exceeded the court's jurisdiction and constituted an "unlawful end run around § [7-250] . . . ." The defendant disagrees, contending that the court either had continuing jurisdiction to invalidate the lien as a means of effectuating its summary judgment ruling in favor of the defendant or that it properly acted pursuant to the statutory authority granted it by § 49-51. Alternatively, the defendant argues that the plaintiff's claim is barred by res judicata and/or judicial estoppel. For the reasons that follow, we agree with the plaintiff that the court improperly ordered the sewer benefit assessment lien discharged and reject the defendant's arguments to the contrary. Accordingly, we reverse in part the judgment of the court and remand with direction to deny, in total, the defendant's postjudgment motion.

We begin with our standard of review and relevant legal background regarding sewer benefit assessments. "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 308 (2013), and cert. denied, 309 Conn. 912, 69 A.3d 309 (2013). Thus, we engage in plenary review of the plaintiff's claim that, by ordering the discharge of the sewer benefit assessment lien, the court exceeded its jurisdiction or authority. To the extent that we determine that the trial court had authority to act, our review of the court's exercise of that authority is limited to whether the court abused its discretion; see *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 211, 884 A.2d 981 (2005); meaning we consider "whether the trial court correctly applied the law and

reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 759, 159 A.3d 666 (2017).

The plaintiff is not an ordinary, private litigant but, instead, is a public, nonprofit municipal corporation that was created by a special act of the General Assembly in 1929. See 20 Spec. Acts 1204, No. 511, § 1 (1929). As previously explained by our Supreme Court, the plaintiff "was given broad powers relating to sewage disposal, water supply and regional planning as well as powers limited to certain highways. . . . The [plaintiff] has been designated the water pollution control authority for the metropolitan district, which includes eight member and five nonmember towns in the greater Hartford area . . . . The [plaintiff's] authority is limited to those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes." (Citations omitted; internal quotation marks omitted.) *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 829, 251 A.3d 56 (2020).

Among the powers granted to the plaintiff by the legislature is the authority to sue and be sued. See *Rocky Hill Convalescent Hospital, Inc.* v. *Metropolitan District*, 160 Conn. 446, 455, 280 A.2d 344 (1971). Accordingly, the plaintiff has the authority to initiate a civil action in the Superior Court to vindicate its contractual rights or to seek other legal and equitable remedies.

In addition, § 7-249 provides in relevant part: "*At any time* after a municipality, by its water pollution control authority, has acquired or constructed, a sewerage system or portion thereof, *the water pollution control authority may levy benefit assessments* upon the lands and buildings in the municipality which, in its judgment,

are especially benefited thereby, whether they abut on such sewerage system or not, and upon the owners of such land and buildings, according to such rule as the water pollution control authority adopts, subject to the right of appeal as hereinafter provided. . . .'' (Emphasis added.) Thus, by its clear and unambiguous terms, § 7-249 grants to municipal entities like the plaintiff broad authority and discretion, *unrestricted by any express limitation period*, to levy assessments on properties that have benefitted from a municipal sewer system.[15] Indeed, the plaintiff has an obligation to its rate payers to recover the cost of appropriate expenditures that are made for the benefit of properties like the Marriott Hartford Downtown.

If a water pollution control authority chooses to exercise its authority and levies a sewer benefit assessment, § 7-250 authorizes anyone aggrieved by such an assessment to file an appeal no later than twenty-one days after the assessment is filed. See footnote 4 of this opinion. Our Supreme Court previously has held that § 7-250 provides ''a complete remedy by means of an appeal . . . whereby the court may exercise its inherent broad equitable powers to confirm or to alter the assessment . . . .'' *Vaill* v. *Sewer Commission*, supra, 168 Conn. 519. ''It is the general rule, with reference to special assessments of benefits, that *an assessment legally made cannot be attacked in a collateral proceeding* but requires pursuit of the statutory remedy for review, unless the assessment is void. . . . [If] an assessment [is] made and the person assessed did not appeal, that person [can] later urge only such objections

[15] The benefit referred to in § 7-249 is an increase in the market value of the property as a consequence of the sewer. See *Shoreline Care Ltd. Partnership* v. *North Branford*, 231 Conn. 344, 351, 650 A.2d 142 (1994). ''[A] property need not be connected to the system in order for it to receive a benefit. If the property has increased in market value merely by virtue of its access to town sewers, it has received a benefit for which an assessment may be levied.'' Id., 351–52.

as show a want of jurisdiction. If the commission assesses benefits where a property is not benefited, it commits an error but does not act beyond its jurisdiction. . . . Section 7-250 does not limit the grounds for the taking of the appeal, other than that the person taking the appeal [must] be aggrieved, and affords such person the opportunity to seek complete judicial relief." Id., 518–19. (Citations omitted; emphasis added.)

This court's decision in *Mangiafico* v. *Farmington*, 173 Conn. App. 158, 163 A.3d 689 (2017), rev'd in part on other grounds, 331 Conn. 404, 204 A.3d 1138 (2019), is instructive on the issue of whether a court properly may discharge in a collateral civil action a lien that is the result of an unpaid municipal assessment from which no appeal was taken. In *Mangiafico*, the plaintiff had filed a civil action alleging violations of his federal and state constitutional rights and intentional infliction of emotional distress arising from the town's placing his residential property on the town's blight list and filing liens on his property for unpaid municipal blight citations. Id., 160–61. In addition to seeking damages and declaratory and injunctive relief, he also asked the court to discharge the liens. Id., 161. The court dismissed four of the five counts of the complaint on the ground that the plaintiff had failed to exhaust his administrative remedies, and it also granted the defendant town's motion for summary judgment on the remaining count seeking discharge of the blight liens on concluding that the plaintiff could not collaterally attack the validity of the assessments underlying the liens. Id., 164–65. The plaintiff appealed. Id., 165.

This court affirmed the judgment of the trial court and adopted its reasoning with respect to the issue of the discharge of the municipal liens. Id., 177. The trial court had determined that § 49-51 was "the proper statute by which to request the discharge of the municipal blight liens" but concluded that the defendant town

was entitled to summary judgment because "the plaintiff failed to avail himself of the appellate remedy in which he could have pursued all the arguments he makes here as to [the] invalidity of the assessments on which the liens are based. He cannot now use the statutory process of . . . § 49-51 to do the same thing. Where the same claims could have been asserted in a timely appeal, the plaintiff's claims as to the invalidity of the liens are nothing more than an impermissible collateral attack on their validity. . . . In the absence of an appeal, the town's decisions are final and not reviewable." (Internal quotation marks omitted.) Id. This court agreed with the defendants that "the plaintiff could not attack the validity of the assessments secured by the liens because those assessments were final, and therefore valid, and there was no dispute that the liens were in proper form and duly recorded." Id., 175. With the foregoing in mind, we turn to the present case.

It is important at the outset to recognize that the plaintiff was entirely within its rights as a municipal water pollution control authority to pursue any and all legal avenues open to it. Because the state granted the plaintiff the power to sue and be sued; see *Rocky Hill Convalescent Hospital, Inc.* v. *Metropolitan District*, supra, 160 Conn. 455; one option was to bring the underlying action seeking compensatory damages on a theory of breach of contract or unjust enrichment. Another was to exercise its authority to levy a sewer benefit assessment against the property. See General Statutes § 7-249. These two options are not mutually exclusive, and neither the trial court nor the defendant has cited to any legal authority, or any prior order of the court, pursuant to which the plaintiff was barred from following these parallel legal paths. Whether the causes of action raised in the complaint in the underlying action had merit—an issue that was never resolved by the court—is not relevant to our resolution of the present

appeal because the relative merits of the underlying civil action have no bearing on the validity of the plaintiff's decision to exercise its separate and distinct administrative authority to levy a sewer benefit assessment or on the validity of any resulting lien.

We take this opportunity to emphasize that the exclusive method by which to challenge the propriety of the sewer benefit assessment levied by the plaintiff was an appeal filed pursuant to § 7-250. See *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 690, 490 A.2d 509 (1985) (§ 7-250 provides "exclusive adequate remedial system" for challenging sewer assessments); *Vaill* v. *Sewer Commissioner*, supra, 168 Conn. 519 (because § 7-250 "provides for a complete remedy by means of an appeal . . . [it] is the exclusive remedy available"). As part of such an appeal, the defendant could have raised any legal arguments it had with respect to the validity of the assessment, including whether the plaintiff should have been barred from levying an assessment against the Marriott Hartford Downtown property on the basis of a sewer connection that had occurred nearly fifteen years earlier; or whether there was a proper legal and factual basis for the amount of the assessment, which was identical to the amount of damages it sought in the ongoing civil action; or whether the defendant was properly named as one of the parties potentially liable for its payment. Instead, the defendant never attempted to exercise its right to appeal the assessment, nor was any appeal filed by any other party associated with the property.

After the appeal period passed with no challenge to the assessment, the assessment became final and presumptively valid. See *Mangiafico* v. *Farmington*, supra, 173 Conn. App. 175. It could not be collaterally challenged in the underlying civil action except for a "want of jurisdiction"; *Vaill* v. *Sewer Commission*, supra, 168 Conn. 519; which was never considered by

the court. To the extent that the court's rationale for ordering the discharge of the resulting lien appeared to be premised, at least in part, on its displeasure with the parallel assessment proceedings, and particularly the court's lack of notice thereof, such concerns do not alter the fact that the court had no legal authority to adjudicate the validity of the assessment in the context of the case before it.[16]

In ordering the discharge of the sewer assessment lien, the court, nevertheless, invoked both its inherent authority to vindicate or effectuate a prior court judgment and, impliedly, its statutory authority under § 49-51. We discuss each of these in turn. We conclude that, under the circumstances, neither provides a proper alternative basis for the court's order to discharge the sewer assessment lien.

As our Supreme Court has recognized, a trial court has "continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . ." *AvalonBay Communities, Inc.* v.

[16] The court indicated that the plaintiff had never given the court notice that it had instituted a parallel benefit assessment proceeding and that this left the court unable to "consolidate the two cases or at least make an informed decision as to the order in which they should proceed." The court failed to recognize that the defendant also failed to notify the court of the assessment proceeding. Furthermore, there were never two actions to consolidate. The assessment proceeding is an administrative proceeding conducted by and before the plaintiff, not the Superior Court, and, thus, it is unclear how it could have been consolidated with the civil action even if the court had notice of it. Perhaps an appeal taken from the assessment could have been consolidated, but, as we have explained, no such appeal was ever filed. Although we are sympathetic to the extent that the court was concerned with preserving judicial resources, we agree with the plaintiff that the defendant was in as good a position to avoid a waste of judicial resources as the plaintiff, and, in any event, the court's "concerns about potential wasted resources provide no justification for the end run around § 7-250 . . . ."

Plan & Zoning Commission, 260 Conn. 232, 246, 796 A.2d 1164 (2002). This broad power "is grounded in its inherent powers, and is not limited to cases wherein the noncompliant party is in contempt, family cases, cases involving injunctions, or cases wherein the parties have agreed to continuing jurisdiction." Id. Although we acknowledge the existence of the court's general inherent authority to issue orders necessary to protect or vindicate a prior judgment, we are unconvinced that the court's discharge of the sewer benefit assessment lien in the present action can be construed as a proper exercise of that authority.

The court stated that allowing the plaintiff to file a lien and possibly foreclose on it would undermine the court's final judgment. The only final judgment it had rendered, however, was the summary judgment on the complaint in favor of the defendant. That judgment did not reach the merits of the causes of action alleged by the plaintiff because the court determined only that the causes of action alleged, which sounded in breach of contract and unjust enrichment, were barred as a matter of law by the applicable statute of limitations or brought against the wrong party. There is no basis for interpreting that judgment as a ruling regarding the underlying merits of the plaintiff's allegations or whether it would have been entitled to damages had it brought its action sooner and against the correct party. See *Collum* v. *Chapin*, 40 Conn. App. 449, 451, 671 A.2d 1329 (1996) (noting that "the only facts material to the trial court's decision on a motion for summary judgment [on statute of limitations grounds] are the date of the wrongful conduct alleged in the complaint and the date the action was filed" (internal quotation marks omitted)). Moreover, because the lien existed *prior to* the court's summary judgment ruling and was the result of an unpaid and unchallenged sewer benefit assessment obtained in a parallel administrative proceeding, it could not

undermine the court's judgment that the civil action could not proceed.

We similarly are unpersuaded that § 49-51 provided the court with statutory authority to consider a request to discharge the lien as a part of the underlying action. Even if it is assumed, however, that it did, the court improperly exercised that authority under the circumstances presented.

"Section 49-51 permits any person having an interest in any real estate described in any certificate of lien which lien is invalid but not discharged of record to give notice to the lienor to discharge the lien and, if such request is not complied with in thirty days, to bring his complaint to the court which would have jurisdiction of the foreclosure of such lien, if valid, claiming such discharge. That court may adjudge the validity or invalidity of the lien, and a certified copy of a judgment of invalidity recorded on the land records shall fully discharge it." (Internal quotation marks omitted.) *Woronecki* v. *Trappe*, 228 Conn. 574, 579–80, 637 A.2d 783 (1994).

"[T]he discharge of a lien is a statutory proceeding . . . . The statute confers a definite jurisdiction upon a judge and it defines the conditions under which such relief may be given . . . . In such a situation jurisdiction is only acquired if the essential conditions prescribed by [the] statute are met. If they are not met, the lack of jurisdiction is over the subject-matter and not over the parties. . . . The essential condition of an action under . . . § 49-51 is written notice to the lienor sent to him at his last-known address by registered mail or by certified mail, postage prepaid, return receipt requested, to discharge the lien in the office where recorded." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Guilford Yacht Club Assn., Inc.* v. *Northeast Dredging, Inc.*, 192 Conn. 10,

13, 468 A.2d 1235 (1984). The party moving to discharge a lien pursuant to § 49-51 has "the burden of proving compliance with the statutory notice requirement," and the court must make factual findings that such requirements have been met. *Woronecki* v. *Trappe*, supra, 228 Conn. 580.

In the present case, the court cited to § 49-51, noting by way of a parenthetical that it authorized a court to discharge a lien. It also included the text of the statute in a footnote. The court, however, provided no legal analysis and failed to make the necessary findings regarding whether the defendant had complied with all necessary statutory notice requirements. These deficiencies alone are enough to reject the court's reliance on § 49-51 as a source of authority for ordering the discharge of the lien in the present case. Even if we were to overlook these problems, § 49-51 only provides the court with the authority to discharge a lien that "is invalid but not discharged of record . . . ." As we have already explained, the court made no finding that the lien, which was the result of an unpaid and unchallenged sewer benefit assessment, was legally invalid. Like in *Mangiafico*, nothing in the court's decision suggested that the lien was jurisdictionally defective, not in proper form, or not duly recorded. See *Mangiafico* v. *Farmington*, supra, 173 Conn. App. 175. Accordingly, even if we assume that the court had the authority to consider whether to discharge the sewer benefit assessment lien pursuant to § 49-51, the court abused its discretion by doing so without making the required findings regarding the validity of the lien.

Finally, we find no merit in the defendant's suggestion that either res judicata or judicial estoppel provides an alternative basis on which to affirm the judgment of the court. These arguments warrant little discussion. The defendant appears to argue in its brief that the court's summary judgment ruling, which has not been

challenged on appeal, will remain valid even if the plaintiff is successful in overturning the court's discharge of the lien. As a result, the defendant contends that, on the basis of the summary judgment, it would be able to assert res judicata as a defense in any future action to foreclose the assessment lien. The defendant contends that this potential scenario renders the present appeal "a further waste of judicial resources . . . ." We find no merit in this argument because it relies on speculation over future proceedings and the erroneous premise that the court's summary judgment decision, which was rendered on statute of limitations grounds and the failure to sue the correct party, has any legal bearing on a future determination regarding the validity of the sewer assessment lien.

Although the defendant mentioned res judicata in its postjudgment motion to the trial court as a possible basis for ordering the discharge of the lien, the court, understandably, did not rely on res judicata as a basis for its ruling. As succinctly explained by the plaintiff in its brief, res judicata, if applicable, "operates to foreclose *future* litigation and bars *subsequent* action on a claim after a judgment on the merits. . . . The law of res judicata does not retroactively bar *prior* adjudications that became final *before* the entry of final judgment." (Citations omitted; emphasis in original; internal quotation marks omitted.) Stated differently, res judicata cannot be invoked as justifying the retroactive invalidation of a sewer benefit assessment and lien that were final before the judgment purportedly entitled to preclusive effect was rendered.

The defendant's additional argument, that the plaintiff should be judicially estopped from arguing on appeal that the court lacked continuing jurisdiction to order the discharge of the lien, is likewise meritless. The sole

basis for the judicial estoppel argument is that the plaintiff cited in its opposition to the defendant's postjudgment motion boilerplate language acknowledging that motions for contempt implicate a court's "inherent equitable authority to effectuate and vindicate its judgments." The plaintiff went on to argue, however, as it does on appeal, that this authority provided no basis for discharging the lien under the present circumstances. Accordingly, we reject the defendant's argument that the plaintiff is somehow attempting to take a contrary position on appeal.

We conclude that the court acted in excess of its authority and abused its discretion by ordering a discharge of the sewer assessment lien. Thus, that portion of its ruling on the defendant's motion for contempt and application for discharge cannot stand.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for contempt and application for discharge in its entirety.

In this opinion the other judges concurred.

JENNIFER MOORE *v.* JUSTIN MOORE
(AC 44278)

Elgo, Moll and Suarez, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying his postjudgment motion to modify alimony and child support. At the time of dissolution, the dissolution court deviated from the child support guidelines and did not award child support to either party, concluding that it was in the best interests of the minor children and the parents that no child support be awarded. The defendant's motion for modification claimed that modification of the alimony and child support orders was warranted because the circumstances between the parties had changed substantially because the marital home had been sold, the parties were no longer cohabitating, and the parties' income

and expenses had changed, and, additionally, that the parties' current circumstances warranted child support to be paid per the child support guidelines. *Held*:

1. The trial court improperly denied the defendant's motion to modify the child support order solely on the basis that it did not find a substantial change in circumstances, that court having failed to address the defendant's additional and distinct claim as to whether the motion should be granted on the ground that the child support order substantially deviated from the child support guidelines in the absence of the requisite findings: in issuing its child support order, the dissolution court acknowledged that it was deviating from the child support guidelines but did not make an explicit finding that applying the presumptive amount as provided by the guidelines would be inequitable or inappropriate and, in the absence of a specific finding that a deviation was inequitable or inappropriate, the child support order was continually subject to modification on the ground that it substantially deviated from the guidelines; in the present case, the court should have determined the presumptive amount, thereafter determined whether it would have been inequitable or inappropriate to rely on that amount and, if so, explained which deviation criteria the court was relying on in order to justify its deviation; accordingly, the case was remanded for the purpose of holding a new hearing on the motion with respect to the modification of child support.
2. The defendant could not prevail on his claim that the trial court improperly denied his motion to modify the alimony order, which was based on his claim that the court erred in concluding that he had not proven a substantial change in circumstances: the court, having found that, since the dissolution, the marital home had been sold, as had been anticipated by the court at the time of the dissolution, the parties' financial circumstances had not significantly changed, and, although the parties' incomes had fluctuated since the dissolution, there had not been a substantial change in circumstances as contemplated by the applicable statute (§ 46b-86), properly concluded that the alleged change in circumstances did not warrant modification.

Argued March 7—officially released October 25, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Gould*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Gould*, *J.*, denied the defendant's motion to modify alimony and child support; subsequently, the court, *Gould*, *J.*, denied

the defendant's motion for reargument and reconsideration, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Richard W. Callahan, for the appellant (defendant).

Jennifer Moore, self-represented, the appellee (plaintiff).

Opinion

SUAREZ, J. The defendant, Justin Moore, appeals from the judgment of the trial court denying his postjudgment motion to modify the alimony and child support orders that were entered following the dissolution of his marriage to the self-represented plaintiff, Jennifer Moore. On appeal, the defendant argues that the court improperly denied his motion to modify these orders. We agree with the defendant that the court improperly denied his motion insofar as he sought a modification of the child support order and, accordingly, reverse the judgment of the court with respect to this claim and remand the case for a new hearing with respect to the motion to modify the child support order. With respect to the court's denial of the motion insofar as the defendant sought a modification of the alimony order, we affirm the judgment of the court.

The following facts, as found by the court or as undisputed in the record, and procedural history are relevant to this appeal. The plaintiff and the defendant were married on July 27, 2002. During the marriage, the plaintiff and the defendant had three children. On June 1, 2018, the plaintiff commenced a dissolution action against the defendant. On November 7, 2019, following a hearing at which both parties were self-represented, the dissolution court dissolved the marriage of the parties and issued orders from the bench. In so doing, the dissolution court made several factual findings. The dissolution court found, inter alia, that the plaintiff was

employed at Sikorsky Aircraft earning $2346 per week. The dissolution court also found that the defendant owned a painting and power washing business from which he earned $1000 per week.

The dissolution court subsequently issued the following orders: "The parties shall have joint legal custody of the minor children. They shall have shared residential custody. The primary address for school purposes will be with the plaintiff . . . .

"The court adopts the proposed parenting agreement of the defendant, which is dated November 7, 2019, and incorporates that herein.

"The court will deviate from an award for child support due to the shared custodial arrangements, such that no child support will be awarded at this time. The court notes that the statutory guidelines would call for a numerical award. The court believes it's in the best interest of the minor children and in the best interest of the parents that no child support be awarded for the reasons indicated, and shall deviate therefrom. . . .

"The plaintiff shall provide health insurance for the minor children. Any unreimbursed medical and/or extracurricular activity expenses shall be paid in the following manner: 76 percent by the plaintiff; 24 percent by the defendant.

"The parties shall alternate tax credits for the minor children with the plaintiff taking the odd years, [the] defendant taking the even years, starting with the tax year 2019 . . . .

"The plaintiff is ordered to pay $100 per week [in] alimony to the defendant for a period of seven years. That is nonmodifiable as to duration. It is modifiable as to amount.

"The marital residence is located at 54 Monroe Street in Shelton, Connecticut. It has a current value of $290,000. It is encumbered by a mortgage in the amount of $248,000, yielding equity in the amount of approximately $42,000.

"The parties may remain in the residence until the closing. . . .

"The property shall be listed at $314,000. And when sold, the proceeds will be split between the parties.

"Each party shall keep his or her individual bank accounts, retirement accounts, and shall be solely responsible for their own liabilities, as listed in their respective financial affidavits, and shall hold harmless and indemnify the other regarding each.

"The plaintiff shall retain the 2013 Yukon; the defendant shall retain the 2016 Dodge, each holding the other harmless and indemnifying the other from any and all expenses and claims regarding those vehicles.

"Each party shall maintain life insurance in the amount of $300,000 per year, naming the children as beneficiaries. Proof of insurance shall be exchanged by the parties each year.

"The defendant shall maintain 100 percent interest in his business, and shall hold harmless and indemnify the plaintiff therefrom." The court ultimately ordered that the marriage of the parties be dissolved.

Following the sale of the marital residence pursuant to the judgment, the plaintiff moved to Seymour in order to reside at her parents' vacant home. The defendant rented a residence in Shelton.

On July 6, 2020, the defendant filed a postjudgment motion for modification requesting that the court (1) designate his address as the children's primary residence for school purposes, (2) order that the plaintiff

pay the defendant weekly child support pursuant to the child support guidelines, and (3) increase the plaintiff's weekly alimony payment to the defendant. The defendant claimed that modification of the alimony and child support orders was warranted because the circumstances between the parties had "changed substantially" since the time of the dissolution because the marital home had been sold, the parties were no longer cohabitating, and the parties' incomes and expenses had changed. Beyond relying on changed circumstances, the defendant claimed that "[t]he current circumstances warrant child support to be paid per the [child support] guidelines . . . ."

On August 17, 2020, the court held a remote hearing on the defendant's motion for modification. At the hearing, the parties addressed only the modification of alimony and child support because the issue of the primary residence of the children had been resolved by the plaintiff's purchase of a home. At the conclusion of the hearing, the court stated that it had listened carefully to the sworn testimony of the parties, was aware of the statutory requirements regarding the motions for modification, and had reviewed the documentation, including but not limited to the financial affidavits filed by the parties. The court concluded that it could not "find a substantial change in circumstances." The court then denied the defendant's motion for modification from the bench. On that same day, the court also issued a written order in which the court stated that it was denying the motion because it did not find a substantial change in circumstances.

On August 20, 2020, the defendant filed a motion to reargue or reconsider the court's denial of the motion to modify the child support order. Therein, the defendant again argued that the evidence established a substantial change in circumstances. Alternatively, the defendant argued that, in its denial of the motion for modification

of child support, the court failed to address the issue of whether modification was warranted because the support order entered on November 7, 2019, substantially deviated from the child support guidelines and that the dissolution court, in entering the support order, failed to make findings on the record related to the deviation, as required by law. The court summarily denied the defendant's motion to reargue or reconsider on September 1, 2020. This appeal followed.[1]

On October 26, 2020, after this appeal was filed, the defendant, pursuant to Practice Book § 64-1,[2] moved for the trial court to issue a memorandum of decision concerning the denial of his motion for modification. On November 5, 2020, the court issued a memorandum of decision.

On December 4, 2020, the defendant sought an articulation from the court as to its findings of fact and legal conclusions, which the court summarily denied on December 9, 2020. Among the requests for articulation, the defendant asked the court to explain "what facts supported the trial [court's] decision to not order child support in accordance with the guidelines on August 17, 2020, when it heard the defendant's postjudgment motion to modify . . . ." The defendant also noted that, in his motion to reargue or reconsider, he had again

[1] In addition to the defendant's claims with respect to the motion for modification, the defendant also argues on appeal that the court erred in denying his motion for reargument or reconsideration. Because we ultimately reverse the judgment of the court denying the defendant's motion for modification of child support and remand the case for a new hearing thereon, we need not separately address the defendant's claim with respect to the motion for reargument or reconsideration.

[2] Practice Book § 64-1 (a) provides in relevant part: "The trial court shall state its decision either orally or in writing . . . in making any . . . rulings that constitute a final judgment for purposes of appeal under Section 61-1, including those that do not terminate proceedings. The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. . . ."

relied on what he believed to be an improper deviation from the guidelines, and argued that this issue had not been addressed by the court.

The defendant then filed with this court a motion for review of the court's denial of his motion for articulation pursuant to Practice Book § 66-7.[3] In his motion for review, the defendant argued, in part, that he was entitled to relief because the court, in denying the motion for modification of child support, had not addressed his argument that modification was proper because the child support order issued by the dissolution court improperly deviated from the child support guidelines. This court granted the motion for review and ordered the trial court "to articulate with respect to its . . . denial of the [defendant's] motion for modification . . . by stating the factual basis for its finding that there was no substantial change in circumstances, including therein a discussion of the evidence put forth by the parties . . . ."

On September 22, 2021, the trial court issued an articulation of its memorandum of decision pursuant to this court's order. In that articulation, the court stated that "[t]he defendant's instant motion to modify the alimony order alleges a substantial change in circumstances, pursuant to the requirements of . . . General Statutes § 46b-86 . . . .

"Within his motion, the defendant . . . alleged that the substantial change in circumstances included the fact that the parties' marital home was sold, the parties no longer live together, the plaintiff's income has

[3] Practice Book § 66-7 provides in relevant part: "Any party aggrieved by the action of the trial judge regarding rectification of the appeal or articulation under Section 66-5 may, within ten days of the issuance of notice by the appellate clerk of the decision from the trial court sought to be reviewed, file a motion for review with the appellate clerk, and the court may, upon such a motion, direct any action it deems proper. . . ."

increased and her expenses have decreased, the defendant's income is more inconsistent and unstable and his expenses have increased.

"Thus, the defendant requested an increase in the plaintiff's alimony order and an order of child support pursuant to the state guidelines.

"At the time of their dissolution, the plaintiff had gross weekly income of $2346, and net weekly income of $1763; and the defendant had gross weekly income of $1000, and net weekly income of $827, according to the parties' financial affidavits filed at the time. The presumptive weekly child support at the time was $460 for the plaintiff, and $216 for the defendant.

"In addition, the plaintiff alleged weekly expenses in the amount of $1475, and the defendant alleged weekly expenses in the amount of $650, including $600 to the plaintiff for a share of the expenses on their marital residence.

"At the time of the instant hearing, the defendant, a house painter, had gross weekly income of $629, and net weekly income of $554. In addition, he had weekly expenses in the amount of $949. He lost some work due to circumstances surrounding the [COVID-19] pandemic. Since the time of the original order, he also received a total of $13,000 from the sale of the parties' marital residence. The plaintiff did not receive any money from the sale of that residence. The plaintiff, at the time of the instant hearing, had gross weekly income of $2388, and net weekly income of $1644. In addition, she had weekly expenses in the amount of $1904. In addition, the parties were continuing with their shared custodial arrangement regarding their minor children.

"In determining whether there has been a substantial change in circumstances, a court is permitted to compare the circumstances at the time of the last court

order of alimony with [the] circumstances at the time that a party seeks a modification of that order. Relatively minor fluctuations in income alone will not be enough to overcome the substantial change in circumstances threshold.

"Even where the court finds a substantial change in circumstances, it must then consider the statutory criteria in . . . General Statutes § 46b-82 in determining whether a modification is warranted. However, its inquiry is necessarily confined to a comparison between the current conditions and the last court order. To permit the trial court to reconsider all evidence dating from before the original divorce proceedings, in determining the adjustment of alimony, would be, in effect, to undermine the policy behind the well established rule of limiting proof of the substantial change in circumstances to events occurring subsequent to the latest alimony order—the avoidance of relitigating matters already settled. . . .

"A comparison of the defendant's financial affidavit at the time of the dissolution and original alimony and child support orders, in addition to the testimony of the parties at the instant hearing, shows that the defendant's net weekly earnings decreased from $827 to $554, while, at the same time, he received $13,000 from the sale of the marital residence. Further, as noted above, the parties continue to have shared residential custody of their minor children.

"For the foregoing reasons, the court finds that there has not been a substantial change in circumstances as contemplated by . . . [§] 46b-86. Further, even if the court were to find a substantial change in circumstances, a review of the statutory criteria in . . . [§] 46b-82, as applied to the plaintiff and the defendant in the instant case, does not warrant modification." (Citation omitted; internal quotation marks omitted.)

Before turning to the defendant's claims, we set forth the standard of review that applies. "[W]e will not disturb the trial court's ruling on a motion for modification of alimony or child support unless the court has abused its discretion or reasonably could not conclude as it did, on the basis of the facts presented. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 200 Conn. App. 229, 245–46, 240 A.3d 688 (2020), cert. denied, 336 Conn. 909, 244 A.3d 561 (2021). "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have broad discretion in deciding motions for modification." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 200 Conn. App. 130, 135, 238 A.3d 113, cert. denied, 335 Conn. 970, 240 A.3d 286 (2020).

I

The defendant first claims that the court erred in denying his motion for modification of the child support order. Specifically, the defendant argues that the court erred in (1) concluding that there was not a substantial change in circumstances and (2) not modifying the order based on the fact that the dissolution court substantially deviated from the presumptive child support amount without making the requisite findings. We agree with the defendant that the court did not properly consider his motion for modification because it did not

address whether the motion should be granted on the ground that the child support order substantially deviated from the guidelines in the absence of the requisite accompanying findings.[4]

Before turning to the merits of the defendant's claim, we discuss some governing legal principles. Although, as we stated previously in this opinion, the trial court is vested with broad discretion in domestic relations matters, with respect to child support "the parameters of the court's discretion have been somewhat limited by the factors set forth in the child support guidelines." (Internal quotation marks omitted.) *Colbert* v. *Carr*, 140 Conn. App. 229, 240, 57 A.3d 878, cert. denied, 308 Conn. 926, 64 A.3d 333 (2013). General Statutes § 46b-84 (a) provides in relevant part that "the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . ." General Statutes § 46b-215a provides in relevant part for a commission to oversee the establishment of child support guidelines, which must be updated every four years, in order "to ensure the appropriateness of criteria for the establishment of child support awards . . . ." "In support of the application of these guidelines, [General Statutes] § 46b-215b (a) provides: 'The . . . guidelines issued pursuant to [§] 46b-215a . . . shall be considered in all determinations of child support amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. *A specific finding on the record that the application of the guidelines would be inequitable or inappropriate* in a particular case . . . shall be required in

[4] In light of our conclusion, we do not address whether the court erred in concluding that there was not a substantial change in circumstances warranting a modification of the child support order. This issue is left to the trial court on remand as necessary.

order to rebut the presumption in such case.' . . . This exception to the application of the presumptive guideline amount is reiterated in § 46b-86 (a), which governs the modifiability of support orders. Section 46b-86 (a) provides in relevant part: '[A]ny final order for the . . . payment of . . . support . . . may, at any time thereafter, be . . . modified by the court . . . upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to [§] 46b-215a, *unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate*.' " (Emphasis in original.) *Righi* v. *Righi*, 172 Conn. App. 427, 435–36, 160 A.3d 1094 (2017).

Moreover, "[§] 46b-215a-5c (a) of the Regulations of Connecticut State Agencies provides in relevant part: 'The current support . . . contribution amounts calculated under [the child support guidelines] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such section and include a factual finding to justify the variance. Only the deviation criteria stated in . . . subdivisions (1) to (6), inclusive, of subsection (b) of this section . . . shall establish sufficient bases for such findings.'[5]

[5] "The criteria enumerated in § 46b-215a-5c (b) of the regulations are: '(1) Other financial resources available to a parent . . . (2) [e]xtraordinary expenses for care and maintenance of the child . . . (3) [e]xtraordinary parental expenses . . . (4) [n]eeds of a parent's other dependents . . . (5) [c]oordination of total family support . . . [and] (6) [s]pecial circumstances. . . .' Shared physical custody is considered a 'special circumstance' that justifies deviation when '(i) such arrangement substantially: (I) reduces expenses for the child, for the parent with the lower net weekly income, or (II) increases expenses for the child, for the parent with the higher net weekly income; and (ii) sufficient funds remain for the parent receiving support to meet the needs of the child after deviation; or (iii) both parents have substantially equal income.' Id., § 46b-215a-5c-(b) (6) (A). The '[b]est

"Our courts have interpreted this statutory and regulatory language as requiring three distinct findings in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." (Citation omitted; footnote in original.) Id., 436–37.

"Absent such a finding, the order is modifiable pursuant to § 46b-86 (a) because the final order for child support substantially deviates from the child support guidelines . . . ." (Internal quotation marks omitted.) Id., 441. "[O]nce the court enters an order of child support that substantially deviates from the guidelines, and makes a specific finding that the application of the amount contained in the guidelines would be inequitable or inappropriate, as determined by the application of the deviation criteria established in the guidelines, that particular order is no longer modifiable solely on the ground that it substantially deviates from the guidelines. By the same token, in the absence of such a specific finding, the order is continually subject to modification on the ground of a substantial deviation from the guidelines. Such specific finding, therefore, has very real and meaningful consequences and must be made by the court anytime the court enters a child support award that deviates from the child support guidelines." (Footnote omitted.) *McHugh* v. *McHugh*, 27 Conn. App. 724, 728–29, 609 A.2d 250 (1992).

This court's decision in *Righi* v. *Righi*, supra, 172 Conn. App. 427, is instructive. In *Righi*, the facts of

interests of the child' is also considered a special circumstance that justifies deviation. Id., § 46b-215a-5c (b) (6) (D)." *Righi* v. *Righi*, supra, 172 Conn. App. 436 n.3.

which are similar to the present case, the dissolution court found that, as for the presumptive child support amount pursuant to the guidelines, "the defendant would have had to pay $111 per week to the plaintiff if the children primarily lived with the plaintiff, and the plaintiff would have had to pay $256 per week to the defendant if the children primarily lived with the defendant." Id., 429. After noting the presumptive amount of child support, the dissolution court, at the request of the defendant, deviated from the presumptive amount and ordered that neither party pay child support to the other. See id., 429–30. The dissolution court did not expressly find that applying the presumptive amount would be inequitable or inappropriate under the circumstances. Id. The dissolution court noted that it felt that "the agreement is fair and equitable under all the circumstances and in the best interests of the two minor children . . . ." (Internal quotation marks omitted.) Id., 430.

The defendant in *Righi* subsequently filed a postjudgment motion to modify the child support order on the ground that, since the time that the dissolution judgment was rendered, there had been a substantial change in circumstances. Id. The court found that there had not been a substantial change in circumstances since the time the dissolution judgment was rendered but nevertheless granted the motion for modification. Id. The court noted that the original order, which did not provide for any child support payments to either party, represented a substantial deviation from the child support guidelines. Id., 430–31. The court also noted that the dissolution court did not make a finding as to whether it would be inequitable or inappropriate to apply the presumptive guidelines support amount. Id., 431. Even though the defendant requested a modification on the basis of a substantial change in circumstances, the court instead granted the modification on

the basis of the dissolution court's substantial deviation from the child support guidelines. See id., 430–31.

On appeal, the plaintiff in *Righi* claimed that the court (1) had improperly granted the defendant's motion to modify child support after determining that there had not been a substantial change in circumstances, and (2) had erred by finding that the dissolution court, in creating the original child support order, failed to make a finding that applying the presumptive support amount set forth in the child support guidelines would be inequitable or inappropriate in light of the fact that the dissolution court found that the agreement was "fair and equitable . . . ." Id., 428–29, 434. First, this court held that the trial court was not required to find a substantial change in circumstances in order to grant the defendant's motion to modify child support because a court has the power to modify a child support order on the basis of a substantial deviation from the guidelines, independent of whether there has been a substantial change in the circumstances of the parties. See id., 433–34. Second, this court held that, in order to properly deviate from the child support guidelines, the court must make an *explicit* finding that following the guidelines in a given case would be inequitable or inappropriate. See id., 434–41.

It is not in dispute that, in its November 7, 2019 oral decision, the dissolution court stated that "[t]he court will deviate from an award for child support due to the shared custodial arrangements, such that no child support will be awarded at this time. The court notes that the statutory guidelines would call for a numerical award. The court believes it's in the best interest of the minor children and in the best interest of the parents that no child support be awarded for the reasons indicated, and shall deviate therefrom." Although the dissolution court, in issuing the child support order, acknowledged that it was deviating from the child support

guidelines for the reasons stated, it did not make an explicit finding that, in the present case, applying the presumptive amount as provided by the guidelines would be inequitable or inappropriate.[6]

When the court in the present case considered the defendant's motion to modify child support, it denied the motion solely on the basis that it did not find a substantial change in circumstances. In so doing, it failed to address the defendant's additional and distinct claim with respect to the propriety of child support relative to the guidelines. As we explained in our discussion of the procedural history of this case, this issue was raised by the defendant in his motion to modify, his motion to reargue or reconsider, his motion for articulation, and his motion for review. In the absence of a specific finding that a deviation is inequitable or inappropriate, as determined by the deviation criteria established in the guidelines, the child support order was continually subject to modification on the ground that it substantially deviates from the guidelines. See *Righi* v. *Righi*, supra, 172 Conn. App. 433–41; *McHugh* v. *McHugh*, supra, 27 Conn. App. 728–29. Accordingly, we conclude that it was improper for the court to fail to consider, as the defendant alleged, whether modification was warranted on the ground that the child support order deviated from the presumptive amount as determined by the guidelines, in the absence of the requisite findings. The court should have determined the presumptive amount and, thereafter, specifically and

[6] As stated previously in this opinion, the dissolution court found that it was in the "best interest of the minor children and in the best interest of the parents that no child support be awarded . . . ." To the extent that the dissolution court relied on the "best interest of the parents" as a deviation criterion, it is not among the criteria that may justify a support order different from the support amounts calculated under the child support guidelines, as set forth in § 46b-215a-5c (b) of the Regulations of Connecticut State Agencies. See footnote 5 of this opinion.

explicitly determined whether it would have been inequitable or inappropriate to rely on that amount and, if so, explained which deviation criteria the court was relying on to justify its deviation. Because the court failed to do so, we conclude that it abused its discretion in denying the defendant's motion for modification with respect to child support. The proper remedy is for this court to reverse the judgment in part and remand the case for the purpose of holding a new hearing on the motion for modification of child support.

II

The defendant next claims that the court erred in denying his motion to modify the alimony order. Specifically, the defendant argues that the court erred in concluding that he had not proven a substantial change in circumstances to warrant modification. We are not persuaded.

We begin by setting forth the applicable legal principles. "[Section] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony . . . the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony . . . are relevant to the question of modification. . . . More specifically, these criteria, outlined in . . . § 46b-82, require the court to consider the needs and financial resources of each of the parties and their children, as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties. . . . The power of the trial court to modify the existing order does not, however, 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. . . .

"Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, supra, 200 Conn. App. 246–47.

"Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential." (Internal quotation marks omitted.) *Dan* v. *Dan*, 315 Conn. 1, 9, 105 A.3d 118 (2014). "A

conclusion that there has been a substantial change in financial circumstances justifying a modification of alimony based only on income is erroneous; rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award to determine if there has been a substantial change." (Internal quotation marks omitted.) *O'Donnell* v. *Bozzuti*, 148 Conn. App. 80, 87–88, 84 A.3d 479 (2014).

After a careful review of the record, we conclude that the court did not abuse its broad discretion when it determined that there had not been a substantial change in the parties' circumstances since the last court order. In the present case, the last court order was the judgment of the dissolution, which was rendered on November 7, 2019. At that time, the dissolution court ordered that the parties would have joint custody of the children, ordered that the marital home be sold and that the parties may reside together until the marital home was sold, and ordered alimony to be paid from the plaintiff to the defendant in the weekly amount of $100.

In his motion for modification dated July 6, 2020, the defendant asserted that there was a substantial change in circumstances since the dissolution of the parties' marriage in November, 2019, because the marital home had been sold, the parties no longer cohabitated, and the parties' income and expenses had changed. In its September 2, 2021 articulation, the court found that the marital home had been sold, as was anticipated by the court at the time of the dissolution on November 7, 2019, and that the parties continued to share residential custody of their minor children. The court further found that the parties' financial circumstances had not significantly changed since the time of the dissolution, approximately eight months earlier. Specifically, the court found that at the time of the dissolution, the

plaintiff had a gross weekly income of $2346 and a net weekly income of $1763. The defendant had a gross weekly income of $1000 and a net weekly income of $827. At that time, the plaintiff had weekly expenses in the amount of $1475, and the defendant had weekly expenses in the amount of $650, $600 of which was paid to the plaintiff for the shared expenses of the marital residence. At the time of the hearing on the motion for modification, the plaintiff had a gross weekly income of $2388 and a net weekly income of $1644. In addition, she had weekly expenses in the amount of $1094. At the time of the hearing on the motion for modification, the defendant's income had decreased. He then had a gross weekly income of $629 and a net weekly income of $554. He also had weekly expenses in the amount of $949. The court noted that some of the loss of the defendant's income was attributable to a loss of work during the COVID-19 pandemic.

Although, since the time of dissolution, the defendant's net weekly earnings decreased from $827 to $554, he also received $100 weekly in alimony. The court found that, although there was a fluctuation in the parties' incomes since the time of the dissolution, there had not "been a substantial change in circumstances as contemplated by . . . [§] 46b-86." Moreover, even though the court did not find a substantial change in circumstances, it nevertheless reviewed the statutory criteria set forth in § 46b-86, and concluded that the alleged change in circumstances as applied to the plaintiff and the defendant in the present case did not warrant modification.

On appeal, the defendant argues that, "[l]egally, the undisputed facts constitute a substantial change in circumstances." Beyond referring to the undisputed facts, the defendant does not cite to any legal authority that is tailored to the present or similar facts in support of this bald legal assertion. To the contrary, our review

of relevant precedent reflects that there is no rigid mathematical formula for us to follow in order to determine whether a change in circumstances is significant enough to warrant consideration of the factors set forth in § 46b-86. See, e.g., *Schwarz* v. *Schwarz*, 124 Conn. App. 472, 477–79, 5 A.3d 548, cert. denied, 299 Conn. 909, 10 A.3d 525 (2010); *Crowley* v. *Crowley*, 46 Conn. App. 87, 93–95 n.9, 699 A.2d 1029 (1997). Having reviewed the record and the court's ruling, and allowing every reasonable presumption to be made in support of the court's determination, we are not persuaded that the court could not reasonably conclude, as it did, that the change in the parties' circumstances did not amount to a substantial change warranting consideration of the factors set forth in § 46b-86. The court applied the correct legal standard and did not abuse its discretion by denying the motion to modify the alimony order.

The judgment is reversed only as to the denial of that portion of the defendant's motion for modification seeking to modify child support and the case is remanded for a new hearing on the defendant's motion for modification with respect to the child support order; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* FRANK V. RAGO ET AL.
(AC 43761)

Prescott, Moll and Flynn, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants, F and L, following their default on a promissory note secured by the mortgage. The trial court granted the plaintiff's motion for summary judgment as to liability against the defendants and rendered a judgment of strict foreclosure. The trial court later vacated

the summary judgment rendered against L only, as he was a nonappearing party. Thereafter, the trial court granted the plaintiff's motion for default against L for failure to plead. On L's appeal from the judgment of strict foreclosure, this court affirmed the judgment and remanded the matter for the purpose of setting new law days. Thereafter, the plaintiff filed a motion to reset the law days. It later filed an updated affidavit of debt, a new appraisal of the property, and an affidavit of the appraiser, although it did not file an accompanying motion requesting that the trial court update the amount of the debt or the fair market value of the property. Following a short calendar proceeding on the motion, which the defendants did not attend as they were not provided with notice, the trial court issued an order reopening, modifying and reentering the judgment of strict foreclosure to increase both the amount of the debt and the fair market value of the property. It also set new law days. On F's appeal to this court, *held* that the trial court erred in rendering the subsequent judgment of strict foreclosure by making updated findings sua sponte and without providing the parties with adequate notice and an opportunity to be heard: the plaintiff's motion sought only to reset the law days in accordance with this court's remand order, and the trial court exceeded the scope of that motion and the remand order by modifying the judgment to substitute updated fair market value and debt findings; moreover, F was not afforded due process in connection with the trial court's making of the updated findings because he was not notified that the court was considering modifying the judgment in such a manner; accordingly, this court remanded the case with direction to reinstate the original judgment and for the purpose of setting new law days.

Argued October 4, 2021—officially released October 25, 2022

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability and rendered judgment of strict foreclosure; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, vacated the summary judgment rendered against the defendant Louis A. Rondinello; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for default against the defendant Louis

A. Rondinello for failure to plead; thereafter, the defendant Louis A. Rondinello appealed from the judgment of strict foreclosure to this court, *Prescott*, *Elgo* and *Pellegrino*, *Js.*, which affirmed the judgment, and the case was remanded for the purpose of setting new law days; subsequently, the plaintiff filed a motion to reset the law days; thereafter, the court, *Spader*, *J.*, opened and modified the judgment and rendered a judgment of strict foreclosure, from which the named defendant appealed to this court. *Reversed*; *judgment directed.*

Brian E. Lambeck, for the appellant (named defendant).

Kevin C. Sandberg, for the appellee (plaintiff).

Opinion

MOLL, J. This matter returns to us following our decision in *U.S. Bank National Assn.* v. *Rago*, 189 Conn. App. 902, 203 A.3d 718 (2019), in which this court, by memorandum decision, affirmed a judgment of strict foreclosure rendered in favor of the plaintiff, U.S. Bank National Association, as trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2007-MX1, and remanded the case "for the purpose of setting new law days." Id. The defendant Frank V. Rago[1] now appeals from the trial court's subsequent judgment of strict foreclosure rendered, on remand, in favor of the plaintiff. On appeal, the defendant claims, inter alia, that the court, in rendering the subsequent judgment of strict foreclosure, improperly exceeded the scope of the remand order in opening the judgment and making updated findings, sua sponte and without providing to the parties adequate notice and an opportunity to be

[1] Although the plaintiff's complaint also named Louis A. Rondinello as a defendant, Rondinello was defaulted for failure to plead and is not participating in this appeal. See footnote 3 of this opinion. For the sake of simplicity, we refer in this opinion to Frank V. Rago as the defendant and to Rondinello by name.

heard, with respect to the fair market value of the property and the amount of the debt at issue.[2] We agree, and, accordingly, we reverse the judgment of the trial court.

The record reveals the following facts. On June 23, 2006, the defendant and Louis A. Rondinello promised to pay the principal sum of $380,000 payable with interest to Chase Bank USA, N.A., as provided in a promissory note. To secure the note, the defendant and Rondinello executed a mortgage on real property located at 1392–1398 South Avenue in Stratford (property), of which they are the owners of record. The mortgage deed, which is conditioned on the payment of the note and the performance of certain covenants and other conditions, was recorded on July 25, 2006, in the Stratford land records. Following certain assignments, the plaintiff became, and remains, the current holder of the note and mortgage. The payments of principal and interest due on December 1, 2011, and each and every month thereafter, have not been made. Accordingly, the plaintiff exercised its option to declare the entire balance on the note due and payable.

On November 2, 2015, the plaintiff commenced this foreclosure action. On March 3, 2016, the defendant filed his answer, in which he acknowledged that he and Rondinello were the current owners of the property and were in possession thereof. On August 15, 2016, the plaintiff filed a motion for summary judgment as to liability only, with an accompanying memorandum of law and exhibits, against the defendant and Rondinello. On September 11, 2017, the trial court, *Hon.*

[2] The defendant embeds this claim within his primary claim on appeal that the plaintiff failed to provide proper notice to him regarding its short calendar " 'ready' " marking of its motion to reset the law days pursuant to Practice Book § 17-10. The defendant also claims that the court erred in denying his motion to reargue the October 21, 2019 judgment of strict foreclosure. In light of our conclusion herein, we need not address these other claims of error.

Alfred J. Jennings, Jr., judge trial referee, granted the plaintiff's motion for summary judgment against both the defendant and Rondinello.[3] On October 27, 2017, the plaintiff filed a motion for judgment of strict foreclosure, which the court granted on December 11, 2017. In rendering the original judgment of strict foreclosure, the court found, inter alia, the fair market value of the property to be $280,000 and the amount of the debt to be $627,647.93.[4]

On January 3, 2018, Rondinello appealed from the original judgment of strict foreclosure. On April 2, 2019, this court affirmed the judgment and, in a memorandum decision, remanded the case "for the purpose of setting new law days." Id.

On October 2, 2019, the plaintiff filed, pursuant to Practice Book § 17-10,[5] a motion titled "Motion to Reset Law Days." In that motion, the plaintiff did not request that the court update the findings as to the fair market

[3] On November 9, 2017, the court issued a revised ruling on the plaintiff's motion for summary judgment as to liability only, vacating the summary judgment rendered against Rondinello because Rondinello was then a nonappearing party who had not (yet) been defaulted. The summary judgment rendered against the defendant remained in effect. On November 20, 2017, Rondinello filed an appearance through counsel. Thereafter, on December 6, 2017, the plaintiff filed a motion for default against Rondinello for failure to plead, which the court granted on December 11, 2017.

[4] We note that, in the original judgment of strict foreclosure, the property was identified as 1392 South Avenue, Stratford, Connecticut, a description that went undisturbed in the subsequent judgment of strict foreclosure and that is not challenged on appeal. Several documents, however, including the complaint and answer, the original appraisal, and the assignment of the mortgage, describe the property as 1392–1398 South Avenue, Stratford, Connecticut. The November 6, 2017 appraiser affidavit identifies the property as "the commercial premises known as 1392–1398 South Avenue, also known as 1392 South Avenue, Stratford, Connecticut."

[5] Practice Book § 17-10, titled "Modifying Judgment after Appeal," provides: "If a judgment fixing a set time for the performance of an act is affirmed on appeal by the Supreme Court and such time has elapsed pending the appeal, the judicial authority which rendered the judgment appealed from may, on motion and after due notice, modify it by extending the time."

value of the property or the amount of the debt, as set forth in the original judgment of strict foreclosure. Nevertheless, on October 17, 2019, the plaintiff filed, without any accompanying motion, inter alia, (1) an affidavit of debt, which included an updated calculation of the defendant's debt,[6] (2) a new appraisal of the property, which included an updated fair market value of the property, and (3) an affidavit of the appraiser.

The plaintiff's motion to reset the law days appeared on the October 21, 2019 short calendar; the plaintiff marked it "ready" and appeared accordingly before the court, *Spader*, *J.*, on October 21, 2019. The defendant did not attend the short calendar proceeding. See footnote 2 of this opinion. That same day, the court issued an order stating in relevant part that the "[j]udgment of strict foreclosure is hereby reopened, modified and reentered as follows: Debt: $727,162.61 . . . Fair Market Value: $320,000." The result of this modified judgment was to increase the amount of the debt from $627,647.93, as found by Judge Jennings, to $727,162.61 and to increase the fair market value from $280,000, as found by Judge Jennings, to $320,000. The court also set new law days to commence on November 26, 2019. On November 12, 2019, the defendant filed a motion to reargue the October 21, 2019 order, claiming not to have received notice of the plaintiff's short calendar "ready" marking. On December 10, 2019, the court denied the defendant's motion to reargue.[7] This appeal followed.[8]

[6] The plaintiff acknowledges in its appellate brief that it did not timely send a copy of the affidavit of debt to the defendant, either electronically or by mail.

[7] In denying the motion to reargue, which was pending at the time the law days were set in the October 21, 2019 order, the court set new law days to commence on January 14, 2020. The defendant filed this appeal on December 31, 2019.

[8] On February 10, 2020, the plaintiff filed a motion to terminate the appellate stay. On March 4, 2020, the trial court granted that motion. On June 18, 2020, this court granted the defendant's timely motion for review of

The defendant claims on appeal that the court improperly exceeded the scope of this court's remand order in *Rago* by making updated findings, sua sponte, regarding the fair market value of the property and the amount of the debt at issue. The plaintiff responds that the court properly performed its equitable function in making updated findings regarding the debt and fair market value of the property to confirm that strict foreclosure, as opposed to foreclosure by sale, was still appropriate. We agree with the defendant that the court erred in making updated findings sua sponte and without providing to the parties adequate notice and an opportunity to be heard.

We begin by setting forth the applicable standard of review and relevant legal principles. Determining the scope of a remand is a question of law over which our review is plenary. *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011). "Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . *We have rejected efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they*

termination of stay and granted the relief requested therein, thereby vacating the order terminating the stay.

may be brought into the remand hearing." (Emphasis altered; internal quotation marks omitted.) *TDS Painting & Restoration, Inc.* v. *Copper Beech Farm, Inc.*, 73 Conn. App. 492, 506–507, 808 A.2d 726, cert. denied, 262 Conn. 925, 814 A.2d 379 (2002).

Mindful of the foregoing principles, we recognize that updating prior findings concerning fair market value and the amount of debt at issue can serve important policy reasons that are not extraneous to the purposes of a remand in the foreclosure context. Depending on the circumstances, such updated findings may inure to the benefit of the lender, the borrower, or both. Most notably, changes in such findings based on a sufficient evidentiary showing may inform the court that a judgment of strict foreclosure should be opened and substituted with a judgment of foreclosure by sale.[9] See *Toro*

[9] We recognize that the question of whether, on remand from a decision by this court affirming a judgment of strict foreclosure and remanding the case for the purpose of setting new law days, a trial court may entertain a motion to open the judgment for the purpose of ordering a foreclosure by sale instead of a strict foreclosure was addressed almost thirty years ago in *Connecticut National Bank* v. *Zuckerman*, 31 Conn. App. 440, 441, 624 A.2d 1163 (1993). By way of background, in *Zuckerman*, in a prior appeal, this court affirmed the trial court's denial of a motion to open a judgment of strict foreclosure and remanded the case "for the purpose of setting new law days." *Connecticut National Bank* v. *Zuckerman*, 29 Conn. App. 541, 546, 616 A.2d 814 (1992). On remand, the plaintiff filed a motion to modify the judgment for the limited purpose of setting new law days, whereupon the defendants filed a motion to modify the judgment of strict foreclosure, seeking, instead, a foreclosure by sale. *Connecticut National Bank* v. *Zuckerman*, supra, 31 Conn. App. 441. The trial court granted the plaintiff's motion, denied the defendants' motion, and set new law days. Id. The defendants appealed therefrom. Id.

On appeal, this court rejected the defendants' claim that "the court had an option to deviate from our direction and, instead, order foreclosure by sale." Id. This court reasoned that "[i]t is well settled that on a remand from an appellate court, a trial court cannot deviate from the directions given by the appellate court." Id.; see also id., 441–42 (collecting cases). This court further stated that "the trial court . . . could not have taken any action on remand other than to set new law days . . . ." Id., 442.

Considering the sound policy reasons supporting a trial court's post-remand fact-finding to update prior findings concerning fair market value

Credit Co. v. *Zeytoonjian*, 341 Conn. 316, 330, 267 A.3d 71 (2021) ("foreclosure by sale is the preferred 'decree' in situations in which the property's fair market value exceeds the debt"); *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 394, 180 A.3d 611 ("when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale" (internal quotation marks omitted)), cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018). In addition, an updated judicial finding concerning the amount of the debt owed to the plaintiff affects the right to redeem. See *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 323, 898 A.2d 197 ("[a] decree of strict foreclosure finds the amount due under the mortgage, orders its payment within a designated time and provides that should such payment not be made, the debtor's right and equity of redemption will be forever barred and foreclosed" (emphasis omitted; internal quotation marks omitted)), cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); see also Practice Book § 23-17 (b) (1). Therefore, especially because "foreclosure is peculiarly an equitable action"; (internal quotation marks omitted) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 374, 260 A.3d 1187 (2021); it is not difficult to conceive of a post-remand posture in which, on a proper motion with an evidentiary showing and due notice and an

and the amount of debt at issue, we have concerns that this court wrongly decided *Zuckerman*, which this court may wish to revisit en banc in an appropriate case. See *Consiglio* v. *Transamerica Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999) ("[T]his court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc."). The court need not do so in the present appeal, however, in light of our holding that it was error for the trial court to make such updated findings concerning fair market value and the amount of the debt in the absence of either (1) a motion to open the judgment for such purpose or (2) notice to the parties of the court's intention to update such findings and an opportunity to be heard thereon following such notice.

opportunity to be heard, such findings could be made and deemed "not extraneous to the issues and purposes of the remand"; (internal quotation marks omitted) *TDS Painting & Restoration, Inc.* v. *Copper Beech Farm, Inc.*, supra, 73 Conn. App. 507; notwithstanding a prior affirmance of a judgment of strict foreclosure and an attendant remand for the purpose of setting new law days.

In the present case, the question remains, therefore, whether the trial court erred in making such updated findings sua sponte and without providing to the parties adequate notice and an opportunity to be heard. We conclude that it did.

This court's decision in *Townsley* v. *Townsley*, 37 Conn. App. 100, 103, 654 A.2d 1261 (1995), is instructive. In *Townsley*, a marital dissolution action, the plaintiff filed a motion to open a judgment for the limited purpose of either suspending her obligation to make the first of four installment payments in accordance with the dissolution judgment or allowing her to deposit that payment into an escrow account. Id., 102. The court opened the judgment, however, "as to all issues except the dissolution itself." Id. On appeal, this court held that the trial court erred in opening the judgment as to all issues because "the defendant was not afforded due process because he was not notified that the court was considering opening the judgment as to all issues . . . ." Id., 104. The situation in the present case is analogous to that in *Townsley* in that the plaintiff filed a motion seeking only to reset the law days in accordance with our remand order, and the court exceeded the scope of that motion and our remand by modifying the judgment, sua sponte and without adequate notice to the parties, to substitute updated fair market value and debt findings. Furthermore, akin to the defendant in *Townsley*, the defendant in the present case did not have notice that the court was considering modifying

the judgment in such a manner. This contravenes the long-standing principle that "no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." (Internal quotation marks omitted.) *Urich* v. *Fish*, 58 Conn. App. 176, 181, 753 A.2d 372 (2000).

In sum, on the basis of the notice considerations rooted in due process as articulated in *Townsley* and its progeny, we conclude that the court erred in making updated findings, sua sponte and without providing to the parties adequate notice and an opportunity to be heard, concerning the fair market value of the property and the amount of debt.[10]

The judgment is reversed and the case is remanded with direction to reinstate the original judgment and for the purpose of setting new law days.

In this opinion the other judges concurred.

KARL ANDERS HEBRAND *v.* ANNIKA HEBRAND (AC 44703)

Moll, Suarez and Seeley, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying her motion to open and vacate a prior trial court's postjudgment modification of the plaintiff's alimony obligation. In 2017, the trial court modified the plaintiff's alimony obligation in accordance with a stipulated agreement the parties had filed with the court. The defendant did

[10] We note that the plaintiff argued in its appellate brief that this appeal is moot because, regardless of whether the defendant prevails in this court, he "effectively gets what he seeks," namely, an opportunity on remand for argument on the motion to reset the law days. The plaintiff expressly abandoned its mootness claim during oral argument before this court. Because a reversal of the judgment negates the updated findings as explained in this opinion, we reject the plaintiff's mootness claim in any event.

not file her motion to open until three years later, in 2020. On appeal, the defendant claimed, inter alia, that the court improperly concluded that she failed to prove that the plaintiff had fraudulently induced her to enter into the 2017 modification agreement and that the modification court lacked subject matter jurisdiction to consider the agreement because, inter alia, the plaintiff mislabeled the motion to modify the alimony obligation and failed to pay the required filing fee. *Held*:

1. The defendant's contention that the modification court lacked subject matter jurisdiction to consider and modify the plaintiff's alimony obligation was meritless; none of the purported defects in the motion to modify would have deprived the court of jurisdiction, and the defendant failed to provide any authority to support her jurisdictional claims.

2. The trial court did not abuse its discretion in denying the defendant's motion to open and vacate the modification court's alimony order: the defendant failed to establish that the plaintiff fraudulently induced her to join his efforts to modify the alimony obligation, as the evidence showed that the parties negotiated the agreement with the advice of their counsel and that the defendant chose to sign the agreement despite her counsel's advice not to do so.

3. The defendant's claims that the modification court improperly failed to find the occurrence of a substantial change in the parties' circumstances and to conform its order to those changes was unavailing; because the plaintiff failed to file her motion to open or an appeal from the 2017 alimony modification within the twenty day appeal period, the claims she raised constituted an untimely and impermissible collateral attack on the actions of the modification court, as she could test only whether the court abused its discretion in denying her motion to open and vacate the alimony modification.

Argued May 17—officially released October 25, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Stanley Novack*, judge trial referee, granted the parties' joint motion to modify alimony

and other financial orders; subsequently, the court, *M. Moore, J.*, denied the defendant's motion to open the modified order of alimony and other financial orders, and the defendant appealed to this court. *Affirmed.*

Sol Mahoney, for the appellant (defendant).

Yakov Pyetranker, for the appellee (plaintiff).

Opinion

SEELEY, J. The defendant, Annika Hebrand, appeals from the judgment of the trial court denying her motion to open a 2017 postjudgment modification, following the 2013 dissolution of her marriage to the plaintiff, Karl Anders Hebrand. The defendant claims that (1) the trial court lacked subject matter jurisdiction, in 2017, to modify the dissolution judgment, and (2) the court, in 2020, improperly failed to find fraud in denying her motion to open. Additionally, the defendant set forth a myriad of other claims in support of her efforts to reverse the denial of her motion to open. The plaintiff counters, inter alia, that the defendant's jurisdictional claim is without merit, the court properly determined that the defendant failed to prove her allegations of fraud, and the remainder of her claims are without merit. We agree with the plaintiff, and, accordingly, affirm the judgment of the trial court denying the motion to open.

The following facts and procedural history are relevant to the resolution of this appeal. The parties married on August 10, 1991, in Gislov, Sweden. On October 25, 2011, the plaintiff commenced the underlying dissolution action, alleging that the marriage had broken down irretrievably. On January 17, 2013, the parties entered into a settlement agreement to resolve the financial and

property matters (2013 agreement).[1] The 2013 agreement provided, in relevant part, that the plaintiff would pay alimony to the defendant until her death or remarriage, or until he attained the age of sixty-five. The plaintiff agreed to pay the defendant a monthly amount equal to 27.5 percent of the first $625,000 of his gross earned annual income from employment and an additional 10 percent of his gross earned annual income between $625,000 and $750,000. The 2013 agreement provided that "[i]n the event that the [plaintiff's] compensation changes substantially . . . the [defendant] shall have the right to petition the court for such modification as she believes appropriate." The 2013 agreement also provided for child support to the defendant for the parties' three minor children. The court, *Hon. Stanley Novack*, judge trial referee, dissolved the parties' marriage and incorporated the 2013 agreement into the judgment of dissolution.

On November 15, 2017, the parties jointly moved to modify certain financial aspects of the 2013 agreement. On December 20, 2017, the parties filed a stipulation with the court (2017 modification). The 2017 modification provided that the plaintiff would pay the defendant monthly alimony at a fixed amount of $7000.[2] The parties expressly stated that they had the opportunity to obtain independent legal counsel and that each had been advised by an attorney with respect to the 2017 modification.

[1] The 2013 agreement specifically provided that each party has "received independent advice from counsel of his or her selection and has been fully informed of their legal rights and liabilities and believing this [a]greement to be fair, just and reasonable, has assented to its terms freely and voluntarily . . . ."

[2] The 2017 modification further provided that the defendant was no longer obligated to contribute equally to the extracurricular, nonroutine activities of the parties' children, to the college education expenses for two of the children, or be responsible for any of the children's uninsured and unreimbursed medical expenses.

Judge Novack held a hearing on December 20, 2017, where the parties appeared as self-represented litigants.[3] In response to a question from the court, the defendant stated that she had consulted with an attorney and indicated that the $7000 per month in alimony was fair. She further stated that she voluntarily agreed to the change in alimony and that she had not been forced into it by anyone. The court then granted the parties' motion and issued a new order of alimony in accordance with the parties' stipulation.

On June 29, 2020, the plaintiff moved to modify the judgment.[4] In his motion to modify, he argued that, subsequent to the 2017 modification, a substantial change in circumstances had occurred.[5] The plaintiff represented that his income decreased, his expenses increased, the defendant's expenses decreased, and that "[t]he defendant has been living together with another person under circumstances which should result in the modification, suspension, reduction or termination of alimony because the living arrangements have caused such a change of circumstances as to alter the financial needs for the defendant." The plaintiff sought, inter alia, to reduce or terminate his alimony obligation.

Thereafter, on October 9, 2020, the defendant filed a motion to open the 2017 modification. On February 25,

[3] Neither party filed a certified copy of the transcript from the December 20, 2017 hearing with this court. See Practice Book § 63-8. The defendant included a copy of the nine page transcript in the appendix to her appellate brief. See Practice Book § 67-2 (d).

[4] It does not appear that this motion has been adjudicated by the trial court.

[5] General Statutes § 46b-86 (a) provides in relevant part that, "[u]nless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." See also *Olson* v. *Mohammadu*, 310 Conn. 665, 671–72, 81 A.3d 215 (2013); *Pishal* v. *Pishal*, 212 Conn. App. 607, 614, 276 A.3d 434 (2022).

2021, she filed a second amended motion to open and vacate the 2017 modification. Therein, she set forth fifteen bases for vacating the 2017 modification, including lack of jurisdiction, lack of statutory authority, fraud in the inducement, and mistake. On April 9, 2021, the court, *M. Moore*, *J.*, held a hearing on the defendant's motion.

The court issued its order on April 30, 2021. It stated: "The crux of the defendant's argument is that she and the plaintiff discussed modifying the alimony to a reduced figure which would be nonmodifiable in the event she cohabitated or remarried. The stipulation signed by both parties and approved in 2017 has no such provision regarding nonmodifiable alimony. The defendant now claims that the plaintiff committed fraud in the inducement and misrepresentation of material facts." The court concluded that the defendant had failed to prove, by clear and convincing evidence, that the plaintiff had made a false representation.

Addressing the remainder of the defendant's arguments, the court explained: "The defendant presented several additional bases for reopening and vacating the [2017 modification]: the [modification] was prohibited by the separation agreement, the motion was not properly filed because no fee was paid, motion was not properly titled, lack of jurisdiction, lack of authority, proper authority not cited in motion, lack of finding of substantial change in circumstances, negligent misrepresentation, lack of jurisdiction for retroactive modification of alimony by agreement, mistake, accident, estoppel by nonmodifiable clause, and lack of subject matter jurisdiction. *The defendant failed to provide any credible evidence or case law to substantiate the additional claims made in her motion.* The motion to open and vacate is denied." (Emphasis added.) This appeal followed.

We begin with the applicable standard of review. "Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court . . . to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 5, 164 A.3d 787, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017); see also *Conroy* v. *Idlibi*, 343 Conn. 201, 204, 272 A.3d 1121 (2022). In applying this standard, the court's factual findings will not be disturbed unless they are clearly erroneous. See, e.g., *Lavy* v. *Lavy*, 190 Conn. App. 186, 199, 210 A.3d 98 (2019).

I

The defendant first claims that the court lacked subject matter jurisdiction to modify the dissolution judgment in 2017. Specifically, she argues that the plaintiff labeled his filing as a motion for order, rather than a motion to modify, and failed to pay the required filing fee. The defendant contends that, as a result of these purported defects, the court lacked subject matter jurisdiction to modify the 2013 dissolution judgment. We conclude that the trial court had subject matter jurisdiction to consider and accept the parties' 2017 modification and that the defects alleged by the defendant, even if accepted as true, would not deprive the court of

subject matter jurisdiction.[6] Accordingly, this claim must fail.[7]

[6] We note that had the defendant presented arguments before this court that implicate the subject matter jurisdiction of the trial court, we would need to consider whether the motion to open brought in 2020 was proper or whether it constituted an untimely collateral attack on the 2017 actions of the trial court.

Our Supreme Court has recognized that, "[a]lthough challenges to subject matter jurisdiction may be raised at any time, it is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016); see also *Vogel* v. *Vogel*, 178 Conn. 358, 362, 422 A.2d 271 (1979); *Urban Redevelopment Commission* v. *Katsetos*, 86 Conn. App. 236, 240–44, 860 A.2d 1233 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1289 (2005). As a result of our conclusion that the purported defects set forth by the defendant, even if true, would not have deprived the trial court of subject matter jurisdiction, we need not consider whether her claim constitutes an improper collateral attack on the 2017 modification.

[7] The defendant also made passing references in her appellate brief that the trial court lacked the statutory authority to grant the 2017 modification. "Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *Fusco* v. *Fusco*, 266 Conn. 649, 652, 835 A.2d 6 (2003). Stated differently, "a failure to comply with statutory requirements will implicate only the court's authority to act in accordance with the statute, not the court's subject matter jurisdiction." *GMAT Legal Title Trust 2014-1, U.S. Bank, National Assn.* v. *Catale*, 213 Conn. App. 674, 691, 278 A.3d 1057, cert. denied, 345 Conn. 905, A.3d (2022). The defendant, however, has failed to set forth a complete and persuasive legal argument as to how the court improperly exercised its legal authority in granting the 2017 modification. Furthermore, raising this argument, which does not implicate the court's subject matter jurisdiction,

It is axiomatic that "[s]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016). Although we review the decision of the trial court to grant or deny a motion to open under the abuse of discretion standard, an underlying issue of subject matter jurisdiction presents a question of law subject to plenary review by this court. *Tittle* v. *Skipp-Tittle*, 161 Conn. App. 542, 549, 128 A.3d 590 (2015).

Our Supreme Court expressly has stated that "the Superior Court is a general jurisdiction tribunal with plenary and general subject matter jurisdiction over legal disputes in family relations matters under General Statutes § 46b-1 . . . ."[8] (Citation omitted; footnote omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 776–77. Section 46b-1 provides in relevant part that "[m]atters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving . . . (4) alimony, support, custody and change of name incident

in the 2020 motion to open constitutes an improper collateral attack of the 2017 orders of the trial court.

Additionally, the defendant argued in her appellate brief that the plaintiff failed to provide the court with "any proper authority for granting the [2017 modification]," nor did he provide the court with a copy of the 2013 agreement ordering him to pay alimony. We conclude that these contentions are meritless and do not address them further.

[8] Although the legislature has amended § 46b-1 since the events underlying this appeal; see, e.g., Public Acts 2021, No. 21-78; those amendments have no bearing on the merits of this appeal. All references herein to § 46b-1 are to the current revision of the statute.

to dissolution of marriage, legal separation and annulment . . . .'' It is clear, therefore, that the Superior Court had jurisdiction to consider and grant the postdissolution motion to modify the award of alimony in this case. See *Tittle* v. *Skipp-Tittle*, supra, 161 Conn. App. 549 (§ 46b-1 (4) provides that Superior Court has jurisdiction over disputes in family relations matters, and General Statutes § 46b-86 (a) provides that court has continuing subject matter jurisdiction to modify alimony).

Furthermore, none of the defects alleged by the defendant, even if true, would have deprived the court of subject matter jurisdiction with respect to the 2017 modification. Specifically, the arguments that the plaintiff mislabeled his 2017 motion and failed to pay a required filing fee simply are not jurisdictional in nature. Regarding the former, our case law has recognized that ''a motion is to be decided on the basis of the substance of the relief sought rather than on the form or the label affixed to the motion. . . . It is the substance of a motion, therefore, that governs its outcome, rather than how it is characterized in the title given to it by the movant.'' (Citations omitted.) *State* v. *Taylor*, 91 Conn. App. 788, 791–92, 882 A.2d 682, cert. denied, 276 Conn. 928, 889 A.2d 819 (2005); see also *Silver* v. *Silver*, 200 Conn. App. 505, 520, 238 A.3d 823, cert. denied, 335 Conn. 973, 240 A.3d 1055 (2020). In regard to the latter, this court has noted that the failure to pay a filing fee is not jurisdictional in nature. See *Bruno* v. *Bruno*, 146 Conn. App. 214, 228–29 n.13, 76 A.3d 725 (2013) (mistake by court regarding necessity of filing fee did not deprive it of subject matter jurisdiction to hear motion to open); *Kores* v. *Calo*, 126 Conn. App. 609, 620–21, 15 A.3d 152 (2011) (defendants' failure to pay filing fee did not deprive court of subject matter jurisdiction).[9] Moreover,

[9] In her appellate brief, the defendant claims that the trial court's lack of subject matter jurisdiction to modify the dissolution in 2017 was ''entirely obvious,'' and, therefore, her 2020 jurisdictional challenge did not amount

the defendant has failed to provide us with any authority to support her jurisdictional arguments. Accordingly, the defendant's claim that the court lacked subject matter jurisdiction to consider and grant the 2017 modification is without merit.

II

The defendant next claims that the court improperly failed to find fraud in denying her motion to open. Specifically, she argues that the plaintiff made false statements, which he knew to be untrue, with the intent to induce her to modify the alimony in 2017. Essentially, the defendant disagrees with the court's finding that she failed to establish an element of fraud by clear and convincing evidence.

We begin with the relevant legal principles. "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may

to an untimely collateral attack. Within that discussion, she argues that the December 20, 2017 modification constituted an improper retroactive modification of alimony because the effective date of the $7000 monthly alimony was January 1, 2017. The defendant subsequently argues in her appellate brief that the court lacked the statutory authority to permit the parties to modify the alimony award retroactively.

To the extent that the defendant contends that a claim of an improper retroactive modification of alimony implicated the subject matter jurisdiction of the trial court, we disagree. We emphasize that the Superior Court is provided, by our statutes, with "plenary and general subject matter jurisdiction over legal disputes in family relations matters, including custody and support." (Internal quotation marks omitted.) *O'Bryan* v. *O'Bryan*, 67 Conn. App. 51, 54, 787 A.2d 15 (2001), aff'd, 262 Conn. 355, 813 A.2d 1001 (2003). Regarding the defendant's argument that the court lacked the authority to modify the alimony award retroactively, we conclude that this contention amounts to an untimely and improper collateral attack on the 2017 orders of the trial court. We also note that the trial court rejected this claim on the basis of the defendant's failure to present any evidence or authority in support thereof. Finally, we note that the principle that alimony already accrued may not be modified applies only when a party seeks modification pursuant to § 46b-86, which was not the basis of the 2017 modification. See *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 520, 620 A.2d 1327 (1993).

not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . . This statute, however, does not abrogate the court's common-law authority to open a judgment beyond the four month limitation upon a showing that the judgment was obtained by fraud, duress, or mutual mistake." (Internal quotation marks omitted.) *Karen* v. *Loftus*, 210 Conn. App. 289, 297, 270 A.3d 126 (2022); see generally General Statutes § 52-212a; Practice Book § 17-4. Simply stated, "[u]nder Connecticut law, although a motion to open a judgment normally must be filed within four months of entry of the judgment . . . a motion to open on the basis of fraud is not subject to this limitation . . . ." (Citation omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 153 Conn. App. 625, 631, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

"Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A court's determinations as to the elements of fraud are findings of fact that we will not disturb unless they are clearly erroneous." (Footnote omitted; internal quotation marks omitted.) *Gaary* v. *Gillis*, 162 Conn. App. 251, 256, 131 A.3d 765 (2016); see also *Karen* v. *Loftus*, supra, 210 Conn. App. 300. The defendant bore the burden of proving every element of fraud by clear and convincing evidence. *Sousa* v. *Sousa*, 173 Conn. App. 755, 758, 164 A.3d 702, cert. denied, 327 Conn. 906, 170 A.3d 2 (2017).

In the present case, the court heard the testimony of the parties and considered the evidence.[10] The court noted that the parties had exchanged emails regarding various financial scenarios prior to the execution of the 2017 modification, including the payment of nonmodifiable alimony to the defendant, even in the event that she remarried. "In defendant's exhibit F, the plaintiff provides a draft agreement [which did not include the aforementioned alimony clause] to the defendant which he tells her to forward to her attorney. In the defendant's response, she said her attorney reviewed a prior draft and told her not to sign the agreement. She continued that she was going to proceed with the agreement against the advice of counsel because she did not want to bargain."

In finding that the defendant had failed to meet her burden of proof with respect to the fraud claim, the

[10] "In considering a motion to open the judgment on the basis of fraud . . . the trial court must first determine whether there is probable cause to open the judgment for the limited purpose of proceeding with discovery related to the fraud claim. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim. . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery. See *Oneglia* v. *Oneglia*, [14 Conn. App. 267, 269–70, 540 A.2d 713 (1988)] (approving trial court's position that [i]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held)." (Internal quotation marks omitted.) *Gaary* v. *Gillis*, supra, 162 Conn. App. 256–57; see also *Brody* v. *Brody*, supra, 153 Conn. App. 634 (party seeking to obtain discovery related to allegedly fraudulent conduct that transpired prior to entry of judgment must, consistent with aforementioned precedent, (1) move to open that judgment and (2) demonstrate to trial court that allegations of fraud are founded on probable cause). Our review of the record reveals that an *Oneglia* hearing was not held in the present case. Rather, the court held a hearing on the merits of the defendant's motion to open based on fraud, without a request, or any objection, from the parties for discovery pursuant to *Oneglia*. On appeal, the defendant does not challenge the absence of an *Oneglia* hearing in this matter.

court stated: "The evidence submitted by the plaintiff shows the negotiation between the parties on the terms of the [2017 modification]. One email shows the defendant reviewed the agreement with her attorney who advised her not to sign the [2017 modification]. The defendant signed the [2017 modification] against legal advice. The defendant was not fraudulently induced to sign the agreement by the plaintiff." The court specifically found that the plaintiff did not make a false statement to the defendant with respect to the terms of the 2017 modification or the execution of that document.

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . As such, the trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility." (Internal quotation marks omitted.) *Longbottom* v. *Longbottom*, 197 Conn. App. 64, 75, 231 A.3d 310 (2020). Although the defendant asserts in her brief to this court that the plaintiff secured the 2017 modification by fraud, she has failed to demonstrate that the court's findings were clearly erroneous. As a result of the court's finding that the defendant failed to establish that she was fraudulently induced to join the plaintiff's efforts with respect to the 2017 modification of the dissolution judgment, a finding that has not been shown to be clearly erroneous, we cannot conclude that Judge Moore abused her discretion in denying the motion to open in 2020. "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Jackson*, 334 Conn. 793, 811, 224 A.3d 886 (2020); see also *Johnson* v. *Johnson*, 203 Conn. App. 405, 415–16, 248 A.3d 796 (2021). Accordingly, we conclude that

the trial court did not abuse its discretion in denying the defendant's motion to open.

III

Finally, the defendant presents a multitude of additional arguments challenging Judge Moore's denial of the 2020 motion to open. These additional arguments include challenges to the granting of the parties' 2017 joint motion to modify, namely, that Judge Novack (1) failed to find that a substantial change in circumstances had occurred before approving the 2017 stipulation that resulted in the modification of alimony, and (2) failed to conform the order to distinct and definite changes in the circumstances of the parties.[11] In ruling on the 2020 motion to open, Judge Moore rejected these arguments because "[t]he defendant failed to provide any credible evidence or case law to substantiate the additional claims made in her motion."

In this case, the defendant did not file her motion to open or an appeal from the underlying judgment in 2017 within the twenty day appeal period. See Practice Book

[11] The defendant also claims that the 2017 modification was based on mutual mistake and therefore should have been opened. We agree with Judge Moore's conclusion that the defendant failed to substantiate this claim with evidence and case law. We also note that the plaintiff testified that he would not have signed the 2017 modification in the absence of a change to the alimony award, and the court was free to credit this testimony.

We conclude that the defendant has inadequately briefed her claims that (1) "the motion for order . . . should be opened and vacated by estoppel due to the nonmodifiable clause contained within paragraph 6.7 of the separation agreement," and (2) the court improperly failed to award attorney's fees. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022); *Stilkey* v. *Zembko*, 200 Conn. App. 165, 175, 238 A.3d 78 (2020).

§ 63-1. The defendant's appeal from the denial of the 2020 motion to open, therefore, "can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment." (Internal quotation marks omitted.) *Charbonneau* v. *Charbonneau*, 51 Conn. App. 311, 312–13, 721 A.2d 565 (1998), cert. denied, 247 Conn. 964, 724 A.2d 1125 (1999). We conclude that these challenges raised in the defendant's 2020 motion to open constitute an untimely and impermissible collateral attack on the 2017 actions of the court. We also agree with Judge Moore's conclusion that the defendant failed to provide any credible evidence or case law to substantiate these claims. See *Cimino* v. *Cimino*, supra, 174 Conn. App. 8.

The judgment is affirmed.

In this opinion the other judges concurred.

DIANE DELENA *v.* GREGORY GRACHITORENA ET AL.
(AC 44914)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff grandmother appealed to this court from the order of the trial court denying her petition for visitation with her minor grandchildren brought pursuant to statute (§ 46b-59). The plaintiff, whose testimony was the only evidence presented at the hearing on the petition, claimed that she had had visitation with the children before the termination of the parental rights of the children's biological parents but that the defendants ended that visitation when they became the children's legal guardians. On appeal, the plaintiff claimed that the court improperly applied the factors set forth in § 46b-59 in determining that she did not have a parent-like relationship with the children and improperly emphasized the length of time since she had last seen them. *Held* that the trial court did not err in denying the plaintiff's petition for visitation with the children, as it found that the plaintiff had not demonstrated, by clear and convincing evidence, that she had a parent-like relationship

with them: the court, which found the plaintiff's testimony not credible, determined that the plaintiff had seen the children once in four years and that her relationship with them had changed substantially from when it started in that she had had almost no contact with them since the defendants became their legal guardians; moreover, contrary to the plaintiff's assertions, the record supported the court's finding that the plaintiff had seen the children only once in four years, and it reasonably could be inferred from the court's decision that, pursuant to the factors in § 46b-59 (d), the court considered whether the plaintiff had had regular contact with and a close and substantial relationship with them; furthermore, because the court found that no parent-like relationship with the children existed, it was not required to determine, as the plaintiff claimed, whether the denial of the visitation petition would result in real and significant harm to the children.

Argued September 7—officially released October 25, 2022

Procedural History

Petition for the right of visitation with two minor children for whom the defendants are the legal guardians, brought to the Superior Court in the judicial district of New London at Norwich, where the court, *Newson, J.*, denied the petition and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Alexandra C. Ritter, for the appellant (plaintiff).

Opinion

MOLL, J. The plaintiff, Diane Delena, appeals from the judgment of the trial court denying her petition for visitation with her two minor grandchildren (children) brought pursuant to General Statutes § 46b-59.[1] On appeal, the plaintiff claims that the trial court erred

[1] General Statutes § 46b-59 (b) provides in relevant part: "Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. . . . [T]he court shall grant the right of visitation with any minor child to any person if the court finds after hearing and by clear and convincing evidence that a parent-like relationship exists between the person and the minor child and denial of visitation would cause real and significant harm."

in denying her petition for visitation in that the court improperly applied the factors set forth under § 46b-59 when it determined that the plaintiff did not meet her burden to demonstrate by clear and convincing evidence that she has a parent-like relationship with the children.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On April 6, 2021, pursuant to § 46b-59, the plaintiff filed a verified petition for visitation with the children.[3] The plaintiff alleged that the defendants, Gregory Grachitorena and Leticia Grachitorena, who are the children's paternal grandfather and stepgrandmother, respectively, became the children's legal guardians after the parental rights of the children's biological parents were terminated in 2017 (termination of parental rights).[4] The plaintiff further alleged that she had had visitation with the children prior to the termination of parental rights but that the defendants had abruptly terminated her visitation once they became the legal guardians of the children. In addition, the plaintiff alleged facts seeking to demonstrate that she had a parent-like relationship with the children and that denying her visitation would cause real and significant harm.

A hearing regarding the plaintiff's petition was held on August 5, 2021.[5] The only evidence presented at that hearing was the plaintiff's testimony. At that hearing,

[2] The defendants, Gregory Grachitorena and Leticia Grachitorena, did not file a brief in this court. We therefore decide this appeal on the basis of the record, the plaintiff's brief and appendix, and the plaintiff's oral argument.

[3] In an affidavit accompanying the petition, the plaintiff averred that the children were born in 2010 and 2012.

[4] During the hearing held on the petition, the plaintiff testified that termination proceedings began in 2014 and that the parental rights of the children's biological parents were terminated in 2017.

[5] The record reveals that the defendants did not file appearances in this matter and did not attend the August 5, 2021 hearing.

the plaintiff testified that she believed that the Department of Children and Families (department) did not award her custody of the children after the parental rights of the biological parents had been terminated because she was not a Connecticut resident and, thus, not a resource, during the period of the termination proceedings from 2014 through 2017.[6]

The plaintiff also testified about her relationship with the children, focusing mainly on events that occurred before the termination of parental rights. The plaintiff testified that, for a period before the termination proceedings began, she traveled back and forth between Tennessee and Connecticut to be with her daughter, the children's mother, to help take care of the children. The plaintiff also testified that while she maintained a residence in Connecticut, she lived in Tennessee. The plaintiff testified that, until the termination proceedings began in 2014, in regard to the children, she provided transportation to and from day care, provided swimming and dancing lessons, took them shopping and to medical appointments, taught them how to ride a bike, got them baptized, took them on various recreational activities, and provided financial assistance to her daughter for the care of the children. The plaintiff also testified that she continued visiting the children during the termination proceedings, but that once the defendants became the legal guardians of the children, they denied her visitation despite her several attempts to arrange visitation.

As to the last time that she had seen the children, the plaintiff offered conflicting testimony. At one point, the plaintiff testified that she last saw the children in a parking lot with the defendant Leticia Grachitorena before the onset of the COVID-19 pandemic, presumably in 2019. Later, the plaintiff testified that "[t]he last

[6] The plaintiff testified that, at the relevant times, she resided in Tennessee, Connecticut, and New York.

time [the children] saw me they were screaming, crying, begging me not to let [them] go . . . .'' When asked by the court to specify when that event had occurred, the plaintiff testified that it happened in November, 2017.

On August 6, 2021, the trial court, *Newson*, *J.*, denied the plaintiff's petition for visitation. The court concluded that, ''[b]ased on [the plaintiff's] testimony, the court determines that it does not find it credible that the plaintiff has recently had a parent-like relationship [with the children]. By her own admission, her current relationship with the children has changed substantially from when it started. [The department] did not consider her a Connecticut resident. [The department] also took custody of the minor children seven years ago [in 2014], and the plaintiff has only seen the children once in four years. The court cannot make a finding that there is now a parent-like relationship to meet that statutory burden.'' This appeal followed.

On appeal, the plaintiff claims that the trial court erred in denying her petition. Specifically, the plaintiff argues that the court improperly applied the factors set forth in § 46b-59 when it determined that she did not meet her burden to demonstrate by clear and convincing evidence that she has a parent-like relationship with the children. The plaintiff also contends that the court placed improper emphasis on the length of time since she has seen the children. We disagree.

''Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction

that a mistake has been committed." (Internal quotation marks omitted.) *Jeanette-Blethen* v. *Jeanette-Blethen*, 172 Conn. App. 98, 102, 159 A.3d 236 (2017); see also *DiGiovanna* v. *St. George*, 300 Conn. 59, 69, 12 A.3d 900 (2011) (indicating that appellate review of determinations as to whether parent-like relationship and harm exist as required by § 46b-59 is subject to clearly erroneous standard).

Relevant here, § 46b-59 (c) provides nine nonexclusive factors that a court may consider when determining whether there is a parent-like relationship between the person seeking visitation and the minor child. Section 46b-59 (c) provides that a court "may consider, but shall not be limited to . . . (1) The existence and length of a relationship between the person and the minor child prior to the submission of a petition pursuant to this section; (2) The length of time that the relationship between the person and the minor child has been disrupted; (3) The specific parent-like activities of the person seeking visitation toward the minor child; (4) Any evidence that the person seeking visitation has unreasonably undermined the authority and discretion of the custodial parent; (5) The significant absence of a parent from the life of a minor child; (6) The death of one of the minor child's parents; (7) The physical separation of the parents of the minor child; (8) The fitness of the person seeking visitation; and (9) The fitness of the custodial parent." In addition, § 46b-59 (d) provides that, "[i]n determining whether a parent-like relationship exists between a grandparent seeking visitation pursuant to this section and a minor child, the Superior Court may consider, in addition to the factors enumerated in subsection (c) of this section, the history of regular contact and proof of a close and substantial relationship between the grandparent and the minor child."

Of emphasis in the court's decision was its consideration of the factors set forth in § 46b-59 (c) (1) and (2), particularly the length of time since the plaintiff has had contact with the children. The court found the plaintiff's testimony that she had a recent parent-like relationship with the children not credible, determining that her relationship with the children has "changed substantially from when it started." The court noted that the department did not consider the plaintiff a Connecticut resident at the time of the termination of parental rights in 2017, that the department took custody of the children in 2014, and that the plaintiff had seen the children only "once in four years."[7] Section 46b-59 (c) does not require a court to consider all nine factors enumerated, or to place greater emphasis on some factors over others. Consequently, the court did not err when it concluded that it could not find that the plaintiff had shown by clear and convincing evidence that she has a parent-like relationship with the children, in part because of the length of time since the plaintiff had seen the children and because her relationship with them had "changed substantially from when it started."

The plaintiff's testimony was subject to a credibility determination by the court. "[I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *DE Auto Transport, Inc.* v. *Eurolite, LLC*, 186 Conn. App. 270,

[7] Additionally, the plaintiff argues that the court "improperly weighed" the department's decision not to consider the plaintiff a resource because she was not a Connecticut resident. As noted, the court was not required to consider only the nonexclusive factors enumerated in § 46b-59 (c) and, therefore, was permitted to consider other relevant factors related to the plaintiff's relationship with the children. See *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 731, 205 A.3d 716 (2019) (noting that nine factors enumerated in § 46b-59 (c) are "nonexclusive").

276, 199 A.3d 92 (2018), cert. denied, 330 Conn. 960, 199 A.3d 560 (2019). The court stated that, "[b]ased on [the plaintiff's] testimony," it did not find "it credible that the plaintiff has recently had a parent-like relationship" with the children. From this express language, because the only evidence presented at the hearing was the plaintiff's testimony, it reasonably can be inferred that the court did not find the plaintiff's testimony supporting the existence of a parent-like relationship with the children credible.

The plaintiff next argues that the court was required to consider, in addition to the factors in § 46b-59 (c), the factors in § 46b-59 (d), which the court failed to do. It reasonably can be inferred from the court's decision that, pursuant to § 46b-59 (d), it considered whether the plaintiff had had "regular contact" and a "close and substantial relationship" with the children. As noted previously, the court concluded that the plaintiff's relationship with the children had changed "substantially from when it started," in that she had had almost no contact with the children since the defendants became their legal guardians in 2017. Thus, we are not convinced that the court committed any error under § 46b-59 (d).

Additionally, the plaintiff argues that the court erred in finding that she last saw the children in 2017, instead asserting that she last saw the children in 2019. Contrary to the plaintiff's argument, however, the court did not make a finding that she last saw the children in 2017; rather, it found that she "has only seen the children once in four years" (i.e., the four years prior to the court's August 6, 2021 ruling on the plaintiff's petition for visitation). The court's finding does not specify when the plaintiff last saw the children, and it can be interpreted to mean that the last contact was in 2019. In any event, assuming, arguendo, that the court found that the plaintiff last saw the children in 2017, the record supports that finding. As noted previously, the plaintiff

gave conflicting testimony as to when she last saw the children; the plaintiff testified separately that she last saw the children (1) in 2017 and (2) immediately before the onset of the COVID-19 pandemic. It was within the province of the court to resolve this inconsistent testimony. See, e.g., *Hospital Media Network, LLC* v. *Henderson*, 209 Conn. App. 395, 430, 268 A.3d 657 (2021), cert. denied, 343 Conn. 916, 274 A.3d 867 (2022); id. ("a trier of fact is free to credit one version of events over the other, even from the same witnesses" (internal quotation marks omitted)).

The plaintiff further contends that the court failed to find whether denial of her petition would cause "real and significant harm" to the children. Section 46b-59 (b) requires that a person seeking visitation allege specific and good faith allegations, and show by clear and convincing evidence, that both a parent-like relationship exists between the person and the minor child and that denial of visitation would cause "real and significant harm" to the minor child. Failure to meet this burden on either of the two elements warrants denial of a petition for visitation. Therefore, the court, having found that no such parent-like relationship exists between the plaintiff and the children, was not required to consider whether denial of the petition would cause "real and significant harm." General Statutes § 46b-59 (b).

In sum, we conclude that the court did not err when it found that the plaintiff had not satisfied her burden of showing by clear and convincing evidence that she has a parent-like relationship with the children and in denying the plaintiff's petition for visitation.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSE AYUSO *v.* COMMISSIONER OF CORRECTION (AC 44171)

Prescott, Seeley and Sheldon, Js.

Syllabus

The petitioner sought a writ of habeas corpus, alleging that the respondent Commissioner of Correction had provided him with inadequate treatment for certain medical conditions that constituted deliberate indifference to his medical needs in violation of the eighth amendment to the United States constitution. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petitioner certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner failed to demonstrate that the habeas court abused its discretion by denying his petition for certification to appeal, as the court expressly credited the testimony of the respondent's medical expert, who opined to a reasonable degree of medical certainty that the petitioner had received adequate medical treatment, as well that of the petitioner's treating physician, in finding that the petitioner had received medically appropriate treatment, and this court, on appeal, would not second-guess those credibility determinations.

Argued September 19—officially released October 25, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Chaplin*, *J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Jose Ayuso, self-represented, the appellant (petitioner).

Lisamaria T. Proscino, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Robert S. Dearington*, former assistant attorney general, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Jose Ayuso, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus in which he alleged deliberate indifference to his medical needs in violation of the eighth amendment to the United States constitution. The gravamen of the petitioner's deliberate indifference claim is that the respondent, the Commissioner of Correction, is providing inadequate medical treatment for the petitioner's back pain and for a lump on his inner thigh, including by not providing the petitioner with a magnetic resonance imaging (MRI) scan and back surgery.

In its memorandum of decision, the habeas court expressly credited the testimony of the respondent's medical expert, who opined to a reasonable degree of medical certainty that the petitioner has received adequate medical treatment and that there was no medical indication for either surgery or an MRI scan. On the basis of that expert testimony as well as that of the petitioner's treating physician, the habeas court ultimately found that "the petitioner received medically appropriate treatment for [his leg] [and] for his back pain." The petitioner's arguments on appeal are limited to attacking the credibility determinations of the habeas court, which, as we have repeatedly indicated, we will not second-guess on appeal. See, e.g., *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 887, 173 A.3d 525 (2017) ("[i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court"); *Jolley* v. *Commissioner of Correction*, 98 Conn. App. 597, 599, 910 A.2d 982 (2006) ("[W]e must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole

arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.)), cert. denied, 282 Conn. 904, 920 A.2d 308 (2007). We conclude, on the basis of our review of the record, the briefs, and the arguments of the parties, that the petitioner has failed to demonstrate, in accordance with *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994), that the court abused its discretion by denying his petition for certification to appeal.

The appeal is dismissed.

SUSANNE P. WAHBA *v.* JPMORGAN CHASE BANK, N.A.
(AC 45020)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiff appealed from the trial court's judgment of strict foreclosure in favor of the defendant bank, rendered on remand from this court. On the plaintiff's previous appeal, this court had affirmed a judgment of strict foreclosure rendered in favor of the defendant and remanded the case solely for the purpose of setting new law days. On remand, the defendant filed a motion to reset the law days. The plaintiff objected, contending that the original judgment of strict foreclosure was based on a 2017 appraisal that did not consider a steep rise in Connecticut property values that had occurred since the trial court had rendered judgment. The plaintiff argued that the defendant should be required to file a motion to open the judgment and submit an updated appraisal and updated debt figures to allow the trial court to determine whether strict foreclosure or foreclosure by sale was appropriate. The trial court rejected the plaintiff's argument, reasoning that it was bound by the rescript of this court in in the previous appeal, *Wahba* v. *JPMorgan Chase Bank, N.A.* (200 Conn. App. 852), to only set new law days. *Held* that the plaintiff could not prevail on her claim that the trial court, in rendering its subsequent judgment of strict foreclosure, erred in interpreting this court's remand order as prohibiting it from changing the nature of the judgment to a foreclosure by sale: the plaintiff's claim was foreclosed by *Connecticut National Bank* v. *Zuckerman* (31 Conn. App. 440), in which this court reasoned that, on remand from an appellate court, a trial court cannot deviate from the directions given by the appellate court; moreover, even if it is assumed that the trial court had

the authority, following remand, to change the nature of the judgment to a foreclosure by sale, the plaintiff failed to file a motion to open the judgment for such purpose, nor did she preserve her claim by providing the trial court with an evidentiary foundation to support her argument, which amounted to little more than an unsupported statement of counsel.

Argued September 21—officially released October 25, 2022

Procedural History

Action to recover damages for violations of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim seeking to foreclose a mortgage on certain real property owned by the plaintiff; thereafter, the plaintiff's claim was tried to the jury before *Povodator*, *J.*; verdict for the defendant; subsequently, the defendant's counterclaim was tried to the court, *Povodator*, *J.*; judgment for the defendant on the complaint and on the counterclaim, from which the plaintiff appealed to this court, *Lavine*, *Alvord* and *Harper*, *Js.*, which dismissed the appeal in part and remanded the case for the purpose of setting new law days; thereafter, the court, *Hon. Kenneth Povodator*, judge trial referee, rendered a judgment of strict foreclosure, from which the plaintiff appealed to this court. *Affirmed.*

Thomas P. Willcutts, for the appellant (plaintiff).

Brian D. Rich, with whom, on the brief, was *Anthony E. Loney*, for the appellee (defendant).

Opinion

PER CURIAM. This case returns to us following our decision in *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 241 A.3d 706 (2020), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021), in which this court, inter alia, affirmed a judgment of strict foreclosure rendered in favor of the defendant, JPMorgan Chase Bank, N.A., on its counterclaim seeking foreclosure, and

remanded the case "solely for the purpose of setting new law days." Id., 869. The plaintiff, Susanne P. Wahba, now appeals from the trial court's subsequent judgment of strict foreclosure rendered, on remand, in favor of the defendant.[1] On appeal, the plaintiff claims that the court, in rendering the subsequent judgment of strict foreclosure, erred in interpreting this court's remand order as prohibiting it from changing the nature of the judgment to a foreclosure by sale. We affirm the judgment of the trial court.

The facts and procedural history leading up to *Wahba* are recited therein and need not be repeated here. See id., 855–57. On remand following *Wahba*, on August 13, 2021, the defendant filed a motion titled "motion to reset law days following appeal," seeking only the resetting of the law days. On August 26, 2021, the plaintiff filed an objection to the defendant's motion, contending, as is relevant to this appeal, that the original judgment of strict foreclosure was based on a 2017 appraisal that "does not take into account the steep rise in Connecticut property values that has occurred since the court determined to enter a judgment of strict foreclosure, rather than a foreclosure by sale. The steep rise in property values has been most dramatic for high-end shoreline properties, which describes the [plaintiff's] property at issue here." The plaintiff further argued that the defendant should be required to file a new motion to open the judgment and provide an updated appraisal and updated debt figures to allow the trial court to determine anew whether strict foreclosure was still the appropriate vehicle, instead of a foreclosure by sale. On August 30, 2021, the court granted the defendant's motion to reset the law days, setting new law days to commence on October 19, 2021. In so doing, the court

[1] The defendant's counterclaim named several counterclaim defendants, none of whom is participating in this appeal. See *Wahba* v. *JPMorgan Chase Bank, N.A.*, supra, 200 Conn. App. 855 n.2.

cited *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 689 A.2d 1097 (1997), and reasoned that it was bound by the rescript in *Wahba* simply to set new law days.

On September 17, 2021, the plaintiff filed, without any exhibits, a motion to reargue the August 30, 2021 order, requesting for the first time that the court take judicial notice of a purported value assigned by the real estate website Zillow to the plaintiff's property, which the plaintiff claimed was more than two million dollars greater than the appraised value on which the trial court relied in rendering the original judgment of strict foreclosure. That same day, the court denied the plaintiff's motion to reargue. This appeal followed.[2]

As stated previously in this opinion, the plaintiff claims that the court, in rendering the subsequent judgment of strict foreclosure, erred in interpreting this court's remand order as prohibiting it from changing the judgment to a foreclosure by sale. We reject the plaintiff's claim for the following two independent reasons.

First, the plaintiff's claim is foreclosed by *Connecticut National Bank* v. *Zuckerman*, 31 Conn. App. 440, 441, 624 A.2d 1163 (1993),[3] which addressed the question of whether, on remand from a decision by this court affirming a judgment of strict foreclosure and remanding the case for the purpose of setting new law days, a trial court may entertain a motion to open the judgment for the purpose of ordering a foreclosure by sale instead of a strict foreclosure. In *Zuckerman*, this

[2] On November 8, 2021, the defendant filed a motion to terminate the appellate stay. On December 8, 2021, the trial court granted that motion. On January 25, 2022, this court granted the plaintiff's timely motion for review of termination of stay and granted the relief requested therein, thereby vacating the order terminating the stay.

[3] See *U.S. Bank National Assn.* v. *Rago*, 216 Conn. App. 200, 207 n.9, A.3d (2022) (recognizing that any revisiting of *Zuckerman* would require en banc consideration).

court rejected the defendants' claim that "the [trial] court [on remand] had an option to deviate from our direction and, instead, order foreclosure by sale." Id. This court reasoned that "[i]t is well settled that on a remand from an appellate court, a trial court cannot deviate from the directions given by the appellate court." Id.; see also id., 441–42 (collecting cases). This court further stated that "the trial court . . . could not have taken any action on remand other than to set new law days . . . ." Id., 442.

Second, even assuming arguendo that the court had such post-remand authority to change the nature of a judgment of strict foreclosure to a foreclosure by sale, we reject the plaintiff's claim on appeal because the plaintiff did not file a motion to open the judgment for such purpose (creating a procedural posture akin to *Zuckerman*), nor did she preserve her claim on appeal by providing the trial court with an evidentiary foundation to support her argument, which amounted to little more than the ipse dixit of counsel, that a renewed judgment of strict foreclosure would result in a windfall of more than two million dollars to the defendant.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.