ANGEL VILLAFANE *v.* COMMISSIONER OF CORRECTION (AC 43232)

Elgo, Suarez and DiPentima, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, to burglary in the first degree and criminal violation of a protective order, sought a writ of habeas corpus. The habeas court, on its own motion 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 the petitioner's guilty plea waived any alleged constitutional defects not involving the court's jurisdiction and that the complaint attacked only issues that were outside the jurisdiction of the habeas court. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The trial court abused its discretion in denying the petition for certification to appeal: 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), the issue raised in the petitioner's petition for certification to appeal concerning the right to notice and a right to be heard prior to a dismissal under Practice Book § 23-29 was debatable among jurists of reason, a court could resolve the issue in a different manner, and the issue deserved encouragement to proceed further.
2. This court concluded that, although the habeas court was not required to hold a full hearing, the petitioner was entitled to notice of that court's intention to dismiss and an opportunity to file a brief or a written response concerning the proposed basis for dismissal, which it did not do; accordingly, on remand, should the habeas court consider dismissal of 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 procedure set forth in *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 January 13, 2021—officially released December 13, 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, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed*; *further proceedings*.

Cheryl A. Juniewic, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom were *Angela R. Macchiarulo*, senior assistant state's attorney, and *Matthew C. Gedansky*, state's attorney, and, on the brief, *Rocco A. Chiarenza*, senior assistant state's attorney, and *Margaret E. Kelley*, state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Angel Villafane, appeals, following the denial 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.[1]

[1] 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."

The petitioner argues that the court abused its discretion in denying his petition for certification to appeal and claims that the court improperly dismissed his petition for a writ of habeas corpus without affording him an opportunity to be heard. We agree that the court abused its discretion by denying the petition for certification to appeal. Further, we conclude, 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), that the habeas court improperly dismissed the petition for a writ of habeas corpus pursuant to § 23-29 without providing the petitioner with prior notice of its intention to dismiss, on its own motion, the petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal. Accordingly, we reverse the judgment of the habeas court.

The following undisputed procedural history is relevant to our resolution of this appeal. "On December 17, 2014, the petitioner pleaded guilty to one count of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2) and one count of criminal violation of a protective order in violation of General Statutes § 53a-223. The petitioner also admitted to violating his probation in two instances and violating a conditional discharge in violation of General Statutes § 53a-32. According to the factual basis provided by the state at the petitioner's plea hearing, the petitioner forced his way into a house occupied by a woman with whom he had [had] a previous relationship, where he proceeded to strike her 'several times in the head, and then grabbed a knife from the kitchen and attempted to stab her . . . .' The prosecutor indicated that the woman's daughter called the police, and, at that time, the petitioner fled from the residence. After canvassing the petitioner, the court determined that the pleas had

been 'knowingly and voluntarily made' and were supported by a factual basis.

"At the petitioner's sentencing hearing on February 25, 2015, the court imposed a total effective sentence of eight years [of] incarceration followed by seven years of special parole. The court terminated the other probations that the petitioner was serving at the time." *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 567–68, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

In 2015, the petitioner filed a petition for a writ of habeas corpus in which he alleged that, in connection with the plea hearing that occurred in this case, his trial counsel had not provided effective assistance and that the trial court, *Iannotti*, *J.*, had improperly refused to grant his motion to dismiss his trial counsel. Id., 568. The petitioner appealed from the judgment of the habeas court, *Sferrazza*, *J.*, denying the petition for a writ of habeas corpus following its denial of his petition for certification to appeal. Id., 567. This court dismissed the petitioner's subsequent appeal. Id.

On August 16, 2017, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus in the present habeas action.[2] On August 28, 2017, the court granted the petitioner's application for waiver of fees and his request for the appointment of counsel. On April 11, 2018, the court granted the motion of the petitioner's appointed counsel, Attorney Robert O'Brien, to withdraw his appearance due to the petitioner's expressed desire to represent himself. On October 5, 2018, the petitioner, in a self-represented capacity, filed an amended petition for a writ of habeas corpus.

[2] In this appeal, we do not address the grounds set forth in the petition for a writ of habeas corpus or the amended petition for a writ of habeas corpus as it is unnecessary for us to do so.

On November 19, 2018, the respondent, the Commissioner of Correction, filed his return. On the same day, the petitioner filed his reply. On May 3, 2019, the parties filed a certificate of closed pleadings and the court issued a scheduling order that, among other things, set a trial date of September 25, 2019.

On May 14, 2019, the petitioner filed a motion requesting the appointment of standby counsel. On May 24, 2019, the petitioner filed a motion for summary judgment. The court did not rule on either of these motions.

On May 28, 2019, the court, *Newson*, *J.*, on its own motion, issued an order in which it dismissed the amended petition for a writ of habeas corpus. The court did not afford the petitioner prior notice of its intention to dismiss the amended petition or any opportunity to address the proposed basis for its dismissal. The court stated: "Upon review of the complaint . . . the court hereby gives notice pursuant to Practice Book § 23-29 that the matter has been dismissed for the following reasons: (1) The court lacks jurisdiction . . . . More specifically, the petitioner entered a guilty plea, which waived any alleged constitutional defects not involving the court's jurisdiction. . . .

"The complaint, read in a light most favorable to the petitioner, does not attack the voluntary, intelligent or knowing nature of the plea, but attacks the sufficiency of the evidence to support the plea, separation of powers, and the Code of Judicial Conduct, none of which falls within the jurisdiction of the habeas court. . . ." (Citations omitted; internal quotation marks omitted.)

Thereafter, the petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g).[3] One of the grounds on which the petitioner

[3] General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release

sought certification to appeal concerned the fact that the court had dismissed the appeal without affording him "the right to argue in opposition [to the dismissal] after being aware of the proposed grounds for such dismissal . . . ." The court denied the petition for certification to appeal. This appeal followed.[4]

Beyond arguing that the court abused its discretion in denying his petition for certification to appeal, the sole claim raised on appeal by the petitioner focuses on the propriety of the court's dismissal of the amended petition pursuant to Practice Book § 23-29, following the issuance of the writ and on its own motion, without affording him notice and a right to be heard with respect to the proposed grounds for the dismissal. On January 13, 2021, this court heard oral argument in this appeal. On October 17, 2022, we ordered the parties to file supplemental briefs "addressing the effect, if any, of *Brown* v. *Commissioner of Correction*, [supra, 345 Conn. 1], and *Boria* v. *Commissioner of Correction*, [supra, 345 Conn. 39], on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24.' *Brown* v. *Commissioner of Correction*, supra, 17 and n.11; *Boria* v. *Commissioner of Correction*, supra, 43." The parties have submitted briefs in compliance with our supplemental briefing order.

We first turn to the threshold argument that the court abused its discretion in denying the petition for certification to appeal. Our inquiry is well established. "Faced

may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

[4] In contrast to the proceedings before the habeas court, during the appeal process, the petitioner has been represented by counsel.

with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 811, 975 A.2d 42 (2009).

In light of our Supreme Court's decisions in *Brown* and *Boria*, we conclude that the issue raised in the petitioner's petition for certification to appeal concerning the right to notice and a right to be heard prior to a dismissal under Practice Book § 23-29 is debatable among jurists of reason, that a court could resolve the issue in a different manner, and that the issue deserves encouragement to proceed further. Accordingly, we conclude that the court's denial of the petition for certification to appeal reflects an abuse of discretion.

Turning to the merits of the appeal, we conclude, as do the parties in their supplemental briefs, that *Brown* and *Boria*, both of which address claims similar to the claim before us, not only govern our resolution of the appeal but require a reversal of the judgment of dismissal. In *Brown*, the court concluded "that [Practice Book] § 23-29 requires the habeas court to provide prior notice of the court's intention to dismiss, on its own motion, a petition that it deems legally deficient and an opportunity to be heard on the papers by filing a

written response. The habeas court may, in its discretion, grant oral argument or a hearing, but one is not mandated." *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4. In *Boria*, our Supreme Court adopted the reasoning and conclusions set forth in *Brown*. *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43.

In his principal appellate brief, the petitioner frames his claim in somewhat broad terms. He argues that the court acted improperly in that "[he] received no notice, constructive or otherwise, that the court was considering dismissing his habeas corpus petition. More importantly, the petitioner certainly did not have any opportunity to respond to the court's motion to dismiss his petition, nor did the court schedule a hearing regarding any potential dismissal." The petitioner further argues that the court denied him the "right to be heard" on the court's decision to sua sponte dismiss the amended petition. In portions of his argument, the petitioner also refers to the absence of a "hearing," stating that the court committed error in that he was "entitled to a hearing" with respect to the dismissal of the amended petition under Practice Book § 23-29 and that "no hearing was ever held" prior to the dismissal. We agree with the petitioner that, prior to the sua sponte dismissal, he was entitled to notice of the court's intention to dismiss and an opportunity to file a brief or a written response concerning the proposed basis for dismissal. *Brown* and *Boria*, however, do not support the petitioner's argument, echoed in his supplemental brief, that the court was obligated to hold a full hearing. As stated previously in this opinion, the court is not required to hold a full hearing but may exercise its discretion to do so in cases in which it is deemed to be appropriate.

We conclude that the proper remedy is for us to reverse the court's dismissal of the amended petition and to remand the case to the habeas court for further

proceedings according to law. If the court considers dismissal of the amended petition, or any amended petition properly filed by the petitioner, on its own motion pursuant to Practice Book § 23-29, the court must comply with the procedure set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and affording the petitioner at least an opportunity to submit a brief or written response addressing the matter.

We must next consider an additional issue concerning the proper course for the habeas court to take on remand. We note that the judgment of dismissal in the present case occurred prior to our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020). In *Gilchrist*, our Supreme Court attempted to clarify the proper application of Practice Book §§ 23-24[5] and 23-29. In *Gilchrist*, the court stated that "the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. . . . Screening petitions prior to the issuance of the writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded pro se. . . . [I]n such

[5] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under [Practice Book] § 23-24, the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced." (Citations omitted; internal quotation marks omitted.) Id., 560–61. The court explained that, "[i]n contrast [to Practice Book § 23-24], Practice Book § 23-29 contemplates the dismissal of a habeas petition after the writ has issued on any of the enumerated grounds." Id., 561.

We note that, in *Brown*, the habeas court, relying on Practice Book § 23-29 and without having the benefit of our Supreme Court's decision in *Gilchrist*, sua sponte dismissed a petitioner's original habeas petition, which the petitioner had filed in a self-represented capacity. *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 8. This occurred, however, after the writ had issued to commence the habeas proceeding and the court had granted the petitioner's request for the appointment of counsel and his application for a waiver of fees. Id. In reversing the judgment of dismissal on the grounds that the habeas court improperly failed to afford the petitioner prior notice and an opportunity to submit a brief or written response, the court in *Brown* directed this court to remand the case to the habeas court with direction to first consider whether any grounds existed for it to decline to issue the writ under Practice Book § 23-24. Id., 17. The court explained that "[b]ecause the habeas court in the present case did not

have the benefit of this court's decision in *Gilchrist*, the case must be remanded to the habeas court for it 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.) Id., 17–18; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43. In footnote 11 of its opinion, the court in *Brown* also stated: "We are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist*. . . . In 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." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17 n.11.

In the present case, the petitioner argues that because the writ has issued and the dismissal occurred after counsel was appointed to represent him, he had filed an amended petition, and the case had advanced to a stage in which a trial date had been set, "[t]here is no reason" for this court to remand the case to the habeas court with direction to consider whether it should decline to issue the writ under Practice Book § 23-24. The respondent urges us to conclude that, because the dismissal in the present case occurred prior to the official release of *Gilchrist*, this case "falls squarely within the remand order contemplated by the [Supreme Court] in *Brown* and *Boria*."

Although the present dismissal occurred prior to *Gilchrist*, we are not persuaded that we should apply

the rationale in footnote 11 of *Brown* to the present case. Unlike in *Brown* and *Boria*, the dismissal in the present case occurred not merely after the writ had issued but after counsel had appeared on the petitioner's behalf and an amended petition was filed. In fact, in the present case, the petitioner filed the operative petition—his amended petition—nearly fourteen months after he filed his original petition. Although we recognize that the petitioner filed the amended petition in a self-represented capacity, the record suggests at a minimum that he did so after having received the advice of his assigned counsel concerning the merits of the habeas action.[6] The fact that an amended petition had been filed at the time of the court's dismissal in this case leads us to conclude that the proper course on remand is not for the court to first consider whether declining to issue the writ under Practice Book § 23-24 is warranted. In so concluding, we rely on this court's recent decision in *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616, A.3d (2022), which addressed a very similar issue. In *Hodge*, this court reasoned that "[i]t 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

[6] As stated previously in this opinion, on August 16, 2017, the petitioner filed his original petition in this case in a self-represented capacity. On August 28, 2017, the court granted the petitioner's request for the appointment of counsel. On April 11, 2018, the court granted appointed counsel's motion to withdraw his appearance. In that motion, counsel represented to the court that, during the course of his representation, he had had two in-person visits and one telephone conversation with the petitioner and had sent three separate letters to the petitioner concerning the merits of the habeas action. He also stated that he had "investigated the case and discussed possible claims and limitations in pursuing [the habeas corpus action]." The petitioner's counsel also stated that he had provided the petitioner with a letter "which contained a summary of [counsel's] legal analysis and strategic recommendations" concerning the habeas corpus action. Counsel represented that, ultimately, the petitioner conveyed to him "that he desired to represent himself . . . ." The petitioner filed his amended petition in this case, acting once again in a self-represented capacity, on October 5, 2018.

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 the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended." (Emphasis in original.) Id., 623–24.

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

In this opinion the other judges concurred.

AMMAR IDLIBI *v.* HARTFORD COURANT COMPANY (AC 44977)

Cradle, Suarez and Seeley, Js.

Syllabus

The self-represented plaintiff, a pediatric dentist, sought to recover damages for, inter alia, defamation and intentional misrepresentation in connection with two articles published by the defendant. The articles concerned the plaintiff's disciplinary proceedings before the Connecticut State Dental Commission (commission) that stemmed from a complaint about his treatment of a three year old child. A reporter employed by the defendant contacted the plaintiff after he learned of a similar complaint against another dentist at the plaintiff's dental practice. The reporter left the plaintiff a voicemail, in which he asked for an interview. The parties disputed whether the reporter informed the plaintiff in that voicemail or in subsequent conversations that he would be the subject of the published articles. The defendant filed a motion for summary judgment on all counts of the plaintiff's complaint, arguing, inter alia, that it was protected from liability for defamation under the fair report privilege and substantial truth doctrine and that the plaintiff's intentional misrepresentation claim was legally insufficient. In his objection to the motion for summary judgment, the plaintiff pointed to specific statements in the articles to which he objected, including the headline of the first article, and argued that the recorded voicemail from the reporter provided sufficient evidence to support his claim of misrepresentation. The court granted the defendant's motion for summary judgment, concluding that the alleged defamatory statements were protected under either the fair report privilege, which protects the publication of a report

of an official action or proceeding that deals with a matter of public concern if the report is accurate and complete or a fair abridgment of the proceeding, or the substantial truth doctrine. Moreover, on the basis of an email exchange between the reporter and a senior editor employed by the defendant, which indicated that the original draft of at least one of the articles had referenced the second dentist, the court held that, because the reporter's affirmative representation was true, the reporter had no duty to tell the plaintiff he would be the subject of the defendant's article, and the plaintiff had no legal right to interfere with the defendant's publication of a story about him, the defendant was entitled to summary judgment on the plaintiff's intentional misrepresentation claim. *Held*:

1. The trial court did not err in granting summary judgment with respect to the plaintiff's defamation claims on the basis that the fair report privilege protected the defendant from liability:

   a. The trial court properly found that the statement in one of the defendant's articles that the Department of Public Health had been investigating the plaintiff for two years was protected by the fair report privilege, as it was a fair and accurate abridgement of the underlying proceedings; moreover, if describing the proceedings before the commission as an "investigation" strayed from the truth of the matter, it did so only slightly and well within the leeway afforded to reporters of official matters of public concern.

   b. The plaintiff could not prevail on his claim that the defendant abused the fair report privilege because the headline of one article used the word "children" rather than the word "child" and conveyed a message that the state's inquiry extended beyond the three year old child: the headline was accurate overall and any imprecision therein was ameliorated by the accuracy of the article's abridgement of the proceedings, which clearly indicated that the case involved only one child.

   c. This court declined to review the plaintiff's claim that the defendant's use of a specific statistic from another state agency in one of the articles was an abuse of the fair report privilege: the trial court determined that the fair report privilege did not apply to that statement, and, instead, that it was exempt from liability for defamation because that statistic was substantially true; moreover, the plaintiff failed to sufficiently brief his argument that the statistic was not substantially true.

2. The trial court properly granted the defendant's motion for summary judgment with respect to the claim of intentional misrepresentation: contrary to the plaintiff's claim, the trial court did not choose between competing interpretations of fact, rather, the reporter's statement that he was working on an article about another dentist was apparently true, thus defeating any claim of intentional misrepresentation.

Argued September 12—officially released December 13, 2022

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Farley, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ammar A. Idlibi, self-represented, the appellant (plaintiff).

William S. Fish, Jr., with whom was *Alexa T. Millinger*, for the appellee (defendant).

Opinion

CRADLE, J. The self-represented plaintiff, Ammar Idlibi, a pediatric dentist, appeals from the summary judgment rendered in favor of the defendant, Hartford Courant Company, on his claims of defamation and intentional misrepresentation.[1] This appeal arises from two articles the defendant published reporting on the plaintiff's disciplinary proceedings before the Department of Public Health (DPH) and the Connecticut State Dental Commission (commission). On appeal, the plaintiff claims that the court erroneously (1) concluded that the fair report privilege applied to the allegedly defamatory statements made by the defendant, and (2) rendered summary judgment on the plaintiff's intentional misrepresentation claim. We disagree and, therefore, affirm the judgment of the trial court.

[1] The plaintiff's complaint alleged "deceitful misrepresentation," which the trial court construed as a claim of intentional misrepresentation. The plaintiff also purported to assert claims for negligent infliction of emotional distress and gross negligence. The court, identifying that those claims arose from the same underlying facts as the plaintiff's defamation claim, granted summary judgment on those two claims on the same ground as the plaintiff's defamation claim. The plaintiff has not challenged this aspect of the court's judgment on appeal.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party on the prevailing motion for summary judgment, reveals the following facts and procedural history. The plaintiff was the subject of two separate disciplinary proceedings beginning in 2013 and 2016. The first proceeding followed allegations that the plaintiff improperly prescribed medications, outside the scope of dentistry, to himself and his family.[2]

The second proceeding arose from the plaintiff's treatment of a three year old patient on April 26, 2016. On the scheduled treatment date, the plaintiff placed the patient under general anesthesia and placed crowns on eight of her teeth without the consent of the patient's mother, who had provided informed consent for the placement of only one crown. The patient's mother submitted a complaint to DPH, which subsequently led to charges before the commission. A panel of commissioners (panel) conducted hearings on January 11 and 16, 2018, following which the panel submitted a proposed decision to the commission, pursuant to General Statutes § 4-179,[3] and notified the plaintiff and DPH's

[2] As a result of the first proceeding, the plaintiff signed a consent order in which he admitted to prescribing medications to himself and family members outside the scope of dentistry, which required that the plaintiff pay a $2000 civil penalty to the state and waive his right to a hearing on the merits of the matter.

[3] General Statutes § 4-179 provides in relevant part: "(a) When, in an agency proceeding, a majority of the members of the agency who are to render the final decision have not heard the matter or read the record, the decision, if adverse to a party, shall not be rendered until a proposed final decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the members of the agency who are to render the final decision.

"(b) A proposed final decision made under this section shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its findings. . . ."

attorney that a hearing on the proposed decision would be held before the full commission on September 5, 2018.[4]

On or about August 31, 2018, prior to the plaintiff's full commission hearing, Matthew Ormseth, a reporter employed by the defendant, called the plaintiff and left him the following voicemail message: "Hi, Ammar, my name is Matt Ormseth. I'm a reporter with the Hartford Courant. . . . [A] woman who put her daughter into Smile by Design[5] . . . a few weeks ago told me that her daughter went through a pretty traumatic experience there and ended up having four teeth extracted and having eight stainless steel crowns installed in about a half hour, and she's very concerned about this. And she's going to DPH, and . . . I learned from DPH that . . . you're being investigated for doing something similar to a three year old girl, and you've got a hearing coming up on September 5th, and . . . I just want to hear your side of the story and . . . give you the opportunity to respond to some of these complaints, some of these allegations. . . ." (Footnote added.) Ormseth then provided his phone number and encouraged the plaintiff to call him back. The plaintiff later returned Ormseth's call, but the substance of their discussion is disputed by the parties. The plaintiff alleges that Ormseth never informed the plaintiff that he would be the subject of the published article, and Ormseth avers that he did.

On September 5, 2018, before the plaintiff's commission hearing, the defendant published an article, authored by Ormseth, entitled "State Probes Terryville Dentist for Excessive Work on Children's Teeth" (first

[4] The panel consisted of two dentists and a registered nurse, all of whom were commissioners on the commission.

[5] Smile by Design was a dental practice that was co-owned by the plaintiff.

article). The article included an image of a child undergoing a dental procedure.[6] Following the image, the article begins with the following statements: "The 3-year-old girl had been told she needed a crown. When the operation was over, she had eight.

"After a two-year investigation, the state Department of Public Health has concluded the work was unnecessary and medically unsound, and recommended that the man who did it, Terryville dentist Ammar Idlibi, be fined, put on probation and be monitored regularly. A hearing before the state's dental oversight board is set for Wednesday."

The first article then includes information from an interview with David Dearborn, a spokesperson for the Department of Social Services (DSS). Among the information attributed to Dearborn is the following statistic published in the first article: "In Connecticut, just 37 steel crowns were placed on kids under general anesthesia who were insured by Medicaid in the last fiscal year." The first article subsequently states that, "[d]espite the DPH inquiry and a $2,000 penalty in 2014 for prescribing codeine, Xanax, Valium and other drugs outside the scope of dentistry to himself and family members, [the plaintiff] has been allowed to keep practicing and treating children. His license was not suspended while DPH investigated." (Internal quotation marks omitted.)

On the same day, September 5, 2018, after conducting its hearing, the commission concluded that "the plaintiff (1) failed to obtain adequate informed consent from the patient's mother to place crowns on eight of the patient's teeth, (2) placed one or more crowns without adequate justification, (3) failed to chart findings of cervical decalcification adequately, (4) failed to attempt

[6] The parties do not dispute that the image included in the article does not depict the plaintiff or the patient.

treatment of the cervical decalcification by other means, and (5) failed to chart caries or other dental disease adequately for one or more of the teeth that was crowned. The only charge that the commission did not find against the plaintiff was the allegation that the plaintiff had failed to make adequate attempts at treatment without general anesthesia, as the commission determined there was insufficient evidence to support that charge. Subsequently, the commission ordered sanctions against the plaintiff, including the payment of a $10,000 civil penalty, placement of a reprimand on his license, and a three year probationary period during which his license would be subject to conditions."[7] *Idlibi* v. *State Dental Commission*, 212 Conn. App. 501,

[7] "On September 10, 2018, the plaintiff appealed to the Superior Court. . . . After briefing by the parties and oral argument, on January 7, 2020, the court issued an order remanding the final decision for clarification of [a] finding [of fact] . . . . [A panel of commissioners] heard this issue on remand and issued a new proposed final decision, finding, inter alia, that 'the use of stainless steel crowns was not justified, and [that the plaintiff] practiced below the standard of care in using eight stainless steel crowns.' . . . On June 16, 2020, the commission issued a second final decision, this time determining that it was not a violation of the standard of care to place eight stainless steel crowns in the patient's mouth, but that the disciplinary orders contained in the initial decision were still appropriate on the basis of the other findings concerning the allegations against the plaintiff.

"On August 10, 2020, the court issued a second remand order related to the same charge. Specifically, the court ordered the commission to reconcile an inconsistency between the finding of fact that the plaintiff 'did not practice below the standard of care with respect to the placement of the stainless steel crowns' with a statement in its decision that 'the [department] sustained its burden of proof' with respect to this charge. . . . On September 16, 2020, the commission issued a third and final decision . . . . The final decision stated that, '[w]ith regard to the allegations . . . of the charges that [the plaintiff] placed one or more crowns without adequate justification . . . the department did not sustain its burden of proof.' " *Idlibi* v. *State Dental Commission*, 212 Conn. App. 501, 511–12, 275 A.3d 1214, cert. denied, 345 Conn. 904, 282 A.3d 980 (2022). The final decision sustained the original sanctions.

The plaintiff appealed the final decision, and "[o]n October 13, 2020, the court issued a written decision dismissing the plaintiff's appeal." Id., 513. This court subsequently affirmed the court's dismissal of the plaintiff's appeal. Id., 532.

510–11, 275 A.3d 1214, cert. denied, 345 Conn. 904, 282 A.3d 980 (2022).

Later that same day, the defendant published a second article—this one entitled: "Dental Board Disciplines Terryville Dentist for Doing Unnecessary Work on 3-Year-Old" (second article). The second article reported on the commission's decision and then largely restated the same information published in the first article.

On August 26, 2020, the plaintiff commenced this action by way of a four count complaint alleging defamation, intentional misrepresentation, negligent infliction of emotional distress, and gross negligence. On January 22, 2021, the defendant filed a motion for summary judgment on all four counts of the plaintiff's complaint.[8] As to the defamation claim, the defendant argued that it was entitled to judgment as a matter of law because it was protected from liability for defamation under the fair report privilege and substantial truth doctrine. The defendant further asserted that the plaintiff needed to demonstrate that the defendant acted with actual malice to succeed on his defamation claim. Regarding the intentional misrepresentation claim, the defendant argued that the claim was legally insufficient.

In his opposition to the defendant's motion, filed February 16, 2021, the plaintiff responded that five statements from the two articles were false and, further, the defendant was not entitled to the fair report privilege on the basis thereof: the first article's headline; the statement that DPH conducted a two year investigation into the plaintiff; the statement that DPH concluded that the plaintiff's treatment of the patient was unnecessary and medically unsound; the statistic that "37 steel crowns were placed on kids under general anesthesia who were insured by Medicaid" in the previous year;

[8] See footnote 1 of this opinion.

and the statement regarding the plaintiff's prescribing medications outside the scope of dentistry to himself and his family. Additionally, the plaintiff argued that Ormseth's August 31, 2018 voicemail message provided sufficient evidence to support his claim of intentional misrepresentation. In response, the defendant asserted that the statements identified by the plaintiff were substantially true and privileged. The plaintiff subsequently filed a surreply memorandum on April 12, 2021, reasserting that the five statements listed in his memorandum in opposition of summary judgment were defamatory and not privileged.[9]

In its August 6, 2021 memorandum of decision, the court found in favor of the defendant and rendered summary judgment on the plaintiff's defamation claim because the alleged defamatory statements were protected under either the fair report privilege or the substantial truth doctrine.[10] Moreover, the court held that, "[b]ecause Ormseth's affirmative representation was true, because he had no duty to tell the plaintiff he would be the subject of [the defendant's] article, and because the plaintiff had no legal right to interfere with the [defendant's] publication of a story about him, the [defendant] is entitled to summary judgment on" the

[9] On the same day, the plaintiff filed a supplemental affidavit in which he asserted that Ormseth "assured [the plaintiff] that he was writing a story about another dentist from" the plaintiff's practice. In support of that assertion, the plaintiff attached an email chain between Ormseth and a senior editor for the defendant to his supplemental affidavit. The email contained a draft of the article that included reference to a dentist other than the plaintiff. However, in their email correspondence, the senior editor notified Ormseth that he removed the sections referencing the other dentist.

[10] The court concluded that the statistic—regarding the number of crowns placed on children under general anesthesia and insured by Medicaid—was not protected by the fair report privilege but was nonetheless exempt from liability for defamation because it was substantially true. The court held that the remaining allegedly defamatory statements identified by the plaintiff in his memorandum in opposition to summary judgment were protected by the fair report privilege.

plaintiff's intentional misrepresentation claim. Following the court's rendering of summary judgment, on August 12, 2021, the plaintiff filed a motion to reargue. The court denied that motion on September 8, 2021. This appeal followed. Additional facts and procedure will be set forth as necessary.

On appeal, the plaintiff claims that the trial court erred in (1) concluding that the fair report privilege provided grounds for granting summary judgment on the plaintiff's defamation claims, and (2) granting summary judgment on the plaintiff's intentional misrepresentation claim.

We begin by setting forth the applicable standard of review. "Our review of a trial court's decision to grant a motion for summary judgment is well settled. Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an 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 [in support of a motion for summary judgment]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citation omitted; internal quotation

marks omitted.) *Elder* v. *21st Century Media Newspaper, LLC*, 204 Conn. App. 414, 420, 254 A.3d 344 (2021). "[T]he determination of whether the contents of a newspaper article are privileged as fair reporting is an issue of law over which we exercise plenary review." (Internal quotation marks omitted.) Id., 424.

With these principles in mind, we address the plaintiff's claims in turn.

I

The plaintiff first claims that the court erred in granting the defendant's motion for summary judgment as to the plaintiff's defamation claims on the basis that the fair report privilege protected the defendant from liability for statements made in the two September 5, 2018 articles. We disagree.

"The fair report privilege is well established. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. . . . If the report is accurate or a fair abridgment of the proceeding, an action cannot constitutionally be maintained for defamation. . . . The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true, and even when he knows them to be false and even if they are libel per se." (Citation omitted; internal quotation marks omitted.) Id., 422. "Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." Id.

The plaintiff argues that the defendant abused the fair report privilege in its publication of (1) the statement that DPH had been investigating the plaintiff for

two years, and (2) the headline "State Probes Terryville Dentist for Excessive Work on Children's Teeth."[11]

A

The plaintiff first claims that the defendant abused the fair report privilege by using the word "investigation" to describe the DPH complaint and resulting proceedings and by stating that the "investigation" spanned two years.

[11] Although the plaintiff identified five allegedly defamatory statements in his objection to the motion for summary judgment, in this appeal he focuses on only three of those statements. Specifically, on appeal, the plaintiff does not rely on the statements referring to the plaintiff's actions as "medically unsound" or his prescription of medications outside the scope of dentistry. These aspects of the claim raised before the trial court are therefore deemed abandoned. See *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 35 n.15, 257 A.3d 360 ("arguments [that] have not been advanced on appeal . . . are deemed abandoned"), cert. denied, 338 Conn. 913, 259 A.3d 653 (2021).

The plaintiff also claims, for the first time on appeal, that the defendant's publication of a particular image in both articles constituted an abuse of the fair report privilege because it was "a misleading picture of a child undergoing invasive [dental] implants" and was unrelated to the proceedings. Although the plaintiff referenced the image before the trial court in several pleadings and at the summary judgment hearing, he never did so in furtherance of a distinct argument that the picture itself abused the fair report privilege, as he now does on appeal. Because this issue was not distinctly raised before, or decided by, the trial court, it is not properly before us now. *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 421.

Additionally, the plaintiff claims that the defendant abused the fair report privilege by using a DSS statistic "unrelated to the official proceeding." However, the court held that the fair report privilege *did not apply* to this statement—instead holding that it was substantially true: "A statement procured from a public official by a reporter working on a story does not appear to fall within the scope of the fair report privilege, which applies only to an official action or proceeding or of a meeting open to the public. . . . Nevertheless, the statement as reported by the [defendant] was substantially true and therefore not actionable." (Citation omitted; internal quotation marks omitted.) Therefore, to the extent that the plaintiff claims that the use of the DSS statistic was an abuse of the fair report privilege, such claim is moot. *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017) (claim is moot where appellant fails to challenge basis of trial court's adverse ruling). We further note that the plaintiff fails to sufficiently brief his argument that the DSS statistic was not substantially true. Accordingly, we decline to review this claim. See *Starboard Fairfield Development, LLC* v.

"[T]he fair reporting privilege requires the report to be accurate. It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings . . . . The accuracy required is to the proceedings, not to the objective truth of the [alleged] defamatory charges. . . . Further, the fair report privilege affords leeway to an author who attempts to recount and popularize an . . . event. . . . The author's job is not simply to copy statements verbatim, but to interpret and rework them into the whole. . . . A fussy insistence upon literal accuracy would condemn the press to an arid, desiccated recital of bare facts. . . . [T]he author of a news article reporting on a judicial decision has no duty to conduct an impartial investigation of the underlying facts of the case—[t]he only question is whether the news article represents a substantially accurate report of the court decision upon which it is reporting." (Citations omitted; internal quotation marks omitted.) Id., 424.

In the present case, it was substantially accurate for the defendant to state that DPH had engaged in an investigation of the plaintiff. The court rejected the plaintiff's argument that use of the word "investigation" was misleading and, in its memorandum of decision, noted that "any potential ambiguity raised by using the word 'investigation' instead of the word 'proceeding' was avoided by the substance of what the [defendant] accurately reported." The defendant adopts the court's rationale on appeal and additionally highlights that "a letter from DPH to the Connecticut Children's Medical Center dated May 26, 2016, [referenced] the petition

Gremp, 195 Conn. App. 21, 31, 223 A.3d 75 (2019) ("[b]ecause we conclude that the defendants have failed to adequately brief this claim, we decline to review it").

against the plaintiff . . . and [stated] that DPH is conducting 'an investigation. . . .' " The letter was attached as an exhibit to Ormseth's supplemental affidavit, filed with approval from the court on April 21, 2021.

Although "investigation" may give rise to more insidious implications than the word "proceedings," the defendant owes no duty to the plaintiff to use the exact word used by the official as long as the word it chooses is a substantially accurate report of official proceedings. *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 428. To that end, DPH's use of the word "investigation" to describe the proceedings in its May 26, 2016 letter supports the accuracy of its use in the article. Further, if describing the proceedings before the commission as an "investigation" strayed from the truth of the matter, it did so only slightly, and well within the leeway afforded to reporters of official matters of public concern. See id., 427 (holding fair report privilege applicable where defendant newspaper used the word "impersonating" rather than "misidentifying himself" because it was a "miniscule [departure from fact] and can be attributed to the leeway afforded an author who attempts to recount and popularize an . . . event" (internal quotation marks omitted)).

Turning to the "two-year" designation used in the first article, in its memorandum of decision, the court noted the relevant timeline of the proceedings: "The underlying incident occurred in April, 2016, the DPH complaint was filed in September, 2017, and the [commission's] decision was issued two years later." The plaintiff does not dispute this timeline on appeal.

Therefore, because the defendant's statement regarding DPH's two year investigation was a fair and accurate abridgement, the fair report privilege applies as a matter of law and shields the defendant from liability for defamation as to this statement.

B

The plaintiff also claims that the defendant abused the fair report privilege by using the word "children" rather than the singular "child" in the headline of the first article.[12] The court held that the headline was not an abuse of the fair report privilege, reasoning: "The plaintiff first complains about the headline of the first article, 'State Probes Terryville Dentist for Excessive Work on Children's Teeth.' He argues the headline conveyed a message that the state's inquiry extended beyond the three year old patient that was the subject of the underlying complaint. The article is clear, however, that the case involved only one child. The report is accurate overall and any technical inaccuracy in the headline is not sufficient to make the report actionable."

We agree with the court that the headline was accurate overall and that any imprecision therein was ameliorated by the accuracy of the article's abridgement of the proceedings. See *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 424 ("[a] fussy insistence upon literal accuracy would condemn the press to an arid, desiccated recital of bare facts" (internal quotation marks omitted)).

On the basis of the foregoing, we conclude as a matter of law that the defendant did not abuse the fair report

[12] The plaintiff also claims that the headline of the first article, as well as other statements made by the defendant, indicate malice and that the court erroneously held that the privilege applied regardless of malice. In response to the plaintiff's September 23, 2021 motion for articulation, the court stated that it "did not reach the plaintiff's allegations of malice . . . in rendering its decision on summary judgment. The fair report privilege applies even assuming, arguendo, the plaintiff could prove those allegations." Quoting *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 422, the court concluded that "[t]he privilege exists even though the publisher himself does not believe the defamatory words he reports to be true, and even when he knows them to be false and even if they are libel per se." (Internal quotation marks omitted.) Because we agree with the court that the fair report privilege applies in the present case, the plaintiff's malice argument fails as a matter of law. See id.

privilege by publishing the statement about DPH's investigation into the plaintiff or by its use of the word "children" in the headline of the first article. Therefore, the court properly rendered summary judgment on the plaintiff's defamation claim.

II

The plaintiff next claims that the court erred in rendering summary judgment on his intentional misrepresentation claim. The plaintiff argues specifically that the court improperly "weighed the plaintiff's evidence against the plaintiff in favor of the [defendant] and drew inference[s] from the plaintiff's evidence in favor of the [defendant]."[13] We disagree.

As stated previously herein, "[o]ur review of the trial court's decision to grant [a] motion for summary judgment is plenary." *Elder* v. *21st Century Media Newspaper, LLC*, supra, 204 Conn. App. 420. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) Id. "When the evidence in a summary judgment record reasonably is susceptible to competing inferences, it is improper for a trial court, in ruling on the summary

[13] The plaintiff also claims that the "court erroneously ruled that the plaintiff's claim of fraudulent misrepresentation cannot be sustained because Ormseth does not have the duty to speak, i.e., to disclose to the plaintiff, that Ormseth was writing a story about the plaintiff. The court overlooks the plaintiff's claim that the plaintiff had the right to remain silent and not to speak to Ormseth or to any member of the press." However, the plaintiff does not cite to any relevant authority in support of this argument. Because we conclude that the plaintiff has failed to adequately brief this claim, we decline to review it. *Starboard Fairfield Development, LLC* v. *Gremp*, supra, 195 Conn. App. 31.

Insofar as the plaintiff intended for this argument to challenge the court's alternative grounds for rendering summary judgment—that the plaintiff was actually alleging fraud by omission and failed because "he had no legal right to know the [defendant] was writing an article about him"—that argument is inadequately briefed and we decline to review it. Id.

judgment motion, to choose among those inferences." *Doe* v. *West Hartford*, 328 Conn. 172, 197–98, 177 A.3d 1128 (2018).

In rendering summary judgment on the plaintiff's intentional misrepresentation claim, the court stated: "From the evidence submitted by the plaintiff it appears Ormseth was in fact working on an article about another dentist. The plaintiff has submitted evidence that the article Ormseth was preparing did include reporting about another dentist, as described, in a practice that was partially owned by the plaintiff. According to the [defendant's] September 4, 2018 internal . . . email submitted by the plaintiff in opposition to the [defendant's] motion, [an editor for the defendant] eliminated the portions of the draft article that concerned the other dentist. The plaintiff's evidence establishes that Ormseth's statement that he was working on an article about another dentist was true, not false.

"The factual dispute between the parties is whether Ormseth told the plaintiff he was writing an article about *him*. Ormseth says he did; the plaintiff says he did not. But the affirmative representation relied upon by the plaintiff, that Ormseth was working on a story about another dentist, is an accurate statement. Assuming Ormseth said he was working on a story concerning the other dentist without mentioning that the plaintiff was also a subject of the story, Ormseth may have allowed the plaintiff to believe the story would not be about him, without actually saying so. . . . Because Ormseth's affirmative representation was true, because he had no duty to tell the plaintiff he would be the subject of [an] article [by the defendant], and because the plaintiff had no legal right to interfere with the [defendant's] publication of a story about him, the [defendant] is entitled to summary judgment on" the plaintiff's claim for intentional misrepresentation. (Emphasis in original.)

The plaintiff argues that the court improperly engaged in fact finding by stating the following: "The plaintiff's purpose in submitting [the defendant's internal email exchange] was to corroborate his claim that Ormseth told him he was preparing an article about another dentist. Viewed slightly differently, however, the evidence also reflects that Ormseth was truthful when he told the plaintiff he was working on an article about another dentist. The plaintiff's complaint is that Ormseth omitted any mention of the fact that the plaintiff would also be the subject of the article."[14]

The flaws in the plaintiff's argument are manifold, but, most crucially, the court never chose between competing interpretations of fact. As the court properly held, Ormseth's affirmative statement to the plaintiff—that he was working on an article about another dentist—is apparently true as evidenced by the plaintiff's own affidavit and evidence, thus defeating any claim of intentional misrepresentation.[15] See *Dickau* v. *Mingrone*, 196 Conn. App. 59, 66 n.7, 229 A.3d 479 (2020) (listing as required element of intentional misrepresentation that false statement be made as statement of fact). We conclude that the court did not impermissibly

[14] Additionally, the plaintiff suggests that the court could not use evidence submitted in the plaintiff's affidavit in support of its decision to render summary judgment. The court was permitted, however, under Practice Book § 17-49, to consider the email attached to the plaintiff's affidavit in rendering summary judgment. See *Salamone* v. *Wesleyan University*, 210 Conn. App. 435, 443, 270 A.3d 172 (2022) ("Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law").

[15] The court additionally construed the plaintiff's claim as one of fraud by omission. The court concluded that the plaintiff had no legal right to know the defendant was writing an article about him and, therefore, could not sustain a claim of fraud by omission. On appeal, the plaintiff asserts that he had a right to not talk to Ormseth but does not otherwise challenge this aspect of the court's conclusion. See footnote 13 of this opinion.

weigh evidence or choose between competing inferences. We further conclude that the court properly granted the defendant's motion for summary judgment as to the intentional misrepresentation claim.[16]

The judgment is affirmed.

In this opinion the other judges concurred.

ERIC WESTRY ET AL. *v.* LITCHFIELD VISITATION CENTER
(AC 45039)

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

Syllabus

The plaintiff brought an action alleging, inter alia, discrimination on the basis of race against the defendant. After the defendant was defaulted for failure to plead, it filed an answer to the plaintiff's complaint and a motion to set aside the default, which the trial court granted. The defendant then filed a motion to dismiss the plaintiff's complaint on the basis that the court lacked subject matter jurisdiction because the plaintiff failed to bring the action within the ninety day statutory (§ 46a-101 (e)) time limitation after receiving a release of jurisdiction from the Commission on Human Rights and Opportunities (commission). The court granted the defendant's motion to dismiss on the basis of the plaintiff's untimely filing. Following oral argument on the plaintiff's motion for reconsideration, the court denied the request to reconsider its decision and reverse its ruling on the motion to dismiss. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court abused its discretion in granting the defendant's motion to set aside the default:

[16] The plaintiff claims that the court erred in denying his motion to reargue. On the basis of our discussion herein, we conclude that the court did not abuse its discretion in denying reargument on the plaintiff's defamation and intentional misrepresentation claims. See *JPMorgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 277, 73 A.3d 757 ("The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.)), cert. denied, 310 Conn. 935, 79 A.3d 889 (2013).

the court found that the defendant's claim that it had made a mistake in understanding the timing of its response was valid and further observed that the defendant had filed an answer by the time it was considering the motion; moreover, the plaintiff did not claim, either before the trial court or this court, that he suffered any prejudice; furthermore, the record reflected that this was the defendant's first request to open a default and that the duration between the time when the default entered and when the defendant filed its answer was only seventeen days.

2. This court declined to review the plaintiff's claims that the trial court improperly granted the defendant's motion to dismiss for failure to commence the action within the ninety day time limitation set forth in § 46a-101 (e): it was improper for this court to review the plaintiff's claims when he had not properly raised them before the trial court and that court did not decide the issues; moreover, although the defendant argued in its brief to this court that these new claims by the plaintiff were not preserved, the plaintiff failed to address the defendant's argument, as he declined to file a reply brief and waived his right to oral argument.

Argued September 20—officially released December 13, 2022

Procedural History

Action for the defendant's alleged discrimination on the basis of, inter alia, race, brought to the Superior Court in the judicial district of Waterbury where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the named plaintiff appealed to this court. *Affirmed.*

Eric Westry, self-represented, filed a brief as the appellant (named plaintiff).

Adam V. Maiocco, with whom, on the brief, was *Michael Rigg*, for the appellee (defendant).

Opinion

CLARK, J. The self-represented plaintiff, Eric Westry,[1] appeals from the trial court's judgment granting the

[1] Amelia-Amenirdis Westry (Amelia) also was named as a plaintiff in this action. The trial court noted, however, that there was never an appearance filed for Amelia and that Eric Westry (Eric) could not "speak for her as a party to this action." Amelia did not participate in the action in the Superior Court.

On October 14, 2021, an appeal was filed with this court indicating that it was being initiated by both Eric and Amelia. On October 19, 2021, this court ordered that the appeal filed on October 14, 2021, purporting to be

motion to dismiss filed by the defendant, Litchfield Visitation Center. On appeal, the plaintiff claims that the trial court erred in (1) setting aside a default that had been entered against the defendant and (2) granting the defendant's motion to dismiss the complaint for failure to commence the action within the ninety day time limitation set forth in General Statutes § 46a-101 (e). We affirm the judgment of the trial court.[2]

We begin by setting forth the relevant procedural history of this case. On August 27, 2018, the plaintiff commenced this action against the defendant by writ of summons and complaint. The complaint alleged, among other things, that the defendant had engaged in a wide variety of discriminatory practices against the plaintiff. Appended to the complaint was a "Release of Jurisdiction" dated May 18, 2018, from the Commission on Human Rights and Opportunities (commission).

On September 28, 2018, the plaintiff filed a motion for default for failure to plead. On October 30, 2018, the clerk granted the plaintiff's motion.

On November 16, 2018, the plaintiff filed a claim for a hearing in damages. The same day, the defendant filed both an answer to the plaintiff's complaint and also a motion to set aside the default.[3] In its motion to set aside the default, the defendant argued that it had made

initiated by Eric and Amelia would be treated as an appeal by Eric only unless a properly completed joint appeal consent form was filed on or before October 29, 2021. A consent document was never filed with this court. Accordingly, this court ordered that the appeal would proceed as an appeal by Eric only. As such, any reference to the plaintiff in this opinion is to Eric Westry only.

[2] On September 19, 2022, the plaintiff filed with this court a request to waive his oral argument, which was granted by the court. The parties were notified that the oral argument would proceed, and the appeal would be considered on the record and the defendant's argument.

[3] The defendant's motion was filed on the Judicial Branch form titled "Motion to Open Judgment" but was treated by the court as a motion to set aside the default because there had been no judgment rendered yet.

a mistake in understanding the timing of its response and requested that the court allow it an opportunity to submit a proper response to the complaint.

On November 19, 2018, the plaintiff filed an objection to the defendant's motion to set aside the default. Specifically, he argued that "[m]isunderstanding the rules and law are a reason to enlist professional legal assistance, to ensure mistakes admitted to, are averted."

On December 3, 2018, the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion to set aside the default. The court's order stated: "Judgment has not been granted at this time. Default was entered and may be opened in accordance with [Practice Book §] 17-42 upon good cause shown. The defendant has provided a valid reason and has filed an answer [to] the complaint. Therefore, the motion to open default is granted."

On April 1, 2019, the defendant filed a motion to dismiss the plaintiff's complaint on the basis that the court lacked subject matter jurisdiction. The defendant argued that, because the plaintiff had failed to bring the present action within ninety days of receiving a release of jurisdiction from the commission, the court lacked jurisdiction over the case. On April 2, 2019, the plaintiff filed an objection to the defendant's motion to dismiss. He argued that the requirement to seek recourse with the commission before bringing an action in the Superior Court applies only when a defendant is a governmental entity. As such, his objection implied that the ninety day limitation to file an action following the release of jurisdiction from the commission did not apply in this case because the defendant was not a governmental entity.

On August 19, 2019, the court, *Brazzel-Massaro*, *J.*, issued a memorandum of decision on the defendant's motion to dismiss. The court disagreed with the defendant that the ninety day time limitation in question was

jurisdictional. The court explained that our Supreme Court's decision in *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 259, 777 A.2d 645 (2001), supports the position that the ninety day period in this case is to be interpreted as a statute of limitations subject to waiver and equitable tolling. Nevertheless, the court explained that "[t]here is nothing in the complaint nor in the memorandum in opposition that supports a claim of tolling or waiver." The court also rejected the plaintiff's argument that the statutory deadline for commencing an action under § 46a-101 (e) applies only when the defendant is a governmental entity. Accordingly, the court granted the defendant's motion to dismiss on the basis of the plaintiff's untimely filing.

On August 20, 2019, the plaintiff filed a motion to reconsider the court's dismissal, requesting that the court reconsider its decision on the following grounds: "(1) [the] court agrees that the deadline for filing the action was [August 16, 2018]"; "(2) [the] court clerk filing of complaint is clearly dated on the docket: [August 15, 2018]"; "(3) [t]he preceding fee waiver for the filing granted by . . . Judge Mark Taylor is dated the same day, [August 15, 2018]"; and "(4) [t]he clock for filing is stopped upon the filing—and granting—of the fee waiver." On August 22, 2019, the defendant filed an objection to the plaintiff's motion to reargue in which it argued that the court properly granted the defendant's motion to dismiss and that the plaintiff was now attempting to make new arguments that he failed to make in his objection to the defendant's motion to dismiss or at the time of oral argument.

On January 13, 2020, the plaintiff's motion for reconsideration and the defendant's objection appeared on the trial court's short calendar, at which time the plaintiff and counsel for the defendant appeared and argued their respective positions before the court, *Gordon*, *J.*

Following that argument, the court issued an order indicating that it would be inappropriate for the court to consider such arguments because Practice Book § 11-12 (c) required the judge who decided the motion to dismiss to decide the plaintiff's motion to reconsider. The court thus directed the parties to contact the caseflow office in order to have the matter referred to Judge Brazzel-Massaro.

Following the referral of the plaintiff's motion to Judge Brazzel-Massaro, the court, *Brazzel-Massaro, J.*, allowed a second oral argument on May 19, 2021. During the hearing, the court indicated that it would also review the transcripts of the first oral argument that the parties presented to Judge Gordon.

On September 16, 2021, the court issued its memorandum of decision on the plaintiff's motion for reconsideration. The court observed that "[t]he plaintiff's argument before this court on the motion to reconsider and reargue recognizes a number of facts and case law which were not raised at the prior argument before this court after which the court dismissed the complaint." Namely, the court observed that the plaintiff was now arguing that his submission of a fee waiver application on August 15, 2018, either commenced the action or tolled the ninety day time limitation. To that end, the court stated: "The parties agreed that the [ninety] day time period ended on August 16, 2018. The plaintiff submitted a fee waiver request which was filed on August 15, 2018, in accordance with the docket entry sheet of the complaint demonstrating the granting of the fee waiver. The fee waiver was not filed with the court on this date because there was no pending action at the time. Although the fee waiver addressed the costs of filing as well as the costs for service it did not constitute commencement of an action within the court. However, the plaintiff has argued now that the time is tolled because he submitted an August 15, 2018 waiver of the

fees to file this action." (Footnote omitted.) The court rejected the plaintiff's tolling argument, concluding that there is "no authority to extend the statutory time period for commencing an action beyond the ninety days and based upon the memorandum and argument of the parties does not find that there is any legal basis to support the plaintiff's new argument." The court's decision also noted that "[at] argument the plaintiff inserted additional arguments for which he provided no evidence or legal support for [the] court to consider. Thus, the court does not address other arguments without legal or factual support." The court concluded by stating that "this court has permitted a reargument but denies the request to reconsider and reverse its ruling on the motion to dismiss. That decision is affirmed." This appeal followed.

I

On appeal, the plaintiff argues that the trial court abused its discretion in setting aside the default that had been entered against the defendant because there was not good cause to do so. We are not persuaded.

We begin by setting forth our standard of review and the relevant legal principles that inform our analysis. "It is well established that [the] determination of whether to set aside [a] default is within the discretion of the trial court . . . [and] such a determination will not be disturbed unless that discretion has been abused or where injustice will result. In the exercise of its discretion, the trial court may consider not only the presence of mistake, accident, inadvertence, misfortune or other reasonable cause . . . factors such as [t]he seriousness of the default, its duration, the reasons for it and the degree of contumacy involved . . . but also, the totality of the circumstances, including whether the delay has caused prejudice to the nondefaulting party." (Internal quotation marks omitted.)

Johnson v. *Raffy's Cafe I, LLC*, 173 Conn. App. 193, 203, 163 A.3d 672 (2017).

A motion to set aside a default for failure to plead is governed by Practice Book §§ 17-32 and 17-42. Section 17-32 (b) provides in relevant part: "If a party who has been defaulted under this section files an answer before a judgment after default has been rendered by the judicial authority, the default shall automatically be set aside by operation of law unless a claim for a hearing in damages or a motion for judgment has been filed. If a claim for a hearing in damages or a motion for judgment has been filed, the default may be set aside only by the judicial authority. . . ." Section 17-42 provides: "A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose. As part of its order, the judicial authority may extend the time for filing pleadings or disclosure in favor of a party who has not been negligent. Certain defaults may be set aside by the clerk pursuant to Sections 17-20 and 17-32." See also *Snowdon* v. *Grillo*, 114 Conn. App. 131, 138, 968 A.2d 984 (2009) (discussing interplay between §§ 17-32 and 17-42).

As an initial matter, the defendant argues that, although it filed a motion to set aside the default with the court, the court was not required to act on that motion because the default automatically was set aside by operation of law when the defendant filed its answer. Specifically, the defendant contends that, because the plaintiff had not requested a hearing in damages prior to the filing of the defendant's answer to the complaint, the default automatically was set aside pursuant to Practice Book § 17-32. This argument lacks merit because, despite the defendant's contention that it filed its answer *prior* to the plaintiff's claim for a hearing in damages, the electronic docket in this case reflects that the plaintiff's claim for a hearing in damages (Docket

Entry 102.00) already had been filed by the time the defendant filed its motion to set aside the default (Docket Entry 107.00) and answer (Docket Entry 108.00). Although all three documents were filed on the same day, the record reflects that the plaintiff's claim was filed first. As a result, the default could be set aside "only by the judicial authority." See Practice Book § 17-32 (b) ("[i]f a claim for a hearing in damages or a motion for judgment has been filed, the default may be set aside only by the judicial authority").

The question then is whether the court abused its discretion in granting the defendant's motion to set aside the default. Upon our careful review of the record, we conclude that it did not. The court found that the defendant's mistake as to the timing of its response was valid and further observed that the defendant had in fact filed an answer by the time the court was considering the motion. Additionally, neither before the trial court nor this court did the plaintiff claim that he suffered any prejudice. The record reflects that this was the defendant's first request to open a default and that the duration between the time when the default entered and when the defendant filed its answer was only seventeen days.

On the basis of our review of the record, we conclude that the court did not abuse its discretion in granting the defendant's motion to set aside the default.

II

The plaintiff next claims that the trial court improperly granted the defendant's motion to dismiss for failure to commence the action within the ninety day time limitation set forth in § 46a-101 (e).[4] In support of his

[4] General Statutes § 46a-101 (e) provides: "Any action brought by the complainant in accordance with section 46a-100 shall be brought not later than ninety days after the date of the receipt of the release from the commission."

claim, the plaintiff appears to argue that the action was timely commenced because the writ of summons and complaint were delivered to the marshal prior to the expiration of the time limitation or, in the alternative, that the time limitation to commence an action was tolled because the defendant evaded the marshal's service of process, resulting in service occurring beyond the ninety day time limitation.[5] The defendant argues that the plaintiff did not properly raise these claims before the trial court and that the trial court did not decide these issues. The defendant therefore argues that it would be improper for this court to review the plaintiff's claims. We agree with the defendant.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). We repeatedly have held that "[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); see also Practice Book § 60-5. "[T]o permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court

[5] On appeal, the plaintiff no longer argues, nor does he brief, the claims he made before the trial court that § 46a-101 (e) applies only in cases where a defendant is a governmental entity or that an application for a fee waiver either tolled the time limitation or commenced the action. We, accordingly, deem those claims abandoned.

or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 454–55, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). Our law is also "clear that [r]aising an issue for the first time in a motion to reargue will not preserve that issue for appellate review." (Internal quotation marks omitted.) *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 227, 137 A.3d 809, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016).

In the present case, the plaintiff did not argue in his written opposition to the defendant's motion to dismiss or at oral argument on that motion that the action was timely commenced because he delivered the summons and complaint to a state marshal within the ninety day time limitation or that the time limitation to file was tolled because the defendant somehow evaded service. The plaintiff only argued in his opposition that the requirement to bring a prior complaint with the commission only applied in cases where the defendant was a governmental entity. In its August 19, 2019 memorandum of decision, the court disposed of that argument and granted the defendant's motion to dismiss.

The plaintiff also did not raise the claims he now raises on appeal in either his written motion to reconsider the court's decision to grant the defendant's motion to dismiss or at the first oral argument on that motion. Rather, in his written motion for reconsideration, the plaintiff argued that the filing of an application for a fee waiver either commenced the action or tolled the limitation period. This was the focus of the plaintiff's oral argument at the first argument on his motion for reconsideration. Indeed, the plaintiff explicitly stated

at that oral argument: "I'm basically here to point out that there were facts that were overlooked in terms of the filing of the fee waiver . . . ."

The first time that the plaintiff arguably raised the claims he now asserts on appeal came in a rather convoluted argument made at the second oral argument on his motion to reconsider before Judge Brazzel-Massaro on May 19, 2021, after the motion had been referred to her by Judge Gordon. These claims were intertwined with general arguments to the court that the court should not have set aside the default previously and that the defendant had discriminated against him. After the plaintiff raised these new claims at the second oral argument on his motion to reconsider, counsel for the defendant objected to these claims, arguing that "[the plaintiff] did not bring up anything about a marshal" previously, and that the arguments the plaintiff was attempting to make "were not made at the time of the opposition to the motion to dismiss or in his papers regarding the motion to reargue . . . ." The defendant's counsel argued that "[a] motion to reargue, as the court is well aware, is not an opportunity to have a second bite of the apple."

In regard to these new claims pertaining to the marshal's alleged efforts to effect service of process and the defendant's alleged evasive conduct, the court, in its memorandum of decision denying the motion to reconsider, stated that, "[a]t argument the plaintiff inserted additional arguments for which he provided no evidence or legal support for this court to consider. Thus, the court does not address other arguments without legal or factual support." The court instead addressed the plaintiff's fee waiver claim that he raised in his written motion for reconsideration. The court concluded that there was "no authority to extend the statutory time period for commencing an action beyond the ninety days and based upon the memorandum and

argument of the parties does not find that there is any legal basis to support the plaintiff's new argument." Citing to other Superior Court decisional law, the court observed that "the commencement of an action begins when the writ, summons, and complaint have been served upon the defendant." The court therefore stated that it "permitted a reargument but denies the request to reconsider and reverse it ruling on the motion to dismiss. That decision is affirmed."

On appeal, as noted previously, the plaintiff no longer pursues his fee waiver claims or the claim that the time limitation in § 46a-101 (e) applies only in cases when a defendant is a governmental entity. See footnote 5 of this opinion. Instead, he claims that the writ of summons and complaint being delivered to the marshal prior to the expiration of the time limitation timely commenced the action or, in the alternative, that the defendant's alleged evasive behavior to avoid service tolled the limitation period.

Although the defendant argued in its appellee's brief that these new claims by the plaintiff were not preserved, the plaintiff does not address the defendant's argument, as he declined to file a reply brief addressing the defendant's arguments and waived his right to oral argument. As previously stated, however, our law is clear that "[r]aising an issue for the first time in a motion to reargue will not preserve that issue for appellate review." *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 634; see also *Gleason* v. *Smolinski*, 319 Conn. 394, 404 n.11, 125 A.3d 920 (2015) (observing that issues mentioned for first time in postjudgment motion for articulation or motion to reargue will not preserve those issues for appellate review). This is especially true when the trial court did not even rule on the claims raised. A motion to reargue, including any attendant hearing on that motion, "is not a device to obtain 'a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the

original argument.' " *Durkin Village Plainville, LLC* v. *Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006). As such, we decline to review these claims on appeal,[6] and, consequently, affirm the court's judgment of dismissal.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] To the extent the plaintiff's claim on appeal can be construed as challenging the court's decision not to address in its memorandum of decision the plaintiff's new claims raised for the first time at the second oral argument on his motion for reconsideration, such argument lacks merit. "The granting of a motion for reconsideration and reargument is within the sound discretion of the court. The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Ray* v. *Ray*, 177 Conn. App. 544, 574, 173 A.3d 464 (2017).

Here, the plaintiff, at the second oral argument on his motion for reconsideration, plainly was seeking the proverbial "second bite." He raised new claims and theories that he never made in the first, or even second, instance. Furthermore, it is clear from the record that the plaintiff failed to provide an evidentiary or legal basis to support the new claims proffered. On the basis of our review, we conclude that the court did not abuse its discretion in declining to address the new claims the plaintiff raised for the first time at the second oral argument on his motion for reconsideration. See *Gleason* v. *Smolinski*, supra, 319 Conn. 404 n.11 (raising new issue in postjudgment motion generally will not preserve issue for appellate review).

[7] We note that this court recently held that the time limitation set forth in § 46a-101 (e) "for commencing an action in Superior Court pursuant to § 46a-100 is mandatory and not jurisdictional." *Sokolovsky* v. *Mulholland*, 213 Conn. App. 128, 134, 277 A.3d 138 (2022). As such, the proper procedure for raising that defense is now by way of an answer and special defense; see Practice Book § 10-50; as opposed to a motion to dismiss, which raises jurisdictional arguments. See Practice Book § 10-30. Although the defendant raised the time limitation defense in a motion to dismiss, we discern no appropriate basis under the circumstances of this case to upset the court's judgment of dismissal. The plaintiff did not properly raise or preserve a waiver, consent, or equitable tolling claim below or on appeal that would warrant reversal of the court's dismissal. We therefore affirm the court's judgment dismissing the plaintiff's complaint. See *Mosby* v. *Board of Education*, 187 Conn. App. 771, 775 n.5, 203 A.3d 694 ("[b]ecause the plaintiff presents no argument as to whether the time limit of § 46a-101 (e) is either mandatory or jurisdictional and presents no claim of waiver, consent, or

SHERI SPEER *v.* CITY OF NORWICH
(AC 45169)

Cradle, Suarez and Clark, Js.

Syllabus

The self-represented plaintiff appealed to this court from the judgment of the trial court dismissing her action seeking to enjoin the defendant city of Norwich from proceeding with a tax foreclosure sale of certain real property she owned until the state lifted its COVID-19 restrictions. The plaintiff alleged, inter alia, that an auction of the property while COVID-19 restrictions imposed by the state were in effect would bring a lower sale price than would an auction when the COVID-19 restrictions were not in place and, thus, result in an unconstitutional taking of her property. At the hearing on the defendant's motion to dismiss, the trial court was informed that the property had been sold and that the foreclosure court had approved the sale. The trial court concluded that the plaintiff's case was moot and that the court therefore lacked subject matter jurisdiction. Subsequent to the plaintiff's filing of her appeal, and after the COVID-19 restrictions had been lifted, the trial court was informed that the successful bidder had failed to consummate the sale and the court ordered his deposit forfeited, thereby leaving the property unsold. *Held* that the trial court properly dismissed the plaintiff's action for lack of subject matter jurisdiction, as the sale of the property had been approved by the court at the time of the hearing on the defendant's motion to dismiss, and the plaintiff's appeal was moot, as there was no practical relief this court could grant her because the next foreclosure auction of the property would occur without any COVID-19 restrictions in place; moreover, contrary to the plaintiff's assertion, her case did not fall within the capable of repetition, yet evading review exception to the mootness doctrine, as this court was not convinced that her action or its effect was of a limited duration such that it would become moot before appellate litigation could be concluded, nor was this court persuaded that the questions posed were likely to arise in the future or that issues of public importance were involved in the plaintiff's appeal.

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equitable tolling, we conclude that the court properly dismissed . . . the [plaintiff's] claim regardless of whether the time limit is jurisdictional" (internal quotation marks omitted)), cert. denied, 331 Conn. 917, 204 A.3d 1160 (2019); *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 616, 184 A.3d 761 (2018) (same).

Procedural History

Action, inter alia, to enjoin the defendant from proceeding with a foreclosure action against certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Young*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Sheri Speer, self-represented, filed a brief as the appellant (plaintiff).

Aimee L. Siefert filed a brief for the appellee (defendant).

Opinion

PER CURIAM. In the underlying action, the self-represented plaintiff, Sheri Speer, sought injunctive relief that would effectively prohibit the defendant, the city of Norwich, from proceeding with a tax foreclosure sale of real property she owned. The plaintiff appeals from the trial court's granting of a motion to dismiss in favor of the defendant. The court determined that the issues raised in the action were moot and, thus, it lacked subject matter jurisdiction over her action. On appeal, the plaintiff claims that (1) the court erred in finding that the matter was moot, (2) even if the matter was moot, the collateral consequences doctrine still applies, and (3) the court "improperly den[ied] [her] due process by not enjoining the tax sale proceedings to which she was not a party and to which were subjected to the impaired functionality and limitations on higher bids imposed [by] COVID-19 restrictions." We dismiss the appeal as moot.

The following undisputed facts and procedural history are relevant to the resolution of this appeal. In a prior tax foreclosure action brought by the defendant

against the Brenton Family Trust, the plaintiff moved to intervene, asserting that she had become the owner of record of the subject property. The trial court, *Hon. Emmet L. Cosgrove*, judge trial referee, denied her motion to intervene. After the court, *Calmar*, *J.*, rendered judgment in the defendant's favor, the plaintiff appealed to this court, challenging the trial court's denial of her motion to intervene. This court affirmed the judgment of foreclosure by sale and remanded the case to the trial court for the purpose of setting a new sale date. See *Norwich* v. *Brenton Family Trust*, 202 Conn. App. 905, 244 A.3d 186 (2021). After the subject property was sold at a public auction on September 18, 2021, and the sale was approved by the trial court, *Calmar*, *J.*, on October 13, 2021, the plaintiff brought a subsequent appeal in that action, which this court dismissed on November 18, 2021. See *Norwich* v. *Brenton Family Trust*, Superior Court, judicial district of New London, Docket No. CV-19-6041779-S (October 25, 2021), appeal dismissed, Connecticut Appellate Court, Docket No. AC 45071 (November 18, 2021).

On June 15, 2021, while the foreclosure action was still pending, the plaintiff filed the underlying action against the defendant. The plaintiff alleged that, due to COVID-19 restrictions imposed by the state of Connecticut, a tax foreclosure auction of property of which she was the record owner would result in the land being sold at a lower price than it otherwise would be without the restrictions in place.[1] The result, she alleged, would be an unconstitutional taking of her property. The plaintiff sought a temporary and permanent injunction preventing the foreclosure sale of the property until the

[1] Specifically, the plaintiff alleged that state government mandates requiring the wearing of face masks, requiring social distancing, limiting crowds, and imposing "rent holidays" resulted in artificially low real estate prices at foreclosure auctions.

state lifted its COVID-19 restrictions, as well as damages, costs, and other relief that the court deemed fair and proper.

On June 23, 2021, the defendant filed a motion to dismiss. In that motion, the defendant argued that the plaintiff's action was barred by the prior pending action doctrine because the trial court had previously denied the plaintiff's motion to intervene in the foreclosure action, which involved the same facts and issues. In response, the plaintiff filed a memorandum of law opposing the motion to dismiss in which she argued that the prior pending action doctrine did not bar her action.

On November 1, 2021, the court, *Young*, *J.*, heard arguments from the parties on the motion to dismiss. At the hearing, the defendant informed the court that the subject property had been sold and that the court had approved the sale. The court ordered each party to brief the issue of whether the matter had become moot. The parties each filed briefs on the matter, and, on November 29, 2021, the court issued a memorandum of decision in which it granted the defendant's motion to dismiss. The court, rejecting the plaintiff's reliance on the existence of an appellate stay in connection with appeals that she had filed as a nonparty in connection with the foreclosure action, ruled that the matter was moot because the property at issue had been sold and the court had approved the sale. This appeal followed.

In her principal brief on appeal, the plaintiff argues that the court had subject matter jurisdiction because the matter was not moot, that the collateral consequences doctrine would apply even if the matter was otherwise moot, and that she was denied due process under the fifth amendment to the United States constitution. Thereafter, the defendant submitted its brief, noting therein that "the successful bidder [in the completed and approved foreclosure sale had] . . . forfeited his

deposit, and the [trial] court has scheduled argument to reset the sale date. In addition, [the plaintiff] has also become a party to that pending action . . . .'' On October 14, 2022, this court ordered both parties to submit supplemental briefs ''addressing whether this appeal should be dismissed as moot because (1) the restrictions associated with the COVID-19 pandemic that form the basis for the plaintiff's request for injunctive relief in this action have expired, and (2) the particular tax foreclosure sale of which the plaintiff complains was not consummated and the successful [bidder's] deposit was ordered forfeited on May 26, 2022.''

On October 24, 2022, the plaintiff filed her supplemental brief. Importantly, she does not appear to dispute the facts about the failed sale or the fact that the restrictions of which she complained are no longer in effect. She argues that the matter is reviewable, regardless of mootness, under the capable of repetition, yet evading review exception to the mootness doctrine.[2] The defendant, on November 4, 2022, filed its supplemental brief, arguing therein that the matter is moot because ''there is no practical relief this court can order, the gathering restrictions are lifted, and foreclosure sales can continue as they were [prior to the period of time during which COVID-19 pandemic restrictions were in effect].'' We are persuaded by the defendant.

''Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction. . . . Because

[2] Additionally, in her supplemental brief, the plaintiff claims that ''[t]he effects of the sale constituted an unjust taking, even though the deposit was forfeited.'' Because her second claim is outside the scope of the issue that this court ordered the parties to brief, we decline to review it. See, e.g., *Demarest* v. *Fire Dept.*, 76 Conn. App. 24, 27, 817 A.2d 1285 (2003) (''[o]rdinarily, an issue may not be raised for the first time in a supplemental brief when the court has not ordered supplemental briefing on that issue'').

courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable . . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy [is] capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the court] cannot grant the appellant any practical relief through its disposition of the merits . . . . Because mootness implicates this court's subject matter jurisdiction, it raises a question of law over which we exercise plenary review. . . .

"It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . *An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal.* . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Martocchio* v. *Savoir*, 156 Conn. App. 224, 230, 112 A.3d 211, cert. denied, 317 Conn. 922, 118 A.3d 63 (2015).

In her complaint, the plaintiff sought injunctive relief preventing a foreclosure auction of the property until the governor ended all COVID-19 restrictions. Since her complaint was filed, the COVID-19 restrictions that she complained of have been lifted. Additionally, since this

appeal was filed, the court ordered the successful bidder's deposit forfeited, and, therefore, the subject property has not been sold. It is not disputed that, when the property is put up for sale at the next foreclosure auction, the auction will occur without any COVID-19 restrictions in place. As such, there is no practical relief that this court can grant the plaintiff.

We are not persuaded by the plaintiff's argument that, even if the matter is otherwise moot, this court should still adjudicate it because the capable of repetition, yet evading review exception applies. For this exception to the mootness doctrine to apply, the court must find all three of the following: "First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995).

In her brief, the plaintiff does not explain why the issue raised in this action—COVID-19 restrictions affecting a foreclosure sale—is, by its nature, of a limited duration such that there is a strong likelihood that the majority of cases seeking to raise the issue in the future will become moot before appellate litigation can be concluded. Furthermore, she does not address why there would be a reasonable likelihood of this question arising in the future. She merely states in a conclusory fashion that there could be "likely subsequent repeats of

the same fact patterns involving similar subject matter." Finally, without stating what other questions of public importance this issue raises, she argues in her brief that "there does exist a substantial question—indeed, several questions—of public importance."

We are not convinced that the present action or the effect of it is, by its nature, of a limited duration so that it would become moot before appellate litigation can be concluded. Furthermore, because the restrictions that were put in place in connection with the COVID-19 pandemic—itself an uncommon historic event—have been lifted, we are not persuaded that the questions posed in this appeal are likely to arise in the future. Last, we are not persuaded by the plaintiff's bald assertion that issues of public importance are involved in this appeal. Accordingly, the capable of repetition, yet evading review exception to the mootness doctrine is not applicable to this case.

The appeal is dismissed.