# ATLANTIC ST. HERITAGE ASSOCIATES, LLC *v.* ATLANTIC REALTY COMPANY ET AL. (AC 43857)

Elgo, Moll and Pellegrino, Js.

*Syllabus*

The plaintiff, an entity that owned commercial real property, sought, inter alia, injunctive relief enjoining the defendants, various entities that owned or leased commercial property located to the south of the plaintiff's property within the same city block, from interfering with the plaintiff's right to use a claimed easement area. The plaintiff acquired its real property in 1982, and the defendants, which were all owned or controlled by members of the same family, purchased their respective real properties between 1988 and 2014. Since the acquisition of its property, the plaintiff's members, employees, tenants, and invitees have used a twelve foot wide alleyway located between two of the properties owned by certain of the defendants and a portion of the paved area behind the defendants' properties to access its own gated parking lot. In 2015, the defendants erected a gate at the end of the alleyway that connected to the street and installed a chain barrier across the end of the alleyway that abutted the paved area. During the hours when the retail business that operated out of the defendants' properties was closed, the defendants locked the gate and put the chain barrier in place. After the defendants refused to provide the plaintiff with a key to the gate, the plaintiff commenced the present action, alleging, in its operative complaint, that it had a prescriptive easement over the alleyway and a portion of the paved area. The defendants asserted five special defenses to the plaintiff's complaint prior to its filing of the operative complaint. Thereafter, the plaintiff filed a motion for summary judgment, and the defendants filed a cross motion for summary judgment. The trial court heard oral argument on the parties' cross motions. Thereafter, without seeking leave of the court, the defendants filed an answer to the plaintiff's operative complaint and filed amended special defenses, which reasserted the five original special defenses and also asserted five new special defenses. The trial court granted the plaintiff's motion for summary judgment and denied the defendants' cross motion for summary judgment. On the defendants' appeal to this court, *held*:

1. The trial court improperly granted the plaintiff's motion for summary judgment:

a. To invoke the trial court's authority to grant the plaintiff's motion for summary judgment, the plaintiff was obligated to address any special defenses to its operative complaint that the defendants had properly asserted in accordance with the rules of practice and, in moving for summary judgment, the plaintiff addressed only one of the defendants'

five original special defenses: the trial court improperly adjudicated, sua sponte, the defendants' other four original special defenses that asserted waiver, estoppel, unclean hands, and laches; moreover, the plaintiff was not obligated to address the defendants' new special defenses and the trial court did not err in rejecting the same on procedural grounds because those defenses were not properly before the court, as the defendants did not file them until approximately three weeks after the date of oral argument on the parties' motions for summary judgment, which was beyond the filing period prescribed by the applicable rule of practice (§ 10-61), and they did so without obtaining the trial court's permission. b. The defendants' claim that the trial court improperly determined that there were no genuine issues of material fact as to the plaintiff's prescriptive easement claim was unavailing: the trial court properly rejected the relevant portion of the affidavit submitted in connection with the defendants' cross motion for summary judgment by M, one of the family members who controlled the defendants, because it did not constitute competent evidence pursuant to the applicable rule of practice (§ 17-46), as M's averments regarding the frequency with which the plaintiff used the alleyway were conclusory rather than factual, in that they lacked any indication of the regularity and frequency of M's observations of the vehicular traffic in the alleyway and over the paved area and evidenced his limited familiarity with the plaintiff and his inability to recognize vehicles driven by any of the plaintiff's owners, employees, clients or tenants, other than two individuals; moreover, the trial court did not err in concluding that there were no genuine issues of material fact that the plaintiff's use of the alleyway was under a claim of right because the plaintiff's failure to respond to occasional closures of the alleyway during the prescriptive period did not, on its own, imply that the plaintiff recognized a superior right of the defendants to the alleyway and the defendants' evidence that the parties were friendly with one another and shared parking spaces under certain circumstances was too speculative to infer implied permission on behalf of the defendants, as those facts were disconnected from the plaintiff's use of the alleyway; furthermore, the trial court did not err in concluding that there were no genuine issues of material fact as to whether the plaintiff's use of the claimed easement area was distinguishable from the public's use of that area, and, by comparing the use of both the alleyway and the paved area, the court conducted the correct analysis in making that determination because the plaintiff alleged in its operative complaint that it had acquired a prescriptive easement over both the alleyway and a portion of the paved area, and the defendants' special defense that asserted that the trial court should have considered only the use of the alleyway was procedurally improper because it was raised in the pleading that was filed in violation of Practice Book § 10-61.

2. The defendants' claim that the trial court improperly denied their cross motion for summary judgment was unavailing: the defendants' claim

that the plaintiff could not seek to establish both deeded and prescriptive easements was not properly before the trial court because the defendants did not include such claim in their summary judgment submissions and, instead, asserted it for the first time at oral argument on the parties' motions for summary judgment and reasserted it in the pleading that the trial court deemed was procedurally improper pursuant to Practice Book § 10-61; moreover, because the defendants did not challenge on appeal the trial court's rejection of the claim on procedural grounds, this court did not reach the merits of the claim; furthermore, even if this court assumed that the defendants had properly raised the claim before the trial court, it would still fail because the plaintiff abandoned its deeded easement claims by withdrawing those counts from its complaint and by filing its operative complaint, which alleged only a prescriptive easement over the claimed easement area.

Argued September 9, 2021—officially released November 22, 2022

*Procedural History*

Action for, inter alia, a temporary and permanent injunction prohibiting the defendants from restricting the plaintiff's access to a claimed easement area, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the plaintiff's motions to cite in 200 Atlantic, LLC, and 210 Atlantic, LLC, as party defendants; thereafter, the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the plaintiff's motion for summary judgment, denied the defendants' cross motion for summary judgment, and rendered judgment thereon, from which the defendants appealed to this court. *Reversed in part*; *further proceedings*.

*Arthur N. Chagaris*, pro hac vice, with whom was *John R. Harness*, for the appellants (defendants).

*Michael J. Cacace*, with whom, on the brief, was *Nicholas W. Vitti*, *Jr.*, for the appellee (plaintiff).

*Opinion*

MOLL, J. The defendants, Atlantic Realty Company, 200 Atlantic, LLC, 210 Atlantic, LLC, 252 Atlantic Street,

LLC, and Safavieh Atlantic, LLC, appeal from the judgment of the trial court granting a motion for summary judgment filed by the plaintiff, Atlantic St. Heritage Associates, LLC, and denying their cross motion for summary judgment vis-à-vis the plaintiff's second amended complaint claiming a prescriptive easement over certain property at issue.[1] As to the summary judgment rendered in favor of the plaintiff, the defendants claim that the court (1) lacked the authority to grant the plaintiff's motion for summary judgment because, in moving for summary judgment, the plaintiff failed to address their special defenses, and (2) improperly determined that no genuine issues of material fact exist as to the plaintiff's prescriptive easement claim.[2] We agree in part with the defendants' first claim that the court lacked the authority to grant the plaintiff's motion for summary judgment, such that we reverse the summary judgment rendered in favor of the plaintiff and remand the case for further proceedings. Additionally, because it is sufficiently likely to arise on remand, we will address the defendants' second claim that the court incorrectly determined that there are no genuine issues of material fact regarding the plaintiff's prescriptive easement claim. As to the denial of their cross motion for summary judgment, the defendants claim that, as a matter of law, the plaintiff is precluded from asserting both deeded and prescriptive easement rights simultaneously. This claim is untenable. Accordingly, insofar as the defendants appeal from the denial of their cross

[1] "The denial of a motion for summary judgment is ordinarily not an appealable final judgment; however, if parties file cross motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal. See *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 132 Conn. App. 629, 630 n.2, 33 A.3d 783 (2011), [aff'd, 308 Conn. 146, 61 A.3d 485 (2013)]." *Hannaford* v. *Mann*, 134 Conn. App. 265, 267 n.2, 38 A.3d 1239, cert. denied, 304 Conn. 929, 42 A.3d 391 (2012).

[2] For ease of discussion, we address the defendants' claims in a different order than they are presented in the defendants' principal appellate brief.

motion for summary judgment, we affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. In 1982, the plaintiff acquired commercial property located at 184 Atlantic Street in Stamford. Between 1988 and 2014, the defendants, which are entities owned or controlled by several nonparty family members, acquired parcels of commercial property situated to the south of the plaintiff's property on the same city block. Specifically, Atlantic Realty Company acquired 234 Atlantic Street in 1988; 252 Atlantic Street, LLC, acquired 252 Atlantic Street in 1994; and 200 Atlantic, LLC, and 210 Atlantic, LLC, acquired 200 Atlantic Street and 210 Atlantic Street, respectively, in 2014.[3] Safavieh Atlantic, LLC, is a retail rug and furniture business, owned by the family members who own or control the other defendants, that leases the premises at those locations.

Located between 234 Atlantic Street and 252 Atlantic Street is a twelve foot wide alleyway (alleyway) providing a route from Atlantic Street to a paved area behind 200 Atlantic Street, 210 Atlantic Street, and 234 Atlantic Street (paved area), which connects to a gated parking lot that services the plaintiff's property.[4] In 2015, the defendants erected a gate at the western end of the alleyway facing Atlantic Street and installed a chain barrier across the eastern end of the alleyway abutting the paved area. The defendants lock the gate and put the

[3] We note that there is evidence in the record suggesting that 210 Atlantic Street was purchased sometime between 2005 and 2007. In their respective summary judgment submissions filed in this matter, however, the parties appeared to agree that the defendants acquired 210 Atlantic Street in 2014. Thus, we consider it to be undisputed that 210 Atlantic Street was acquired in 2014.

[4] The parties do not appear to dispute that, in addition to the alleyway, there is a driveway that provides ingress to and egress from the paved area, although that driveway does not connect directly to Atlantic Street.

chain barrier in place during the hours when Safavieh Atlantic, LLC, is closed for business. The defendants have refused to provide the plaintiff with a key to the gate.

In July, 2016, the plaintiff commenced the present action against Atlantic Realty Company, 252 Atlantic Street, LLC, and Safavieh Atlantic, LLC. In count one of its original, three count, verified complaint, the plaintiff alleged that it owned a deeded easement right to the alleyway. In count two, the plaintiff alleged that, pursuant to General Statutes § 47-37, it had acquired a prescriptive easement over the alleyway. In count three, the plaintiff alleged that it owned a deeded easement right to a thirty foot right-of-way in the paved area linking the alleyway to the plaintiff's parking lot. On October 28, 2016, Atlantic Realty Company, 252 Atlantic Street, LLC, and Safavieh Atlantic, LLC, filed a verified answer denying the plaintiff's material allegations. Additionally, these defendants asserted five special defenses directed to all three counts of the original complaint, namely, (1) failure to state a claim on which relief can be granted, (2) waiver, (3) estoppel, (4) unclean hands, and (5) laches.[5]

On November 14, 2017, the plaintiff filed a motion to cite in 200 Atlantic, LLC, and 210 Atlantic, LLC, as additional defendants and requested permission to file an amended, verified complaint. On December 8, 2017, after the trial court, *Povodator*, *J.*, had granted its motion without objection, the plaintiff filed an amended, three count, verified complaint, which was identical to the original complaint other than (1) setting forth the interests of 200 Atlantic, LLC, and 210 Atlantic, LLC, and (2) expanding the scope of count two by

[5] The second, third, fourth, and fifth special defenses were identical with respect to all three counts of the plaintiff's original complaint. The first special defense set forth distinct allegations as to each count.

alleging a prescriptive easement over both the alleyway and a portion of the paved area connecting the alleyway to the plaintiff's parking lot. Atlantic Realty Company, 252 Atlantic Street, LLC, and Safavieh Atlantic, LLC, did not plead further in response to the amended complaint, whereas 200 Atlantic, LLC, and 210 Atlantic, LLC, filed an answer and special defenses that tracked the other defendants' October 28, 2016 pleading.

On April 26, 2019, the plaintiff filed a motion for summary judgment, accompanied by a supporting memorandum of law, exhibits, and affidavits, as to count two of its amended complaint alleging a prescriptive easement. Among the affidavits submitted by the plaintiff were personal affidavits of Richard A. Silver and David S. Golub, two of the plaintiff's members, and of Jonathan A. Blauner, an employee of the plaintiff. On June 18, 2019, the defendants filed a memorandum of law in opposition to the plaintiff's motion for summary judgment, accompanied by exhibits and affidavits, and, on June 21, 2019, they filed a cross motion for summary judgment, which incorporated their June 18, 2019 memorandum of law and the accompanying exhibits and affidavits, as to the plaintiff's amended complaint. Among the affidavits submitted by the defendants were the personal affidavits of Michael Yaraghi (Michael) and Arash Yaraghi (Arash), two of the family members who own or control the defendants. On August 5, 2019, the plaintiff filed a combined memorandum of law replying to the defendants' objection to its motion for summary judgment and objecting to the defendants' cross motion for summary judgment.

On August 27, 2019, the plaintiff withdrew counts one and three of its amended complaint, which had alleged deeded easement rights to the alleyway and to a portion of the paved area, respectively. The same day, the plaintiff moved for permission to file a second amended complaint, submitted with its motion, which

the court granted without objection on September 9, 2019. The sole count of the second amended complaint (operative complaint) alleged that the plaintiff had acquired in 1997 a prescriptive easement over the alleyway and a portion of the paved area leading to its parking lot (claimed easement area). As relief, the plaintiff sought (1) a declaratory judgment establishing that it has prescriptive rights to use the claimed easement area without interference from the defendants and (2) preliminary and permanent injunctions barring the defendants from interfering with its use of the claimed easement area. On September 12, 2019, the plaintiff filed a revised motion for summary judgment, which relied solely on its prior summary judgment submissions, seeking summary judgment as to the prescriptive easement claim raised in its operative complaint. On September 23, 2019, the court heard oral argument on the parties' cross motions for summary judgment.

On October 15, 2019, without seeking leave of the court, the defendants filed an answer to the plaintiff's operative complaint denying the plaintiff's material allegations. Additionally, the defendants filed amended special defenses, reasserting the original five special defenses set forth in their prior pleadings and asserting five new special defenses. The amended third, fifth, sixth, seventh, and eighth special defenses substantively tracked the original five special defenses asserted previously as to count two of the plaintiff's prior complaints. The amended first special defense alleged that the plaintiff was precluded from claiming a prescriptive easement over the claimed easement area because, in its original complaint and in its amended complaint, it had asserted deeded easement rights to the same. The amended second special defense alleged, affirmatively, that the plaintiff has a deeded easement right to a portion of the paved area located behind 200 Atlantic Street and 210 Atlantic Street, thereby precluding the plaintiff

from simultaneously claiming a prescriptive easement over the same. The amended fourth special defense alleged that the plaintiff used the claimed easement area with the permission of the prior owner of the defendants' properties and that such permission was revoked subsequently. The amended ninth special defense alleged that the plaintiff had used the claimed easement area with the implied permission of the defendants because, through its conduct, the plaintiff had recognized the defendants' superior claim to the claimed easement area. The amended tenth special defense alleged that the plaintiff had failed to state a claim on which relief can be granted in light of its recognition of the defendants' superior claim to the claimed easement area. On November 15, 2019, the plaintiff filed a reply denying the allegations of the amended special defenses.

On January 15, 2020, the court issued a memorandum of decision granting the plaintiff's motion for summary judgment, as revised, and denying the defendants' cross motion for summary judgment. The court concluded that "the plaintiff has established its right to summary judgment as to its claim of prescriptive easement; it has established that there is no material issue of fact and that it has used the claimed easement area in a manner that was open, visible, continuous, and uninterrupted for fifteen years and made under a claim of right." With regard to the defendants' cross motion for summary judgment, the court concluded that the defendants had failed to negate any element of the plaintiff's prescriptive easement claim.[6] As to the defendants' ten amended special defenses, the court rejected the five defenses asserted for the first time in the defendants'

[6] The court also determined that, insofar as the defendants had moved for summary judgment on the first and third counts of the plaintiff's amended complaint, which had been withdrawn, the defendants' cross motion for summary judgment was moot.

October 15, 2019 pleading as procedurally improper; nevertheless, the court proceeded to discuss, and reject, the merits of all ten defenses. As relief, the court (1) declared that the plaintiff had a prescriptive easement extending through the alleyway and over a portion of the paved area leading to the parking lot located behind its property,[7] and (2) enjoined the defendants from "unreasonably interfering with the use of the prescriptive easement," which included "locking access to any portion of the easement in a manner that interferes with the plaintiff's use of the easement area," although "brief closures for maintenance type activities and for construction type activities [were] presumptively permissible . . . ." This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the defendants' claims, we set forth the standard of review applicable to this appeal and relevant legal principles. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to

[7] Specifically, the court ruled that the plaintiff had a prescriptive easement over (1) the full width of the entire alleyway and (2) a ten foot path in the portion of the paved area behind 210 Atlantic Street and 234 Atlantic Street that continued through the portion of the paved area behind 200 Atlantic Street, excluding a segment that had been used for parking, and up to the boundary of the plaintiff's property.

the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45].[8] . . . Our review of the trial court's decision to grant [or to deny a] motion for summary judgment is plenary." (Footnote in original; internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 835–36, 277 A.3d 200 (2022).

The plaintiff's operative complaint alleged a prescriptive easement claim pursuant to § 47-37, which provides: "No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years." "The well established statutory elements necessary to establish an easement by prescription are that the use is (1) open and visible, (2) continuous and uninterrupted for fifteen years, and (3) engaged in under a claim of right." (Internal quotation marks omitted.) *Faught* v. *Edgewood Corners, Inc.*, 63 Conn. App. 164, 168, 772 A.2d 1142, cert. denied, 256 Conn. 934, 776 A.2d 1150 (2001).

[8] "Practice Book § 17-45 (a) provides: 'A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents.' " *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 836 n.14, 277 A.3d 200 (2022).

I

With respect to the trial court's decision granting the plaintiff's motion for summary judgment, the defendants claim that the court (1) lacked the authority to grant the plaintiff's motion because, in moving for summary judgment, the plaintiff failed to address their special defenses, and (2) improperly determined that no genuine issues of material fact exist vis-à-vis the plaintiff's prescriptive easement claim. We agree in part with the defendants' first claim that the court lacked the authority to render summary judgment in the plaintiff's favor, and, therefore, the court's decision granting the plaintiff's motion for summary judgment must be reversed and the case must be remanded for further proceedings. Although our resolution of the defendants' first claim is dispositive of the portion of the appeal taken from the summary judgment rendered in the plaintiff's favor, because it is sufficiently likely to arise on remand, we will also address the defendants' second claim. See *Budlong & Budlong, LLC* v. *Zakko*, 213 Conn. App. 697, 714 n.14, 278 A.3d 1122 (2022) ("[a]lthough our resolution of the defendant's first claim is dispositive of this appeal, we also address the defendant's second claim because it is likely to arise on remand").

A

The defendants claim that the court lacked the authority to grant the plaintiff's motion for summary judgment because, in moving for summary judgment, the plaintiff did not address their special defenses. For the reasons that follow, we agree in part with the defendants.

The following additional procedural history is relevant to our resolution of this claim. By the time that the court heard oral argument on the parties' cross motions for summary judgment on September 23, 2019, the defendants had asserted the following five special

defenses directed to the prescriptive easement claim set forth in the plaintiff's operative complaint: (1) failure to state a claim on which relief can be granted on the basis of the public's use of the alleyway; see part I B 2 b of this opinion; (2) waiver; (3) estoppel; (4) unclean hands; and (5) laches (original special defenses). In its memorandum of law in support of its motion for summary judgment, the plaintiff argued that the original special defense asserting failure to state a claim was meritless; however, the plaintiff did not address the four other special defenses.

On October 15, 2019, approximately three weeks following oral argument, the defendants filed an answer accompanied by amended special defenses directed to the plaintiff's operative complaint (October 15, 2019 pleading). In addition to reasserting the five original special defenses, the defendants asserted five new special defenses, which we summarized previously in this opinion (new special defenses). The defendants did not seek leave of the court to file the October 15, 2019 pleading.

In granting the plaintiff's motion for summary judgment, the court discussed the ten amended special defenses asserted in the October 15, 2019 pleading. At the outset, the court determined that the October 15, 2019 pleading was procedurally improper because the defendants had failed either (1) to comply with Practice Book § 10-61[9] by filing it within ten days after the plaintiff had filed its operative complaint or (2) to seek

[9] Practice Book § 10-61 provides: "When any pleading is amended the adverse party may plead thereto within the time provided by Section 10-8 or, if the adverse party has already pleaded, alter the pleading, if desired, within ten days after such amendment or such other time as the rules of practice, or the judicial authority, may prescribe, and thereafter pleadings shall advance in the time provided by that section. If the adverse party fails to plead further, pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading."

permission to file it pursuant to Practice Book § 10-60.[10] Additionally, insofar as the defendants had asserted the five new special defenses, the court noted that the defenses were raised after the court had heard oral argument on the parties' cross motions for summary judgment, such that "the parties did not brief the issues in the [new] special defenses . . . did not have an opportunity to submit evidence relating to the new [special defenses] (or identify 'old' evidence already before the court that would be relevant), and did not have an opportunity to argue the issues presented by the new special defenses." The court further noted that, although the plaintiff had filed a reply denying the allegations of the amended special defenses, it had not consented in advance to the amendment and had no opportunity to address the new special defenses in its summary judgment submissions. The court continued: "Under these unique if not bizarre circumstances, the court believes it appropriate to reject the new special defenses that were added as a matter of fundamental fairness."[11] Notwithstanding its rejection of the new special defenses as procedurally defective, the court discussed, and rejected, the merits of all ten defenses.

On appeal, relying chiefly on *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 185 A.3d 643 (2018), the defendants claim that the court lacked the authority to grant the plaintiff's motion for summary judgment because, in moving for summary judgment, the plaintiff failed to address their special defenses either by (1) challenging the legal sufficiency of the defenses or (2)

[10] Pursuant to Practice Book § 10-60 (a), except as provided in Practice Book § 10-66, which governs amendments to statements of amounts in demand, a pleading may be amended "(1) [b]y order of judicial authority; or (2) [b]y written consent of the adverse party; or (3) [b]y filing a request for leave to file an amendment . . . ."

[11] The court determined that the five original special defenses reasserted by the defendants in the October 15, 2019 pleading were not procedurally improper.

submitting competent evidence to demonstrate that no genuine issues of material fact exist vis-à-vis the defenses. The defendants further contend that, insofar as the court rejected the merits of their special defenses, the court committed error by considering the defenses sua sponte, that is, without the plaintiff having addressed them in its summary judgment submissions. We agree with the defendants only with regard to the four original special defenses asserting waiver, estoppel, unclean hands, and laches.

In *Mollo*, which involved an appeal taken from a judgment of strict foreclosure, the dispositive issue was whether the trial court lacked the authority to grant the plaintiff's motion for summary judgment as to liability only on the ground that, in moving for summary judgment, the plaintiff had failed either to attack the legal sufficiency of the defendant's special defenses or to submit competent evidence establishing that there were no genuine issues of material fact with regard to the defenses. Id., 784. In its operative motion for summary judgment and supporting memorandum of law, the plaintiff asserted that there were no genuine issues of material fact with respect to the allegations of its complaint. Id., 786. The motion for summary judgment appeared on the short calendar of March 14, 2016, for argument. Id., 787. Three days prior to the short calendar hearing, on March 11, 2016, the defendant filed (1) an answer, in which he denied that the plaintiff was entitled to any relief or that the plaintiff could establish that it was entitled to the equitable remedy of foreclosure, (2) special defenses asserting unclean hands, fraudulent inducement, and equitable estoppel, (3) a counterclaim, and (4) an objection to the motion for summary judgment, which was untimely pursuant to Practice Book (2016) § 17-45. Id., 787–88. In his objection to the plaintiff's motion for summary judgment, the defendant argued that his special defenses were

legally sufficient and there were genuine issues of material fact relating thereto. Id., 788. At the short calendar hearing, the court overruled the defendant's objection and granted the plaintiff's motion for summary judgment.[12] Id., 789. In doing so, "[t]he court made only passing references to the defendant's special defenses . . . . The court indicated that it did not 'see anything wrong in the making of [the promissory note at issue] except that [the defendant] made a bad bargain.' " Id., 789–90. The court subsequently rendered a judgment of strict foreclosure, from which the defendant appealed. Id., 790.

On appeal, this court observed that rendering summary judgment as to liability only in the plaintiff's favor would have been proper "if the complaint and supporting affidavits had established an undisputed prima facie case and the defendant had failed to assert any legally sufficient special defense." Id., 793. This court then concluded that "the [trial] court lacked authority to render summary judgment as to liability in favor of the plaintiff with respect to the factual or legal viability of the defendant's special defenses because the issues relating to the special defenses remained outside the scope of the plaintiff's motion for summary judgment." Id., 796. This court recognized that, as a consequence of the defendant's "last-minute filing," the plaintiff had

[12] In *Mollo*, the plaintiff's counsel was present at the beginning of the short calendar hearing, but the defendant's counsel was not. *Nationstar Mortgage, LLC* v. *Mollo*, supra, 180 Conn. App. 788. The plaintiff's counsel argued that the defendant's objection to its motion for summary judgment as to liability only was untimely. Id., 788–89. Alternatively, if the court were to consider the defendant's objection, the plaintiff's counsel argued that the plaintiff should be granted additional time to amend its motion for summary judgment. Id., 789. Without the defendant's counsel present, the court overruled the defendant's objection and granted the plaintiff's motion. Id. Later that day, while the plaintiff's counsel was still present, the defendant's counsel arrived, and the court agreed to rehear argument. Id. After hearing additional argument, the court again overruled the defendant's objection and maintained its decision granting the plaintiff's motion. Id.

not addressed the defendant's special defenses in its summary judgment submissions. Id., 797. Nevertheless, in light of the defendant's special defenses, this court determined that the plaintiff should have marked off argument on the motion for summary judgment so as to permit it to file "a new pleading addressing the special defenses with an accompanying brief and/or competent evidence sufficient to establish their legal insufficiency or that no genuine issue of material fact exists."[13] Id., 798. As summarized by this court, "on the basis of the facts of [the] case . . . the [trial] court acted in excess of its authority when it raised and considered, sua sponte, grounds for summary judgment not raised or briefed by the plaintiff." Id.; see also id., 790 n.11 ("[w]e disagree with the plaintiff's position that, despite the fact that its . . . motion for summary judgment did not address the defendant's special defenses, the court had the authority to [decide] whether the defendant sufficiently [pleaded] his special defenses . . . and whether any deficiency could not be cured by repleading" (internal quotation marks omitted)). Accordingly, this court reversed the judgment rendered in favor of the plaintiff and remanded the case for further proceedings according to law. Id., 798.

Applying the rationale of *Mollo* to this appeal,[14] we conclude that, to invoke the trial court's authority to grant the plaintiff's motion for summary judgment, the plaintiff was obligated to address any special defenses to its operative complaint that the defendants had

[13] This court noted that it did not countenance the defendant's late filing of his objection to the plaintiff's motion for summary judgment as to liability only, but that the defendant's conduct did "not justify the [trial] court's consideration of the plaintiff's motion as having adequately raised and refuted the special defenses so as to justify granting summary judgment." *Nationstar Mortgage, LLC* v. *Mollo*, supra, 180 Conn. App. 795 n.14.

[14] Although *Mollo* concerned an appeal filed in a foreclosure action; *Nationstar Mortgage, LLC* v. *Mollo*, supra, 180 Conn. App. 783; we do not read *Mollo* as limiting its rationale to foreclosure matters only.

asserted properly in accordance with our rules of practice. The only special defenses meeting this requirement were the five original special defenses, those being (1) failure to state a claim on which relief can be granted on the basis of the public's use of the alleyway, (2) waiver, (3) estoppel, (4) unclean hands, and (5) laches. In its memorandum of law supporting its motion for summary judgment, the plaintiff expressly addressed the original special defense sounding in failure to state a claim; however, the plaintiff's summary judgment submissions were silent as to the other four defenses. Accordingly, the court improperly adjudicated, sua sponte, the four original special defenses asserting waiver, estoppel, unclean hands, and laches, such that the court committed error in granting the plaintiff's motion for summary judgment.[15]

We reach a different conclusion, however, with respect to the five new special defenses that the defendants asserted in the October 15, 2019 pleading. The court rejected the new special defenses on, inter alia, procedural grounds because the defendants had filed them approximately three weeks after oral argument on the parties' cross motions for summary judgment, well beyond the filing period prescribed by Practice Book § 10-61, and without the court's permission. In other words, the new special defenses were not properly before the court, thereby absolving the plaintiff of any obligation to address them in order to invoke the court's authority vis-à-vis its motion for summary judgment.[16]

[15] The plaintiff argues that any error with respect to the four original special defenses is harmless because the court rejected them on the merits, which the defendants do not address on appeal. This argument is unavailing, however, because *Mollo* instructs that the court could not consider, sua sponte, the merits of these special defenses without the plaintiff addressing them in its summary judgment submissions. See *Nationstar Mortgage, LLC* v. *Mollo*, supra, 180 Conn. App. 798.

[16] The defendants do not challenge on appeal the court's rejection of the new special defenses as procedurally improper and, thus, we do not discuss the propriety of that ruling.

In sum, because the plaintiff did not address the defendants' four original special defenses asserting waiver, estoppel, unclean hands, and laches in its summary judgment submissions, we conclude that the plaintiff failed to invoke the court's authority to grant its motion for summary judgment and that the court improperly addressed these defenses sua sponte. Accordingly, we conclude that the court improperly granted the plaintiff's motion for summary judgment.[17]

B

The defendants also claim that the court improperly determined that there are no genuine issues of material fact as to the plaintiff's prescriptive easement claim. There are two subsets to this claim. First, the defendants assert that the court committed error in "disregard[ing]" a portion of the personal affidavit of Michael (Michael affidavit) that they filed as part of their summary judgment submissions. Second, the defendants contend that, even if the court properly "disregarded" the relevant portion of the Michael affidavit, there are genuine issues of material fact as to whether (1) the plaintiff's use of the alleyway was under a claim of

Additionally, we note that the amended ninth and tenth special defenses, individually or collectively, alleged that the defendants had given the plaintiff implied permission to use the claimed easement area and that the plaintiff had recognized the defendants' superior claim to the claimed easement area. Although these issues were not properly asserted as special defenses, such that the plaintiff was not obligated to discuss them to invoke the court's authority as to its motion for summary judgment, these issues were addressed in the parties' respective summary judgment submissions and analyzed elsewhere in the court's decision. See part I B 2 a of this opinion.

[17] Consistent with this court's rescript in *Mollo*, we reverse the judgment of the trial court granting the plaintiff's motion for summary judgment and remand the case for further proceedings according to law. It will remain within the trial court's discretion on remand as to whether to grant leave for the filing of (1) an amended answer and special defenses to the extent leave is requested and required under Practice Book § 10-60 (a) (3) and/or (2) any additional motions for summary judgment under the circumstances of the present case.

right, and (2) the plaintiff's use and the public's use of the alleyway were indistinguishable. These contentions are unavailing.

Before continuing with the merits of each of these contentions, we first highlight that the court did not disregard, or ignore, a portion of the Michael affidavit. To the contrary, the court expressly considered it. As we set forth in more detail in part I B 1 of this opinion, the court explained that it rejected any evidentiary value of Michael's statement as to frequency of use because it was conclusory rather than factual and that, as a result of the lack of foundation, Michael's opinion as to frequency of use did not constitute competent evidence for purposes of Practice Book § 17-46. Thus, mindful of the court's actual treatment of the Michael affidavit, we consider the defendants' contentions.

1

The defendants argue that the court erred in rejecting a portion of the Michael affidavit on the basis that it did not constitute competent evidence pursuant to Practice Book § 17-46.[18] We disagree.

[18] The defendants also claim that the court improperly concluded that the portion of the Michael affidavit at issue could be disregarded pursuant to the "sham affidavit" rule, which "refers to the trial court practice of disregarding an offsetting affidavit in opposition to a motion for summary judgment that contradicts the affiant's prior deposition testimony" and which has yet to be adopted expressly by our appellate courts. (Internal quotation marks omitted.) *Kenneson* v. *Eggert*, 176 Conn. App. 296, 310, 170 A.3d 14 (2017). Briefly, we note that, in replying to the defendants' objection to its motion for summary judgment, the plaintiff asserted that the Michael affidavit conflicted with Michael's prior deposition testimony, which was elicited on December 12, 2018, and, thus, constituted a sham affidavit. In its decision, the court stated in a footnote that, "[w]ere the sham affidavit rule [to] be adopted in Connecticut . . . the court would have no hesitation about determining it to be applicable here"; however, the court expressly declined to adopt and to apply the rule in this case, instead "prefer[ring] to rely on established rules of evidence" and determining that the relevant portion of the Michael affidavit was not competent evidence pursuant to Practice Book § 17-46. Accordingly, we need not address the defendants' claim regarding the sham affidavit rule, and we leave for another day the question of whether the rule is a viable doctrine in Connecticut.

Practice Book § 17-46 provides in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." Section 17-46 "sets forth three requirements necessary to permit the consideration of material contained in affidavits submitted in a summary judgment proceeding. The material must: (1) be based on 'personal knowledge'; (2) constitute facts that would be admissible at trial; and (3) affirmatively show that the affiant is competent to testify to the matters stated in the affidavit." *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 251, 654 A.2d 748 (1995). "Affidavits that fail to meet the criteria of . . . § 17-46 are defective and may not be considered to support the judgment. Defects in affidavits include such things as assertions of facts or conclusory statements." *U.S. Bank Trust, N.A.* v. *Dallas*, Superior Court, judicial district of Litchfield, Docket No. CV-16-6013346-S (May 24, 2021) (reprinted at 213 Conn. App. 487, 491, 278 A.3d 1141), aff'd, 213 Conn. App. 483, 278 A.3d 1138 (2022); see also *Stuart* v. *Freiberg*, 316 Conn. 809, 828, 116 A.3d 1195 (2015) (averments in affidavit that are conclusory are "inadequate to defeat a summary judgment motion"); *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793–94, 749 A.2d 1144 (2000) ("[a] conclusory assertion . . . does not constitute evidence sufficient to establish the existence of a disputed material fact for purposes of a motion for summary judgment"); Black's Law Dictionary (8th Ed. 2004) p. 308 (defining "conclusory" as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based"). The question before us is whether the court properly rejected the relevant portion of the Michael affidavit on the basis that the averments contained therein were conclusory.

The following additional procedural history is relevant to our disposition of this claim. In support of the plaintiff's motion for summary judgment, the plaintiff submitted personal affidavits of Silver, Golub, and Blauner. Silver and Golub averred that they had been members of the plaintiff since 1982 and were partners at a law firm now known as Silver Golub & Teitell LLP (SGT), which moved its offices into the plaintiff's property in 1982. Silver and Golub further averred, individually or collectively, that, between 1982 and 2014, (1) they used the claimed easement area to access the plaintiff's parking lot "on a daily basis," and (2) the claimed easement area was used "on a daily basis" by (a) the plaintiff's members and employees, (b) SGT's personnel, business invitees, family, and friends, and (c) the plaintiff's other tenants and their invitees. Blauner averred that, since 1990, he has been employed either by the plaintiff or by SGT and that, during his years of employment prior to 2015, (1) he used the claimed easement area "regularly and routinely" to access the plaintiff's parking lot and (2) other SGT personnel utilized the claimed easement area "on a regular daily basis . . . ."

In opposing the plaintiff's motion for summary judgment, the defendants submitted, inter alia, the Michael affidavit. Michael averred that, beginning in June, 1988, he was "primarily responsible for the day-to-day management of . . . Safavieh Atlantic, LLC," and that he was present at the 234 Atlantic Street and 252 Atlantic Street properties "almost daily until the early 2000s," after which he "frequently visited" the properties, "although not on a daily basis."[19] Michael further averred that, "during [his] time on the [d]efendants'

[19] The defendants also submitted the transcript of Michael's deposition taken on December 12, 2018, which contains testimony in line with his averments regarding his responsibilities as to Safavieh Atlantic, LLC, and his presence on the defendants' properties.

propert[ies], [he] saw [Silver and Blauner] use the [a]lleyway to access [the plaintiff's property] only a couple of times," that "[a]t some point, [the defendants] learned that . . . Silver would use the [a]lleyway from time to time and that . . . Blauner would use the [a]lleyway on occasion to access [the] [p]laintiff's parking lot," and that he "[did] not know of any additional or unique use of the [a]lleyway by [the] [p]laintiff." Moreover, Michael averred that (1) other than with respect to Silver and Blauner, he did not know what vehicles the plaintiff's owners, employees, clients, or tenants drove, and (2) there are no windows in the defendants' buildings that overlook the alleyway.

In granting the plaintiff's motion for summary judgment, the court determined that Michael's averments regarding the frequency with which the plaintiff, through its representatives, used the alleyway did not constitute competent evidence pursuant to Practice Book § 17-46 because they were "conclusory rather than factual, absent any indication of regularity and frequency of observations." The court further explained: "An assertion that the principals of the defendants—chiefly Michael—have seen only occasional (rare) use of the claimed easement[20] by principals of the plaintiff is intended to suggest, without explicitly stating, that the usage is sporadic. Stating that an observer has only seen an event infrequently does not, without more (e.g., some sense of frequency and intensity of observation), support a reasonable inference that the event occurs only infrequently.

"From a different perspective, this is a variation of the difficulties in proving a negative—this is an attempt

[20] Although the court used the phrases "claimed easement" and "claimed easement area" in its analysis, we note that Michael's averments concerned only the plaintiff's use of the alleyway rather than the claimed easement area as a whole.

to prove an almost negative. Merely stating only occasional observations of the plaintiff's principals or staff using the claimed easement area does not, without more, imply negation of regular use. Absent some level of monitoring of use of the alleyway and rear of the defendants' buildings, or some equivalent ability to assert some absolute quality to the 'occasional-ness' of the observations, the statement of only occasional observations is essentially anecdotal rather than factual in a general sense. It may be rare to see a neighbor from the far end of the street drive past one's residence, but that would not support a reasonable inference that that neighbor only rarely or sporadically does drive on the street—except perhaps if accompanied by a statement that the observer regularly spends the day in a chair facing and observing the street. There is nothing in the record suggesting much less establishing that the defendants' principals spend extensive periods of time watching persons driving through the alleyway and into the [paved] area behind their buildings. Indeed, [Michael and Arash] testified that there are no windows on the sides of the buildings providing a direct view of the alleyway, and that there are no windows in the rears of the buildings, such that observations would only be made at times they were physically outside and presumably to the rear of the buildings (since there would not seem to be much reason to stand in the alleyway). Without more, it would be unreasonable to infer that someone working in a commercial enterprise with no windows facing in the relevant directions can characterize the frequency of use of blocked from view passageways by specific drivers of vehicles.

"Additionally, [Silver and Blauner] are only a small percentage of the class of claimed users—other employees of the law firms with offices in the plaintiff's building and their clients and invitees. And, almost trivially, persons going to the plaintiff's building early in the morning, before the defendants' principals arrive, would be

unseen. The defendants indicated very limited familiarity with the plaintiff's personnel—apparently knowing/recognizing only [Silver and Blauner] . . . . Therefore, they would have no way of knowing whether someone seen driving over the claimed easement area was a client or employee or otherwise an invitee to the plaintiff's premises unless they made a conscious effort to watch the person so as to determine the eventual destination."[21] (Emphasis omitted; footnoted added.) In sum, the court concluded that, "[a]bsent a foundation, a statement as to frequency of use (and, especially, [one that is] limited to only two of the people who worked in the building, and ignoring the unknown drivers [Michael] might have seen heading to the plaintiff's building as actual or potential clients) is no better than conclusory if not speculative. Absent a foundation, statements as to claimed frequency of use must be rejected pursuant to Practice Book § 17-46."

The defendants maintain that the court improperly rejected Michael's averments regarding the frequency of the plaintiff's use of the alleyway. They argue that, in light of the evidence reflecting that Michael was present at 234 Atlantic Street and 252 Atlantic Street almost daily between 1988 and the early 2000s and charged with managing the premises, there is a "logical inference that [he] was not only inside of the premises during his work week, [but that] in order to maintain

[21] The court also stated that, in asserting its prescriptive easement claim, the plaintiff was not contending that the claimed easement area was the sole means providing access to its parking lot but, rather, that, as a result of the configuration of the surrounding roads, the claimed easement area provided the only reasonable route to the plaintiff's parking lot for drivers traveling southbound on Atlantic Street. As the court further explained, "[t]he failure to observe particular drivers using the alleyway . . . could only be of any significance if it were known that the driver was headed southbound on Atlantic Street—a northbound driver likely would never be seen by the defendants' principals or witnesses but the failure to observe such individuals would be of no significance to the regularity of use."

the propert[ies], he necessarily was frequently and regularly outside and about the grounds of the propert[ies], on the sidewalk in front of the propert[ies], in the alleyway, and outside in the parking lot and the rear of the defendants' properties," such that, "on a daily basis, he was capable of and in fact made frequent observations as to the vehicular traffic moving through the alleyway and towards the rear of the building[s]." The defendants also contend that Blauner's affidavit buttresses their position, as Blauner averred that, while he was driving to and from the plaintiff's parking lot, he "often" saw Michael.[22] We are not persuaded.

First, we do not agree that Michael's averments logically infer that he was "frequently and regularly outside" observing vehicles traversing the alleyway. Although Michael's regular presence on the premises in his role as the day-to-day manager of the defendants' business may infer that he witnessed *some* vehicular traffic around the defendants' properties, we are not convinced that it follows, without more specific averments, that he was making "frequent observations" daily as proposed by the defendants. Additionally, we do not consider Blauner's averment that he "often" encountered Michael while driving to and from the plaintiff's parking lot as providing a sufficient foundation to render Michael's averments as to the plaintiff's frequency of use competent under Practice Book § 17-46.

Second, assuming arguendo that the record demonstrates that Michael was making "frequent observations" of vehicular traffic on a daily basis, the defendants cannot overcome the other flaw recognized by

[22] Blauner averred in relevant part that, "[i]n or about the late 1990s, I became acquainted with Michael . . . . I often saw [Michael] as I was driving on over the paved area behind 234 Atlantic [Street] to or from the [plaintiff's] parking lot. . . . We frequently exchanged pleasantries . . . . There is no question that he observed me driving over his properties (including up and down the alleyway) to and from [the plaintiff's] parking lot."

the court, namely, that Michael's averments focused only on two individuals associated with the plaintiff, Silver and Blauner. Michael did not aver that he witnessed Golub or others with connections to the plaintiff utilize the alleyway infrequently; rather, he averred that he "[did] not know of any additional or unique use of the [a]lleyway by [the] [p]laintiff." Moreover, Michael averred that, although he recognized the vehicles driven by Silver and Blauner, he did not know which vehicles the plaintiff's other owners, employees, clients, or tenants drove. Given his limited familiarity with the plaintiff, Michael's averments as to the plaintiff's frequency of use did not constitute competent evidence under Practice Book § 17-46.

In sum, we conclude that the court properly rejected the relevant portion of the Michael affidavit pursuant to Practice Book § 17-46.

2

The defendants next assert that, even if the court properly rejected the relevant portion of the Michael affidavit, there are genuine issues of material fact regarding whether the plaintiff's use of the alleyway was (1) under a claim of right, and (2) indistinguishable from the public's use of the same.[23] We disagree.

[23] The defendants also assert that there are genuine issues of material fact as to whether the plaintiff has a deeded easement right to a portion of the paved area, which, the defendants posit, would defeat the plaintiff's prescriptive easement claim. The defendants raised this issue for the first time by way of their amended second special defense asserted in their October 15, 2019 pleading, which the court rejected as procedurally improper. See part I A of this opinion. The defendants do not claim on appeal that the court committed error in rejecting this issue on procedural grounds. Thus, although the court discussed the merits of the amended second special defense after it had deemed the defense to be procedurally defective and determined that there was no evidence of a deeded easement, we decline to address the defendants' claim that there exist genuine issues of material fact regarding a deeded easement because of their failure to challenge the other, procedural basis for the court's disposition of this issue.

a

The defendants contend that the court improperly determined that there are no genuine issues of material fact as to whether the plaintiff's use of the alleyway was under a claim of right.[24] We are not persuaded.

"Use made under a claim of right means use that is made without recognition of the rights of the owner of the servient tenement. . . . To establish an easement by prescription it is absolutely essential that the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised. . . . The use must occur without license or permission and must be unaccompanied by any recognition of [the right of the owner of the servient tenement] to stop such use. . . .

"The claim of right requirement serves to ensure that permissive uses will not ripen into easements by prescription by requiring that the disputed use be adverse to the rights of the owner of the servient tenement. . . . Nevertheless, it is not necessary in order that a use be adverse that it be made either in the belief or under a claim that it is legally justified. . . . Instead, the essential quality is that the use not be made in subordination to those against whom it is claimed to be adverse." (Citations omitted; internal quotation marks omitted.) *Crandall* v. *Gould*, 244 Conn. 583, 590–91, 711 A.2d 682 (1998).

"The requirement that the [use] must be exercised under a claim of right does not necessitate proof of a claim actually made and brought to the attention of the owner . . . . It means nothing more than a [use] as of right, that is, without recognition of the right of the landowner, and that phraseology more accurately

[24] The defendants limit their claim to the alleyway as opposed to the claimed easement area as a whole.

describes it than to say that it must be under a claim of right." (Internal quotation marks omitted.) *Cirinna* v. *Kosciuszkiewicz*, 139 Conn. App. 813, 822, 57 A.3d 837 (2012); see also *Wadsworth* v. *Zahariades*, 1 Conn. App. 373, 376, 472 A.2d 29 (1984) ("[t]he term 'under a claim of right' denotes a user who does not recognize the rights of an owner of a servient estate"). "[When] there is no proof of an express permission from the owner of the servient estate, on the one hand, or of an express claim of right by the person or persons using the way, on the other, the character of the [use], whether adverse or permissive, can be determined as an inference from the circumstances of the parties and the nature of the [use]." (Internal quotation marks omitted.) *Cirinna* v. *Kosciuszkiewicz*, supra, 822.

It is well established that a "[u]se by express or implied permission or license cannot ripen into an easement by prescription." (Internal quotation marks omitted.) *Gallo-Mure* v. *Tomchik*, 78 Conn. App. 699, 705, 829 A.2d 8 (2003). "There is a distinction made in our case law between the terms 'permission' and 'acquiescence' in the context of a prescriptive easement claim. On this point, the following excerpt from *Phillips* v. *Bonadies*, [105 Conn. 722, 726, 136 A. 684 (1927)] is particularly illuminating: 'In the very nature of [prescriptive easement] case[s] . . . every such user is by permission of the owner of the servient tenement in the sense that he permits it to continue without exercising his right to terminate it. A permissive user therefore as distinguished from one exercised under a claim of right is not to be inferred from mere passive acquiescence. The facts and circumstances must be such as to warrant the inference of a license exercised in subordination to the rights of the owner of the soil and which he may revoke at any time.' . . . As the *Phillips* court admonished, permissive use should not be confused with 'passive acquiescence.' The two terms have vastly

different impacts. If there is permission granted to use the contested property, then the user of the land is acting in subordination to the ownership rights of the servient landowner, and the claim of prescriptive easement arising out of his use is negated. In contrast, passive acquiescence does not indicate such subordination and permits the finding of a prescriptive easement. Id. For this reason, *Phillips* emphasized the importance of an indication of subordinate conduct in determining whether there was permissive or acquiescent conduct." (Emphasis omitted.) *Gallo-Mure* v. *Tomchik*, supra, 707–708.

The following additional procedural history is relevant to our resolution of this claim. In support of the plaintiff's motion for summary judgment, Silver and Golub averred, individually or collectively, in relevant part as follows. In 1982, the plaintiff purchased 184 Atlantic Street by way of a warranty deed recorded on the Stamford land records. Prior to purchasing 184 Atlantic Street, the plaintiff was told by the prior owner that whoever owned 184 Atlantic Street also possessed deeded easement rights to use the claimed easement area to access the property's parking lot. After acquiring 184 Atlantic Street in 1982, and with the understanding that they had deeded easement rights to do so, Silver, Golub, and the plaintiff's other members used the claimed easement area to access the plaintiff's parking lot. Additionally, for more than thirty years thereafter and without seeking or receiving permission from the defendants, the plaintiff's members, employees, business invitees, tenants, and invitees of its tenants used the claimed easement area to access the plaintiff's parking lot. The plaintiff relied on this evidence to claim that there was no genuine issue of material fact that it had used the claimed easement area under a claim of right.

In support of the defendants' objection to the plaintiff's motion for summary judgment, Michael and Arash averred, individually or collectively, in relevant part as follows. During renovations performed on 234 Atlantic Street in 1988 and on 252 Atlantic Street in 1994, which occurred immediately after each property had been purchased, the defendants blocked the alleyway on several occasions for periods ranging from one day to one week. In addition, the defendants closed the alleyway periodically to perform maintenance and repaving. The plaintiff never objected to or inquired as to the alleyway's closures. This evidence, the defendants argued, raised a genuine issue of material fact as to whether the plaintiff's use was under a claim of right because it indicated that the plaintiff had recognized their superior right to the alleyway.

In addition, the defendants argued that there was a genuine issue of material fact as to the claim of right requirement in light of evidence indicating that they gave implied permission to the plaintiff to use the alleyway as a neighborly accommodation. In support of this argument, the defendants relied on affidavits and deposition testimony indicating that, inter alia, (1) Michael and Arash were aware of, and did not object to, the plaintiff's use of the alleyway, (2) Blauner exchanged pleasantries with Michael, (3) the plaintiff often allowed the defendants to use its parking lot during weekends, and (4) the defendants permitted the plaintiff to use parking spots located behind 200 Atlantic Street and 210 Atlantic Street.

In granting the plaintiff's motion for summary judgment, the court concluded that there were no genuine issues of material fact that the plaintiff had used the claimed easement area under a claim of right. The court determined that, irrespective of whether the plaintiff owned valid deeded easement rights to the claimed easement area, there was no genuine issue of material

fact that the plaintiff believed that it owned such rights. Additionally, the court rejected the defendants' arguments that the evidence indicated that (1) the plaintiff had recognized their superior right vis-à-vis the alleyway and (2) they had given the plaintiff implicit permission to use the alleyway as a neighborly accommodation.

On appeal, the defendants assert that there are genuine issues of material fact as to whether the plaintiff used the alleyway under a claim of right in light of the evidence demonstrating that they occasionally closed the alleyway during the prescriptive period, thereby restricting the plaintiff's access to the alleyway, without objection or inquiry from the plaintiff. The defendants maintain that the plaintiff's inaction following the alleyway's closures indicated that the plaintiff acknowledged their superior right to the alleyway. We disagree with the supposition that the plaintiff's failure to respond to the alleyway's closures, which were intermittent, implies that the plaintiff recognized the defendants' ability to stop the plaintiff's use. See, e.g., *Frech* v. *Piontkowski*, 296 Conn. 43, 59, 994 A.2d 84 (2010) (rejecting defendants' claim that there was insufficient evidence adduced at trial supporting trial court's determination that plaintiffs used defendants' reservoir under claim of right when evidence demonstrated, inter alia, that plaintiffs did not respond to defendants' "intermittent attempts" to prevent plaintiffs' use of reservoir). Given that "[p]rescriptive easements, unlike title gained by adverse possession, do not require exclusive use by the claimant"; *Gallo-Mure* v. *Tomchik*, supra, 78 Conn. App. 706 n.4; we cannot conclude that the defendants' sporadic, temporary closures of the alleyway to perform maintenance and repairs, even to the sole benefit of the defendants, operated to undermine the plaintiff's claim of right, particularly when the record, viewed in the light most favorable to the defendants, reflects that

the plaintiff resumed use of the alleyway when it reopened and the closures prevented all users, not only the plaintiff, from traveling across the alleyway.

The defendants also claim that there are genuine issues of material fact because of evidence indicating that they had granted the plaintiff implied permission to use the alleyway as a neighborly accommodation. The defendants cite evidence reflecting that they did not object to the plaintiff's known use of the alleyway, that the parties were friendly with one another, and that the parties shared parking spaces under certain circumstances. None of this evidence creates genuine issues of material fact. A landowner's mere failure to object to a claimant's use, notwithstanding knowledge of the claimant's use, does not signify implied permission. See id., 707–708 (discussing difference between permission and passive acquiescence). Moreover, we deem it far too speculative to infer implied permission from evidence indicating that the parties had a friendly relationship and shared parking spaces at times, which are wholly disconnected from the plaintiff's use of the alleyway.[25]

In sum, we conclude that the court did not err in concluding that there were no genuine issues of material fact that the plaintiff's use of the alleyway was under a claim of right.[26]

[25] In support of their argument, the defendants rely in part on evidence reflecting an agreement reached by the parties that enabled the defendants to use the plaintiff's parking lot in exchange for the plaintiff using parking spaces located to the rear of 200 Atlantic Street. Such evidence, however, is irrelevant because it is undisputed that 200 Atlantic Street was purchased in 2014, well after the plaintiff had acquired the prescriptive easement in 1997.

[26] The defendants claim that *Sachs* v. *Toquet*, 121 Conn. 60, 183 A. 22 (1936), supports their claim. We disagree. In *Sachs*, the parties were abutting landowners who, by way of deed, had the right to use a common, ten foot driveway without interference from one another. Id., 62–63. One of the issues addressed by our Supreme Court on appeal was whether the trial court's subordinate findings supported its conclusion that the plaintiff had acquired a prescriptive right "to permit vehicles to stand upon the driveway

b

The defendants also assert that the court improperly determined that there are no genuine issues of material fact as to whether the plaintiff's use and the public's use of the alleyway were indistinguishable. We reject this claim.

"Where the use of a right-of-way is in common with the public, the common use is considered to negate a presumption of grant to any individual use. In such a case, the individual user must, in order to establish an independent prescriptive right, perform some act of which the servient owner is aware and which clearly indicates his individual claim of right. . . . A finding that the use made by the claimant and his predecessors in title was not different from that made by the general public is fatal to the establishment of any prescriptive right in the claimant." (Citation omitted; internal quotation marks omitted.) *Gioielli* v. *Mallard Cove Condominium Assn., Inc.*, 37 Conn. App. 822, 829–30, 658 A.2d 134 (1995).

for such reasonable length of time as would reasonably permit the loading and unloading of goods at the rear door of his store." Id., 65–66. Our Supreme Court concluded that "[t]he trial court ha[d] not found that [the] plaintiff's use was exercised under a claim of right or that it was adverse. It ha[d] found facts which clearly establish that it was not of that character. The temporary parking of vehicles in the driveway while loading or unloading might have continued for years without interfering with the use of the driveway by the defendants, and such parking would be more consistent with a permissive use as a matter of neighborly accommodation than an invasion of the defendants' rights under a claim of right." Id., 66–67. Moreover, the trial court found that, except for one instance that occurred shortly before the filing of the action, the plaintiff moved vehicles parked on the driveway on request to allow other vehicles to pass, which, our Supreme Court determined, "disclose[d] that [the] plaintiff's use of the driveway for parking was accompanied by a recognition of the right of the defendants to pass and repass without interference by such parking, and it is inconsistent with the claim that such parking was exercised under a claim of right." Id., 67. In short, we do not construe the circumstances of the present case to be akin to the facts in *Sachs* demonstrating permissive use and recognition of the defendants' right as to the property.

The following additional procedural history is relevant to our disposition of this claim. In its memorandum of law in support of its motion for summary judgment, acknowledging that the defendants had raised the "public use" doctrine as a special defense, the plaintiff argued that there was no genuine issue of material fact that its use of the claimed easement area was distinguishable from the public's use because, unlike the plaintiff, the public never used the entirety of the claimed easement area for the purpose of reaching the plaintiff's parking lot.

In support of the defendants' objection to the plaintiff's motion for summary judgment, Arash and Michael averred that, following the purchase of 234 Atlantic Street in 1988, they observed members of the general public use the alleyway (1) to access parking spaces located in a portion of the paved area behind 200 Atlantic Street and 210 Atlantic Street, some of whom would then walk to patronize businesses fronting on Atlantic Street, or (2) as a shortcut to reach a nearby mall via the driveway providing ingress and egress to the paved area. They further averred that they did not observe the plaintiff use the alleyway in any "distinct" manner relative to the general public. The defendants relied on this evidence to argue that there were genuine issues of material fact as to whether the plaintiff's use of the alleyway was indistinguishable from the public's use.

In granting the plaintiff's motion for summary judgment, the court determined that there were no genuine issues of material fact that the plaintiff's use of the alleyway *and* the paved area, collectively, was distinguishable from the public's use of the same. The court reasoned that, although there was a partial overlap in the routes used by the plaintiff and the public to traverse the alleyway and the paved area, there was a segment of the paved area adjacent to the plaintiff's parking lot that the public did not utilize, which was sufficient to

distinguish the plaintiff's use of the alleyway *and* the paved area from that of the public's.[27]

On appeal, the defendants do not contest the court's determination that the plaintiff used a portion of the paved area that the public did not, which was the foundation of the court's conclusion that there was no genuine issue of material fact that the plaintiff's use of the alleyway *and* the paved area was distinguishable from the public's use. Instead, the defendants contend that the court committed error by failing to compare the plaintiff's use and the public's use of the alleyway only, without considering the manner in which the paved area was utilized. The defendants iterate their position that the plaintiff owns a deeded easement right to a portion of the paved area and, as such, the plaintiff cannot establish a prescriptive easement over the same. See footnote 23 of this opinion. Consequently, the defendants posit, any usage of the paved area is irrelevant to the issue of whether a prescriptive easement exists as to the alleyway. The defendants further contend that, when the issue is properly framed, there are genuine issues of material fact as to whether the plaintiff's use and the public's use of the alleyway were indistinguishable.

The defendants' claim merits only a brief discussion. In its operative complaint, the plaintiff alleged that it had acquired a prescriptive easement over both the alleyway *and* a portion of the paved area for the purpose of accessing its parking lot from Atlantic Street, and

[27] The court also seemed to question whether the defendants' evidentiary submissions as to whether there was a consistent public use of the alleyway and the paved area were conclusory rather than factual. Insofar as the court deemed their evidentiary submissions to be conclusory, the defendants argue that the court's determination was improper. We do not construe the court's decision to reflect that the court, in fact, rejected the defendants' evidentiary submissions in this regard. Indeed, the court's analysis focused on whether there was a distinction between the public's use and the plaintiff's use. Thus, we need not address this claim.

the plaintiff's revised motion for summary judgment sought summary judgment as to that claim. At no point prior to asserting their amended second special defense in the October 15, 2019 pleading did the defendants claim that the plaintiff has a deeded easement right to a portion of the paved area,[28] and the court deemed that defense to be procedurally improper.[29] Thus, the court conducted the correct analysis in comparing the uses by the plaintiff and the public of the alleyway *and* the paved area collectively, and, therefore, we reject the defendants' claim.

II

In addition to challenging the trial court's decision granting the plaintiff's motion for summary judgment, the defendants claim that the court improperly denied their cross motion for summary judgment. The limited basis of this claim is that, as a matter of law, the plaintiff is precluded from asserting both deeded and prescriptive easement rights, and, therefore, the defendants are entitled to summary judgment. We reject this claim.

The following additional procedural history is relevant here. After withdrawing counts one and three of its amended complaint, which alleged deeded easement rights to the alleyway and a portion of the paved area, respectively, the plaintiff filed its operative, one count complaint alleging a prescriptive easement right to the claimed easement area. The operative complaint set forth certain allegations referencing deeded rights vis-à-vis the claimed easement area. Paragraph 7 alleged

[28] In their principal appellate brief, the defendants represent that they never disputed that the plaintiff has a deeded easement right to use a portion of the paved area to access its parking lot. As the court recognized in its memorandum of decision, however, that representation is belied by the record.

[29] As we explained in footnote 23 of this opinion, we decline to examine whether there is a genuine issue of material fact as to whether the plaintiff has a deeded easement right to a portion of the paved area.

that the prior owner of 184 Atlantic Street informed the plaintiff "that 184 Atlantic [Street] had deeded rights of access to Atlantic Street over the [claimed easement area]." Paragraphs 8 and 9 alleged that the deeds of prior owners of 184 Atlantic Street contained "easements authorizing [the] use of the [claimed easement area] . . . ." Paragraph 25 alleged: "The plaintiff's original warranty deed from [the prior owner of 184 Atlantic Street] inadvertently failed to properly reflect the plaintiff's right to use the [claimed easement area] to travel between Atlantic Street and the 184 Atlantic [Street] parking lot. Although the inadvertent error in the deed was corrected by a subsequent deed from [the prior owner of 184 Atlantic Street] recorded on the Stamford land records in 2015, the defendants take the position that the easement rights provided in the plaintiff's 2015 (corrected) deed are invalid and that the plaintiff has no deeded right to use the [claimed easement area]."

During oral argument on the parties' cross motions for summary judgment, for the first time, the defendants argued that the plaintiff's prescriptive easement claim was untenable in light of the allegations in paragraphs 7, 8, 9, and 25 of its operative complaint, which, according to the defendants, indicated that the plaintiff was alleging deeded easement rights. The defendants maintained that the plaintiff could not assert both prescriptive and deeded easement rights, as the deeded easement right would negate the adversity element of a prescriptive easement claim. In response, the plaintiff argued that the purpose of paragraphs 7, 8, 9, and 25 of the operative complaint was to set forth "the belief of [the plaintiff] that [it] had rights to use [the claimed easement area] and that [such use] was adverse to the other property owner[s] and that [the plaintiff] didn't need permission [and] never asked for permission." The plaintiff further iterated that it "[chose] to proceed solely on the prescriptive easement matter here."

On the record, the court questioned whether the plaintiff was asserting deeded easement rights, observing that the plaintiff had withdrawn and abandoned counts one and three of its prior complaints. The court further construed the allegations in the operative complaint referencing deeded easement rights as indicating that (1) the plaintiff held a belief that it had deeded easement rights to the claimed easement area and (2) there is a dispute as to whether such deeded easement rights exist, such that the plaintiff decided not to pursue a claim seeking to establish deeded easement rights. Additionally, the court rejected, as speculative, an argument raised by the defendants that the plaintiff could seek to resurrect its deeded easement claims if its prescriptive easement claim failed.

Approximately three weeks following argument on the parties' cross motions for summary judgment, the defendants filed the October 15, 2019 pleading directed to the plaintiff's operative complaint. In their amended first special defense, the defendants alleged that the plaintiff's prescriptive easement claim failed because, in its original complaint and in its amended complaint, the plaintiff affirmatively alleged that it had deeded easement rights to the claimed easement area.

In granting the plaintiff's motion for summary judgment, the court rejected the October 15, 2019 pleading, including the defendants' amended first special defense, as procedurally improper. See part I A of this opinion. In further discussing the amended first special defense, the court determined that (1) the plaintiff was not prohibited from pleading both prescriptive and deeded easement rights as alternative theories, and (2) the plaintiff had abandoned its deeded easement claims, instead pursuing its prescriptive easement claim only, such that the existence of deeded easement rights was no longer an issue before the court and the "historical existence of past claims of deeded easement rights is

not a defense to the prescriptive easement claim before the court."

On appeal, the defendants assert that, as a matter of law, the plaintiff cannot seek to establish both deeded and prescriptive easements, and, therefore, they are entitled to summary judgment vis-à-vis their cross motion for summary judgment.[30] This claim is untenable for two reasons.

First, this issue was not properly raised before the trial court. Nowhere in their summary judgment submissions did the defendants assert that they were entitled to summary judgment on this ground. The defendants presented this issue for the first time during oral argument on the parties' cross motions for summary judgment, and they later raised it in their October 15, 2019 pleading by way of their amended first special defense, which the court deemed to be procedurally improper. The defendants do not challenge on appeal the court's rejection of this claim on procedural grounds, and, thus, we need not reach the merits of this claim.

Second, assuming arguendo that the defendants properly raised this claim before the trial court, the claim fails because the plaintiff abandoned its deeded easement claims by withdrawing counts one and three of its amended complaint and, thereafter, by filing its operative complaint alleging a prescriptive easement over

[30] This claim is distinct from the defendants' separate claim, concerning the summary judgment rendered in favor of the plaintiff, that there are genuine issues of material fact as to whether the plaintiff owns a deeded easement right to a portion of the paved area. See footnote 23 of this opinion. This distinction is further delineated by the amended first and second special defenses asserted by the defendants. In the amended first special defense, the defendants alleged that the plaintiff could not maintain a prescriptive easement claim because, in its original complaint and in its amended complaint, the plaintiff pleaded that it owned deeded easement rights. In the amended second special defense, the defendants alleged that, in fact, the plaintiff owned deeded easement rights.

the claimed easement area. Whether the plaintiff previously had alleged deeded easement rights is of no moment.[31] Moreover, insofar as the operative complaint contained allegations referencing deeded easements, we construe those allegations as (1) evincing a belief by the plaintiff that it possessed deeded easement rights during the prescriptive period, which was germane to the claim of right element of the plaintiff's prescriptive easement claim, and (2) recognizing that there is a dispute as to whether the plaintiff owns deeded rights, such that the plaintiff was abandoning its pursuit of its deeded easement claims in favor of a prescriptive easement claim. Thus, after it had filed its operative complaint, the plaintiff was not alleging both deeded and prescriptive easement rights simultaneously.

In sum, we reject the defendants' claim that the court improperly denied their cross motion for summary judgment.

The judgment is reversed only as to the decision granting the plaintiff's motion for summary judgment and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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## DAVID TAYLOR *v.* COMMISSIONER OF CORRECTION (AC 44665)

Prescott, Suarez and Bishop, Js.

*Syllabus*

The petitioner, a citizen of the United Kingdom who had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, that his

[31] The defendants reassert their argument that the plaintiff could seek to reinstate its deeded easement claims in the event that its prescriptive easement claim is unsuccessful. Like the trial court, we reject this contention as purely speculative.

constitutional rights to procedural due process and equal protection were violated when the respondent Commissioner of Correction assigned a certain risk level to him, classified him as a public safety risk and limited his access to certain prison rehabilitative programs and other services. The habeas court dismissed the petition, concluding that it lacked subject matter jurisdiction over the petitioner's claims. On the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court properly dismissed the habeas petition with respect to the petitioner's procedural due process claim, the petitioner having failed to sufficiently allege, under the stigma plus test, a cognizable liberty interest over which the court had subject matter jurisdiction; contrary to the petitioner's contention that being assigned a certain risk level and classified as a public safety risk satisfied the stigma portion of the stigma plus test, he failed to sufficiently allege facts that, if taken as true, established stigma, as it appeared that the respondent was mindful that the petitioner was a British citizen subject to deportation upon completion of his sentence, and it was likely that his conviction of murder itself was the source of any stigma of being a public safety risk.
2. The habeas court improperly dismissed the petitioner's equal protection claim, in which he sufficiently alleged that he was treated differently from similarly situated prisoners because of his alienage and British citizenship; in the present case, because the habeas petition alleged that the respondent denied the petitioner access to rehabilitative programs and other services that were available to inmates who are United States citizens, the petitioner sufficiently alleged a cognizable violation of his right to equal protection, and, as alienage and national origin are suspect classifications, he sufficiently pleaded that the applicable statutes (§§ 18-81w, 18-81x and 18-81z), as applied, burdened a suspect class of persons, notwithstanding the respondent's narrow interpretation of the habeas petition as asserting a class of one claim.
3. The habeas court improperly dismissed the petitioner's claim that he was subjected to cruel and unusual punishment as a result of the respondent's management of the COVID-19 virus at the correctional facility in which the petitioner was incarcerated; the petitioner sufficiently pleaded that the COVID-19 virus and the conditions of his confinement put his life at risk because of his preexisting medical conditions and that the respondent was deliberately indifferent to and disregarded that risk because social distancing and the use of personal protective equipment were not enforced among inmates or prison staff.

Argued May 10—officially released November 22, 2022

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland, where the court, *Bhatt, J.*, granted the respondent's motion to dismiss the petition and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Bhatt, J.*, issued an articulation of its decision. *Reversed in part*; *further proceedings*.

*Alexander T. Taubes*, assigned counsel, for the appellant (petitioner).

*Zenobia G. Graham-Days*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (respondent).

*Opinion*

BISHOP, J. The petitioner, David Taylor,[1] appeals from the judgment of the habeas court dismissing his second amended petition for a writ of habeas corpus pursuant to Practice Book § 23-29 (2) and (5).[2] On appeal, the petitioner claims that the court incorrectly dismissed his claims that the respondent, the Commissioner of Correction, violated his constitutional rights to (1) procedural due process, (2) equal protection of the law, and (3) freedom from cruel and unusual punishment. We disagree that the court improperly dismissed the petitioner's first claim. We agree, however, that the

[1] The petitioner was self-represented throughout the proceedings before the habeas court but is represented by counsel on appeal.

[2] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

court improperly dismissed his second and third claims. We therefore affirm, in part, and reverse, in part, the judgment of the habeas court and remand the case for further proceedings consistent with this opinion.

The following procedural history and facts, as alleged in the petitioner's second amended petition (operative petition),[3] or as otherwise undisputed in the record, are relevant to this appeal.[4] The petitioner, a citizen of the United Kingdom, is currently incarcerated at the Osborn Correctional Institution (Osborn) in Somers, serving a term of twenty-five years of incarceration for the crime of murder. In his operative petition, the petitioner asserts, in essence, three claims.

The first claim asserts that the respondent violated the petitioner's right to procedural due process. According to the petition, the respondent assigned the petitioner an overall risk score of three and a detainer score of three.[5] The respondent also labeled the petitioner "a public safety risk." An Immigration and Naturalization Service and Immigration and Customs

[3] The petitioner filed his first petition for a writ of habeas corpus on July 15, 2020, and his first amended petition on September 17, 2020. Subsequently, on December 11, 2020, the petitioner filed a "motion for permission to file additional pages to the amended petition," which was docketed as a second "amended application for writ of habeas corpus." Thus, the petitioner's second amended petition is the operative petition, which we review to determine whether the habeas court had subject matter jurisdiction.

[4] "Because this appeal arises from the habeas court's ruling dismissing the petition on the basis that the court lacked jurisdiction, we [assume] the facts [as] alleged in the petition, including those facts necessarily implied from the allegations, construing them in favor of the petitioner for purposes of deciding whether the court had subject matter jurisdiction." *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 670, 166 A.3d 614 (2017).

[5] The respondent assigns each inmate an overall classification assessment score of one to five, with one representing the lowest security level and five representing the highest. See Conn. Dept. of Correction, Administrative Directive 9.2 (6) and (8) (effective July 1, 2006) (Administrative Directive 9.2). In determining an inmate's overall classification assessment score, the inmate's risks and needs are assessed. Id., 9.2 (8). Seven factors determine an inmate's overall risk score. Id. Each individual factor is assigned a rating from one to five, with one representing the least risk and five representing

Enforcement detainer[6] was issued against the petitioner in 2010. As a result of this detainer, the petitioner faces deportation upon the completion of his sentence. The petitioner alleges that, by classifying him as "a public safety risk" and improperly assigning him a detainer score of three, the respondent has violated his right to procedural due process. Specifically, the petitioner contends that those classifications are false, stigmatizing, and result in punishment that is qualitatively different from that characteristically suffered by a person convicted of a crime. According to the petitioner, because he has been improperly classified, he has been denied rehabilitative programs, and his reputation has been, and will continued to be, injured.

The petitioner's second claim asserts an equal protection violation.[7] The petitioner claims that he is being

the highest risk. See Office of Legislative Research, OLR Research Report: Department of Correction Inmate Classification (March 1, 2000) available at https://www.cga.ct.gov/2000/rpt/2000-R-0257.htm (last visited November 17, 2022). One of these factors is the presence of a detainer. See Administrative Directive 9.2 (8) (A) (5). "After independently rating each factor, [the respondent] establishes an overall risk level. The highest rating assigned to any of the seven factors determines the inmate's overall risk level. Thus if an inmate has a two on six of the factors and a four on one factor, his overall rating is a four." OLR Research Report: Department of Correction Inmate Classification, supra. Because the petitioner has a detainer lodged against him, he has been assigned a detainer score that affects his overall risk score.

[6] According to the petitioner, the detainer is a civil detainer. An immigration detainer "serves to advise another law enforcement agency that the [United States Department of Homeland Security (Department)] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7 (a) (2022).

[7] We note that the court did not address the petitioner's equal protection claim in its memorandum of decision and that, generally, this court is not required to review issues not considered at the habeas proceeding. See, e.g., *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 528, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019). We also note,

denied equal protection of the laws because the respondent has limited his access to rehabilitative programs that are available to all inmates pursuant to General Statutes §§ 18-81w,[8] 18-81x[9] and 18-81z[10]—including

however, that "a reviewing court properly may address jurisdictional claims that neither were raised nor ruled on in the trial court." *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 535, 911 A.2d 712 (2006).

In the present case, the petitioner did raise his equal protection claim in his operative petition, but the court did not address the claim. The petitioner attempted to rectify this deficiency by filing a motion to reargue, asserting that the court failed to address his equal protection claim; however, the court denied the motion. Nevertheless, we address this claim because the parties have fully briefed the merits of the jurisdictional issue as it pertains to the petitioner's equal protection claim. Additionally, the claim is based on undisputed procedural facts and, therefore, does not require a review of any factual determinations, and the petition can reasonably be read broadly to include such a claim.

[8] General Statutes § 18-81w (a) provides: "The Criminal Justice Policy and Planning Division within the Office of Policy and Management shall develop and implement a comprehensive reentry strategy that provides a continuum of custody, care and control for offenders who are being supervised in the community, especially those offenders who have been discharged from the custody of the Department of Correction, and assists in maintaining the prison population at or under the authorized bed capacity. The reentry strategy shall support the rights of victims, protect the public and promote the successful transition of offenders from incarceration to the community by (1) maximizing any available period of community supervision for eligible and suitable offenders, (2) identifying and addressing barriers to the successful transition of offenders from incarceration to the community, (3) ensuring sufficient criminal justice resources to manage offender caseloads, (4) identifying community-based supervision, treatment, educational and other services and programs that are proven to be effective in reducing recidivism among the population served by such services and programs, and (5) establishing employment initiatives for offenders through public and private services and partnerships by reinvesting any savings achieved through a reduction in prison population."

[9] General Statutes § 18-81x provides: "For the fiscal year ending June 30, 2007, and each fiscal year thereafter, the sum of $350,000 from revenue derived by the Department of Administrative Services from the contract for the provision of pay telephone service to inmates of correctional facilities shall be transferred to the Department of Correction, for Other Current Expenses, for expanding inmate educational services and reentry program initiatives."

[10] General Statutes § 18-81z provides: "The Department of Correction, the Board of Pardons and Paroles and the Court Support Services Division of

reentry and discharge planning, and community release—because he is a British citizen.

The petitioner's third claim asserts that the respondent has violated his right under the eighth amendment to be free from cruel and unusual punishment. The petitioner, who is almost sixty-seven years old, alleges that the COVID-19 virus poses a sufficiently and objectively serious risk to his life because the virus has been particularly deadly for institutionalized populations and because he has numerous preexisting medical conditions. The petitioner further alleges that the respondent has acted with deliberate indifference toward him by failing to follow Centers for Disease Control and Prevention (CDC) guidelines—specifically, by failing to enforce mask wearing and social distancing.[11]

In his prayer for relief, the petitioner "ask[ed] the court to order the commissioner to:

"(1) Reduce [his] detainer score to a 1 and [his] overall score to a 2, which would make [him] eligible for community release and other relevant programs.

the Judicial Branch shall develop a risk assessment strategy for offenders committed to the custody of the Commissioner of Correction that will (1) utilize a risk assessment tool that accurately rates an offender's likelihood to recidivate upon release from custody, and (2) identify the support programs that will best position the offender for successful reentry into the community. Such strategy shall incorporate use of both static and dynamic factors and utilize a gender-responsive approach that recognizes the unique risks and needs of female offenders. In the development of such risk assessment strategy, the department, board and division may partner with an educational institution that has expertise in criminal justice and psychiatry to evaluate risk assessment tools and customize a risk assessment tool to best meet the state's needs. On or before January 1, 2009, and annually thereafter, the department, board and division shall report to the Governor and the joint standing committee of the General Assembly on judiciary, in accordance with section 11-4a, on the development, implementation and effectiveness of such strategy."

[11] The respondent's appellate brief addresses only the first two of the petitioner's three claims— the due process claim and the equal protection claim. The respondent does not address the petitioner's third claim, namely, that the respondent violated his right to be free from cruel and unusual punishment.

"(2) Grant [him], as a low risk offender, and future deportee with over 85 [percent] of [his] sentence served, with a positive institutional record, community release here or in the [United Kingdom] under [General Statutes] § 18-91a, because of [his] deteriorating health, age, and high risk for COVID-19 with complications.

"(3) [Afford him] [a]ny other relief the court deems just and proper under the circumstances."

On September 14, 2020, the respondent filed a motion to dismiss the petition pursuant to Practice Book § 23-29 (1), (2) and (5).[12] In his memorandum of law in support of the motion, the respondent claimed that the court lacked subject matter jurisdiction over the petition because the petitioner did not have a protected liberty interest in a certain classification and because the petition failed to state a claim on which habeas relief could be granted.[13] On October 16, 2020, the petitioner filed an objection to the respondent's motion to dismiss in which he argued that the court had subject matter jurisdiction over his petition because he sufficiently had alleged that the respondent had violated his rights to procedural due process, equal protection, and freedom from cruel and unusual punishment. On December 8, 2020, a virtual hearing on the respondent's motion to dismiss was held.

On January 19, 2021, the court issued a memorandum of decision in which it dismissed, pursuant to Practice

[12] Although the petitioner twice amended his petition after the respondent filed his motion to dismiss, the respondent did not file an objection to either of the amended petitions; nor did the respondent seek to amend his motion to dismiss after the petitioner filed the amended petitions.

[13] The respondent also argued that the petitioner's COVID-19 claim had been released and was barred based on a settlement agreement reached in *McPherson* v. *Lamont*, United States District Court, Docket No. 3:20-CV-0534 (JBA) (D. Conn. July 20, 2020). In its memorandum of decision, the court concluded that the claim was not barred by the *McPherson* settlement because the settlement was approved on July 20, 2020, whereas the habeas petition was filed on July 15, 2020. The respondent does not reassert this argument on appeal.

Book § 23-29 (2) and (5), the entirety of the operative petition.[14] On January 27, 2021, the petitioner filed a petition for certification to appeal, which the court granted. On February 16, 2021, the petitioner filed a motion to reargue, which the court denied on February 17, 2021. This appeal followed.[15]

Before turning to the petitioner's claims, we first set forth the relevant standard of review and legal principles that guide our analysis. "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Byrd* v. *Commissioner of Correction*, 177 Conn. App. 71, 82, 171 A.3d 1103 (2017).

"[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . However, [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is

[14] In its memorandum of decision, the court stated that it had subject matter jurisdiction over the petitioner's cruel and unusual punishment claim, and yet the court dismissed the petition in its entirety without providing a specific reason relating to that particular claim. On review, we see no basis for the court to have dismissed this claim, without a hearing on the merits, on the basis of either Practice Book § 23-29 (2) or (5).

[15] On July 21, 2021, this court ordered, sua sponte, that the habeas court articulate whether it had considered the petitioner's second amended petition for a writ of habeas corpus when ruling on the respondent's motion to dismiss. In its articulation, dated July 27, 2021, the habeas court explained that it had reviewed and considered the petitioner's second amended petition when ruling on the motion to dismiss.

limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings . . . to decide claims not raised." (Citation omitted; internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 850–51, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018).

To the extent the respondent claims that the petition is legally insufficient, our review requires us to interpret the pleadings. The interpretation of pleadings involves an assessment of whether they are legally sufficient, and, therefore, our review is plenary. See, e.g., *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020) ("[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient to allow recovery." (Emphasis omitted; internal quotation marks omitted.)), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021).

Practice Book § 23-29, which governs motions to dismiss habeas petitions, "serves, roughly speaking, as the analog to Practice Book §§ 10-30 and 10-39, which, respectively, govern motions to dismiss and motions to strike in civil actions." *Gilchrist* v. *Commissioner of*

*Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020). "[A]s it would do in evaluating the allegations in a civil complaint, in evaluating the legal sufficiency of allegations in a habeas petition, a court must view the allegations in the light most favorable to the petitioner, which includes all facts necessarily implied from the allegations." *Finney* v. *Commissioner of Correction*, 207 Conn. App. 133, 142, 261 A.3d 778, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021).

"Whether a habeas court properly dismissed [the operative petition] for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 553. We therefore must "decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 342, 199 A.3d 1127 (2018), rev'd on other grounds, 345 Conn. 39, 282 A.3d 433 (2022).

I

The petitioner first claims that the court improperly dismissed his petition for a writ of habeas corpus because the allegations within his petition regarding his classification status established the denial of a protected liberty interest without due process. Specifically, the petitioner contends that the petition's allegations sufficiently alleged a claim under the stigma plus test, and, therefore, sufficiently alleged a cognizable liberty interest invoking the subject matter jurisdiction of the court. We are unpersuaded.

We first set forth the legal principles underlying our determination of the petitioner's first claim. "In order to state a claim for a denial of procedural due process

. . . a prisoner must allege that he possessed a protected liberty interest, and was not afforded the requisite process before being deprived of that liberty interest. . . . A petitioner has no right to due process . . . unless a liberty interest has been deprived . . . . Our first inquiry, therefore, is whether the petitioner has alleged a protected liberty interest. That question implicates the subject matter jurisdiction of the habeas court." (Citation omitted; internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 674–75.

In *Anthony A.*, our Supreme Court adopted the stigma plus test used by federal courts to determine whether the petitioner had alleged a cognizable liberty interest in a prison classification.[16] Id., 680–81. In that case, the petitioner sought a writ of habeas corpus, claiming that the Department of Correction (department) improperly had classified him as a sex offender without providing him with procedural due process. Id., 672. Our Supreme Court observed that, "in certain situations, a different inquiry is appropriate to determine whether the due process clause directly confers a liberty interest on inmates." (Internal quotation marks omitted.) Id., 679. "Specifically . . . where a state action has stigmatizing consequences for a prisoner and results in a punishment that is qualitatively different from that characteristically suffered by a person convicted of crime, the protected liberty interest arises from the due process clause directly." (Citation omitted; internal quotation marks omitted.) Id. The court explained that "an inmate raising a due process claim pursuant to the stigma plus test . . . also must allege the falsehood of the stigmatizing label or classification." Id., 680.

The court in *Anthony A.* determined that the stigma plus test was applicable in the case before it, in which

[16] Both parties, in their appellate briefs, have analyzed the petitioner's due process claim under the stigma plus test.

the petitioner had "alleged that he was stigmatized when the respondent wrongfully classified him as a sex offender, and allege[d] as the 'plus' that he suffered various negative consequences, including being compelled to participate in treatment or risk forfeiting good time credits and parole eligibility . . . ." Id. Thus, the court continued, its inquiry "focuse[d] on whether the allegations of the petition demonstrate[d] that the classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." Id., 680–81. The court determined that the petitioner sufficiently had alleged a claim under the stigma plus test and, thus, sufficiently had alleged a protected liberty interest to invoke the habeas court's subject matter jurisdiction. Id., 686.

Accordingly, to plead a stigma plus claim, a petitioner must allege facts demonstrating that a "classification was wrongful and stigmatized the petitioner, and that the consequences suffered by the petitioner were 'qualitatively different' from the punishments usually suffered by prisoners, so that they constituted a major change in the conditions of confinement amounting to a grievous loss." Id., 681.

Following *Anthony A.*, this court has held that the stigma plus test was satisfied only where, like in *Anthony A.*, a petitioner improperly was classified as a sex offender. Compare *Carolina* v. *Commissioner of Correction*, 192 Conn. App. 296, 302, 217 A.3d 1068 (petitioner sufficiently alleged protected liberty interest under stigma plus test because he was classified as sex offender, which court determined implicated liberty interest), cert. denied, 334 Conn. 909, 221 A.3d 43 (2019), with *Vitale* v. *Commissioner of Correction*, supra, 178 Conn. App. 870–71 (petition failed to sufficiently allege

stigma plus claim because petition did not allege classification as sex offender was false and because labeling inmate as sex offender and providing recommendation for treatment, in absence of negative consequences for failure to participate in such treatment, was insufficient to show consequences petitioner suffered were qualitatively different from punishments usually suffered by prisoners), and *Stephenson* v. *Commissioner of Correction*, 203 Conn. App. 314, 327–31, 248 A.3d 34 (petition failed to sufficiently allege stigma plus claim where crux of petition constituted attempt by petitioner to advance his parole eligibility and where petition did not identify consequences qualitatively different from punishments usually suffered by prisoners), cert. denied, 336 Conn. 944, 249 A.3d 737 (2021).

In the present case, the petitioner contends that being classified as a "public safety risk" and being assigned a certain classification score is sufficient to satisfy the "stigma" portion of the stigma plus test because these classifications injure his reputation. The petitioner alleged, in his operative petition, that the classifications placed on him by the respondent ensure that he will be known as a public safety risk in the United Kingdom for years to come, which, according to the petitioner, will potentially have negative effects on him and his family, including potentially "disenfranchising" him and "making [him] a ward of the state . . . ."

Although the petitioner alleges that the classifications are stigmatizing and will result in harm to his reputation, he fails to sufficiently allege that these classifications are "uniquely stigmatizing" or akin to being classified as a sex offender. See *Anthony A.* v. *Commissioner of Correction*, supra, 326 Conn. 681 ("[T]he first part of the test—whether it is stigmatizing to be classified as a sex offender—may be dispatched with ease and relatively little analysis. That classification is uniquely stigmatizing. . . . We can hardly conceive of a state's

action bearing more stigmatizing consequences than the labeling of a prison inmate as a sex offender. . . . One need only look to the increasingly popular Megan's Laws, whereby states require sex offenders to register with law enforcement officials who are then authorized to release information about the sex offender to the public, to comprehend the stigmatizing consequences of being labeled a sex offender." (Internal quotation marks omitted.)); see also *Carolina* v. *Commissioner of Correction*, supra, 192 Conn. App. 301 ("classification as a sex offender is 'uniquely stigmatizing' "); id., 301 n.6 ("[c]onstitutional privacy interests are implicated . . . because . . . [t]he damage to [citizens'] reputations resulting from [disclosure] stigmatizes them as currently dangerous sex offenders, can harm their earning capacities, and can cause them to be objects of derision in the community" (internal quotation marks omitted)).[17] Here, it appears that the respondent assigned a risk level to the petitioner, mindful that he is a British citizen subject to deportation once his sentence is complete. We do not believe that such action facially meets the stigma plus test. We also do not believe that the respondent's labeling of the petitioner as "a public safety risk" is sufficient to constitute stigma. Indeed, given that the petitioner was convicted of murder, it is likely that his conviction itself, rather than any assessment of a risk level, is the source of any stigma of being "a public safety risk." Accordingly, we conclude that the petitioner has failed to allege facts, which, if taken as true, establish "stigma" under the stigma plus test.[18] Therefore, with respect to the petitioner's procedural due process claim, he has not sufficiently alleged a cognizable liberty interest over which

[17] We also note that no court has extended the stigma plus test to apply beyond instances in which the petitioner is labeled a sex offender. The petitioner neglects to set forth any argument that the stigma plus test should be extended beyond the context of cases involving classification as a sex offender.

[18] "The stigma plus test is conjunctive and, therefore, we need not consider whether the petitioner sufficiently alleged facts satisfying the remaining

the habeas court had subject matter jurisdiction, and the habeas court properly dismissed the petition with respect to this claim.

II

The petitioner next asserts that the court improperly dismissed his equal protection claim. The petitioner argues that his petition sufficiently alleges that he has been treated differently from similarly situated prisoners because of his alienage and national origin, namely, because he is a British citizen. Specifically, the petitioner contends that he has sufficiently alleged that he has been denied rehabilitative programs, reentry services, discharge planning, and community release because he is not a citizen of the United States.

In response, the respondent interprets the petition as asserting a "class of one" equal protection claim because the petition does not allege membership in a protected class. The respondent also asserts that the petition fails to "allege facts showing a reasonably close resemblance between [himself] and a proffered comparator." (Internal quotation marks omitted.) See *Hsin* v. *City of New York*, 779 Fed. Appx. 12, 15 (2d Cir. 2019). The respondent further contends that the petition does not allege that the petitioner was treated differently because of his British citizenship or alienage. We do not read the petition so narrowly. We understand the petition to allege disparate treatment on the basis of his alienage and national origin and, thus, to allege membership in a protected class. We therefore do not construe the petitioner's equal protection claim as a "class of one" claim.

"The equal protection clause of the fourteenth amendment to the United States constitution, § 1, provides in relevant part: No State shall make or enforce

portions of the test." *Stephenson* v. *Commissioner of Correction*, supra, 203 Conn. App. 331 n.12.

any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." (Internal quotation marks omitted.) *Hunter* v. *Commissioner of Correction*, 271 Conn. 856, 862 n.7, 860 A.2d 700 (2004). "The Equal Protection Clause of the [f]ourteenth [a]mendment to the United States [c]onstitution is essentially a direction that all persons similarly situated should be treated alike. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute [or statutory scheme] in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Consequently], the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [petitioner is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 601–602, 834 A.2d 52 (2003).

After this initial inquiry, the court "must . . . determine the standard by which the challenged statute's constitutional validity will be determined. If, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest. . . . If the statute does not touch upon either a fundamental right or a suspect

class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Footnote omitted; internal quotation marks omitted.) *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 877, 792 A.2d 774 (2002). "Although the federal constitution does not expressly enumerate any suspect classes, the United States Supreme Court has identified three such classifications, namely, race, alienage and national origin." *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 159, 957 A.2d 407 (2008).

"[A]n equal protection claim based on unequal application of the law . . . must be established by . . . showing . . . intentional or purposeful discrimination." (Internal quotation marks omitted.) *Tuchman* v. *State*, 89 Conn. App. 745, 759, 878 A.2d 384, cert. denied, 275 Conn. 920, 883 A.2d 1252 (2005). "[T]he plaintiff must prove that the state discriminated against him based on an impermissible, invidious classification. . . . Therefore, the plaintiff must prove that the action had a discriminatory effect and that it was motivated by a discriminatory purpose. . . . Put another way, the plaintiff must establish that he, compared with others similarly situated, was selectively treated . . . and . . . that such selective treatment was based on impermissible considerations . . . ." (Citations omitted; internal quotation marks omitted.) *DiMartino* v. *Richens*, 263 Conn. 639, 673, 822 A.2d 205 (2003); see also *Hunt* v. *Prior*, 236 Conn. 421, 443, 673 A.2d 514 (1996) ("[w]hen, as here, a claimed equal protection violation arises from the alleged selective application of a facially neutral state [law], it must be shown that (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations" (internal quotation marks omitted)).

In the present case, we conclude that the petitioner has alleged sufficient facts, when properly construed in the light most favorable to him, to constitute an equal protection claim. The crux of the petitioner's claim is that the respondent has limited his access to rehabilitative programs, including reentry and discharge planning, and community release—programs he alleges are available to inmates who are United States citizens—because he is a British citizen.

When construed broadly and realistically, the petition asserts that §§ 18-81w, 18-81x and 18-81z, as applied by the respondent, violate the petitioner's right to equal protection of the law.[19] The petitioner alleges that he is similarly situated to inmates who are citizens of the United States. The petitioner pleads that, although he is similarly situated to inmates who are citizens of the United States, unlike those inmates, he has been denied access to rehabilitative programs because he is a citizen of the United Kingdom.

The petition also sufficiently alleges that §§ 18-81w, 18-81x and 18-81z, as applied, burden him as a member of a suspect class of persons. In particular, the petition alleges that the statutes burden him because he is not a United States citizen. According to the petitioner, he has been "denied equal protection of the laws as a British citizen." Because alienage and national origin are suspect classifications; see *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 159; we conclude that the petition sufficiently pleads that the statutes, as applied, burden a suspect class of persons. See *Hammond* v. *Commissioner of Correction*, supra, 259 Conn. 877.

[19] Because §§ 18-81w, 18-81x and 18-81z do not expressly limit rehabilitative programs to citizens of the United States, the petitioner's claim can be understood only as a claim of an equal protection violation as applied to him, and not on its face. See *State* v. *Jason B.*, 248 Conn. 543, 558 n.12, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999).

Last, the petition, read in its entirety and broadly construed, asserts that the respondent, by denying the petitioner access to rehabilitative programs, intentionally and purposefully discriminated against him based on his alienage and national origin.[20] Specifically, the petitioner avers that he has completed only six programs during his incarceration, despite requesting more, and has been told that he does not need further programs. The petitioner claims that the respondent "will provide no reentry and discharge planning," and alleges in the habeas petition that the respondent is "illegally using [the] detainer to limit [his] access to rehabilitative programs, including reentry, discharge planning, and community release."[21] The petition further states that the respondent "has chosen to hinder the limited chances [the petitioner] already [has] to reintegrate into [his] own community after twenty-seven years absence, and [that this] is completely antithetical to the purpose of modern corrections." (Internal quotation marks omitted.) According to the petition, the respondent is "set on punishing [the petitioner] further when [he] return[s] to England."

The petition, read in its entirety, and construed broadly and realistically, rather than narrowly and technically, sufficiently alleges a cognizable violation of the

[20] To the extent that the respondent argues that the petitioner is not being treated differently than similarly situated inmates, namely, those inmates also with detainers lodged against them, we emphasize that this argument goes to whether the petitioner can prove his claim rather than whether he has sufficiently alleged an equal protection claim.

[21] Also of import, we acknowledge that the detainer itself does not make the petitioner ineligible for rehabilitative programs, including reentry, discharge planning, and community release. As described in footnote 6 of this opinion, a civil immigration detainer serves, in short, as a request that the respondent notify the United States Department of Homeland Security prior to the release of the petitioner. See 8 C.F.R. § 287.7 (a) (2022); see also General Statutes § 54-192h (a) (2) (C). Rather, it is the respondent's own inmate classification system that is limiting the petitioner's access to rehabilitative programs, such as reentry, discharge planning, and community release. See Conn. Dept. of Correction, Administrative Directive 9.2 (11) (effective July 1, 2006).

petitioner's right to equal protection. We therefore conclude that the court improperly dismissed this claim on the basis of Practice Book § 23-29 (2) and (5).

III

The petitioner next claims that the court improperly dismissed his petition because it did not sufficiently allege a valid cruel and unusual punishment claim. Specifically, the petitioner contends that the petition adequately stated a claim of cruel and unusual punishment based on the serious risk that COVID-19 poses to his health and the respondent's deliberate indifference to that risk.[22] We agree with the petitioner that the court improperly dismissed this claim, as we believe that he sufficiently alleged facts to support this constitutional claim.

"The [c]onstitution does not mandate comfortable prisons . . . but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the [e]ighth [a]mendment. . . . The [a]mendment also imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates . . . .

"In *Estelle* v. *Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), the United States Supreme Court concluded: [D]eliberate indifference to serious medical

[22] The respondent's appellate brief fails to address the petitioner's cruel and unusual punishment claim. At oral argument, however, counsel for the respondent argued that no habeas court in this jurisdiction has granted a petition for a writ of habeas corpus based on a COVID-19 claim of cruel and unusual punishment. We find this argument unpersuasive. Simply because no habeas court in this jurisdiction has granted such a petition does not mean that the Superior Court, sitting on habeas matters, lacks the subject matter jurisdiction to do so.

needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the [e]ighth [a]mendment. . . .

"These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself. . . .

"A prisoner seeking habeas relief on the basis of his conditions of confinement, which includes the medical care made available to him, bears the burden of establishing both aspects of his claim." (Internal quotation marks omitted.) *Jolley* v. *Commissioner of Correction*, 98 Conn. App. 597, 599–600, 910 A.2d 982 (2006), cert. denied, 282 Conn. 904, 920 A.2d 308 (2007). "In order to establish an [e]ighth [a]mendment claim arising out of inadequate medical care, a prisoner must prove deliberate indifference to [his] serious medical needs. . . . The standard of deliberate indifference includes both subjective and objective components. First, the alleged deprivation must be, in objective terms, sufficiently serious. . . . Second, the [government official] must act with a sufficiently culpable state of mind. . . . An official acts with the requisite deliberate indifference when that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he

must also draw the inference. . . . Thus, an official's failure to alleviate a significant risk that he should have perceived but did not [does not violate the eighth amendment]. . . .

"Accordingly, to establish a claim of deliberate indifference in violation of the eighth amendment, a prisoner must prove that the officials' actions constituted more than ordinary lack of due care for the prisoner's interests or safety. . . . [D]eliberate indifference is a stringent standard of fault . . . requiring proof of a state of mind that is the equivalent of criminal recklessness." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, 288 Conn. 326, 338–39, 952 A.2d 764 (2008). In other words, "the evidence must show that the respondent had actual knowledge of a substantial risk of serious harm facing the petitioner and disregarded that risk by failing to take reasonable measures to abate that risk." *Fuller* v. *Commissioner of Correction*, 75 Conn. App. 133, 137, 815 A.2d 208 (2003).

In the present case, we conclude that the petitioner has alleged sufficient facts, if properly construed in the light most favorable to him, to constitute a claim of cruel and unusual punishment in violation of his eighth amendment right and to thus invoke the subject matter jurisdiction of the habeas court because the gravamen of the petitioner's claim concerns the transmission of the COVID-19 virus, the adequacy of the preventative measures instituted by the respondent, and the serious risk to health attendant to the respondent's management of the virus as it applies to the petitioner's particular circumstances.

As to the first prong—a sufficiently serious deprivation—the petitioner alleged that the COVID-19 pandemic was a "seriously precarious situation," and has

"wreaked havoc across the world and has been particularly deadly for institutionalized populations." This court previously has recognized the seriousness of the COVID-19 virus. See *Gonzalez* v. *Commissioner of Correction*, 211 Conn. App. 632, 646 n.9, 273 A.3d 252 ("[B]ecause incarcerated inmates are necessarily confined in close quarters, a contagious virus represents a grave health risk to them—and graver still to those who have underlying conditions that render them medically vulnerable. . . . The COVID-19 virus is highly infectious and can be transmitted easily from person to person. . . . If contracted, COVID-19 can cause severe complications or death." (Citation omitted; internal quotation marks omitted.)), cert. denied, 343 Conn. 922, 275 A.3d 212 (2022). The petitioner further alleged that the COVID-19 virus posed a serious risk specifically to him because of his preexisting medical conditions. These preexisting conditions include chronic obstructive pulmonary disease, pneumonia, tuberculosis, atelectasis, high blood pressure, and being at high risk for colon cancer. Thus, the petitioner alleged, he was at high risk for serious symptoms associated with COVID-19, and the conditions at Osborn were putting his life at risk. Based on these allegations, we conclude that the petitioner has sufficiently pleaded that his conditions of confinement are, "in objective terms, sufficiently serious." (Internal quotation marks omitted.) *Faraday* v. *Commissioner of Correction*, supra, 288 Conn. 338.

We also conclude that the petitioner has pleaded sufficient facts as to the second prong of the deliberate indifference test—namely, that the officials involved had a sufficiently culpable state of mind, because they knew of and disregarded an excessive risk to his health and safety. See id., 338–39. In his petition, the petitioner alleged that the respondent was not handling the COVID-19 pandemic according to CDC guidelines. In particular, he alleged that the use of personal protective

equipment was not enforced among inmates or prison staff.[23] He similarly alleged that social distancing was not being enforced, resulting in inmates being compelled to dine in close proximity, specifically, within two feet of each other. Based on these allegations, the petitioner claimed that the prison staff "clearly do not care about [his health and safety] at all," and had adopted a "policy of continual delay, denial and deceit [which was] compounding an already seriously precarious situation, putting [his] deteriorating health and well-being in further danger."

We note that "[w]ith respect to deliberate indifference . . . [t]he key inquiry is whether the [commissioner] responded reasonably to th[is] risk." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, supra, 211 Conn. App. 652. In determining whether a response to COVID-19 was reasonable, courts have found relevant, among other things, policies relating to social distancing and masks. See id., 652 (court focused its inquiry on whether respondent "took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks" (internal quotation marks omitted)); see also *Valentine* v. *Collier*, 993 F.3d 270, 284–89 (5th Cir. 2021) (deeming relevant to deliberate indifference analysis whether respondent implemented testing, social distancing, mask use, handwashing, and sanitation or

[23] The petitioner alleged that the lack of enforcement of the use of personal protective equipment violated Executive Order No. 7BB issued by Governor Ned Lamont on April 22, 2020, relating to the use of face masks, an April 21, 2020 memorandum from then Commissioner Rollin Cook to all department staff regarding the wearing of masks, and the terms of a settlement agreement between the department and the American Civil Liberties Union Foundation of Connecticut in *McPherson* v. *Lamont*, United States District Court, Docket No. 3:20-CV-0534 (JBA) (D. Conn. July 20, 2020). See footnote 13 of this opinion.

cleaning); see also *Hope* v. *Warden*, 972 F.3d 310, 327–28 (3d Cir. 2020) (discussing whether prison staff wore masks and enforced social distancing in determining whether respondent warden was deliberately indifferent to inmates' medical needs); *Swain* v. *Junior*, 961 F.3d 1276, 1291 (11th Cir. 2020) ("[b]y taking other measures, besides release—including, among many other things, implementing some social-distancing measures, distributing face masks, screening inmates and staff, and providing cleaning and personal hygiene supplies—[the director of corrections] has responded reasonably to the risk of the virus"). Furthermore, "[o]ur Supreme Court consistently [has] held that reasonableness is a question of fact for the trier to determine based on all of the circumstances. . . . Recklessness likewise presents a question of fact." (Citation omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, supra, 653 n.14.

Although ultimately, it may prove that the petitioner is unable to produce evidence to support his allegations of cruel and unusual punishment,[24] such a possibility cannot support the granting of a motion to dismiss. See *Finney* v. *Commissioner of Correction*, supra, 207 Conn. App. 144. We emphasize that, at the pleading stage, the allegations in the petition must be viewed in the light most favorable to the petitioner. See id., 146. Viewing the petition in such a light, we conclude that the petitioner has raised allegations sufficient to state a cognizable claim for cruel and unusual punishment.[25]

[24] This may, of course, be true as to the entirety of the petition.

[25] We also note that the court could grant relief on the petitioner's equal protection and cruel and unusual punishment claims if the petitioner is able to prove them. The petitioner, in his prayer for relief, sought "[a]ny other relief the court deems just and proper under the circumstances." "[T]he habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . ." (Emphasis omitted; internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, 206 Conn. App. 461, 471, 261 A.3d 49, cert. denied, 338 Conn. 916, 259 A.3d 1180 (2021).

The judgment is reversed with respect to the claims of equal protection and cruel and unusual punishment, and the case is remanded for further proceedings in accordance with law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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# JEFFREY STENNER *v.* COMMISSIONER OF CORRECTION (AC 42852)

# ROFIO GREENFIELD *v.* COMMISSIONER OF CORRECTION (AC 43779)

Prescott, Cradle and Clark, Js.

*Syllabus*

The petitioners, S and G, both of whom had been convicted of murder, each filed a successive habeas petition. Following a hearing to show cause in each case, the habeas courts dismissed the petitions on the ground that the petitioners filed them outside of the two year time limit for successive petitions set forth by statute (§ 52-470 (d) and (e)) without establishing good cause for their respective untimely filings. In S's case, the habeas court rejected S's reliance on the fact that, several days before his filing deadline, he sent an inquiry to the Division of Public Defender Services seeking review of his case. In G's case, the habeas court rejected G's argument that he was unaware of the two year limitation set forth in § 52-470 (d). Specifically, G argued that the legislature had enacted the amendment to § 52-470 (P.A. 12-115) establishing the rebuttable presumption of unreasonable delay for habeas petitions filed outside the two year limitation after the appeal of his prior habeas petition had concluded, and his appellate counsel in that case, D, failed to advise him of P.A. 12-115. On the granting of certification, the petitioners filed separate appeals to this court. *Held*:

1. The habeas court did not abuse its discretion in determining that S failed to demonstrate good cause for the delay in filing his successive habeas petition: although S attributed the delay in filing his petition to the time needed by the public defender to investigate his case, S waited until three days before the deadline for filing his successive petition to send his inquiry, nothing in the record demonstrated that S could not have contacted the public defender sooner or filed his own petition before

the deadline, and, even if the delay could be attributed to the public defender, a petitioner must demonstrate that something outside of his or his counsel's control contributed to the delay; moreover, contrary to S's argument, his general inquiry with the public defender prior to the filing deadline was insufficient to establish good cause under § 52-470 (d), which expressly requires the filing of the successive petition before the deadline; furthermore, to the extent S argued that good cause existed under § 52-470 (e) because his claims were based on newly discovered evidence not reasonably available to him regarding the undue consideration given to his codefendants in exchange for testifying against S, it was undisputed that the allegedly new evidence, which consisted of court records and transcripts from his codefendants' dispositions, was available prior to the conclusion of his first habeas proceeding, and the record supported the habeas court's finding that S was aware of the relevant facts and circumstances that implicated the records at issue when he filed an earlier habeas petition; accordingly, S did not demonstrate that this evidence could not have been discovered and obtained before the filing deadline by the exercise of due diligence or that this evidence would have materially affected the merits of his case.

2. The habeas court did not abuse its discretion in determining that G failed to demonstrate good cause for the delay in filing his successive habeas petition: notwithstanding G's argument that he established good cause for his untimely filing because he was unaware of the two year filing deadline, G presented no evidence to demonstrate how his delay in filing his successive petition involved something outside of his or his counsel's control, as the habeas court found that neither D's nor G's affidavit conclusively established, without corroborating evidence, that D failed to advise G of the two year limitation, and those determinations were not clearly erroneous; moreover, although a petitioner's lack of knowledge of a change in the law is relevant to establishing good cause for an untimely filing, on the facts of the present case, G's lack of knowledge of P.A. 12-115, and D's alleged failure to notify him of P.A. 12-115, were insufficient to demonstrate that the habeas court abused its discretion in finding that good cause did not exist for the untimely filing, especially when G did not argue that his ignorance of the law was attributable to his conditions of confinement or other extenuating circumstances pertaining to his incarceration.

Argued September 8—officially released November 22, 2022

*Procedural History*

Amended petition, in each case, for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where, in the first case, the court, *Newson, J.*, rendered judgment dismissing the petition,

from which the petitioner, on the granting of certification, appealed to this court; thereafter, in the second case, the court, *Chaplin, J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Vishal K. Garg*, assigned counsel, for the appellant in Docket No. AC 42852 (petitioner).

*Robert O'Brien*, assigned counsel, with whom, on the brief, were *Owen Firestone* and *Christopher Y. Duby*, assigned counsel, for the appellant in Docket No. AC 43779 (petitioner).

*Sarah Hanna*, senior assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, former state's attorney, *Leah Hawley*, former senior assistant state's attorney, and *Tamara A. Grosso*, former assistant state's attorney, for the appellee in Docket No. AC 42852 (respondent).

*Sarah Hanna*, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, chief state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee in Docket No. AC 43779 (respondent).

*Opinion*

CLARK, J. The petitioners, Jeffrey Stenner and Rofio Greenfield, appeal following the granting of their petitions for certification to appeal from the habeas courts' dismissals of their respective petitions for a writ of habeas corpus.[1] On appeal, the petitioners claim that the habeas courts erred in concluding that the petitioners failed to establish "good cause" pursuant to General Statutes § 52-470 (d) and (e) to overcome the rebuttable presumption of unreasonable delay stemming from the

[1] Although these appeals have not been consolidated, we resolve both appeals in one opinion for purposes of judicial economy, as the claims involved in each are similar.

untimely filing of their respective habeas petitions. We disagree and, accordingly, affirm the judgments of the habeas courts.[2]

We begin our discussion by setting forth the applicable standard of review and legal principles that govern these appeals. "[A] habeas court's determination of whether a petitioner has satisfied the good cause standard under § 52-470 (d) and (e) is reviewed on appeal for abuse of discretion." *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 432, 274 A.3d 85 (2022).[3] "Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . .

[2] We note that, following the submission of the parties' appellate briefs but prior to oral arguments, our Supreme Court granted certification in *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022), which involved substantially similar claims to the ones at issue in these appeals. Specifically, our Supreme Court granted certification to decide the appropriate standard of review for dismissal of habeas petitions pursuant to § 52-470 and whether this court correctly determined that the petitioner in that case failed to establish good cause necessary to overcome the rebuttable presumption of unreasonable delay as set forth in § 52-470. See *Kelsey* v. *Commissioner of Correction*, 336 Conn. 912, 244 A.3d 562 (2021). In light of our Supreme Court's grant of certification, this court ordered, sua sponte, that the parties notify this court as to whether consideration of their appeals should be stayed pending our Supreme Court's final disposition in *Kelsey* v. *Commissioner of Correction*, petition for cert. filed (Conn. February 3, 2021)(No. 20553). After receiving the parties' responses, this court stayed the appeals pending final disposition in that case. On June 14, 2022, this court lifted the stay and ordered the parties to submit simultaneous supplemental briefs addressing the impact of *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022), on the pending cases. The parties in both cases filed supplemental briefs and presented oral arguments to this court on September 8, 2022.

[3] In their initial appellate briefs, both petitioners argued that our review of their claims was plenary. As noted, however, our Supreme Court subsequently held in *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 439–40, that the proper standard of review of these claims is for abuse of discretion.

reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) Id., 440.

Section 52-470 (d) provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. . . ." Section 52-470 (e) provides in relevant part that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

In order for a petitioner to establish "good cause" sufficient to rebut the presumption of unreasonable delay under § 52-470 (d), "a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 442. In determining whether a petitioner has satisfied the "good cause" requirement, our courts may look to several nonexhaustive factors. They include "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered

by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition." (Internal quotation marks omitted.) *Coney* v. *Commissioner of Correction*, 215 Conn. App. 99, 108, 281 A.3d 461 (2022), quoting *Kelsey* v. *Commissioner of Correction*, supra, 442. A habeas court "may also include in its good cause analysis whether a petition is wholly frivolous on its face," as "[i]t is consistent with the legislative intent of § 52-470 that the good cause determination can be, in part, guided by the merits of the petition." *Kelsey* v. *Commissioner of Correction*, supra, 444 n.9. "No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented." (Internal quotation marks omitted.) Id., 438. With these legal principles in mind, we turn to our application of them to the facts of the petitioners' individual appeals.

I

JEFFREY STENNER

In 2003, Jeffrey Stenner was convicted of murder and later sentenced to sixty years of incarceration. See *State* v. *Stenner*, 281 Conn. 742, 745 and n.4, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S. Ct. 290, 169 L. Ed. 2d 139 (2007). He appealed to our Supreme Court, which affirmed his conviction. Id., 767.

On July 27, 2006, Stenner filed his first petition for a writ of habeas corpus, which was denied by the habeas court following a trial. *Stenner* v. *Warden*, Docket No. CV-06-4001209, 2011 WL 6270076, *8 (Conn. Super. November 22, 2011). Stenner appealed to this court, which dismissed the appeal. *Stenner* v. *Commissioner of Correction*, 144 Conn. App. 371, 372–73, 71 A.3d 693, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013). Stenner then filed a petition for certification for appeal with

our Supreme Court, which was denied on October 2, 2013. *Stenner* v. *Commissioner of Correction*, 310 Conn. 918, 76 A.3d 633 (2013).

On March 16, 2017, approximately three and one-half years after the conclusion of appellate review of his prior habeas action, Stenner filed the instant petition for a writ of habeas corpus, which asserted six claims. On March 22, 2017, the respondent, the Commissioner of Correction, filed a request for an order to show cause, arguing that Stenner's petition should be dismissed pursuant to § 52-470 (d) because it was not filed within two years of our Supreme Court's decision denying certification for review of the denial of his first habeas petition. Stenner filed an objection to that request. On June 1, 2017, the habeas court denied the respondent's request for an order to show cause, concluding that it was premature because the pleadings had yet to close.[4]

On July 11, 2018, Stenner filed an amended petition, which added a constitutional confrontation claim and removed the actual innocence claim that he initially brought. On November 6, 2018, the respondent reclaimed his original motion for an order to show cause, and a hearing was held on December 10, 2018.

By memorandum of decision dated January 29, 2019, the habeas court dismissed Stenner's petition, concluding that, pursuant to § 52-470, Stenner's filing delay "was without good cause." In reaching that conclusion, the habeas court explained that "the final judgment on

[4] Following the habeas court's ruling, our Supreme Court clarified that it is in the discretion of a habeas court to act on the respondent's motion for an order to show cause prior to the close of the pleadings. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 724, 189 A.3d 578 (2018) ("[i]n the absence of any language in [§ 52-470 (e)] cabining the discretion of the habeas court with respect to the timing of the issuance of an order to show cause for delay, we conclude that the legislature intended that the court exercise its discretion to do so when the court deems it appropriate given the circumstances of the case").

[Stenner's] case would have been when his petition for certification to [our] Supreme Court was denied on October 2, 2013." Therefore, in accordance with § 52-470 (d) (1), "any subsequent petition should have . . . been filed [no] later than October 2, 2015." In determining whether good cause existed, the habeas court found that, "[o]n approximately October 2, 2015, the Division of Public Defender Services Post Conviction Unit/Innocence Project (hereinafter, 'Innocence Project') received a standard inquiry from [Stenner] by way of a form they maintain on their website.[5] Upon reviewing the information submitted by [Stenner], Ian Dodds, Innocence Project case analyst, sent [Stenner] back a more detailed questionnaire asking for additional information, which he testified was returned in a timely manner, although no date was given. Immediately upon reviewing the information returned by [Stenner] . . . Dodds indicated it was apparent that the Innocence Project had a conflict of interest, because an attorney who formerly represented one of [Stenner's] codefendants was now employed as an Innocence Project staff attorney. On January 8, 2016, he elevated the case to Attorney Darcy McGraw, Director of the Innocence Project, notifying her of the conflict of interest. . . . McGraw testified that she sought approval from the Office of the Chief Public Defender for permission to assign the file to outside counsel for investigation. While no testimony was provided as to what occurred in the interim . . . McGraw received approval to assign the matter to outside counsel on May 19, 2016, at which time notification of assignment was forwarded to the Kirschbaum Law Firm. Following an investigation of the facts and cir-

[5] "In addition to basic personal information, the form asks only three questions. The first asks for the crimes the person was convicted of, the second asks for their parole eligibility date, and the third asks the following question: 'Summarize new evidence that has become available or that can be developed that could prove your factual innocence. This should include any new scientific evidence that can be considered.' "

cumstances of [Stenner's] case, the Kirschbaum Law Firm filed the petition commencing the present [case]." (Footnote in original.)

In addressing whether there was good cause for Stenner's untimely filing, the habeas court observed that Stenner "argues generally that the fact that he sought review of his matter by filing an inquiry with the Innocence Project should constitute 'good cause' for the delay in filing. [Stenner] claims that the assistance of counsel was necessary to uncover new evidence that could not have otherwise been discovered by [him] in the exercise of due diligence when he was self-represented. Specifically, [Stenner] asserts that the information necessary to support his claim that the state improperly withheld or misrepresented the benefits given to codefendants . . . could not have been discovered without counsel." The habeas court rejected Stenner's arguments, concluding that "the delay was without 'good cause,' because the record reveals that, not only was the information regarding the codefendants' actual plea deals with the state discoverable by the exercise of due diligence through court records available as far back as 2004, [Stenner] actually possessed the information not later than August 12, 2011. Since [Stenner] was fully aware, at a minimum, of how to commence a habeas action and get counsel appointed to represent his interests [as evidenced by the filing of his first petition], his delay in waiting until just days before the two year period ran to reach out to counsel was also without good cause.[6] That delay, resulted in prohibiting any counsel from beginning an investigation into the circumstances of [Stenner's] case until on or after the two year window expired on October 2, 2015. . . . This delay, which was . . . without good cause

[6] The record reflects that the Innocence Project received Stenner's general inquiry on September 29, 2015; however, Dodds, who was assigned to Stenner's case, did not receive the inquiry until October 2, 2015.

and solely within [Stenner's] control, made it impossible for counsel to file a petition within the statutory period." (Citation omitted; footnote added.) Accordingly, the habeas court dismissed Stenner's petition. This appeal followed.

On appeal, Stenner argues that he established good cause for his late filing because he demonstrated that he contacted the Innocence Project prior to the expiration of the two year period. In his view, both the Innocence Project and outside counsel were the cause of the delay because they needed time to investigate his claims prior to filing a habeas petition on his behalf. We disagree. Although Stenner attributes the delay in filing to the Innocence Project and to outside counsel, it was Stenner who waited until three days prior to the deadline to send a general inquiry to the Innocence Project. There is nothing in the record demonstrating that Stenner could not have contacted the Innocence Project sooner or filed his own petition prior to the deadline. Moreover, even if any delay can be attributed to the Innocence Project or to outside counsel, in order to establish good cause to rebut the presumption of unreasonable delay, "a petitioner generally will be required to demonstrate that something outside of the control of the petitioner *or habeas counsel* caused or contributed to the delay." (Emphasis added; internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 442.

In a similar vein, Stenner argues that good cause existed simply because he submitted a general inquiry to the Innocence Project before the expiration of the deadline. Section 52-470 (d), however, does not speak in terms of sending a general inquiry to prospective counsel prior to the relevant deadline; it requires that a petition be *filed* by the pertinent deadline. See General Statutes § 52-470 (d) ("there shall be a rebuttable presumption that the *filing* of the subsequent petition has

been delayed without good cause if such petition is *filed* after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review" (emphasis added)). To adopt Stenner's argument essentially would render the time limitation in the statute a nullity by allowing petitioners to unilaterally extend their filing deadline simply by exploring potential representation on the eve of the deadline. This would undermine the law's purpose of screening out meritless and untimely petitions in an expeditious manner. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 724, 189 A.3d 578 (2018) ("[o]ur conclusion . . . is consistent with the purpose underlying [Public Acts 2012, No. 12-115, § 1 (P.A. 12-115)]—to screen out meritless and untimely petitions in an expeditious manner").

Finally, § 52-470 (e) provides in relevant part: "[g]ood cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section." Stenner contends that he established good cause for his late filing because the claims in his petition were based on newly discovered evidence not reasonably available to him. We disagree.

Stenner's operative petition centers on allegations that the state improperly withheld or misrepresented the substance of the consideration that was going to be given to his codefendants in exchange for testifying against him at his trial. He suggests that these claims are supported by records and transcripts from 2003 and 2004 from his codefendants' dispositions, which were obtained by Attorney Michael Brown, an attorney at the Kirschbaum Law Group assigned to Stenner's case,

while he was investigating Stenner's case prior to filing the instant habeas action. In Stenner's view, this evidence is "new evidence" sufficient to constitute good cause under the statute because he speculates that he could not have obtained those court records and transcripts himself between the conclusion of appellate review of his prior habeas corpus proceeding and the deadline to file his next petition because he was not involved in pending litigation in order to avail himself of a fee waiver to obtain those records. We are not persuaded.

First, it is undisputed that the records and transcripts that Stenner now claims are "new evidence" were available in or around 2004, many years prior to the conclusion of his first habeas proceeding. Second, the record fully supports the habeas court's finding that Stenner was aware of the relevant facts and circumstances that implicate these records at least as far back as 2011, as evidenced by a prior claim he brought in an earlier habeas petition. Indeed, in a prior petition, Stenner alleged that the state failed to disclose impeachment evidence by failing to disclose that the codefendants' cases were being resolved favorably in exchange for testimony against him. See *Stenner* v. *Warden*, supra, 2011 WL 6270076, *3 and n.2. Although Stenner argues that these court records were not reasonably discoverable to him because he was not involved in pending litigation after the conclusion of appellate review of his prior habeas corpus action, which he claims is the only way he could avail himself of a fee waiver to obtain the records, this contention is not supported by anything in the record. Stenner did not offer any evidence that he, in fact, tried to obtain these court records but was unsuccessful. This claim also ignores the fact that Stenner could have filed his own petition—as he had done previously—prior to the filing deadline, which would have resulted in meeting the statutory deadline

and the appointment of counsel. Importantly, as previously discussed in this opinion, he also could have contacted the Innocence Project or other counsel earlier than he did. Simply put, the record reflects that Stenner in fact had this information as early as 2011. Stenner did not sufficiently demonstrate that this evidence could not have been discovered and obtained before the filing deadline by the exercise of due diligence. Last, even if he had demonstrated that this evidence could not have been discovered by the exercise of due diligence in time to meet the deadline, Stenner produced no evidence that this "new evidence" would have materially affected the merits of his case, as § 52-470 (e) requires.

On the basis of our review of the record in this case and guided by the relevant factors set forth in *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 439, we conclude that the habeas court did not abuse its discretion in determining that Stenner failed to demonstrate good cause for the delay in filing his second petition for a writ of habeas corpus.

II

ROFIO GREENFIELD

In 1990, a jury found Rofio Greenfield guilty of murder in violation of General Statutes § 53a-54a (a). *State* v. *Greenfield*, 228 Conn. 62, 63–64, 634 A.2d 879 (1993). He was sentenced to a term of imprisonment of forty-five years. Id., 64. Greenfield's conviction was affirmed by our Supreme Court in 1993. Id.

Following his conviction, Greenfield filed a host of habeas actions. Relevant to this appeal, Greenfield filed his fourth habeas action in 2005. The petitioner amended this petition in 2009, claiming ineffective assistance of counsel and actual innocence. See *Greenfield* v. *Warden*, Docket No. CV-05-4000636, 2010 WL 936894,

*1 (Conn. Super. February 9, 2010). On February 9, 2010, the habeas court dismissed Greenfield's amended petition as to his claims of ineffective assistance of counsel on the basis that they were successive. Id., *3. On June 3, 2010, the habeas court dismissed Greenfield's claim of actual innocence on the basis that he failed to establish a prima face claim. *Greenfield* v. *Warden*, Docket No. CV-05-4000636, 2010 WL 2817259, *1 (Conn. Super. June 3, 2010). Greenfield appealed to this court, which dismissed his appeal; *Greenfield* v. *Commissioner of Correction*, 133 Conn. App. 904, 34 A.3d 481 (2012); and our Supreme Court denied certification for appeal on March 7, 2012. *Greenfield* v. *Commissioner of Correction*, 304 Conn. 906, 38 A.3d 1201 (2012).

In June, 2012, approximately three months after the completion of Greenfield's appeal in his fourth habeas action, the legislature amended § 52-470. See P.A. 12-115. The amendments to § 52-470, which took effect on October 1, 2012, set filing deadlines for petitions for a writ of habeas corpus and require courts to dismiss petitions in cases in which a petitioner has not demonstrated good cause for a delay in filing his or her petition. See General Statutes § 52-470 (e) ("[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition").

On May 9, 2016, Greenfield initiated the instant habeas action. On July 30, 2019, and then again on August 1, 2019, Greenfield filed an amended petition alleging a violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a due process violation based on the state's knowing presentation of false testimony, and ineffective assistance of his three prior habeas counsel and trial counsel.

On July 30, 2019, pursuant to § 52-470 (e), the respondent filed a request for an order to show cause for

Greenfield's delay in filing his habeas petition. In his request, citing § 52-470 (d), the respondent claimed that Greenfield's petition was untimely and that, in order to proceed, he was required to show good cause for his delay in filing.

On September 20, 2019, the habeas court, *Chaplin*, *J.*, held a show cause hearing. Greenfield submitted an affidavit sworn to by himself with numerous documents appended to it and an affidavit sworn to by Attorney Mark Diamond, the attorney who represented Greenfield on appeal from his fourth habeas action. On the basis of this evidence, Greenfield argued, inter alia, that he established good cause because his habeas counsel and habeas appellate counsel failed to keep him apprised of the status of his case and to inform him of the new filing deadlines set forth in § 52-470. Greenfield argued and attested that, if he had known about the new law, he would have filed his petition sooner.

By memorandum of decision dated October 17, 2019, the habeas court found that "the current petition was filed more than four years after the dismissal of [Greenfield's] prior habeas corpus petition was deemed to be a final judgment due to the conclusion of appellate review." The habeas court found "Diamond's affidavit . . . inconclusive for the purpose of determining whether . . . Diamond failed to advise [Greenfield] of the statute of limitations that had not yet become the law when [our] Supreme Court denied [Greenfield's] petition for certification to appeal his prior habeas petition. Furthermore, this court does not find [Greenfield's] affidavit . . . persuasive as to prior appellate habeas counsel's failure to advise him of § 52-470 (d). Even if the court did find his affidavit persuasive on that point, [Greenfield's] affidavit is insufficient without corroborative evidence, of prior appellate habeas counsel's failure to advise [Greenfield] of § 52-470 (d), to demonstrate good cause for filing the current petition

beyond the applicable statute of limitations. . . . Therefore, the court finds that [Greenfield] has failed to make a showing of good cause for filing the current petition more than two years after March 7, 2012; or after October 1, 2014." (Citation omitted.) The habeas court accordingly dismissed Greenfield's petition. This appeal followed.

As an initial matter, Greenfield does not dispute that his fifth petition was presumptively untimely. Under § 52-470 (d), Greenfield had until October 1, 2014, to file the instant habeas petition.[7] He did not file his petition until May 9, 2016.

With respect to whether Greenfield established good cause for this untimely filing, the habeas court found that Diamond's affidavit was inconclusive for purposes of determining whether Diamond failed to advise Greenfield of the statute of limitations that had not yet become the law when our Supreme Court denied Greenfield's petition for certification to appeal his prior habeas petition. Furthermore, the court found Greenfield's affidavit unpersuasive as to prior appellate habeas counsel's failure to advise him of § 52-470 (d), especially without any corroborative evidence. Although Greenfield takes exception to the court's findings as to the evidence he

[7] In its request for an order to show cause filed with the habeas court, the respondent claimed initially that Greenfield was required to file the instant petition by March 7, 2014, in order for it to be timely filed. Although March 7, 2014, would have been two years from the conclusion of his prior habeas action, under § 52-470 (d), Greenfield had until October 1, 2014, to file the instant habeas action. See General Statutes § 52-470 (d) ("there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed *after the later of the following*: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014" (emphasis added)). Neither party disputes at this juncture that the operative deadline to file the instant habeas petition was October 1, 2014.

introduced, we disagree with him that those determinations were clearly erroneous. See *State* v. *Garcia*, 299 Conn. 39, 54, 7 A.3d 355 (2010) ([b]ecause it is the trial court's function to weigh the evidence and [to] determine credibility, we give great deference to its findings" (internal quotation marks omitted)).

Moreover, the habeas court ultimately concluded that, even if it had found that Greenfield's affidavit was persuasive, there still was no good cause for his untimely filing. We conclude that the habeas court did not abuse its discretion in making this determination.

Greenfield argues that he established good cause by proving that he was unaware of the deadline and that the delay in filing was not caused by him but by his prior counsel's failure to inform him that P.A. 12-115 had been enacted and would become effective on October 1, 2012. In support of this argument, he argues that his appellate counsel for his fourth petition, Diamond, sent him a letter on March 13, 2012, informing him that the Supreme Court denied his petition for certification and that Diamond would no longer be representing him. In his view, because Diamond did not include information in that letter informing him that there was pending legislation at that time that could, if eventually passed, affect his appeal timeline, there was good cause for his late filing. Greenfield also contends that he received a letter from Diamond on September 25, 2012, that contained transcripts from his case. He argues that this letter demonstrates that a relationship with his counsel was still ongoing, and that counsel had an obligation in that correspondence to alert Greenfield about the passage of P.A. 12-115. Greenfield contends that, because counsel did not provide him with this information at any time, any delay cannot be attributed to him. We are not persuaded.

Recently, in *Kelsey*, a petitioner argued that, "in addition to his prior habeas counsel's failure to inform him

of any statutory filing deadlines, his status as a self-represented party when he filed this petition caused the delay in filing insofar as his conditions of confinement had caused him to be unaware of the deadline set by the 2012 amendments to § 52-470." *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441. In reaching its conclusion that the petitioner failed to demonstrate good cause, our Supreme Court explained that, "although . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge." (Footnote omitted.) Id., 444–45. The court explained that, "although the petitioner's lack of knowledge of the statutory amendments apparently attributable to his conditions of confinement could have certainly been considered in the habeas court's good cause determination," the record was clear that "the petitioner had access to a resource center that included the General Statutes" when he was out of administrative segregation in the ten months leading up to the filing deadline. Id., 445–46. The court consequently affirmed this court's judgment dismissing the petitioner's habeas petition. Id., 447.

Following our Supreme Court's decision in *Kelsey*, this court has addressed similar claims to the ones made in *Kelsey* and in this appeal. For example, in *Michael*

*G.* v. *Commissioner of Correction*, 214 Conn. App. 358, 369, 280 A.3d 501 (2022), a petitioner argued that he established good cause for his untimely filing because his second habeas counsel failed to explain to him the statutory time limits in § 52-470 and incorrectly advised him to withdraw his prior petition and to refile it outside of the two year statutory deadline. Guided by the *Kelsey* factors, this court explained that, "[e]ven if we were to assume . . . that neither the petitioner nor his habeas counsel was aware of the time limits, the petitioner still cannot demonstrate that the habeas court abused its discretion in determining that the erroneous advice the petitioner received did not establish good cause for the delay in filing the third petition" because there were "no external factors at play and the petitioner and his habeas counsel together exclusively bear responsibility for the delay in filing the petition." (Footnote omitted.) Id., 370.

Similarly, in *Coney* v. *Commissioner of Correction*, supra, 215 Conn. App. 110, the petitioner argued that his prior habeas counsel's advice to withdraw his third petition, despite the fact that the statutory deadline had passed, constituted good cause for the delay in filing. He also argued that his ignorance of the law, his counsel's ignorance of the law, and the unavailability of an important witness, excused his untimely fourth petition. Id., 110. In rejecting the petitioner's arguments, this court explained that "there are no external factors at play and the petitioner and his prior habeas counsel together exclusively bear responsibility for the delay in filing." Id., 111. "[T]he 'cause' of the delay was not 'something outside of the control of the petitioner or habeas counsel' as required under [*Kelsey*'s] definition of good cause . . . .' " Id.

The same is true in this case. Greenfield's lack of knowledge of the change in the law and his counsel's alleged failure to notify him of the changes, on the facts

of this case, are insufficient to demonstrate that the habeas court abused its discretion in finding that good cause did not exist for the untimely filing. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444 ("the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause"). During oral argument before this court, Greenfield's counsel confirmed that Greenfield was not arguing that his ignorance of the law was attributable to his conditions of confinement or other extenuating circumstances pertaining to his incarceration. Indeed, Greenfield presented no evidence to the habeas court to demonstrate how his one year and seven months delay in filing his habeas petition involved "something outside of the control of the petitioner or habeas counsel . . . ." Id., 442. We conclude, therefore, that the habeas court did not abuse its discretion in determining that Greenfield had failed to demonstrate good cause for the delay in filing his fifth habeas petition.[8]

[8] In their supplemental briefing, both petitioners argue that, because the habeas courts did not have the guidance of *Kelsey* when considering whether there was good cause for the delay in the filings, these cases should be remanded for further proceedings. This court, in addressing the same exact argument in a similar case to the present cases, recently held that "this argument has no merit." *Coney* v. *Commissioner of Correction*, supra, 215 Conn. App. 112 n.13. Moreover, we note that our Supreme Court in *Kelsey* did not remand that case to the habeas court for further proceedings. It instead affirmed this court's judgment, concluding "that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing the second habeas petition . . . ." *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 447. Although we do not foreclose the possibility that there could be an instance, albeit rare, in which a remand instructing a habeas court to apply *Kelsey* would be appropriate, we are not persuaded that one is required in either of these cases because neither petitioner has pointed to anything in *Kelsey* that would have required the habeas court in his case to have undertaken a different analysis with respect to the claims he raised before the habeas court. We therefore decline the petitioners' invitations to remand these cases for further proceedings.

The judgments are affirmed.

In this opinion the other judges concurred.

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# MARCUS HODGE *v.* COMMISSIONER OF CORRECTION (AC 41627)

Elgo, Moll and Clark, Js.

*Syllabus*

The petitioner, who had been convicted of manslaughter in the second degree and evading responsibility in the operation of a motor vehicle, sought a writ of habeas corpus, claiming, inter alia, that certain changes to a risk reduction earned credit program had been improperly applied to him by the respondent, the Commissioner of Correction. The habeas court, sua sponte and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's amended petition pursuant to the rule of practice (§ 23-29), concluding that it lacked subject matter jurisdiction over that petition and that the amended petition failed to state a claim on which habeas corpus relief could be granted. On the granting of certification, the petitioner appealed from the habeas court's judgment to this court. *Held* that, in light of our Supreme Court's recent decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), this court concluded that, although the habeas court was not obligated to conduct a hearing before dismissing the amended petition, it was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the amended petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal, which it did not do; accordingly, on remand, should the habeas court again elect to exercise its discretion to dismiss the amended petition, or any subsequent amended petition properly filed by the petitioner, on its own motion pursuant to Practice Book § 23-29, the court must comply with *Brown* and *Boria* by providing the petitioner with prior notice and an opportunity to submit a brief or written response addressing the proposed basis for dismissal.

Argued September 19—officially released November 22, 2022

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*,

judge trial referee, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

*Vishal K. Garg*, assigned counsel, for the appellant (petitioner).

*Steven R. Strom*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (respondent).

*Opinion*

MOLL, J. The petitioner, Marcus Hodge, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court dismissing, on its own motion, his amended petition for a writ of habeas corpus pursuant to Practice Book § 23-29. On appeal, the dispositive claim raised by the petitioner is that the court improperly dismissed his amended habeas petition under § 23-29 without notice and a hearing.[1] In light of our Supreme Court's recent decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and in *Brown*'s companion case, *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), we conclude that the habeas court committed error in dismissing the amended habeas petition pursuant to § 23-29 without providing to the petitioner prior notice of its intention to dismiss, on its own motion, the amended habeas petition and an opportunity to submit a brief or a written response addressing

[1] The petitioner also claims that the court improperly dismissed his amended habeas petition pursuant to Practice Book § 23-29 on the merits. Our conclusion that the court erred in dismissing the amended habeas petition under § 23-29 without providing to the petitioner prior notice and an opportunity to submit a brief or a written response is dispositive of this appeal, and, therefore, we need not address this separate claim.

the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court.

The following procedural history is relevant to our resolution of this appeal. On June 29, 2015, the petitioner, representing himself, filed a petition for a writ of habeas corpus. The same day, the petitioner filed a request for appointment of counsel and an application for a waiver of fees, which were granted on July 2, 2015. On November 15, 2017, after counsel had appeared on his behalf, the petitioner filed an amended eighteen count petition for a writ of habeas corpus (amended petition). The petitioner alleged that, on December 16, 2011, he was sentenced to a total effective sentence of fifteen years of incarceration after being convicted of manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1) and evading responsibility in the operation of a motor vehicle in violation of General Statutes (Rev. to 2009) § 14-224 (a), stemming from an incident that had occurred in March, 2010. The petitioner's substantive allegations implicated "the risk reduction earned credit program that was established in 2011, by No. 11-51 of the 2011 Public Acts . . . as codified in General Statutes (Supp. 2012) §§ 18-98e and 54-125a, [and] which was eliminated in 2013, following the enactment of No. 13-3, § 59, of the 2013 Public Acts . . . ." *Johnson* v. *Commissioner of Correction*, 208 Conn. App. 204, 207, 264 A.3d 121, cert. denied, 340 Conn. 911, 264 A.3d 1001 (2021). Only counts two, six, and twelve of the amended petition are relevant to this appeal.[2] In count two, the petitioner alleged that the respondent, the Commissioner of Correction, improperly applied No. 13-247 of the 2013 Public Acts, § 376, which amended subsections (d) and (e) of General Statutes (Rev. to 2013) § 54-125a, to him retroactively. In

[2] During oral argument before this court, the petitioner's counsel stated that the petitioner was claiming error only with respect to the habeas court's dismissal of counts two, six, and twelve of the amended petition.

count six, the petitioner alleged that the respondent improperly applied No. 13-3 of the 2013 Public Acts, § 59, which amended subsections (b) (2), (c), and (e) of General Statutes (Rev. to 2013) § 54-125a, to him retroactively. In count twelve, the petitioner alleged that "[t]he respondent's interpretation and application of [General Statutes] § 54-125a, as amended in 2013, deprives the petitioner of his right to rely upon governmental representations, protected by the due process clauses of the state and federal constitutions, as explained in *Santobello* v. *New York*, 404 U.S. 257, [92 S. Ct. 495, 30 L. Ed. 2d 427] (1971)."

On March 19, 2018, the habeas court, *Hon. Edward J. Mullarkey*, judge trial referee, dismissed, on its own motion, the amended petition pursuant to Practice Book § 23-29.[3] The court concluded that, "[b]ecause the petitioner has no right to earn and receive discretionary [risk reduction earned credit], and any changes, alterations, and even the total elimination of [risk reduction earned credit] at most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the [amended] habeas corpus petition and that the [amended] petition fails to state a claim for which habeas corpus relief can be granted." The court continued: "Consequently . . . judgment shall enter dismissing the [amended] petition for a writ

[3] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition;

"(4) the claims asserted in the petition are moot or premature;

"(5) any other legally sufficient ground for dismissal of the petition exists."

of habeas corpus. Practice Book § 23-29 (1), (2) and (5)." Thereafter, the petitioner filed a petition for certification to appeal, which the court granted on April 12, 2018. This appeal followed.

While this appeal was pending,[4] our Supreme Court released its decisions in *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 1, and in *Brown*'s companion case, *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 39. In those cases, our Supreme Court concluded that, before dismissing, on its own motion, a habeas petition pursuant to Practice Book § 23-29, a habeas court must provide to the petitioner prior notice of its intention to dismiss the habeas petition and an opportunity to file a brief or a written response to the proposed basis for dismissal. *Brown* v. *Commissioner of Correction*, supra, 11; *Boria* v. *Commissioner of Correction*, supra, 41. Our Supreme Court further concluded that a habeas court is not obligated to hold a full hearing prior to dismissing, on its own motion, a habeas petition pursuant to § 23-29, but it may exercise its discretion to "hold a full hearing when it deems it appropriate." *Brown* v. *Commissioner of Correction*, supra, 17; see also *Boria* v. *Commissioner of Correction*, supra, 42–43.

*Brown* and *Boria* govern our resolution of this appeal.[5] The petitioner's dispositive claim is that the

[4] The petitioner filed this appeal on May 10, 2018, after he had been granted a waiver of fees, costs, and expenses and appointment of counsel on appeal. On September 13, 2018, this court stayed this appeal until the official release of this court's opinions in three habeas appeals pending at the time. On November 1, 2019, this court lifted the stay. Thereafter, on June 30, 2020, the petitioner filed a motion to stay this appeal, which this court granted on July 1, 2020, pending our Supreme Court's final resolution of *Holliday* v. *Commissioner of Correction*, Docket No. SC 20460 (appeal dismissed October 26, 2021). On November 12, 2021, after our Supreme Court had dismissed *Holliday* on mootness grounds, this court lifted the stay.

[5] On October 17, 2022, we ordered, sua sponte, the parties to file simultaneous supplemental briefs addressing the effect, if any, of our Supreme Court's decisions in *Brown* and *Boria* on this appeal. The parties filed briefs in accordance with our order.

court improperly dismissed the amended petition pursuant to Practice Book § 23-29 without notice and a hearing. Pursuant to *Brown* and *Boria*, the court was not obligated to conduct a hearing before dismissing the amended petition; however, it was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the amended petition and an opportunity to submit a brief or a written response vis-à-vis the proposed basis for dismissal, which the court did not do.[6] Accordingly, under the binding precedent of *Brown* and *Boria*, we must reverse the court's dismissal of the amended petition pursuant to § 23-29 and remand the case to the habeas court.[7]

We next consider the appropriate course for the habeas court to take on remand. In *Brown*, notwithstanding that the habeas court in that case had issued

[6] On October 10, 2017, the habeas court, *Westbrook*, *J.*, issued a JDNO notice stating in relevant part that "[t]he parties and counsel are hereby given notice that lack of jurisdiction may be raised by the court at any time and, therefore, the parties and counsel should anticipate presenting arguments addressing jurisdiction at any time." This notice could not have served to notify the petitioner of the court's intention to dismiss the amended petition pursuant to Practice Book § 23-29 because the notice (1) preceded the filing of the amended petition and (2) did not state that the court *was* considering dismissal on the basis of lack of subject matter jurisdiction, but, rather, that the court *may* raise that issue at any time in the future. Moreover, at no point was the petitioner invited to submit a brief or a written response in advance of the court's judgment dismissing the amended petition.

[7] In its supplemental brief, the respondent argues that *Brown* and *Boria* do not require this court to reverse the judgment of dismissal and to remand the case to the habeas court because the petitioner has received an opportunity to be heard regarding the dismissal of his claims, which involve pure questions of law, by virtue of this appeal, and this court is best positioned to address the merits of the petitioner's claims. We reject the respondent's argument, as we construe *Brown* and *Boria* to mandate a reversal of the judgment of dismissal and a remand to the habeas court. Indeed, in *Boria*, one of the claims raised by the petitioner was a risk reduction earned credit challenge claim, which the habeas court dismissed for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1). *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 42.

the writ to commence the habeas proceeding, our Supreme Court remanded the case to the habeas court "to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24. If the writ is issued, and the habeas court again elects to exercise its discretion to dismiss the petitioner's habeas petition on its own motion pursuant to Practice Book § 23-29, it must . . . provide the petitioner with prior notice and an opportunity to submit a brief or a written response to the proposed basis for dismissal." (Footnote omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17–18; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43. Our Supreme Court reasoned that such a remand order was proper in *Brown*, as well as in *Boria*, because, at the time of the respective judgments of dismissal, the habeas courts had not had the benefit of our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020). *Brown* v. *Commissioner of Correction*, supra, 17; *Boria* v. *Commissioner of Correction*, supra, 43. In *Gilchrist*, the habeas court dismissed a habeas petition for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1), notwithstanding that the habeas court had not issued the writ. *Gilchrist* v. *Commissioner of Correction*, supra, 552. Our Supreme Court reversed this court's judgment, which had affirmed the judgment of dismissal, concluding that, rather than dismissing the habeas petition for lack of subject matter jurisdiction under § 23-29 (1), the habeas court should have declined to issue the writ for lack of subject matter jurisdiction pursuant to Practice Book § 23-24 (a) (1). Id., 563. In *Brown*, our Supreme Court explained that "*Gilchrist* firmly established that . . . § 23-24 acts as a gatekeeping mechanism that allows a habeas court to review and dispose of a clearly defective petition by simply providing the petitioner with notice of its decision to decline to issue

the writ." *Brown* v. *Commissioner of Correction*, supra, 10–11. In footnote 11 of *Brown*, our Supreme Court advised that, "[i]n cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." Id., 17 n.11.

We observe that footnote 11 of *Brown* may create some unintended difficulties. This case presents one such occasion. Footnote 11 of *Brown* contemplates, at least in some cases decided prior to *Gilchrist*, a remand to the habeas court to determine whether grounds exist to decline the issuance of the writ pursuant to Practice Book § 23-24, notwithstanding the fact that the writ had already issued. See id. In *Brown*, however, the original habeas petition filed by the self-represented petitioner was the operative habeas petition that the habeas court dismissed pursuant to Practice Book § 23-29. Id., 8. In contrast, after counsel had appeared on his behalf in the present case, the petitioner filed an amended habeas petition more than two years after he had filed the original habeas petition. Without additional guidance from our Supreme Court, we deem the rationale of footnote 11 of *Brown* to be inapplicable to the present case.[8] It would strain logic to construe footnote 11 of *Brown* as advising that we should direct the habeas court on remand to consider declining to issue the writ under § 23-24 vis-à-vis the amended petition, which was filed *after* the writ had been issued. Moreover, affording the habeas court on remand another opportunity to consider declining to issue the writ under § 23-24 vis-à-vis the original habeas petition, in effect, would vitiate

[8] In their respective supplemental briefs, both parties agree that, in the event that the judgment of dismissal is reversed and the case is remanded to the habeas court, this court should not instruct the habeas court on remand to conduct a screening review pursuant to Practice Book § 23-24.

the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended.

In light of the foregoing considerations, we conclude that the proper remedy is to reverse the judgment of dismissal and remand the case to the habeas court for further proceedings according to law. Should the habeas court again elect to exercise its discretion to dismiss the amended petition, or any subsequent amended petition properly filed by the petitioner, on its own motion pursuant to Practice Book § 23-29, the court must comply with the mandate of *Brown* and *Boria* by providing to the petitioner prior notice and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal.

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

In this opinion the other judges concurred.

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## DAWSON LAWRENCE *v.* ROBERTO GUDE ET AL. (AC 45191)

Elgo, Moll and Clark, Js.

*Syllabus*

Pursuant to statute (§ 46b-37 (b) (3)), it is the joint duty of each spouse to support his or her family, and both shall be liable for "the rental of any dwelling unit actually occupied by the husband and wife as a residence . . . ."

The plaintiff landlord, L, sought, inter alia, damages for back rent and use and occupancy in connection with a residential property he leased to the defendants, R and A, who were husband and wife. Although the lease listed both R and A as tenants and both R and A resided at the property, only R signed the lease. L's complaint sounded in breach of contract as to R and alleged that A was liable pursuant to § 46b-37 (b) (3) because she and R were married and used the premises as their primary residence. The trial court rendered judgment in favor of L as against R, in accordance with a stipulation entered into by L and R. The court did not find A liable for back rent or use and occupancy because

A had not signed the lease agreement and, although it considered L's arguments regarding § 46b-37 (b) (3), it did not adopt L's interpretation of that statute. On L's appeal to this court, *held* that the trial court erred in failing to impose joint and several spousal liability as to A pursuant to § 46b-37 (b) (3); the language of that statute unambiguously provides that both spouses shall be liable for the rental of any dwelling unit actually occupied by a husband and wife as a residence, and here, in light of R's liability for back rent and use and occupancy, A was also liable for back rent and use and occupancy, as the defendants' argument that a spouse cannot be liable to a third party under the statute for rent owed when the spouse is not a signatory to the leasehold agreement was contrary to the plain language of § 46b-37 (b) (3) and analogous appellate precedent interpreting other subdivisions of § 46b-37 (b) vis-à-vis third-party claims for payment.

Argued September 19—officially released November 22, 2022

*Procedural History*

Action to recover damages for breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Litchfield, Housing Session at Torrington, and tried to the court, *Wu*, *J.*; judgment in part for the plaintiff, from which the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

*Randall J. Carreira*, for the appellant (plaintiff).

*Douglas J. Lewis*, for the appellees (defendants).

*Opinion*

CLARK, J. The plaintiff, Dawson Lawrence, appeals from the judgment of the trial court rendered following a court trial in an action for damages arising from a residential lease against the married defendants, Roberto Gude (Roberto) and Adriana Gude (Adriana). On appeal, the plaintiff argues that the court improperly found that Adriana was not liable for back rent and use and occupancy under the lease pursuant to General

Statutes § 46b-37 (b) (3).[1] We agree and, accordingly, reverse in part the judgment of the court.

We begin by setting forth the relevant facts, as found by the trial court, and the procedural history in this case. At all relevant times, Roberto and Adriana were married. The plaintiff and Roberto signed a written lease agreement for the plaintiff's real property located at 8 Bittersweet Bluff in New Milford (premises) for a term of one year commencing on September 15, 2015. Although the lease listed both Roberto and Adriana as tenants, Adriana did not sign the lease. Nevertheless, it is undisputed that both Roberto and Adriana resided together as husband and wife at the premises. The lease set the rent at $1750 per month. At the expiration of that year, the plaintiff and Roberto entered into an oral month-to-month lease. The plaintiff subsequently increased the rent to $1850 per month and then, in February, 2020, increased it to $1900 per month. On February 18, 2020, the defendants paid the plaintiff $1000 for rent.

On March 5, 2020, the plaintiff served the defendants with a notice to quit, which required them to vacate the premises on or before March 15, 2020. In the summary process proceedings that followed, the defendants availed themselves of the protection of the public health emergency order issued by the Centers for Disease Control and Prevention titled "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19" (CDC order). On January 6, 2021, the summary

[1] General Statutes § 46b-37 provides in relevant part: "(a) Any purchase made by either a husband or wife in his or her own name shall be presumed, in the absence of notice to the contrary, to be made by him or her as an individual and he or she shall be liable for the purchase.

"(b) Notwithstanding the provisions of subsection (a) of this section, it shall be the joint duty of each spouse to support his or her family, and both shall be liable for . . . (3) the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose . . . ."

process court, *J. Moore*, *J.*, found that the defendants had failed to pay rent but, as a result of the CDC order, could not be evicted. The court did not render judgment at that time because it needed to determine whether the defendants' adult daughter was an occupant of the premises as of March 5, 2020, a fact that, if proven, would require the plaintiff to serve the daughter with a notice to quit before the summary process proceedings could continue.[2]

While the summary process action was pending, the plaintiff commenced the instant action against the defendants on January 27, 2021. The first count of the three count complaint, which sounded in breach of contract, alleged that Roberto was liable for back rent, use and occupancy of the premises, and property damage. The second count alleged that Adriana was liable for back rent pursuant to § 46b-37 because she and Roberto were married and used the premises as their primary residence. The third count alleged that the defendants were liable for back rent and use and occupancy based on a theory of unjust enrichment. On April 12, 2021, the defendants filed an answer to the complaint, admitting, inter alia, that Adriana is Roberto's spouse and that the two lived in the premises as their primary residence at all relevant times.

On April 13, 2021, the summary process court, *J. Moore*, *J.*, rendered judgment of summary process in the plaintiff's favor but stayed execution of the eviction until June 30, 2021, based on the CDC order.

On June 10, 2021, the plaintiff amended his complaint in this action. The amended complaint repleaded all

[2] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor . . . desires to obtain possession or occupancy of any land or building . . . such owner or lessor . . . shall give notice *to each lessee or occupant* to quit possession or occupancy of such land, building, apartment or dwelling unit, at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy." (Emphasis added.)

three counts but added the phrase "use and occupancy" to several paragraphs in all three counts and updated the amounts allegedly owed to reflect the defendants' continued use and occupancy of the premises without paying rent during the pendency of the action. The plaintiff and Roberto stipulated on the first day of trial, July 13, 2021, that the plaintiff was owed $27,500 in back rent and use and occupancy.[3]

On November 26, 2021, the court rendered judgment in favor of the plaintiff on count one against Roberto. The court found Roberto liable for $31,948, awarding $27,500 for back rent and use and occupancy, as stipulated, and $4448 for repair costs due to damage to the premises. With respect to Adriana, however, the court stated that, "[a]lthough . . . Adriana . . . is listed as a party in the written . . . lease, the lease agreement is not signed by her . . . . There was no evidence entered into the record that she participated in the negotiation of the oral, month-to-month lease of the premises. Therefore, the court finds that . . . Adriana . . . is not liable to plaintiff for back rent or use and occupancy."

On November 30, 2021, the plaintiff filed a motion to reargue, asserting that the court failed to address Adriana's alleged liability under § 46b-37 (b). The defendants objected to that motion on December 1, 2021, and argued, inter alia, that § 46b-37 (b) does not apply to the claims of a landlord. On December 17, 2021, the court denied the motion to reargue and stated: "The court, in issuing its decision in this matter, considered the plaintiff's arguments regarding § 46b-37 (b) (3). Title 46b of the . . . General Statutes relates to family law

[3] On August 24, 2021, the second day of trial, despite the stipulation, the plaintiff argued that the amount owed for back rent and use and occupancy was $29,295. The trial court awarded the plaintiff $27,500 for back rent and use and occupancy in accordance with the stipulation, and the plaintiff does not challenge that ruling on appeal.

related issues and matters. The court does not adopt the plaintiff's interpretation of that statute and instead applied principles of contract law to determine liability of the respective defendants." This appeal followed.[4] Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. Because the issue on appeal is whether Adriana is liable to the plaintiff for back rent and use and occupancy under § 46b-37 (b) (3), the plaintiff's claim "raises a question of statutory construction, which is a [question] of law, over which we exercise plenary review." (Internal quotation marks omitted.) *Saunders* v. *Firtel*, 293 Conn. 515, 525, 978 A.2d 487 (2009). Further, "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . [General Statutes §] 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 603–604, 89 A.3d 841 (2014).

On appeal, the plaintiff claims that the trial court erred in failing to impose joint and several spousal liability as to Adriana pursuant to § 46b-37 (b). The defendants disagree and argue that § 46b-37 (b) does

[4] Roberto has not filed a cross appeal.

not apply in actions filed by landlords in regard to a contract claim, and, therefore, the court did not err in finding Adriana not liable under the statute. We agree with the plaintiff.

Section 46b-37 provides in relevant part: "(a) Any purchase made by either a husband or wife in his or her own name shall be presumed, in the absence of notice to the contrary, to be made by him or her as an individual and he or she shall be liable for the purchase. *(b) Notwithstanding the provisions of subsection (a) of this section, it shall be the joint duty of each spouse to support his or her family, and both shall be liable for:* (1) The reasonable and necessary services of a physician or dentist; (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents; *(3) the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose*; and (4) any article purchased by either which has in fact gone to the support of the family, or for the joint benefit of both." (Emphasis added.) This language clearly and unambiguously states that "both" spouses shall be liable for "the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose . . . ." General Statutes § 46b-37 (b) (3); see also *Wilton Meadows Ltd. Partnership* v. *Coratolo*, 299 Conn. 819, 829, 14 A.3d 982 (2011) ("[§ 46b-37 (b) (1) through (3)] expressly enumerate specific types of services and expenses for which a spouse would be liable").

The defendants' argument that a spouse cannot be liable to a third party under § 46b-37 for rent owed when the spouse is not a signatory to the leasehold agreement is contrary to the plain language of § 46b-37 (b) (3) and analogous appellate precedent interpreting other subdivisions of § 46b-37 (b) vis-à-vis third-party

claims for payment. Most recently, in *Stamford Hospital* v. *Schwartz*, 190 Conn. App. 63, 78, 209 A.3d 1243, cert. denied, 332 Conn. 911, 209 A.3d 644 (2019), this court held that § 46b-37 (b) (2) allowed a hospital to recover the costs of medical services rendered to a minor child from both of the child's parents. The mother in *Schwartz* had signed an authorization that made her liable for any medical expenses that the child's health insurance did not cover, and the trial court rendered judgment against both parents pursuant to § 46b-37 (b) (2). Id., 68. We affirmed that judgment on the ground that the father "was liable under the authorization pursuant to § 46b-37, regardless of whether he signed the authorization." Id., 78. This court's decision in *Schwartz* is consistent with a long line of cases that interpreted prior revisions of § 46b-37 (b) as creating joint and several spousal liability to third parties for certain types of debt. See, e.g., *Baledes* v. *Greenbaum*, 112 Conn. 64, 68–69, 151 A. 333 (1930) (affirming judgment against husband for cost of groceries wife purchased for support of family); *Howland Dry Goods Co.* v. *Welch*, 94 Conn. 265, 267, 108 A. 510 (1919) (husband and wife jointly liable for articles purchased by one as long as "the purchases [had] in fact gone to the support of the family" (internal quotation marks omitted)); *Paquin, Ltd.* v. *Westervelt*, 93 Conn. 513, 517–18, 106 A. 766 (1919) (husband liable for cost of clothing wife purchased for individual use from plaintiff); *Fitzmaurice* v. *Buck*, 77 Conn. 390, 393, 59 A. 415 (1904) (concluding prior revision of § 46b-37 (b) "was in its present pertinent provisions designed in no small measure for the protection of third parties who might have dealings with married persons").

Here, the defendants admitted in their answer that, at all relevant times, they were married and were occupying the premises as their primary residence.[5] Pursuant to the plain language of § 46b-37 (b), in light of

[5] As the plaintiff noted in his appellate brief, the defendants did not file an answer to the amended complaint. Practice Book § 10-61 provides in

Roberto's liability for back rent and use and occupancy, Adriana is also liable for back rent and use and occupancy, regardless of whether she signed the lease.[6] See *Stamford Hospital* v. *Schwartz*, supra, 190 Conn. App. 78.

The judgment is reversed as to the defendant Adriana Gude only, and the case is remanded with direction to render judgment in favor of the plaintiff against the defendant Adriana Gude in the amount of $27,500 for back rent and use and occupancy; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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relevant part: "When any pleading is amended the adverse party may plead thereto . . . or, if the adverse party has already pleaded, alter the pleading, if desired . . . . If the adverse party fails to plead further, pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading." The plaintiff's amended complaint did not modify the paragraphs containing the allegations in question. Because the defendants admitted those allegations, the defendants' admissions on those points apply to the amended complaint.

[6] During oral argument before this court, the plaintiff's counsel made clear that the plaintiff was only seeking to hold Adriana liable under § 46b-37 (b) for back rent and use and occupancy, not for property damage.