IN RE MARIE J.*
(AC 45917)

Alvord, Prescott and Moll, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child and

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization

denying the respondent mother's motion to transfer guardianship to E, the child's maternal grandmother. The father had been convicted of sexually assaulting the child's older sibling. Thereafter, the child was adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. After the trial on the petition to terminate parental rights but before the trial court issued its decision, our Supreme Court reversed the father's criminal conviction in *State* v. *Juan J.* (344 Conn. 1). Subsequently, the trial court issued its memorandum of decision finding, inter alia, that, pursuant to statute (§ 17a-112 (j) (1)), the Department of Children and Families made reasonable efforts to reunify the father with the child, and that, pursuant to § 17a-112 (j) (3) (B) (i), despite the department's having provided the father with specific steps and services to facilitate reunification, he had failed to achieve a sufficient degree of personal rehabilitation. *Held:*

1. The respondent father could not prevail on his claim that the trial court improperly concluded that the petitioner established by clear and convincing evidence the statutory grounds on which the court based the termination of his parental rights because, in light of the reversal of his criminal conviction, the cumulative effect of the court's factual findings, was insufficient:

a. The trial court properly concluded that that the father failed to rehabilitate in accordance with § 17a-112 (j) (3) (B) (i): the court found that the father had unaddressed mental health concerns and parenting deficits that affected his ability to parent the child and he did not comply with specific steps meant to address these concerns, his visitation with the child even prior to his incarceration was minimal, as he visited her only once in a twenty-two month period and, although he was referred to counseling services, he attended only one session, demonstrating his lack of effort to address his mental health and parenting deficits; thus, although the father's criminal conviction had been reversed, the court clearly based its conclusion that the father failed to rehabilitate on more than just his conviction and incarceration.

b. The trial court properly determined that there was no ongoing parent-child relationship between the respondent father and his child pursuant to § 17a-112 (j) (3) (D): the court found that the child had no present and positive memories of her father, who had minimal contact with her even prior to his incarceration and the imposition of the standing criminal protective order imposed at his sentencing, the child did not recognize her father, and the court properly found that to allow further time for the establishment of their relationship would be contrary to the child's best interest, noting that she had been in foster care virtually her entire life and needed permanency; moreover, the father could not prevail on

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Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, a protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

his unpreserved claim that the virtual infancy exception applied, as our appellate courts have held that the virtual infancy exception does not apply when a child is four years old at the time of the termination hearing, as was the child in the present case, and the exception does not apply when a child's feelings can be determined by the court, as the court did in this case, when it found that the child had no current and positive feelings toward her father, and, even if the exception were applicable, the court considered the father's conduct, noting his minimal visits with his child and the fact that he failed to use resources offered by the department to establish a relationship with her.

2. The trial court did not abuse its discretion by denying the respondent mother's motion to transfer guardianship to E: the court's conclusion that E was not a suitable and worthy guardian was based on the evidence before it, including testimony from department social workers, that E had an extensive criminal history, a child protection history, and was not a licensed foster parent; moreover, the trial court noted that the child had no relationship with E because they spent little time together, that the child had bonded with her foster parents and foster siblings, and that her foster parents were affectionate and committed to ensuring that the child had every opportunity to grow and thrive; furthermore, the mere fact that certain evidence in the record could support a conclusion that E was a suitable and worthy guardian did not establish that the court's conclusion to the contrary was an abuse of its discretion.

Argued April 4—officially released June 5, 2023**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the respondent mother filed a motion to transfer guardianship; thereafter, the case was tried to the court, *C. Taylor, J.*; judgment denying the motion to transfer guardianship and terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Caroline E. Lovallo, certified legal intern, with whom was *Joshua D. Michtom*, assistant public defender, for the appellant (respondent father).

** June 5, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

Opinion

PRESCOTT, J. The respondent father, Juan J., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his daughter, Marie.[1] On appeal, the respondent claims that the court (1) improperly concluded that the petitioner established by clear and convincing evidence that (a) the respondent failed to rehabilitate in accordance with General Statutes § 17a-112 (j) (3) (B) (i) and (b) there was no ongoing parent-child relationship pursuant to § 17a-112 (j) (3) (D), and (2) abused its discretion by denying S's motion to transfer guardianship to Marie's maternal grandmother, Elizabeth, pursuant to General Statutes § 46b-129 (j).[2] We affirm the judgment of the trial court.

The record reveals the following facts, which are undisputed in the record or were found by the trial court, and procedural history. Marie was born in August, 2017. S and the respondent have five other children together: P, J, E, V, and C.[3] Marie is the youngest of their six children.

In June, 2016, prior to Marie's birth, P disclosed to an official from New Britain Public Schools that the

[1] In the same proceeding, the court also terminated the parental rights of Marie's mother, S. Because she has not appealed from that judgment, we refer to Juan J. as the respondent and to S by name throughout this opinion.

[2] The respondent also claims that this court should use its supervisory authority to remand the case for a new trial because the trial on the petition to terminate his parental rights was inherently unfair. See footnote 13 of this opinion.

[3] P was born in 2002, J was born in 2003, E was born in 2005, V was born in 2006, and C was born in 2010.

respondent had sexually abused her. The official reported the disclosure to the Department of Children and Families (department) and the department reported the allegation to the New Britain Police Department. Because of the allegations against the respondent, the department became involved with the family. The department substantiated the allegation of sexual abuse against the respondent on September 7, 2016. On the basis of P's allegations, the respondent was later charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of criminal attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1).[4]

On February 7, 2017, the department filed neglect petitions against S and the respondent on behalf of P, J, E, V, and C. On April 13, 2017, the court adjudicated the five children neglected. After the adjudication of neglect, the court committed P to the custody of the petitioner[5] but allowed J, E, V, and C to remain with S under protective supervision for a period of six months. During this period of protective supervision, the respondent was not allowed in the home with the children unsupervised.

While the order of protective supervision was still in place for the four children, a department social worker visited the home on August 11, 2017. During this home visit, the social worker observed that there was a baby living in the home whose presence and identity were not previously disclosed to the department. S originally lied to the social worker and told her that the baby—

[4] The record is unclear as to when the defendant was charged and arrested.

[5] S's and the respondent's parental rights with respect to P were later terminated.

later identified as Marie—was not hers. S later admitted, however, that she was the biological mother of Marie and informed the social worker that the respondent was Marie's father.

After learning that S had concealed Marie's birth from the department, the petitioner invoked a ninety-six hour hold on behalf of Marie and her four siblings who were currently in S's care under the order of protective supervision. On August 25, 2017, the petitioner filed a neglect petition on behalf of Marie. On that same day, the petitioner obtained an order of temporary custody for Marie. The court held a contested hearing on the order of temporary custody on September 11, 2017. On September 12, 2017, the order of temporary custody was vacated and Marie, along with four of her siblings, returned to S's care under an order of protective supervision for a period of six months.

Shortly after the children were returned to S's care under protective supervision, the department learned that S had been evicted from her home but continued to remain there unlawfully with Marie and her four siblings. The department also learned that the respondent had unsupervised contact with the children, which violated the safety plan the department had put in place. At this time, the respondent and S were allowing the children to live in "deplorable" conditions.[6] Due to these safety concerns, the petitioner sought and obtained an order of temporary custody on behalf of Marie and the other four children on October 3, 2017. When the department removed Marie from the home, the respondent was present and threatened the social worker. The respondent told the department social worker who

[6] A department social worker that visited the home reported: "[T]he home was extremely dirty, very deplorable conditions. I remember the bathroom had feces all over the toilet, and the tub had feces in it. The children's bedrooms were in complete disarray . . . ." The respondent was in the home at this time in violation of the safety requirement.

removed Marie from the home that he would find her and that, if she had children, they were "going to get it."

On October 13, 2017, S and the respondent entered written pleas of nolo contendere with respect to Marie's neglect petition. The court adjudicated her neglected and ordered specific steps to facilitate reunification with the respondent. The court then committed her to the care and custody of the petitioner and placed her with her current foster parents. She has lived with them continuously since she was two months old.

On April 25, 2019, after a trial by jury, the respondent was convicted of all of the criminal charges brought against him with respect to P. The respondent was sentenced on July 1, 2019, to thirty-five years of incarceration, execution suspended after twenty-five years, followed by twenty-five years of probation. At the respondent's sentencing, the court imposed a standing criminal protective order on the respondent that prohibited him from having contact with any individual under the age of sixteen.[7] The respondent appealed from his conviction.

[7] The court found that the standing criminal protective order imposed at the respondent's sentencing prohibited "visitation with children under sixteen years of age." The court's finding has factual support in a social study admitted into evidence as petitioner's exhibit 13, which states: "There is no visitation with [the respondent] due to a protective order which was imposed at [his] sentencing. The order prohibits any visitation with anyone under the age of 16." Neither party challenges this finding as clearly erroneous. We note for the record, however, that the standing criminal protective order imposed at sentencing does not appear to prohibit the respondent from visitation with anyone under the age of sixteen but, rather, prohibits the respondent, among other things, from having any contact with P. See *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 662 n.2, 240 A.3d 1056 (2020) ("[t]he Appellate Court, like the trial court, may take judicial notice of the files of the Superior Court in the same or other cases" (internal quotation marks omitted)), aff'd, 341 Conn. 332, 267 A.3d 162 (2021). Moreover, at the time of the trial on the termination of the respondent's parental rights, the respondent did not introduce into evidence a copy of the standing criminal protective order or proffer other evidence to rebut the statement in petitioner's exhibit 13 that the standing criminal protective order imposed at sentencing prohibited visitation with anyone under the age of sixteen.

Subsequent to the October 3, 2017 order of temporary custody and prior to the respondent's April 25, 2019 conviction, the respondent visited with Marie once, on or about March 3, 2019.[8] At that time, Marie, who was less than two years old, did not appear to recognize him. Despite the conditions in which the children were living, the respondent also did not engage in counseling because he believed that he did not require parenting education.

On June 30, 2021, the court approved the department's permanency plan for Marie, which called for the termination of the respondent's and S's parental rights and her adoption. The court also discontinued further efforts to reunify Marie with the respondent due to the standing criminal protective order that prohibited him from contacting anyone under sixteen years old.

On July 22, 2021, the petitioner filed a petition to terminate the parental rights of the respondent and S with respect to Marie. The petitioner alleged in the termination petition the adjudicatory grounds that the respondent had failed to achieve a sufficient degree of personal rehabilitation in accordance with § 17a-112 (j) (3) (B) (i) and that he lacked an ongoing parent-child relationship with Marie pursuant to § 17a-112 (j) (3) (D). At a hearing on August 18, 2021, the respondent entered a pro forma denial of the allegations in the petition.

Prior to the start of trial on the petition to terminate parental rights, S filed a motion to transfer guardianship

[8] The March 3, 2019 visit is the only visit documented in the record and is commonly referred to as her "last" visit with the respondent. Petitioner's exhibit 13 states that "Marie's last in-person visit with [the respondent] was [March 3, 2019]. During this visit, [she] didn't recognize [him]. Prior to this, there have been multiple cancell[ations] and no shows . . . by [him] for visitation. When asked about the cancellations, [the respondent] reported employment as a barrier to attending visits. As a result, [he] was offered other visitation times, but he indicated that due to his work schedule he was not able to come at another time or another day."

of Marie to Elizabeth, Marie's maternal grandmother. The hearing on the motion to transfer guardianship was consolidated with the trial on the petition to terminate parental rights. The trial commenced on March 7, 2022, continued on March 8, 2022, and concluded on April 21, 2022.[9] The petitioner presented testimony from the department social workers who worked on Marie's case and a forensic psychologist who had evaluated S. S presented testimony from Elizabeth. The respondent did not present a case.

On July 5, 2022, after the trial on the petition to terminate parental rights concluded but before the court issued its decision, our Supreme Court reversed the respondent's criminal conviction on the ground that the trial court improperly admitted uncharged misconduct evidence. The criminal case was remanded for a new trial. See *State* v. *Juan J.*, 344 Conn. 1, 5, 276 A.3d 935 (2022).

The trial court issued its memorandum of decision in the present case on August 16, 2022. The court granted the petition to terminate the respondent's parental rights and denied the motion to transfer guardianship to Elizabeth. In reaching its conclusions, the court first found, pursuant to § 17a-112 (j) (1), that the department made reasonable efforts to reunify the respondent with Marie. The court then concluded, pursuant to § 17a-112 (j) (3) (B) (i), that Marie had been adjudicated neglected in a prior proceeding and, despite the department providing the respondent with specific steps and services to facilitate reunification, he had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that within a reasonable time he could assume a responsible position

[9] Marie's attorney supported the termination of the respondent's parental rights and the denial of the motion to transfer guardianship. Additionally, on appeal, her attorney adopted the petitioner's brief and supports the affirmance of the trial court's decision.

in Marie's life. In regard to the respondent's failure to rehabilitate, the court found that he had issues with "criminal recidivism, parenting deficits, and a failure to attempt to benefit from counseling and services." Although the court found that he had complied with certain specific steps, it found that he had failed to comply with others.

Specifically, the court found that he failed to keep all appointments set by or with the department; to take part in individual counseling and make progress toward his identified treatment goals; to cooperate with service providers recommended for parenting, individual, or family counseling; to secure and maintain adequate housing and legal income; and to visit Marie as often as the department permitted. The court described the respondent's visitation with Marie as " 'minimal' " and found that he failed to complete counseling, attended only one session, and had no permanent residence. See footnote 8 of this opinion. For these reasons, the court ultimately concluded that, "[g]iven the [respondent's] failure to progress in his parenting abilities, it is reasonable to infer that he will remain besieged by those issues for some extensive time, and that he will not be physically available to serve as a custodial resource for Marie" within a reasonable amount of time.

With respect to the second adjudicatory ground, the court also concluded that there was no ongoing parent-child relationship between the respondent and Marie and that to allow further time for such a relationship to develop would be detrimental to her best interests pursuant to § 17a-112 (j) (3) (D). In regard to the lack of an ongoing parent-child relationship, the court found that the respondent "had minimal contact with Marie . . . even prior to his incarceration and the issuance of the [protective] order. . . . [She] exhibits no bond with or affection toward [him] and does not recognize

him as her father. . . . [She] has been in foster placement for virtually her entire life. [His] obvious failure to involve himself in [her] life demonstrates his lack of capacity to develop an appropriate parental relationship with his daughter."

After concluding that the petitioner had proven both statutory grounds for termination by clear and convincing evidence, the court proceeded to the dispositional phase of the proceeding and determined that the termination of the respondent's parental rights and the denial of S's motion to transfer guardianship to Elizabeth were in Marie's best interests. In the dispositional phase of the proceeding, the court first made written findings regarding each of the seven factors set forth in § 17a-112 (k).[10] The court considered several factors to determine

[10] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

what was in Marie's best interests, including her interests in sustained growth, well-being, and stability. The court first concluded that it was in Marie's best interests to terminate the parental rights of the respondent. In support of this conclusion, the court found that the respondent "ha[d] failed to demonstrate any real initiative to rehabilitate himself so as to be a part of Marie's life, to successfully address his own issues, or to provide an appropriate home and suitable guidance for [her]. . . . [The respondent] received a twenty-five year sentence after being convicted of sexually abusing [P], but this judgment was recently overturned by [our] Supreme Court and remanded for a new trial. The allegations by [P] still remain, however, and are credi[ble] in nature. . . . Marie can no longer wait for permanency, continuity and stability in her life."[11] The court further found that Marie "has a strong relationship and a bond with her foster parents and her extended foster family. She has lived with her foster family for virtually her entire life . . . [she] has no relationship with [the respondent]."

The court also concluded that a transfer of guardianship to Elizabeth was not in Marie's best interests. The court found that "there were no viable relative resources for Marie" and that she did not have a relationship with Elizabeth.[12] The court further found that Elizabeth "has an extensive child protection history and a criminal record. She is not licensable as a foster parent for Marie." On the basis of the foregoing, in addition to its finding that Marie had a strong relationship with

[11] Although it is unclear in the record what evidence the court relied upon in making the determination that the criminal allegations were credible, this finding is supported by the facts that the department substantiated the allegations of sexual abuse and that probable cause existed to arrest the respondent for sexually assaulting P.

[12] The record reveals that Elizabeth "was offered visits with Marie" but that "she has not attended any visits" with her. Marie does not know Elizabeth's relationship to her or Elizabeth's name.

her foster family, the court concluded that the denial of the motion to transfer guardianship was in Marie's best interests. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent first claims that the court improperly concluded that the petitioner proved by clear and convincing evidence the statutory grounds upon which the trial court based the termination of his parental rights.[13]

[13] The respondent also argues that this court should use its supervisory authority to remand the case for a new trial because the reversal of his conviction after the conclusion of the trial resulted in an inherently unfair trial. He claims that his trial strategy was based on the premise that he would remain incarcerated for twenty-five years and, therefore, "he effectively conceded his own case" regarding the termination of his parental rights. The respondent argues that, after his conviction was reversed, "the universe of arguments and options available to him to fight to preserve his constitutional right to a relationship with his daughter changed dramatically." Accordingly, the respondent argues that he was entitled to an opportunity to be heard on the effect that the reversal of his conviction had on the petition to terminate his parental rights. We are not persuaded that such extraordinary measures are appropriate in the present case. See *In re Yasiel R.*, 317 Conn. 773, 789, 120 A.3d 1188 (2015) ("[t]he exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole" (internal quotation marks omitted)).

First, the respondent's claim relies, in part, on his argument that the court failed to consider the reversal of his conviction and the effect it had on the petition to terminate his parental rights. As we set forth in part I of this opinion, we are not convinced that the court failed to consider the reversal of the respondent's conviction in its judgment. Furthermore, as the petitioner argues, the respondent could have sought an opportunity to be heard on the effect of the reversal of his conviction by moving to open the evidence after his conviction was reversed but before the court rendered its judgment. See *In re Janazia S.*, 112 Conn. App. 69, 87, 961 A.2d 1036 (2009) ("Whether or not a trial court will permit further evidence to be offered after the close of testimony in the case is a matter resting within its discretion. . . . In the ordinary situation where a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided." (Internal quotation marks omitted.)). Finally, during oral argument before this court,

The respondent argues that the cumulative effect of the court's factual findings, in light of the reversal of the respondent's criminal conviction, did not establish that (1) the respondent had failed to rehabilitate according to § 17a-112 (j) (3) (B) (i), and (2) there was a lack of an ongoing parent-child relationship between the respondent and Marie pursuant to § 17a-112 (j) (3) (D).[14] We disagree.

We begin with the legal principles relevant to termination of parental rights proceedings and our standard of review. "A hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [commissioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Briana G.*, 183 Conn. App. 724, 728, 193 A.3d 1283 (2018).

"Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn

counsel for the respondent failed to articulate with any degree of specificity how the respondent's trial strategy would have changed or what additional evidence would have been presented if he had been given the opportunity to be heard after his conviction was reversed. On the basis of the foregoing, we are not convinced that the integrity of the trial was compromised, let alone the perceived fairness of the judicial system as a whole.

[14] The petitioner needed to demonstrate by clear and convincing evidence only one of the two alleged grounds for termination. See General Statutes § 17a-112 (j) (3). Accordingly, to demonstrate reversible error, the respondent must establish that the petitioner failed to prove by clear and convincing evidence both of the statutory grounds upon which the court based its termination of the respondent's parental rights, namely, the failure to rehabilitate and the lack of an ongoing parent-child relationship.

from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of [§ 17a-112 (j) (3) (D)] or its applicability to the facts of th[e] case, however, our review is plenary.

* * *

"Moreover . . . the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. . . . Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–25, 222 A.3d 83 (2019).

A

The respondent first claims that the court improperly concluded, in the adjudicatory phase, that the petitioner proved by clear and convincing evidence that he failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B) (i). Specifically,

the respondent argues that the court improperly based its conclusion that the respondent had failed to rehabilitate on his conviction and incarceration. We are not persuaded.

The following legal principles are relevant to the respondent's claim. In the adjudicatory phase of a termination of parental rights proceeding, the court must determine whether one of the six statutory grounds that may serve as a basis for the termination of parental rights exists. *In re Briana G.*, supra, 183 Conn. App. 728. "Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that

at some future date [he] can assume a responsible position in [his] child's life. . . . [I]n assessing rehabilitation, *the critical issue is not whether the parent has improved* [*his*] *ability to manage* [*his*] *own life, but rather whether* [*he*] *has gained the ability to care for the particular needs of the child at issue*." (Emphasis added; internal quotation marks omitted.) Id., 728–29.

"Section 17a-112 (j) (3) (B) allows for the termination of parental rights due to a respondent's failure to achieve personal rehabilitation only after the respondent has been issued specific steps to facilitate rehabilitation. Specific steps provide notice . . . to a parent as to what should be done to facilitate reunification and prevent termination of rights. . . . The specific steps are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B). . . . We acknowledge that the court need not base its determination purely on the respondent's compliance with the specific steps." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 329, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). "A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Internal quotation marks omitted.) *In re Bianca K.*, 188 Conn. App. 259, 271, 203 A.3d 1280 (2019).

In the present case, the court found that the respondent had mental health concerns and parenting deficits that remained unaddressed and that affected his ability to parent Marie. The respondent did not comply with key specific steps meant to address these parenting concerns. Specifically, the evidence before the court

established that, during the period in which he was offered visitation with Marie, the respondent's visitation was minimal. In fact, although the respondent had yet to be incarcerated and was allowed supervised visitation, the respondent visited with Marie only once during the twenty-two month period in which Marie was placed in foster care.[15] The respondent cancelled visits, did not show up to scheduled visits, and declined to reschedule his visits. Although he was referred to counseling services, the respondent attended only one counseling session. According to the respondent, he did not require parenting education. These actions violated the specific steps meant to facilitate reunification with Marie and demonstrated a lack of effort by the respondent to address his mental health and parenting deficits.

Despite these findings, the respondent argues that the court "gauged its failure to rehabilitate finding on the fact that [he] was expected to serve thirty-five years incarcerated." The court, however, clearly based its conclusion that the respondent failed to rehabilitate on more than just his criminal conviction and incarceration. See *In re Katia M.*, 124 Conn. App. 650, 670, 6 A.3d 86 (2010) ("incarceration alone may not be considered a basis for the termination of parental rights"), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010). At the outset of its memorandum of decision, the court acknowledged that the respondent's criminal conviction was reversed by our Supreme Court. Although the court noted that the respondent had issues with "criminal recidivism," the court also found that the respondent had parenting deficiencies and failed to take part in or benefit from counseling. The court concluded that the respondent failed to rehabilitate not because of his

[15] Marie was placed in foster care in October, 2017, when she was approximately two months old. Our review of the record indicates that the respondent was permitted to visit with Marie prior to his sentencing and incarceration, which took place on July 1, 2019.

incarceration but, rather, because he failed to comply with key specific steps that were meant to address these parenting deficiencies,[16] specifically noting that he only visited with Marie once in a twenty-two month period and attended only one session of counseling. The court in its memorandum of decision stated: "[G]iven the [respondent's] failure *to progress his parenting abilities*, it is reasonable to infer that he will remain besieged by those issues for some extensive time." (Emphasis added.)

Furthermore, the court's findings demonstrated that it accounted for the barriers that existed due to the respondent's incarceration, and, thus, its decision to terminate his parental rights was not solely based on his incarceration. The court acknowledged that, during the respondent's sentencing, the court, *Oliver*, *J.*, imposed a standing criminal protective order that prohibited the respondent from contacting anyone under sixteen years of age. The court found, however, that the respondent "failed to consistently visit [with] Marie *prior* to his sentencing. He cancelled visits frequently and failed to appear for visits. His excuse was usually related to employment obligations. [The department] offered other visitation times, but [the respondent] failed to take advantage of these opportunities, again citing work." (Emphasis added.)

Viewed in the manner most favorable to sustaining the judgment, the evidence sufficiently supported the court's conclusion that there was clear and convincing

[16] The respondent argues that the court found him to be in compliance with eleven of his specific steps. Successful completion of some of his specific steps, however, does not establish that the court improperly concluded that the respondent failed to achieve a sufficient degree of rehabilitation. See *In re Eric M.*, 217 Conn. App. 809, 830, 290 A.3d 411 ("successful completion of expressly articulated expectations is not sufficient to defeat a . . . claim [by the petitioner] that the parent has not achieved sufficient rehabilitation" (internal quotation marks omitted)), cert. denied, 346 Conn. 921, 291 A.3d 1040 (2023).

evidence that the respondent failed to achieve a sufficient degree of rehabilitation necessary to encourage a belief that now or within a reasonable time he could assume a responsible position in Marie's life and care for her particular needs. See *In re Briana G.*, supra, 183 Conn. App. 729 ("[i]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue" (internal quotation marks omitted)).

B

The respondent next claims that the court improperly concluded, in the adjudicatory phase, that he lacked an ongoing parent-child relationship according to § 17a-112 (j) (3) (D). We disagree.[17]

We begin with the relevant legal principles. Pursuant to § 17a-112 (j) (3) (D),[18] the lack of an ongoing parent-child relationship is one of the six statutory grounds on which a court may terminate parental rights. "The

[17] Because the court properly concluded that one of the statutory adjudicatory grounds existed, namely, the failure to rehabilitate, we would not ordinarily address the respondent's claim that the court improperly concluded that he lacked an ongoing parent-child relationship as only one adjudicatory ground is required to affirm the court's judgment. See footnote 14 of this opinion. Our state's public policy is to protect children, to provide them with permanency, and to handle child protection cases efficiently; see *In re Amias I.*, 343 Conn. 816, 842, 276 A.3d 955 (2022) (" '[t]ime is of the essence in child custody cases' "). In light of this policy, the unique procedural posture of this case, and to aid in facilitating resolution of any potential future appeal, we choose to address the respondent's claim regarding the second adjudicatory ground that the petitioner proved.

[18] General Statutes § 17a-112 (j) (3) provides in relevant part: "(D) [T]here is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

lack of an ongoing parent-child relationship is a no fault statutory ground for the termination of parental rights. . . . [Our Supreme Court] has explained that the ground of no ongoing parent-child relationship for the termination of parental rights contemplates a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. . . . *The ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature.* . . .

"In its interpretation of the language of [the lack of an ongoing parent-child relationship ground], [our Supreme Court] has been careful to avoid placing insurmountable burden[s] on noncustodial parents. . . . Because of that concern, we have explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . . [D]ay-to-day absence alone, we clarified, is insufficient to support a finding of no ongoing parent-child relationship. . . . We also have rejected the notion that termination may be predicated on the lack of a *meaningful* relationship, explaining that the statute requires that there be *no* relationship." (Emphasis in original; internal quotations marks omitted.) *In re Tresin J.*, supra, 334 Conn. 326.

"Because [t]he statute's definition of an ongoing parent-child relationship . . . is inherently ambiguous when applied to noncustodial parents who must maintain their relationships with their children through visitation . . . [t]he evidence regarding the nature of the respondent's relationship with [the] child at the time of the termination hearing must be reviewed in the light

of the circumstances under which visitation had been permitted." (Citation omitted; internal quotation marks omitted.) *In re Carla C.*, 167 Conn. App. 248, 266, 143 A.3d 677 (2016).

The proper legal test to determine whether the petitioner has proven the lack of an ongoing parent-child relationship is a two step process. "In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In other words, the petitioner must prove by clear and convincing evidence that the child has no present memories or feelings for the natural parent that are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, [this adjudicatory ground] must be denied, and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. . . .

"There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception . . . applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. . . . [W]hen a child is virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence, it makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. . . . Under those circumstances, it is appropriate to consider the conduct of a respondent parent. . . .

"[Our Supreme Court] emphasized in *In re Jacob W.* [330 Conn. 744, 767–68 and n.5, 200 A.3d 1091 (2019)] that it was not the child's age at the time of the respondent's incarceration . . . that controls for purposes of the application of the virtual infancy exception, but [the child's] age . . . at the time of the termination hearing. To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. . . . It would make no sense to require a trial court to resolve whether a child's feelings could have been determined at some time prior to the termination hearing. The inability of the court to discern or to be presented with evidence regarding a virtual infant's present feelings drives the exception. That finding must be made at the time of the termination hearing." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 326–29.[19]

[19] In his preliminary statement of issues that the respondent filed with this court on appeal, he stated that the trial court improperly concluded that there was a lack of an ongoing parent-child relationship because his wrongful conviction was "tantamount to a third-party interference . . . ." This claim implicates the second exception to the lack of an ongoing parent-child relationship. "The second exception . . . applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination." (Internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 327–28. The respondent does not adequately brief this argument in his principal appellate brief. See *In re A'vion A.*, 217 Conn. App. 330, 356–57, 288 A.3d 231 (2023). Although he states that the department's actions, in removing Marie from the home and requiring that his visits with her be supervised, "undeniably strain[ed]" his relationship with Marie, he does not claim that these actions constitute third-party interference or that they precluded the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for the termina-

The court properly concluded that the petitioner proved by clear and convincing evidence that the respondent lacked an ongoing parent-child relationship with Marie. In the present case, the court found that Marie has no present and positive memories of the respondent. The respondent had minimal contact with Marie, even prior to his incarceration and the imposition of the standing criminal protective order. He visited with Marie only once prior to his incarceration.[20] When she last saw him, she did not recognize him. The court found that to allow further time for the establishment of the relationship would be contrary to Marie's best interests. Specifically, the court noted that Marie has been in foster care virtually her entire life and that she needs permanency. The court determined that the respondent's "obvious failure to involve himself in Marie's life," as exhibited by his failure to visit her prior to his incarceration, demonstrated his inability to "develop an appropriate parental relationship with his daughter." Accordingly, there was sufficient evidence to support the court's conclusion.

We next turn to the respondent's argument on appeal that, rather than considering whether Marie had present and positive feelings toward the respondent, the court should have considered his conduct in determining whether there was a lack of an ongoing parent-child relationship because the virtual infancy exception applied in the present case. In response, the petitioner argues that this claim is unpreserved because the respondent did not argue before the trial court that the virtual infancy exception should apply and, therefore, it did not make any findings regarding the applicability

tion of his parental rights. Therefore, any claim that the petitioner's interference caused the lack of an ongoing parent-child relationship pursuant to the second exception to this statutory ground for termination has been abandoned.

[20] See footnote 8 of this opinion.

of the exception. Alternatively, the petitioner argues that, even if the argument is preserved, the virtual infancy exception would not apply in the present case because whether a child is a "virtual infant" is determined by considering the child's age at the time of the termination hearing and not at the time of the parent's incarceration. We agree with the petitioner that the respondent's argument is not preserved and that, even if the argument were preserved, the virtual infancy exception does not apply in the circumstances of this case. Finally, we conclude that, even if the virtual infancy exception did apply in the present case and the respondent's conduct was properly considered, sufficient evidence supported the court's conclusion that he lacked an ongoing parent-child relationship with Marie.

The respondent agrees that he has raised the applicability of the virtual infancy exception for the first time on appeal. "[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." (Internal quotation marks omitted.) *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018). As our Supreme Court has previously stated, the trial court must make a finding at the time of the termination hearing that it is unable to discern the child's present feelings in order for the virtual infancy exception to apply. *In re Tresin J.*, supra, 334 Conn. 329. Because the respondent did not raise the applicability of this exception before the trial court, it did not make a finding as to the applicability of the virtual infancy exception. Instead, the court found that Marie had no present and positive memories of the respondent.

We also agree with the petitioner that, even if the respondent's claim was preserved, the virtual infancy exception is not applicable in the present case. The

petitioner correctly argues that it is the child's age at the time of the termination hearing—not at the time of the respondent's incarceration—that is applicable for purposes of the virtual infancy exception. See id. Marie was four years old at the time of the termination hearing. Our appellate courts previously have held that the virtual infancy exception does not apply when a child was four years old at the time of the termination hearing. See, e.g., id., 330; see also *In re Jacob W.*, supra, 330 Conn. 768 n.5. Furthermore, the petitioner presented evidence that Marie did not recognize the respondent and the court found that Marie had no current and positive feelings toward him. In instances such as the present case, in which a child's feelings can be determined by the court, the virtual infancy exception is not applicable. See, e.g., *In re Jacob W.*, supra, 768 n.5 (virtual infancy exception was not applicable because trial court found that child had " 'little to no memory' " of respondent father).

Finally, even assuming arguendo that the respondent preserved his argument and that the virtual infancy exception applied in the present case, the respondent's conduct by itself also established a lack of an ongoing parent-child relationship. The court found that the respondent had " 'minimal' " visits with Marie during the time in which the department offered him visitation. Although it is true that the respondent successfully sought and obtained a reversal of his conviction, this does not change the fact that the respondent failed to use the resources that the department offered him to establish a relationship with Marie, particularly given his almost complete failure to visit her prior to his conviction. See *In re Tresin J.*, supra, 334 Conn. 330 n.11 ("the parent's perpetuation of the lack of a relationship by failing to use available resources to seek visitation or otherwise maintain contact with the child may

establish the lack of an ongoing parent-child relationship" (internal quotation marks omitted)). Accordingly, the respondent's conduct by itself also established the lack of an ongoing parent-child relationship. On the basis of our review of the record, there was sufficient evidence to support the court's conclusion that, even given the reversal of the respondent's conviction, the petitioner proved by clear and convincing evidence that he lacked an ongoing parent child relationship with Marie pursuant to § 17a-112 (j) (3) (D).

II

Finally, the respondent claims that the court, in the dispositional phase, abused its discretion in denying S's motion to transfer guardianship to Elizabeth.[21] We disagree.[22]

We begin with the relevant legal principles. "The adjudication of a motion to transfer guardianship pursuant

[21] Although the motion to transfer guardianship was filed by S and not the respondent, the respondent implicitly adopted her motion at the trial on the petition to terminate parental rights. In particular, the respondent's counsel argued in favor of the court granting the motion to transfer guardianship to Elizabeth in his final argument. The respondent had a specific, personal, and legal interest in the transfer of guardianship because, according to the respondent, the transfer of guardianship to Elizabeth would better maintain Marie's familial connection compared to her placement with her current nonrelative foster parents. Thus, we conclude that the respondent is aggrieved by the denial of the motion. See General Statutes § 52-263.

[22] The petitioner argues that the record is inadequate to review the respondent's claim that the court abused its discretion by denying the motion to transfer guardianship because the court "did not expressly engage in any suitability and worthiness analysis." We do not agree that the court failed to determine whether Elizabeth was a suitable and worthy guardian. The court made several factual findings regarding Elizabeth's suitability and worthiness: the court found that Elizabeth was not a licensable foster parent for Marie, that she had a criminal record, and that she had an extensive child protection history. These findings directly speak to the court's conclusion, even if it was implicit, that Elizabeth was not a suitable and worthy guardian for Marie.

to [§ 46b-129 (j)][23] requires a two step analysis. [T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second] [t]he court must then find that the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. . . .

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment.

[23] General Statutes § 46b-129 (j) provides in relevant part: "(2) Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may (A) commit such child or youth to the Commissioner of Children and Families, and such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court; (B) vest such child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage; (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage in accordance with the requirements set forth in subdivision (5) of this subsection; or (D) place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court.

* * *

"(6) Prior to issuing an order for permanent legal guardianship, the court shall provide notice to each parent that the parent may not file a motion to terminate the permanent legal guardianship, or the court shall indicate on the record why such notice could not be provided, and the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth . . . ."

. . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence." (Citation omitted; footnote altered; internal quotation marks omitted.) *In re Leo L.*, 191 Conn. App. 134, 139–41, 214 A.3d 430 (2019).

"A trial court's factual findings will not be set aside unless they are clearly erroneous. . . . A finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 138 n.5.[24]

[24] We note that our cases reviewing a trial court's ruling on a motion to transfer guardianship have described the court's inquiry as a two step process. In order to grant the motion to transfer guardianship, the court must determine both that the motion to transfer guardianship is in the child's best interests and that the proposed guardian is suitable and worthy. Although this court has held that the determination of the child's best interests should be reviewed by an abuse of discretion standard, we have not clearly stated

In the present case, the court found that Elizabeth had an extensive criminal history, a child protection history, and was not a licensed foster parent.[25] The court further found that Marie had no relationship with Elizabeth because they spent little time together, that Marie was bonded with her foster parents and foster siblings, and that her foster parents are "affectionate, nurturing, and committed to ensuring that [she] has every opportunity to grow, thrive, and mature . . . ." See *In re Athena C.*, 181 Conn. App. 803, 821, 186 A.3d 1198 ("a trial court may rely on the relationship between a child and the child's foster parents to determine whether a different placement would be in the child's best interest"), cert. denied, 329 Conn. 911, 186 A.3d 14 (2018).

The respondent argues that the court "failed to consider certain evidence adduced at trial" that demonstrated that Elizabeth was a suitable and worthy guardian and that a transfer of guardianship was in Marie's

the appropriate standard for the "suitable and worthy" determination. To the extent that a trial court's determination of whether the proposed guardian is suitable and worthy is based upon subordinate facts, those facts should be reviewed pursuant to the clearly erroneous standard. Because, as a matter of logic, it would not be in a child's best interests to have his or her guardianship transferred to a person who is not suitable and worthy, a court reviewing either determination, i.e., the "best interests" determination or the "suitable and worthy" determination, should apply an abuse of discretion standard of review.

[25] The respondent does not explicitly challenge any of the court's factual findings as "clearly erroneous" but, rather, states that "this conclusion cannot be reasonably supported by the subordinate facts." The "conclusion" to which the respondent refers appears to be the court's findings that Elizabeth had an extensive child protection history and criminal record and could not be licensable as a foster parent. To the extent that the respondent claims that these findings are clearly erroneous, we are not persuaded. A review of the record indicates that a department social worker testified that Elizabeth had an "extensive" child protection and criminal history. A department social worker also testified that Elizabeth was not a licensed foster parent. Accordingly, evidence in the record supported the court's findings that Elizabeth had an extensive criminal history, a child protection history, and was not a licensed foster parent.

best interests. Specifically, the respondent cites to evidence in the record that Elizabeth appealed the child protection claims against her, took steps toward becoming a licensed foster parent, and is the current foster placement for four of Marie's older siblings. The mere fact that evidence in the record could support the conclusion that Elizabeth was a suitable and worthy guardian does not establish, however, that the court's conclusion to the contrary was an abuse of its discretion. Moreover, the court heard and reviewed the evidence before it, including Elizabeth's testimony, and concluded that "there were no viable relative resources for Marie." See, e.g., *In re Miyuki M.*, 202 Conn. App. 851, 864, 246 A.3d 1113 (2021) ("[a]lthough there was testimony from witnesses who indicated that the [proposed guardian] was suitable and worthy, it is the function of the trial court to determine the reliability and weight of the evidence presented"); *In re Leo L.*, supra, 191 Conn. App. 142 ("it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder"). Given the evidence before the trial court, we will not second-guess its determination that it was not in the best interests of Marie to transfer guardianship to Elizabeth; see, e.g., *In re Miyuki M.*, supra, 865; accordingly, the court did not abuse its discretion in denying the motion.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE TIMOTHY B. ET AL.*
(AC 46117)

Alvord, Clark and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her two minor children. The children had been adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. The Department of Children and Families issued specific steps to the mother for reunification and offered her services addressing, inter alia, mental health, substance abuse, and housing. After the petitioner filed petitions to terminate the mother's parental rights, the department referred her for a psychological evaluation. A trial was held on the petitions, and the court found, inter alia, that termination was in the best interests of the children. *Held*:

1. The trial court properly found, by clear and convincing evidence, that the department made reasonable efforts as required by statute (§ 17a-112 (j) (1)) to reunify the respondent mother with her children: although the court referred to opinions contained in the psychological evaluation of the mother that was conducted after the petitioner filed the termination petitions, it was not clear that the court determined that the evaluation itself actually constituted a reunification effort or whether the court simply alluded to the portions of the evaluation that indicated the recommendations the psychologist had made in order to evaluate the reasonableness of the department's efforts as of the petition date; moreover, the mother could not prevail on her claim that the department should have referred her for a psychological evaluation before the petitioner filed the termination petitions, as the court found that the department's reunification efforts, including referring the mother to in-home services addressing substance abuse, mental health and parenting, funding housing for her and the children while the children were still in her care, referring the mother to additional mental health and substance abuse treatment after the children's removal, and making significant efforts to facilitate regular visitation, were reasonable; furthermore, because this court concluded that the trial court properly found that the department made reasonable efforts to reunify the mother with her children, it declined to reach the merits of her argument that the trial

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

court improperly determined that she was unable or unwilling to benefit from those efforts.

2. The respondent mother could not prevail on her claim that the trial court improperly analyzed the best interests of the children in the adjudicatory portion of its decision; the court found that a statutory ground for termination existed because the mother had failed to achieve sufficient personal rehabilitation as required under § 17a-112 (j) (3) (B), including that she was largely noncompliant with the mental health services offered to her, had not fully addressed her issues with substance abuse, had outbursts during her visitation with the children, displayed limited parenting skills, became involved with the criminal justice system following the children's removal, did not have stable housing, and lacked insight into her deficiencies, and the two statements that the court referenced from the mother's psychological evaluation supported its determination regarding her failure to achieve sufficient personal rehabilitation rather than constituted findings regarding the best interests of the children.

Argued April 12—officially released June 7, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Gonzalez*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Matthew Eagan, assigned counsel, for the appellant (respondent mother).

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

** June 7, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

DiPENTIMA, J. The respondent mother, T'Naja T., appeals from the judgments of the trial court terminating her parental rights with respect to her minor children, T and A.[1] On appeal, the respondent claims that the trial court improperly (1) concluded that the Department of Children and Families (department) made reasonable efforts to reunify her with the children and that she was unable or unwilling to benefit from those reunification efforts and (2) considered the best interests of the children during the adjudicatory phase of the termination proceeding. We affirm the judgments of the trial court.

The following facts, which were found by the court, and procedural history are relevant. The department became involved with the respondent in February, 2020, when T was one year old and the respondent was pregnant with A, who was born in May, 2020. The respondent tested positive for marijuana many times during her pregnancy and did not consistently attend prenatal medical appointments. In May, 2020, the department referred the respondent to Family Based Recovery, an intensive, in-home service that provides parenting education as well as counseling for substance abuse and mental health. In June, 2020, the department held a meeting with the respondent to address her "continued substance use and lack of follow-through with T's medical and developmental needs." The department also began funding a studio hotel apartment for the respondent and the children in June, 2020, but the respondent was discharged from the supportive housing program in November, 2020, for failure to comply with the program's drug and alcohol policy.

[1] The court also terminated the parental rights of the minor children's father, and he has not appealed from the judgments of the trial court. We refer in this opinion to the respondent mother as the respondent.

On November 13, 2020, both children were removed from the respondent's care pursuant to a ninety-six hour hold.[2] On November 17, 2020, the petitioner, the Commissioner of Children and Families, filed and the court, *Conway*, *J.*, granted motions for orders of temporary custody. On March 18, 2021, the court, *Marcus*, *J.*, adjudicated the children neglected, committed them to the care and custody of the petitioner and signed the final specific steps as to the respondent.[3]

After the children were removed from the respondent's care, the department arranged visitation and continued to offer the respondent mental health, substance abuse and housing services. The respondent refused to take any medications recommended for the treatment of her bipolar disorder and post-traumatic stress disorder. Her attendance at weekly parenting groups and individual therapy was inconsistent despite the department's engagement of a Multidisciplinary Family Recovery program to assist her in keeping track of appointments. The respondent's behavior during visits with the children was often erratic and sometimes explosive. She failed to attend an intake session after the department referred her to a second housing program. The respondent was arrested in October, 2021, during a domestic violence incident.

On September 16, 2021, a permanency plan for termination of parental rights and adoption was approved by the court, *Marcus*, *J.*, as to both children. The petitioner filed termination of parental rights petitions on November 29, 2021. By agreement of all parties, a virtual trial over the Microsoft Teams platform took place in August, 2022. On October 25, 2022, the court, *Gonzalez*, *J.*, rendered judgment terminating the respondent's parental rights with respect to the children on the

[2] See General Statutes § 17a-101g.

[3] The court initially signed specific steps on November 17, 2020.

ground that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the children, she could assume a responsible position in their lives. In rendering judgment, it determined that there was clear and convincing evidence that the department made reasonable efforts to reunify the respondent with the children and that she was unable or unwilling to benefit from those reunification efforts. It further concluded that termination of the respondent's parental rights was in the children's best interests. This appeal followed.[4]

I

We first address the respondent's claim that the court improperly concluded that the department made reasonable efforts to reunify her with the minor children and that she was unable or unwilling to benefit from the department's reunification efforts.

"[General Statutes §] 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination

[4] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorney for the minor children filed a statement adopting in its entirety the brief filed by the petitioner and supporting the affirmation of the judgments terminating the respondent's parental rights.

that such efforts were not appropriate." (Internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 58, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

A

The respondent argues that the court improperly determined that the department made reasonable efforts to reunify her with the children.[5] Specifically, the respondent contends that the court improperly relied on the psychological evaluation conducted after the filing of the termination petitions as an effort the department made toward reunification and that the department's efforts were not reasonable because it failed to refer her for a psychological evaluation prior to the filing of the termination petitions. We disagree with both contentions.

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review. . . . Under this standard, the inquiry is whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we

[5] The respondent also challenges the constitutionality of General Statutes §§ 17a-111b (a) (2) and 17a-112 (j). Specifically, she argues that § 17a-111b (a) (2) is unconstitutional because that statute relieves the department of its obligation to make reasonable efforts at reunification if the court previously has approved a permanency plan other than reunification, as happened in the present case. Because the court here expressly found that the department made reasonable efforts at reunification and we affirm those findings, we need not address the respondent's constitutional claim. "As a jurisprudential matter, Connecticut courts follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions." (Internal quotation marks omitted.) *In re Kylie P.*, 218 Conn. App. 85, 107, 291 A.3d 158, cert. denied, 346 Conn. 926, A.3d (2023).

construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . .

"[Section 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . . [O]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual case in deciding whether reasonable efforts have been made." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 809–11, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

The respondent argues that, in making its reasonable efforts determination, the court improperly referred to and relied on a psychological examination, conducted after the filing of the termination petitions, by Ines Schroeder, a licensed psychologist. We are not persuaded. It is well established that, when making a reasonable efforts determination, a court generally is limited to considering only those facts that precede the filing of a termination petition. See id., 809; see also Practice Book § 35a-7 (a). Although the court referred to the opinions contained in Schroeder's psychological evaluation in its analysis of the department's efforts to reunify the respondent with her children, it is not clear that the court determined that the evaluation itself actually constituted a reunification effort or whether the court simply alluded to the portion of Schroeder's

report indicating the recommendations she had made in order to evaluate the reasonableness of the department's efforts as of the petition date. Because "[w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment"; (internal quotation marks omitted) *In re Xavier H.*, 201 Conn. App. 81, 95, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020); we conclude that the respondent has failed to demonstrate that the court improperly determined that Schroeder's report constituted an effort by the department at reunification.

We also are unpersuaded by the respondent's argument that the department's reunification efforts were unreasonable because it failed to refer her for an evaluation prior to the filing of the termination petitions. The findings of the court, which the respondent does not contest, establish that the department made reasonable efforts to reunify the respondent with the children prior to filing the termination petitions. The court noted that the department offered services to the respondent addressing mental health, substance abuse, housing, parenting education and visitation. Regarding mental health and substance abuse, the department referred the respondent in May, 2020, while the children were still in her care, to in-home services through Family Based Recovery, which addresses substance abuse, mental health and parenting. The court found that the respondent was "only minimally engaged in the program and continued to consume alcohol and marijuana," which ultimately led to the department's implementation of a ninety-six hour hold. Thereafter, the department referred the respondent to BH Care for mental health and substance abuse treatment. She completed an intake in December, 2020, and a psychological evaluation in January, 2021, the results of which evaluation recommended that she take medication to treat

bipolar disorder and post-traumatic stress disorder. The respondent, however, refused to do so. The respondent's treatment providers at BH Care and her social worker, in consultation with Regional Resource Group, recommended that she first stabilize her mental health before beginning substance abuse treatment. The respondent was referred to a weekly parenting group and individual therapy at BH Care. As a result of the respondent's sporadic attendance at appointments, the department referred her to a case management service to assist her with keeping track of appointments, but she did not "engage meaningfully" in mental health treatment so as to transition to substance abuse treatment until approximately March, 2022.

To address the respondent's housing needs, the department, beginning in June, 2020, funded housing for her and the children at a hotel in New Haven. The department received several calls indicating that, while residing at the hotel, the respondent was using drugs and alcohol and was not supervising the children adequately. In November, 2020, the supportive housing program and the department warned the respondent that illicit drug use was not allowed and that, if she wanted to continue living there, she needed to comply with the services provided by the department and Family Based Recovery. She tested positive for alcohol a few days later. Family Based Recovery providers recommended that the respondent be referred to inpatient substance abuse treatment, but she refused to attend. The department also referred the respondent to Youth Continuum, a case management service with a housing component, but the respondent never attended the intake session.

Regarding visitation and parenting education, the court found that the department "made significant efforts to coordinate regular visitation between [the respondent] and the children and to provide her with

parenting services." Following the removal of the children from the respondent's care in November, 2020, the department facilitated both virtual and in-person visits between the respondent and the children.

Although the respondent contends that the department referred her for a psychological evaluation too late and should have referred her for such an evaluation before, instead of after, the filing of the termination petitions, she points to no authority for the proposition that a court-ordered psychological evaluation pursuant to General Statutes § 46b-129 (i) is required to be conducted prior to the filing of a termination petition. The respondent acknowledges in her appellate brief that no such requirement exists in all cases but, nonetheless, argues that, in the present case, the department was required to refer her for a psychological evaluation prior to the filing of the termination petitions. The respondent notes that Schroeder recommended that she continue with intensive outpatient treatment at BH Care and explore the use of medications to address emotional volatility and that Schroeder stated that she could benefit from a psychoeducational program to gain insight into the traumas that she and the children had experienced. She contends that, "[w]ithout the benefit of. . . Schroeder's expertise from the start of the case, when her recommendations could be reasonably relied upon by the department to provide the services that the respondent truly did need, the department offered its usual buffet of services that were not specifically tailored to the particular needs of this case."

The respondent's argument essentially amounts to a contention that she should have been offered additional services that were tailored to her needs, unlike the services that had been offered by the department, and that she might have engaged in and benefitted from such additional services. The services provided by the department, however, were tailored to the respondent's

needs. The specific steps ordered for the respondent included cooperating with service providers recommended for parenting and individual counseling, submitting to drug and alcohol testing, avoiding illegal drugs and alcohol abuse, and maintaining adequate housing. The department provided services to the respondent for mental health, substance abuse, housing, parenting education and visitation. Schroeder recommended that the respondent continue her intensive outpatient treatment at BH Care. Specifically, the department referred her to intensive outpatient treatment at BH Care prior to the filing of the termination petitions, and the court found that she had completed a psychological evaluation at BH Care in January, 2021, the results of which recommended that she take medication to address her diagnosed bipolar disorder and post-traumatic stress disorder, but she refused. Although the department referred the respondent in May, 2020, to in-home services through Family Based Recovery, which addresses substance abuse, mental health and parenting, the respondent contends that she also should have been offered a psychoeducational program, from which, as Schroeder had recommended, she may have benefited. The respondent, however, acknowledges that "[t]here is no dispute that [she] . . . failed to consistently engage in such services until early in 2022, after the termination petition[s] had been filed."

Moreover, even if the respondent, despite her lack of consistent engagement in the services offered by the department, would have benefitted from a psychoeducational program, the department's failure to offer it to the respondent does not defeat the court's reasonable efforts determination. See *In re Ryder M.*, supra, 211 Conn. App. 812 (assuming evidence existed that respondent would have benefitted from additional services, such evidence would not undermine court's reasonable efforts determination); see also *In re Melody L.*, 290

Conn. 131, 147, 962 A.2d 81 (2009), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014); *In re Christopher L.*, 135 Conn. App. 232, 243, 41 A.3d 664 (2012). "[R]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Ryder M.*, supra, 811. For the foregoing reasons, we reject the respondent's claim that the court improperly determined that the department made reasonable efforts to reunify her with the children.

B

Next, the respondent argues that the court improperly determined that she was unable or unwilling to benefit from reunification efforts. "[T]he [petitioner] must prove [by clear and convincing evidence] *either* that [the department] has made reasonable efforts to reunify *or*, *alternatively*, that the [respondent] is unwilling or unable to benefit from the reunification efforts. Section 17a-112 (j) clearly provides that the [petitioner] is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Anvahnay S.*, 128 Conn. App. 186, 191, 16 A.3d 1244 (2011). Accordingly, because we have concluded that the court properly found that the department made reasonable efforts to reunify the respondent with the children, we decline to reach the merits of the respondent's argument that the court improperly determined that she was unable or unwilling to benefit from those reunification efforts.

II

The respondent next claims that the court improperly considered the best interests of the children in its determination in the adjudicatory phase that the respondent had failed to achieve sufficient rehabilitation as required by statute. We disagree.

"The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016).

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Anthony H.*, 104 Conn. App. 744, 756, 936 A.2d 638 (2007), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008).

"The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." (Citation omitted; internal quotation marks omitted.) *In re Brian P.*, 195 Conn. App. 558, 568, 226

A.3d 159, cert. denied, 335 Conn. 907, 226 A.3d 151 (2020).

In the present case, the court found that a statutory ground for termination existed because the respondent had failed to achieve sufficient personal rehabilitation as required under § 17a-112 (j) (3) (B). In the adjudicatory portion of its decision, the court referred to two statements made by Schroeder in her evaluation report of the respondent. These two statements form the bases of the respondent's claim that the court improperly considered the best interests of the children during the adjudicatory phase: (1) "given the minimal progress [the respondent] has made thus far, it is not in [the children's] best interests to wait further to assess if a relationship can be formed, as [the respondent] has made little progress in other areas" and (2) "[i]t is not beneficial for the children to wait longer for permanency." We disagree that the court's reference to these statements during its determination that the respondent had failed to rehabilitate "crosses over into a consideration of the best interests of the children."

At the beginning of its analysis concerning the respondent's failure to achieve sufficient personal rehabilitation, the court set forth the relevant law under which the court must analyze the respondent's rehabilitative status as it relates to the needs of the children. The court noted that the respondent was largely noncompliant with the mental health services offered to her, had not fully addressed her issues with substance abuse, had outbursts during visitation, displayed limited parenting skills, became involved with the criminal justice system, did not have stable housing and lacked insight into her deficiencies. The court detailed the opinions Schroeder expressed in her psychological evaluation, which the court found credible. The court noted that Schroeder opined that the respondent struggled to understand the impact of her substance abuse on the

children, engaged more significantly with her current providers in the two months preceding her evaluation, gained little insight during the time the children have been out of her care, continued to struggle with the same issues that led to the removal of the children initially, had limited recognition of how the actions underlying her domestic violence charges impacted the children, referred to parenting classes as "additional garbage" requiring her attendance, displayed limited parenting skills and admitted to having used marijuana to manage her frustrations. The court determined that, "while [the respondent] has made progress with her treatment in the past six months, it is not enough to encourage the belief that within a reasonable amount of time, considering the age and needs of the children, [the respondent] could assume a responsible position in the life of the children."

"[A] judicial termination of parental rights may not be premised on a determination that it would be in the child's best interests to terminate the parent's rights in order to substitute another, more suitable set of adoptive parents. Our statutes and [case law] make it crystal clear that the determination of the child's best interests comes into play only after statutory grounds for termination of parental rights have been established by clear and convincing evidence. . . . The court, however, is statutorily required to determine whether the parent has achieved such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Corey C.*, supra, 198 Conn. App. 80–81.

The court's thorough analysis of the respondent's rehabilitation properly focused on whether she had gained the ability to address the particular needs of the

children and thus assume a responsible position in their lives. The court made no findings regarding the best interests of the children in the adjudicatory portion of its decision, and the two challenged statements were direct quotes from Schroeder's report. In the first challenged statement, Schroeder opined that the children cannot wait further given the respondent's minimal progress, and the second challenged statement that the children cannot wait longer for permanency was at the end of a block quote from Schroeder's report in which she also discussed the respondent's failure to gain insight in the time the children were out of her care and her struggles with the same issues that led to the removal of the children initially. Viewed in context, the challenged statements focused on the respondent's failure to rehabilitate within a reasonable time according to the children's needs. We interpret the court's reference to Schroeder's two challenged statements, which were part of a discussion regarding the respondent's ability to meet the needs of the children, as highlighting the children's need for permanence and the respondent's inability to provide that to the children within a reasonable time. See, e.g., *In re November H.*, 202 Conn. App. 106, 135–39, 243 A.3d 839 (2020) (when viewed in context of decision as whole, challenged statements were not construed as trial court having improperly compared respondent with foster parent in adjudicatory part of its decision terminating respondent's parental rights); see also *In re James O.*, supra, 322 Conn. 652–57 (same). In other words, we construe the challenged statements as evidence supporting the court's determination regarding the respondent's failure to achieve sufficient personal rehabilitation, in which it stated that the respondent "has made some progress with her treatment in recent months, but she still faces significant barriers to having the ability to care for her children. Notwithstanding that progress, the issues that

existed at the outset of this case in February, 2020, continue to exist: [the respondent] has not fully addressed her substance abuse and mental health issues, she does not have stable housing, and she lacks insight into the gravity of those deficiencies. The children have been in [the department's] care for nearly two years, during most of which time [the respondent] was noncompliant with [the department's] recommendations for mental health and substance abuse treatment and parenting education. Affording [the respondent] additional time to rehabilitate is not appropriate in this case." Accordingly, we conclude that the court did not improperly analyze the best interests of the children in the adjudicatory portion of its decision.

The judgments are affirmed.

In this opinion the other judges concurred.

EDWARD JAKOBOWSKI, ADMINISTRATOR (ESTATE OF MELINDA JAKOBOWSKI) *v.* STATE OF CONNECTICUT (AC 45088)

Cradle, Seeley and DiPentima, Js.

Syllabus

The plaintiff, E, the administrator of the estate of M, sought to recover damages for the alleged negligence of the defendant, the state of Connecticut, in referring M, while under the care of the Department of Mental Health and Addiction Services, to a certain institute in Florida, whose staff allegedly committed multiple policy and protocol violations resulting in M's death. E filed a notice of claim with the Office of the Claims Commissioner in February, 2012. The state moved to dismiss the notice of claim in August, 2013. In December, 2016, the claims commissioner sent a letter to E asking if he would stipulate to an extension of time until March 31, 2017 for resolution of the claim, to which E agreed. In March, 2017, E notified the claims commissioner that he intended to serve a certain expert witness report by April 22, 2017, asking the claims commissioner to reserve judgment on any motion until the report was filed. On April 22, 2017, following the filing of the

report, the claims commissioner denied the state's motion to dismiss and granted E permission to sue the state. After E filed the present action against the state, the state moved to dismiss E's complaint, claiming that sovereign immunity had not been waived because E did not comply with the statutory requirements ((Rev. to 2017) § 4-160 (b) and § 52-190a) pertaining to medical malpractice claims, and that the claims commissioner did not have jurisdiction over the matter as she did not issue her decision within the applicable two year statute of limitations (§ 4-159a). The trial court denied the state's motion to dismiss. On the state's appeal to this court, *held*:

1. The state could not prevail on its claim that sovereign immunity barred E's claims because the claims commissioner exceeded her statutory authority in granting permission to sue:

   a. The trial court properly held that the claims commissioner's grant of permission was sufficiently broad and clear to grant permission for E to bring the present claim for failure to provide informed consent: E sought to bring a claim based on lack of informed consent rather than medical malpractice, and, although E's notice of claim stated that he sought to bring a claim for negligence in the care and treatment of M, the specific allegations of negligence all involved the transfer of M to the institute without providing E with sufficient information to make an informed decision regarding the transfer, and E's notice of claim did not contain any allegations related to the medical treatment by the state; moreover, even though the claims commissioner referenced statutes related to medical malpractice, §§ 4-160 (b) and 52-190a, those references did not undermine the grant of permission to sue for failure to provide informed consent.

   b. The state could not prevail on its claim that the authorization to sue granted to E was invalid because the claims commissioner did not hold a hearing, develop a factual record, or make a determination that E's claim was just and equitable under § 4-160 (a): after reviewing the plain and unambiguous text of § 4-160 (a) and its relationship to other statutes, this court determined there is no requirement that the claims commissioner hold a hearing prior to granting permission to sue the state, and requiring the claims commissioner to hold an evidentiary hearing prior to authorizing an action against the state would lead to unnecessary duplication and delay and a backlog of claims in the Office of the Claims Commissioner, as the claimant can file an action in the Superior Court, where the matter will be fully adjudicated on the merits; moreover, an expert letter submitted by E to the claims commissioner provided sufficient information to support the claims commissioner's conclusion that it would be just and equitable to authorize suit against the state.

2. The state could not prevail on its claim that the trial court erred in concluding that the claims commissioner's failure to act on E's claim within the two year limitation period set forth in § 4-159a did not deprive the claims commissioner of authority to act: the plain and unambiguous

language of § 4-159a did not expressly set forth a deadline for the claims commissioner to render a decision; moreover, that statute requires that, not later than five days after the General Assembly convenes each regular session, the claims commissioner must notify the General Assembly of all claims that have not been disposed within two years of the date of filing and in which the parties have not agreed to an extension, and, because regular sessions of the General Assembly are held only during certain periods of the year and the claims commissioner renders decisions all year long, the claims commissioner could render a decision beyond two years from the date of the filing of the claim but before the convening of the next regular session of the General Assembly, as she did in the present case.

Argued November 10, 2022—officially released June 13, 2023

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford, where the court, *Sicilian, J.*, denied the defendant's motion to dismiss, and the defendant appealed to this court. *Affirmed.*

Jennifer S. Das, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Joshua Perry*, solicitor general, and *Clare Kindall*, former solicitor general, for the appellant (defendant).

Gregory A. Jones, with whom, on the brief, was *Patrick Tomasiewicz*, for the appellee (plaintiff).

Opinion

SEELEY, J. The defendant, the state of Connecticut, appeals from the judgment of the trial court denying its motion to dismiss the claims asserted against it by the plaintiff, Edward Jakobowski, administrator of the estate of Melinda Jakobowski, on the basis of sovereign immunity.[1] The defendant claims that the court improperly denied its motion to dismiss because the claims

[1] "Although the denial of a motion to dismiss generally is an interlocutory ruling that does not constitute an appealable final judgment, the denial of a motion to dismiss filed on the basis of a colorable claim of sovereign immunity is an immediately appealable final judgment." (Internal quotation marks omitted.) *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 630 n.3, 216 A.3d 753, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

commissioner authorized only a medical malpractice claim pursuant to General Statutes (Rev. to 2017) § 4-160 (b),[2] and the plaintiff did not comply with the mandatory requirements of that statute. Alternatively, the defendant contends that if the claims commissioner authorized the plaintiff to sue the defendant for negligence based on lack of informed consent pursuant to § 4-160 (a), any waiver of immunity was invalid because the claims commissioner did not develop a factual record, hold a hearing, or make a finding that the plaintiff's claim was just and equitable. Finally, the defendant claims than the trial court erred in concluding that the claims commissioner's failure to act on the plaintiff's claim within the two year period set forth in General Statutes § 4-159a[3] did not deprive the claims commissioner of authority to act.[4] We affirm the judgment of the trial court.

[2] We note that § 4-160 has been amended by the legislature since the events underlying the present case. See Public Acts 2019, No. 19-182, § 4; Public Acts 2021, No. 21-91, § 6; Public Acts 2022, No. 22-37, §§ 3, 4. Pursuant to the 2021 amendments, subsection (b) of § 4-160 is now subsection (f). In this opinion, our references to § 4-160 are to the 2017 revision of the statute.

[3] Although § 4-159a was the subject of an amendment in 2022; see Public Acts 2022, No. 22-79, § 2; that amendment has no bearing on this appeal. For simplicity, we refer to the current revision of the statute.

[4] The plaintiff contends that this court lacks subject matter jurisdiction to consider any claim related to the claims commissioner's procedures in waiving sovereign immunity because the claims commissioner performs a legislative function reviewable only by the General Assembly. Although we agree that the claims commissioner "performs a legislative function directly reviewable only by the General Assembly"; (internal quotation marks omitted) *D'Eramo* v. *Smith*, 273 Conn. 610, 618, 872 A.2d 408 (2005); the defendant in the present case "is not attempting to appeal from a decision by the claims commissioner and is not asking the court to substitute its views for the claims commissioner's discretionary legislative determination as to whether sovereign immunity should be waived." Id., 619. The issues raised by the defendant, rather, require this court to interpret the relevant statutes to determine whether the claims commissioner was authorized to grant the plaintiff permission to sue. "Statutory interpretation is a quintessentially judicial function and this court has never hesitated to construe a statute to determine whether it constitutes a waiver of sovereign immunity." Id. We conclude, therefore, that we have jurisdiction to consider the defendant's claims.

The following facts and procedural history are necessary for the resolution of this appeal. On February 8, 2012, the plaintiff filed a notice of claim with the Office of the Claims Commissioner, alleging that his daughter, Melinda S. Jakobowski, the decedent in this case, died on February 10, 2011, while under the care of the Connecticut Department of Mental Health and Addiction Services (department), amid multiple "policy/protocol violations" by the staff at the Florida Institute of Neurological Rehabilitation (institute) where she was a client at the time. He alleged that the decedent was committed to the care of the department in 1993 for "chronic self-destructive thinking and behavioral disorders," and, years later, on September 8, 2010, she was discharged from Connecticut Valley Hospital (hospital) and admitted to the institute based on a referral from the department "and/or [hospital]."

In the notice of claim, the plaintiff alleged that the department, the hospital, and the hospital's employee, Robert M. Pierro, the principal psychiatrist responsible for the decedent's discharge plan, "knew or should have known of a serious history of protocol and human rights violation complaints against [the institute]." He further alleged that the department and the hospital, through their "agents, servants and/or employees," failed to fully disclose to him or the decedent the nature of the treatment to be provided by the institute, the risks and hazards of treating with the institute, alternatives to admission to the institute, and the anticipated benefits of treatment at the institute. The plaintiff indicated in the notice of claim that, as a result of these allegations, he was seeking to bring a claim against the department, the hospital, and Pierro "for their negligence in the care and treatment of the [plaintiff's] decedent . . . ." The plaintiff subsequently filed an amended notice of claim dated August 13, 2012, in which he added allegations

that the decedent was physically abused and threatened while under the care and custody of the institute.

On August 9, 2013, the defendant moved to dismiss the amended notice of claim on the basis that adding a new cause of action was barred by the one year statute of limitations. On October 16, 2013, the plaintiff filed an objection to the defendant's motion to dismiss. On March 20, 2014, the parties appeared before the claims commissioner for a hearing on the motion to dismiss during which the claims commissioner requested supplemental briefing by the parties regarding whether the plaintiff's claim qualified as a medical malpractice claim for which sovereign immunity could be waived pursuant to § 4-160 (b), or whether it was a claim for negligence pursuant to § 4-160 (a). In accordance with the commissioner's request, the parties filed supplemental briefs on this issue.

On December 9, 2016, the claims commissioner, not yet having issued a decision on the motion to dismiss, sent a letter to the plaintiff asking if he would stipulate to an extension of time until March 31, 2017, for the resolution of this claim, which the plaintiff agreed to on December 15, 2016. On March 22, 2017, the plaintiff notified the claims commissioner by letter that he intended to serve a second expert witness report relating to the issue of informed consent by April 22, 2017, and he asked the claims commissioner to reserve judgment on any motion until the report was filed.[5] On April 19, 2017, the plaintiff provided a letter from Alfred Herzog, emeritus medical director, professional programs, with the Institute of Living/Hartford Hospital. After reviewing various records pertaining to the decedent and the institute, Herzog stated in his letter that "it

[5] The plaintiff previously had provided a letter from Stephen J. Nelson, the District (Chief) Medical Examiner for the Tenth Judicial Circuit of Florida, opining that the actions of the staff at the institute contributed causally to the decedent's death.

[was his] opinion, with reasonable medical probability, that the transfer of [the decedent] [constituted] an act of negligence on the part of [the department]."

On April 22, 2017, the claims commissioner denied the defendant's motion to dismiss and granted the plaintiff permission to sue the state "for alleged medical negligence by discharging the [plaintiff's] decedent to [the institute] and allegedly failing to provide sufficient information concerning [the institute], which they knew or should have known, for the [plaintiff] and the decedent to give informed consent to the transfer."[6] On July 14, 2017, the defendant filed a motion to vacate the decision of the claims commissioner, arguing that, because this decision was rendered more than two years from the date the claim was filed, and all extensions of time had expired, the claims commissioner had lost jurisdiction over the claim pursuant to § 4-159a. The defendant also indicated in a footnote, without providing any analysis or argument, that § 4-160 (b) did not provide authority for the claims commissioner's order granting the plaintiff permission to sue.

Approximately one year later, on April 5, 2018, while the defendant's motion to vacate the decision of the claims commissioner was still pending, the plaintiff filed the present action against the defendant, alleging that the decedent's death was caused by the failure of the defendant, through its agents, servants and/or employees, to meet the standard of care in the treatment of the decedent. The plaintiff asserted in his complaint the same allegations as he did in his notice of claim, namely, that the defendant "knew or should have known of a serious history of protocol and human rights violation complaints against [the institute]" and "failed to fully disclose to the [plaintiff] . . . or to the decedent, the nature of the treatment to be provided by [the

[6] Although the claims commissioner's decision is dated April 22, 2017, the decision was not sent to the parties until July 10, 2017.

institute], the risks and hazards of treating with [the institute], alternatives to admission to [the institute] and the anticipated benefits of treatment at [the institute]." Citing to General Statutes § 52-190a, the plaintiff attached to his complaint a certificate of good faith and the written opinions of Herzog and Nelson.

On May 29, 2018, the defendant filed a motion to dismiss the plaintiff's complaint along with a memorandum of law in which it argued, inter alia, that sovereign immunity had not been waived because the plaintiff did not comply with the requirements of § 4-160 (b) or § 52-190a, the statutes pertaining to medical malpractice claims. The defendant also argued that the claims commissioner did not have jurisdiction over this matter as she did not issue her decision within the two year period required by § 4-159a. On August 24, 2018, the plaintiff filed an objection to the defendant's motion to dismiss, along with a memorandum of law in which he argued, inter alia, that the claim before the claims commissioner sounded in lack of informed consent rather than medical malpractice and, thus, that compliance with the statutes regarding medical malpractice claims was not required. The plaintiff also argued that the claims commissioner had complied with § 4-159a as the parties, by their conduct, had agreed to extend the jurisdiction of the commissioner to act. On January 4, 2019, the trial court stayed the matter until the claims commissioner ruled on the pending motion to vacate before it.

On April 15, 2021, the claims commissioner denied the defendant's motion to vacate its decision granting the plaintiff authorization to sue the state. In her decision, the claims commissioner concluded that she did not lose authority to render a decision on the plaintiff's claim after March 31, 2017, the date that the plaintiff had stipulated to for the resolution of the claim. The claims commissioner also concluded, in part, that "the claim of lack of informed consent presents an issue of

law or fact under which the state, were it a private person, could be liable, and that the just and equitable resolution [was] to permit the informed consent claim to be adjudicated with the medical malpractice claim, with which it is legally and factually intertwined."

Thereafter, on September 8, 2021, the court denied the defendant's motion to dismiss. In its decision, the trial court (1) concluded that the claims commissioner's grant of permission was sufficiently broad and clear for the plaintiff to bring the present action for failure to provide informed consent pursuant to § 4-160 (a), and that to the extent the claims commissioner incorrectly referred to §§ 4-160 (b) and 52-190a, the statutes pertaining to medical malpractice actions, those references did not undermine the grant of permission to sue for failure to provide informed consent, and (2) rejected the defendant's claim that the claims commissioner lacked authority over the claim pursuant to § 4-159a because the decision granting permission to sue was not issued before the expiration of the stipulated extension of time.[7] Following the denial of the defendant's motion for reargument, the defendant filed the present appeal.

I

On appeal, the defendant first claims that sovereign immunity bars the plaintiff's claims because the claims commissioner exceeded her statutory authority in granting permission to sue. According to the defendant, the claims commissioner authorized suit only on a medical malpractice claim under § 4-160 (b), and that authorization was invalid because the plaintiff did not comply with the requirements of §§ 4-160 (b) and 52-190a. The

[7] The trial court also rejected the defendant's claim that the Middletown Probate Court did not have jurisdiction to appoint the plaintiff as administrator of the decedent's estate because the decedent was not domiciled in Connecticut at the time of her death. The defendant does not challenge this portion of the trial court's decision on appeal.

plaintiff counters that the claims commissioner's consent to sue included a claim for lack of informed consent under § 4-160 (a) and, therefore, the trial court properly concluded that it retained subject matter jurisdiction over this claim for lack of informed consent. We agree with the plaintiff.

We first set forth the applicable standard of review. "The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . In addition, [s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore [also] presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 79–80, 74 A.3d 1242 (2013).

"[A] litigant that seeks to overcome the presumption of sovereign immunity [pursuant to a statutory waiver] must show that . . . the legislature, either expressly

or by force of a necessary implication, statutorily waived the state's sovereign immunity . . . . In making this determination, [a court shall be guided by] the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect [that] makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *Feliciano* v. *State*, 336 Conn. 669, 674–75, 249 A.3d 340 (2020). "In the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so." *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 351, 977 A.2d 636 (2009).

We next set forth the relevant statutory provisions. Section 4-160 (a) provides: "Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable." This section governs claims sounding in common-law negligence that are brought against the state. *Levin* v. *State*, 329 Conn. 701, 708, 189 A.3d 572 (2018). Section 4-160 (b) provides: "In any claim alleging malpractice against the state . . . the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim."[8] Section 52-190a, in turn, sets forth the

[8] Section 4-160 (b) was enacted in 1998; Public Acts 1998, No. 98-76, § 1; and "[presented] a marked departure from the discretion afforded to the claims commissioner under § 4-160 (a). Indeed, the effect of § 4-160 (b) was to deprive the claims commissioner of his broad *discretionary* decision-making power to authorize suit against the state in cases where a claimant has brought a medical malpractice claim and filed a certificate of good faith.

requirements for the filing of a certificate of good faith and accompanying opinion of a similar health care provider, conditions required for the filing of a medical malpractice action.[9] Section 52-190a does not apply to a claim of lack of informed consent because a claim of lack of informed consent is not a medical negligence claim. *Shortell* v. *Cavanagh*, 300 Conn. 383, 385, 15 A.3d 1042 (2011). "Unlike a medical malpractice claim, a claim for lack of informed consent is determined by a lay standard of materiality, rather than an expert medical standard of care which guides the trier of fact in its determination." Id., 388.[10]

A

In the present case, the parties disagree whether the claims commissioner's grant of permission to sue,

Instead, § 4-160 (b) *requires* the claims commissioner to authorize suit in all such cases. In other words, the effect of the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the claims commissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements." (Emphasis in original; internal quotation marks omitted.) *Levin* v. *State*, supra, 329 Conn. 708 n.3.

[9] General Statutes § 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages [for medical malpractice] . . . unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . ."

[10] "[T]he focus of a medical malpractice case is often a dispute involving the correct medical standard of care and whether there has been a deviation therefrom. Conversely, the focus in an action for lack of informed consent is often a credibility issue between the physician and the patient regarding

which referenced §§ 4-160 (b) and 52-190a, the statutes pertaining to medical malpractice claims, was, as the trial court found, sufficiently broad and clear to grant permission for the plaintiff to bring the present action based on the defendant's failure to provide informed consent under § 4-160 (a). Our Supreme Court considered a similar issue in *Levin* v. *State*, supra, 329 Conn. 701, and we, therefore, look to that case for guidance.

In *Levin*, the plaintiff, the administratrix of the estate of a woman who was fatally stabbed by her son, filed a notice of claim with the Office of the Claims Commissioner, seeking permission to bring an action against the defendant, the state of Connecticut, for medical malpractice based on mental health services and treatment given to the decedent's son. Id., 703–704. At the time of the incident in question, the decedent's son was on an approved home visit from River Valley Services, a mental health-care facility operated by the department. Id., 704. The claims commissioner granted permission to the plaintiff to bring a malpractice action against the defendant under § 4-160 (b). Id. The order specified that the grant of permission to sue was "limited to that portion of the claim alleging malpractice against the [defendant] . . . ." (Internal quotation marks omitted.) Id. The plaintiff thereafter brought an action against the defendant alleging that River Valley Services was negligent in its diagnosis, care, treatment, and custody of the decedent's son, and that its level of care was below that of a reasonably prudent health-care provider. Id., 705. The trial court granted the defendant's motion to strike the complaint, concluding that, pursuant to *Jarmie* v. *Troncale*, 306 Conn. 578, 587, 50 A.3d 802 (2012), a medical malpractice action can be brought only by a patient against a health-care provider. *Levin* v. *State*, supra, 329 Conn. 705. The trial court further

whether the patient had been, or should have been, apprised of certain risks prior to the medical procedure." *Shortell* v. *Cavanagh*, supra, 300 Conn. 389.

noted that, even if the complaint could be construed as a common-law negligence action, it would lack subject matter jurisdiction because there was no basis for finding that the claims commissioner authorized a negligence claim. Id.

On appeal, our Supreme Court considered whether an action authorized by the claims commissioner, limited to medical malpractice, could survive a motion to strike where the plaintiff was not a patient of the defendant. Id., 705–706. The plaintiff argued that *Jarmie* did not control because she was not alleging medical malpractice but, rather, " 'medical negligence' " resulting from the care, treatment, and custody of a patient, and from the failure to warn the decedent of the patient's dangerous propensities. Id., 703. The plaintiff also argued that there was no meaningful difference between her negligence claim and the medical malpractice claim presented to, and authorized by, the claims commissioner. Id. In affirming the judgment of the trial court granting the defendant's motion to strike the complaint, our Supreme Court noted that the claim presented to, and authorized by, the claims commissioner was solely one of medical malpractice, which was barred by *Jarmie*, and that, therefore, the trial court would have lacked subject matter jurisdiction to consider a negligence claim because it would have been beyond the scope of the action authorized by the claims commissioner under § 4-160 (b). Id., 708–10.

In the present case, by contrast, the plaintiff sought to bring a claim based on lack of informed consent rather than medical malpractice.[11] Although the plaintiff's notice of claim stated that "[t]he [plaintiff] seeks to bring a claim against [the department], [the hospital],

[11] In its memorandum of decision denying the defendant's motion to dismiss, the trial court noted that the parties were in agreement that the claim submitted to the claims commissioner was for lack of informed consent, not medical malpractice.

and . . . Pierro . . . for their negligence in the care and treatment of the [plaintiff's] decedent," the specific allegations of negligence all involved the department's transfer of the plaintiff's decedent to the institute without providing the plaintiff with sufficient information to make an informed decision regarding the transfer. Specifically, the notice stated: "The [plaintiff] . . . alleges that [the department] and [the hospital], through their agents, servants and/or employees, failed to fully disclose to the [plaintiff], who was the father of the decedent, or to the decedent, the nature of the treatment to be provided by [the institute], the risks and hazards of treating with [the institute], alternatives to admission to [the institute], and the anticipated benefits of treatment at [the institute]." Neither the plaintiff's notice of claim nor the plaintiff's amended notice of claim contained any allegations related to the medical *treatment* by the defendant.

Moreover, the memorandum of decision granting permission to sue indicates that the claims commissioner understood the plaintiff to be alleging a claim for lack of informed consent. Specifically, the decision states: "The [plaintiff] alleges that the [defendant's] agents knew or should have known of a serious history of complaints of protocol and human rights violations against the [institute] when it developed its discharge plan to transfer the decedent to the [institute] and that *the* [*defendant's*] *agents failed to provide sufficient information concerning the* [*institute*] *to obtain the informed consent of the* [*plaintiff*] *and the decedent to the transfer.*" (Emphasis added.) Notwithstanding the fact that the plaintiff's claim was based on a lack of informed consent rather than medical malpractice, the claims commissioner also referenced §§ 4-160 (b) and 52-190a, pertaining to medical malpractice claims. Specifically, the claims commissioner referenced the letter from Herzog and noted that, although the plaintiff's

attorney had not submitted a certificate of good faith pursuant to § 52-190a, the plaintiff was in substantial compliance with the requirements of that statute.[12]

The trial court, discussing the decision of the claims commissioner, stated that "[t]he claims commissioner's references to medical malpractice §§ 4-160 (b) and 52-190a are understandable in light of the record before her. The plaintiff submitted letters from doctors containing medical opinions and his notice of claim referenced the defendant's 'negligence in the care and treatment of the claimant's decedent . . . .' Nevertheless, the notice of claim did not refer expressly to medical malpractice or to § 4-160 (b). In addition, the claims commissioner's decision, although granting permission to sue 'for alleged medical negligence' describes that

[12] In her ruling denying the state's motion to vacate the decision granting the plaintiff permission to sue the state, the claims commissioner concluded that, under the circumstances of this case, it would be just and equitable to permit the informed consent claim to be adjudicated with the medical malpractice claim. Specifically, the claims commissioner stated that "[t]he amended notice of claim alleges the negligent care and treatment of the decedent by the [defendant's] agents and employees when they developed and implemented the discharge plan transferring her to the [institute], which is a claim of medical negligence. In addition, the claim of lack of informed consent, while not a malpractice claim, is inextricably intertwined with the decedent's medical care and the corresponding claim of medical negligence. In order to prove both claims, the [plaintiff] must establish that the [defendant's] agents and employees knew or should have known of the history of the [institute] and the potential risks involved with the transfer of the decedent there. Separating the medical negligence and the informed consent claims would require trial of the same case twice, resulting in both the waste of judicial resources and the possibility of inconsistent outcomes, results that would be neither just nor equitable. Section 4-160 (a) authorizes the commissioner to grant permission to sue the state whenever the commissioner 'deems it just and equitable' and the claim 'presents an issue of law or fact under which the state, were it a private person, could be liable.' In these unusual circumstances, in which the claims are virtually inseparable, the commissioner concludes that the record establishes that the claim of lack of informed consent presents an issue of law or fact under which the state, were it a private person, could be liable, and that the just and equitable resolution is to permit the informed consent claim to be adjudicated with the medical malpractice claim, with which it is legally and factually intertwined."

negligence as 'discharging the [plaintiff's] decedent to the [institute] and allegedly failing to provide sufficient information concerning the [institute], which they knew or should have known, for the [plaintiff] and the decedent to give informed consent to the transfer.' " In light of the foregoing, the trial court concluded that the claims commissioner's grant of permission was sufficiently broad and clear to grant permission for the plaintiff to bring the present claim for failure to provide informed consent and that, to the extent the claims commissioner included references to §§ 4-160 (b) and 52-190a, those references did not undermine the grant of permission to sue for failure to provide informed consent.

The defendant argues in its brief that "the trial court effectively transformed and rewrote the [claims] commissioner's decision to reflect what the trial court believed the [claims] commissioner *should* have authorized, not what she actually *did* authorize." (Emphasis in original.) We disagree with the defendant's interpretation of the trial court's decision. Unlike in *Levin* v. *State*, supra, 329 Conn. 708–709, in which "the claim presented to, and authorized by, the claims commissioner was solely one of medical malpractice," the trial court in the present case correctly concluded that the claim presented to the claims commissioner was based on lack of informed consent, and that the decision of the claims commissioner granting permission to sue encompassed a claim of lack of informed consent.[13]

[13] Citing *Downs* v. *Trias*, 306 Conn. 81, 90–91, 49 A.3d 180 (2012), the defendant argues that the claims commissioner's references to informed consent do not indicate an intent to authorize a separate negligence cause of action because evidence regarding lack of informed consent is relevant to the medical malpractice claim that the claims commissioner authorized, and that the plaintiff pursued. As previously stated in this opinion, we disagree with the defendant that the claims commissioner authorized only a medical malpractice claim.

We also disagree with the defendant's characterization of the present action as a medical malpractice action rather than an action for lack of informed consent. We first note that "[t]he interpretation of pleadings is

Although we agree with the defendant that the trial court "does not have the authority to waive sovereign immunity on behalf of the state"; (internal quotation marks omitted) id., 709; we disagree that, in denying the defendant's motion to dismiss, the court substituted its judgment for that of the claims commissioner and permitted the case to proceed based on a claim not authorized by the claims commissioner. We conclude, rather, that the trial court properly held that the claims commissioner's grant of permission was sufficiently broad and clear to grant permission for the plaintiff to bring the present claim for failure to provide informed consent.

B

Having concluded that the claims commissioner's grant of permission to sue encompassed a claim of lack of informed consent under § 4-160 (a), we next consider the defendant's claim that any such authorization was invalid because the claims commissioner did not hold a hearing, develop a factual record, or make a determination that the plaintiff's claim was just and equitable, as required by § 4-160 (a). The plaintiff counters that the relevant statutory framework does not require the claims commissioner to hold a hearing or develop a factual record or make an explicit finding that the claim

always a question of law for the court . . . ." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 210, 990 A.2d 853 (2010). Although the plaintiff alleged in the complaint that the defendant, by and through its agents, servants and/or employees, had failed "to meet the standard of care in its treatment of the decedent," the plaintiff specifically alleged that they "knew or should have known of a serious history of protocol and human rights violation complaints against [the institute]" and "failed to fully disclose to the [plaintiff] . . . or to the decedent, the nature of the treatment to be provided by [the institute], the risks and hazards of treating with [the institute], alternatives to admission to [the institute], and the anticipated benefits of treatment at [the institute]." These allegations are consistent with an action for lack of informed consent. See *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 180, 896 A.2d 777 (2006).

is just and equitable. We agree with the plaintiff that a hearing was not required in the present case, and, further, that the letter from Herzog provided sufficient facts from which the claims commissioner could have concluded that it would be just and equitable to authorize suit.[14]

Whether the claims commissioner had statutory authority to waive sovereign immunity without holding a hearing and developing a factual record and without making a determination that the plaintiff's claim was just and equitable raises a question of statutory interpretation. See *Nelson* v. *Dettmer*, 305 Conn. 654, 662, 46 A.3d 916 (2012). As such, we are guided by the principles of General Statutes § 1-2z, which provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

We next set forth the relevant statutory provisions. At the time of the claims commissioner's decision, § 4-160 (a) provided that, "[w]henever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim

[14] We note that it is unclear from the record whether either party requested a hearing before the claims commissioner. The record reveals that, on December 9, 2016, the claims commissioner asked the plaintiff if he would agree to an extension of time until March 31, 2017, for a resolution of the claim. On December 15, 2016, the plaintiff agreed to such an extension. On March 22, 2017, the plaintiff notified the claims commissioner that he intended to serve a second expert witness report by April 22, 2017, relating to the issue of informed consent, and he asked the claims commissioner to "reserve judgment on any motion" until that report was filed. On April 22, 2017, after the plaintiff provided this report, the claims commissioner granted the plaintiff permission to sue the state. The defendant did not argue that the authorization was invalid due to the failure of the claims commissioner to hold a hearing either in its motion to vacate the commissioner's decision or in its motion to dismiss before the trial court. Indeed, the defendant first

which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable." By its terms, this statute does not mandate that a hearing take place or set forth what is required of the claims commissioner to determine that a claim is, in fact, just and equitable. The defendant argues, however, that the statutory scheme unambiguously requires that the claims commissioner's "just and equitable" determination be made on a developed factual record following a hearing. In support of this argument, the defendant points to General Statutes § 4-142 (a), which provides that "[t]here shall be an Office of the Claims Commissioner which shall hear and determine all claims against the state," and General Statutes § 4-151 (a), which provides that "[c]laims shall be heard as soon as practicable after they are filed. . . ."[15] Further, General Statutes § 4-151a provides that the claims commissioner may waive the *hearing* of any claim for $10,000 or less.[16] Finally, General Statutes § 4-157 provides that the claims commissioner "shall adopt rules of procedure . . . governing the proceedings of the Office of the Claims Commissioner. . . ." Pursuant to these rules, the claims commissioner "shall make full inquiry into all facts at issue and shall obtain a full and complete record of all facts necessary for a fair determination of the issues." Regs., Conn. State Agencies § 4-157-10.

made this argument in a footnote in the defendant's memorandum of law in support of its motion to reargue the trial court's decision denying its motion to dismiss.

[15] Subsections (b), (c) and (d) of § 4-151 further provide, respectively, that that the claims commissioner may "call witnesses, examine and cross-examine any witness, require information not offered by the claimant or the Attorney General and stipulate matters to be argued," "administer oaths, cause depositions to be taken, issue subpoenas and order inspection and disclosure of books, papers, records and documents," and, if any person fails to respond to a subpoena, "may issue a capias . . . ."

[16] At the time of the claims commissioner's decision, this amount was $5000. It was increased to $10,000 in 2019. See Public Acts 2019, No. 19-182, § 1.

We disagree with the defendant that any of these statutes *required* the claims commissioner to hold a hearing prior to determining that it would be just and equitable to allow suit against the state. The plain language of the provisions cited by the defendant contains no such requirement. We are mindful "that, in the absence of ambiguity, courts cannot read into statutes, by construction, provisions which are not clearly stated . . . ." (Internal quotation marks omitted.) *Nelson* v. *Dettmer*, supra, 305 Conn. 669. Moreover, "[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so. . . . [O]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent . . . ." (Citations omitted; internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 734, 224 A.3d 525 (2020). In this regard, we observe that, prior to 2005, General Statutes (Rev. to 2003) § 4-159, a related statute regarding the submission of certain claims to the legislature, provided that the claims commissioner was required to make his recommendations to the General Assembly "[a]fter hearing"; the "[a]fter hearing" language was deleted in 2005.[17] We consider this indicative of the fact

[17] Prior to 2005, General Statutes (Rev. to 2003) § 4-159 provided in relevant part: "*After hearing*, the Claims Commissioner shall make his recommendations to the General Assembly for the payment or rejection of amounts exceeding seven thousand five hundred dollars. . . ." (Emphasis added.)

Number 05-170, § 2, of the 2005 Public Acts replaced the requirement that the claims commissioner, after a hearing, make his recommendation to the General Assembly for the payment or rejection of amounts exceeding $7500 with the requirement that the claims commissioner submit all claims where payment in an amount exceeding $7500 was recommended and all claims for which a request for review had been filed. As so revised, General Statutes (Supp. 2006) § 4-159 provided in relevant part: "(a) Not later than five days after the convening of each regular session and at such other times as the speaker of the House of Representatives and president pro tempore of the Senate may desire, the Claims Commissioner shall submit to the General Assembly (1) all claims for which the Claims Commissioner recommended payment of a just claim in an amount exceeding seven thousand five hundred

that the legislature would have expressly stated that a hearing was required if it intended to do so.

Thus, after reviewing the plain and unambiguous text of § 4-160 (a) and its relationship to other statutes, we conclude that the claims commissioner is not required to hold a hearing before authorizing suit against the state. This conclusion is consistent with the rules governing proceedings of the claims commissioner, which are intended to "avoid formal and technical requirements" and "provide a simple, uniform, expeditious and economical procedure for the presentation and disposition of claims." General Statutes § 4-157. Consistent with this intent, the only requirement contained in § 4-160 (a) is that the claims commissioner deem it "just and equitable" before authorizing suit against the state "on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable." Once the claims commissioner authorizes suit pursuant to this section, the claimant can file an action in Superior Court, where the matter will be fully adjudicated on the merits. Requiring the claims commissioner to hold an evidentiary hearing prior to authorizing the action against the state will lead to unnecessary duplication, as well as delay and a backlog of claims in the Office of the Claims Commissioner. We decline to read such a requirement into this statute.[18] See *Casey* v.

dollars . . . and (2) all claims for which a request for review has been filed . . . together with a copy of the Claim[s] Commissioner's findings and the hearing record of each claim so reported. . . ."

We note that § 4-159 currently requires the claims commissioner to submit to the General Assembly all claims for which the recommended payment of a just claim exceeds $35,000 and all claims for which a request for review has been filed. See Public Acts 2019, No. 19-182, § 3.

[18] In 2019, § 4-160 (a) was amended to include the following language: "Whenever a person files a claim that exclusively seeks permission to sue the state, the Claims Commissioner may hold a hearing on the sole issue of the state's liability. During such hearing, the state may present as an affirmative defense the claimant's lack of damages. The Claims Commissioner may prescribe rules pursuant to section 4-157 concerning a hearing

Lamont, 338 Conn. 479, 493, 258 A.3d 647 (2021) (" '[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended' ").

The defendant nonetheless argues that the claims commissioner cannot authorize suit pursuant to § 4-160 (a) without determining that the claim "presents an issue of law or fact under which the state, were it a private person, could be liable," and that the claims commissioner cannot determine whether there is a genuine "issue of law or fact" until she sees the parties' evidence and legal arguments through a hearing conducted in accordance with §§ 4-142 and 4-151. Contrary to the defendant's claim, we conclude that, in the present case, the letter from Herzog provided sufficient information from which the claims commissioner could have concluded that it would be just and equitable to permit the plaintiff to seek redress against the state. After reviewing the decedent's history and treatment at the institute, Herzog stated: "Given [the] publicly available information, and some of it very locally available via [the Department of Children and Families], it

that is held solely to address the state's liability under this subsection." Public Acts 2019, No. 19-182, § 4.

This language was amended again in 2021 to provide in relevant part: "The Claims Commissioner may grant permission to sue for a claim that exclusively seeks permission to sue the state based solely on the notice of claim or any supporting evidence submitted pursuant to section 4-147 . . . or both, without holding a hearing, upon the filing by the attorney or pro se claimant of (1) a motion for approval to assert a claim without a hearing, requesting a ruling based solely on the notice of the claim and any supporting evidence submitted under the provisions of this chapter, and (2) an affidavit attesting to the validity of a claim. . . ." Public Acts 2021, No. 21-91, § 6.

In light of the 2021 amendment, the defendant argues that a hearing was required under the language of § 4-160 (a) in effect when this case was filed, and that the 2021 amendment clarifies that a hearing is not required as long as the motion and affidavit are filed. We disagree. Although we agree that the 2021 amendment provides clarity regarding when the claims commissioner may hold a hearing pursuant to § 4-160 (a), we disagree with the defendant, for the reasons previously stated, that a hearing was required pursuant to the earlier revision of the statute.

is surprising that [the institute] was a consideration for transferring [the decedent] to [the institute]. Furthermore, it is my understanding that this information about [the institute] was never discussed with [the decedent's] father . . . to help him, as her legal representative, make an informed decision about [the decedent's] transfer and admission to [the institute]. After receiving these records, it is my opinion, with reasonable medical probability, that the transfer of [the decedent] [constituted] an act of negligence on the part of [the department]."

Because § 4-160 (a) contains no requirement that the claims commissioner hold a hearing prior to granting permission to sue the state, and because Herzog's letter provided sufficient information to support the claims commissioner's conclusion that it would be just and equitable to authorize suit against the state, the defendant cannot prevail on this claim.

II

The defendant next argues that the trial court erred in concluding that the claims commissioner's failure to act on the plaintiff's claim within the two year limitation period set forth in § 4-159a did not deprive the claims commissioner of the authority to act.[19] We disagree.

As stated previously in this opinion, the plaintiff's initial notice of claim in this case was filed on February

[19] In its brief, the defendant argues that the claims commissioner's failure to comply with the two year time period specified in § 4-159a deprived the claims commissioner of jurisdiction to act. The court's decision, however, framed the issue in terms of whether the claims commissioner had authority to waive sovereign immunity because the decision was rendered outside the time specified in § 4-159a. The court indicated that in the absence of a valid waiver of sovereign immunity, it would lack subject matter jurisdiction over the action. We agree with the trial court's framing of this issue. See *Nelson* v. *Dettmer*, supra, 305 Conn. 662 ("[r]esolution of the issue concerning the trial court's subject matter jurisdiction requires us to determine whether the commissioner had statutory authority to act"); see generally *Reinke* v. *Sing*, 328 Conn. 376, 382, 179 A.3d 769 (2018) (discussion regarding court's subject matter jurisdiction and authority to act).

8, 2012. It is undisputed that the claims commissioner sought and obtained several extensions of time to render a decision on the plaintiff's claim. As relevant to the claim on appeal, on December 15, 2016, the plaintiff agreed to an extension of time until March 31, 2017, for the resolution of the claim. On March 22, 2017, the plaintiff notified the claims commissioner that he expected to serve a second expert witness report by April 22, 2017, and stated that he "would greatly appreciate if [the claims commissioner] would reserve judgment on any motion until [this] report is filed." On April 19, 2017, the plaintiff filed the second expert witness report. On April 22, 2017, the claims commissioner granted the plaintiff's request for authorization to sue the state. This decision was sent to the parties on July 10, 2017. Because the last written extension expired on March 31, 2017, and the decision of the claims commissioner is dated April 22, 2017, the defendant argues that the claims commissioner did not have authority to waive sovereign immunity. We disagree.

We initially note that whether the claims commissioner had statutory authority to act pursuant to § 4-159a raises a question of statutory interpretation for which we are guided by the principles of statutory construction contained in § 1-2z. Section 4-159a (a) provides in relevant part that "(1) [n]ot later than five days after the convening of each regular session, the Claims Commissioner shall report to the General Assembly on all claims that have been filed with the Office of the Claims Commissioner pursuant to section 4-147 and have not been disposed of by the Office of the Claims Commissioner within two years of the date of filing or within any extension thereof . . . except claims in which the parties have stipulated to an extension of time for the Office of the Claims Commissioner to dispose of the claim. . . ."[20] Section 4-159a (b) provides that "[t]he Office of the Claims Commissioner shall give

[20] We note that in 2022, § 4-159a (a) was amended to include the following language: "(2) The report submitted by the Claims Commissioner . . . shall

notice to all claimants whose claims are the subject of a report as provided in subsection (a) of this section that their claims will be considered at the next regular session of the General Assembly pursuant to subsection (c) of this section." Further, § 4-159a (c) provides that, "[w]ith respect to any claim that is the subject of a report as provided in subsection (a) of this section the General Assembly may (1) grant the Office of the Claims Commissioner an extension for a period specified by the General Assembly to dispose of such claim, (2) grant the claimant permission to sue the state, (3) grant an award to the claimant, or (4) deny the claim."

The defendant argues that the "simple and unambiguous reading of . . . § 4-159a (a) and (c) is that the General Assembly intended to deprive the claims commissioner of [authority] to act on stale claims beyond the two year period, and to instead reserve power [to] itself to resolve such claims in one of the four manners set forth in the statute . . . ." In its decision denying the defendant's motion to dismiss, the trial court stated that, "[u]nder the defendant's interpretation of § 4-159a (a), the failure of the claims commissioner to timely dispose of a claim or to make the required report would, for no other reason [than] the claims commissioner's failings, defeat the claim. Nothing in the text of the statute suggests that the legislature intended such a result." We agree with the court's interpretation of the statute.

The plain and unambiguous language of § 4-159a does not expressly set forth a deadline for the claims commissioner to render a decision.[21] By its terms, § 4-159a (a)

minimally include (A) an explanation as to why the claim has not been disposed of, and (B) the date by which a decision will be rendered on the claim in the event the General Assembly were to grant the Office of the Claims Commissioner an extension of time to dispose of the claim." See Public Acts 2022, No. 22-79, § 2.

[21] By contrast, however, General Statutes § 4-154 (a) provides in relevant part that, "[n]ot later than ninety days after hearing a claim, the Claims Commissioner shall render a decision as provided in subsection (a) of section 4-158. . . ."

(1) requires that, *not later than five days after the convening of each regular session*, the claims commissioner must notify the General Assembly of all claims that have not been disposed within two years of the date of filing and in which the parties have not agreed to an extension. Regular sessions of the General Assembly are held from January to June in odd numbered years, and from February to May in even numbered years. Conn. Const., art. III, § 2. The claims commissioner, however, renders decisions all year long and could render a decision, as she did in the present case, beyond two years from the date of the filing of the claim but before the convening of the next regular session of the General Assembly.

Under the defendant's interpretation of § 4-159a, the claims commissioner would be required to cease work on a claim at the two year mark, even though it may be several months before the convening of the next regular session of the General Assembly. As the claims commissioner noted in her decision denying the defendant's motion to vacate, "[a]lthough a written stipulation could expire at any point in the year, the report to the legislature is made only once per year, within five days of the convening of the regular session. . . . Thus, a claim could conceivably be forced into inactivity for a full year or more depending on the timing of the expiration of the stipulation and the resolution by the legislature." (Citation omitted.) We decline to interpret § 4-159a in a manner that would lead to such an unwarranted delay in the resolution of claims before the claims commissioner. See *Fairlake Capital, LLC* v. *Lathouris*, 214 Conn. App. 750, 765, 281 A.3d 1240 (2022) (declining to interpret statute in manner that would lead to absurd consequences or bizarre results). The defendant, therefore, cannot prevail on this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES A. BASSETT *v.* TOWN OF EAST HAVEN ET AL.
(AC 45106)

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

Syllabus

The plaintiff, a former employee of the defendant town, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner dismissing his claim for workers' compensation benefits relating to an injury that he sustained in the course of his employment. The plaintiff was working as a supervisor in a youth program run by the defendant that employed local teenagers to clean areas of the town, including by picking up garbage, when he discovered a smallish brown sphere with a wick. Using his own lighter, the plaintiff lit the sphere's wick; the sphere instantly exploded, resulting in catastrophic injuries to the plaintiff's left hand. The plaintiff initially denied lighting the wick to various authorities but later admitted that he did light it, allegedly because he thought that the sphere was a smoke bomb that would be safer to detonate than to bring as a live item around the teenage employees of the program. He testified before the commissioner that he was never trained by the defendant on how to handle fireworks in the course of his employment. The plaintiff claimed that the board improperly affirmed the commissioner's decision that his lighting of the sphere's wick was not within the scope of his job duties, and, thus, his injuries did not arise out of his employment with the defendant. *Held* that the board correctly affirmed the commissioner's decision: the commissioner found that the act of cleaning up debris was within the scope of the plaintiff's job duties but that lighting the wick of the sphere was not, and there was no evidence presented to the commissioner that program workers ever set fire to debris in order to dispose of it; moreover, the commissioner expressly stated that she did not find the plaintiff's testimony that he lit the wick of the sphere to protect the teenage employees to be credible, and this court does not disturb the commissioner's credibility determinations on appeal; furthermore, the commissioner's finding that, at the moment the plaintiff lit the sphere, the chain of causation was broken, and that the lighting of the sphere was the proximate cause of the plaintiff's injuries was reasonable and conclusive; accordingly, the plaintiff's injuries did not arise out of his employment with the defendant and were not compensable.

Argued April 11—officially released June 13, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District dismissing the plaintiff's claim for benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Leonard A. Fasano, for the appellant (plaintiff).

Michael J. Finn, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, James A. Bassett, appeals from the decision of the Compensation Review Board (board) affirming the dismissal of his claim for benefits by the Workers' Compensation Commissioner for the Third District (commissioner).[1] On appeal, the plaintiff claims that the board erred in upholding the commissioner's decision that the plaintiff's claimed injuries did not arise out of his employment with the defendant town of East Haven (town).[2] We disagree and, accordingly, affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. On July 30, 2018, the plaintiff was employed by the defendant as one of three supervisors

[1] We note that, in 2021, the legislature enacted Public Acts 2021, No. 21-18, § 1 (P.A. 21-18), codified at General Statutes § 31-275d, which substituted the term "administrative law judge" for "workers' compensation commissioner" and "commissioner" in several enumerated sections of the General Statutes, including sections contained in the Workers' Compensation Act, General Statutes § 31-275 et seq. Because the events at issue in this appeal occurred prior to October 1, 2021, the effective date of P.A. 21-18, in this opinion we use the terms workers' compensation commissioner and commissioner.

[2] PMA Management Corporation of New England, the workers' compensation insurer for the town, also was named as a defendant. For ease of reference, we refer to the town as the defendant in this opinion.

for the East Haven Youth Program (program). At that time, the plaintiff was twenty-nine years old, had graduated from high school, and had completed almost two years at a community college. The plaintiff had worked in the program for four to six weeks each previous summer for approximately four to five years. When the plaintiff first began working for the program, another supervisor, Michael Streeto, had trained him.

The program, which employed teenagers, "was charged with cleaning up areas in town to improve quality of life." The program was tasked with picking up "garbage on the beach, on Main Street, at the senior center, around overgrown bridges and wherever else sprucing up was needed." The program supervisors would be notified by a town public works' employee, Robert Parente, "when there were special requests to clean up a certain area." Each program supervisor was provided with a van to transport the teenage employees.

On the morning of July 30, 2018, the plaintiff and his crew of workers cleaned up garbage at the beach and along Main Street. They then ate lunch at a fast-food restaurant, and while they were there, Parente called and "said he wanted work done at either the new high school . . . or at D.C. Moore Elementary School [D.C. Moore] . . . ." Because the plaintiff and his crew "only had a little over an hour before the end of the workday, the [plaintiff] decided to go to D.C. Moore because it was closer" in proximity to their current location. The plaintiff and Streeto traveled in vans with their respective crews to D.C. Moore "to remove some giant weeds growing out of the sewer grates."

D.C. Moore was an elementary school that, at the time, had been closed for a few years. On arriving at D.C. Moore, Streeto remained in his van because it was a hot day and he was not feeling well. From the van, Streeto supervised the workers as they weeded. Once

the plaintiff confirmed that Streeto was supervising the workers, he began to look for trees growing out of a sewer on the property. As he walked through the property, he picked up garbage using a five gallon bucket and grabber, which were provided to him by the defendant. The plaintiff, who was a smoker, had cigarettes and a lighter with him.

While picking up garbage, the plaintiff found and picked up "a smallish brown sphere with paper wrapped around it and foil stuck on it."[3] The plaintiff held the sphere in his left hand, held his lighter in his right hand, and "intentionally lit the wick" on the sphere. The sphere "[i]nstantaneously . . . exploded while he was holding it." The plaintiff, who was alone at the time, ran back toward the workers and Streeto and yelled that he was injured and needed medical attention. Several calls were made to 911, and police, ambulance, and fire personnel arrived on the scene. The explosion resulted in "catastrophic, life altering left hand amputation injuries."

When questioned on the scene by the emergency responders, the plaintiff initially denied lighting the wick of the sphere. The plaintiff reported to the program workers, ambulance personnel, and police officers that he had picked up the sphere and it exploded in his hand. The following day, while being questioned by various authorities about the incident, the plaintiff continued to deny that he lit the wick of the sphere. After being told that remnants of a lighter had been located at the scene of the accident, the plaintiff initially denied

[3] In her written decision, the commissioner stated that "[t]his 'sphere' was referred to during the trial and in the exhibits as 'firework,' 'smoke bomb,' 'mortar,' and 'sphere.' For consistency's sake the item the [plaintiff] picked up will hereinafter be referred to most often as 'sphere.' Regardless of the term used, it should be noted that this item was an explosive." For consistency's sake, we also refer to the item as a "sphere" throughout this opinion.

that the lighter was his. Eventually, the plaintiff admitted that he had "lit the wick of the sphere with his lighter before it exploded."

During their investigation, the police were informed that the third supervisor of the program, John Longley, and his crew had previously been to D.C. Moore on the morning of July 30, 2018, to clean up trash. While at D.C. Moore, Longley's crew "picked up already lit fireworks in the parking lot and thew them into the dumpster at the school." There were no injuries reported. The plaintiff and his workers were unaware that Longley's crew had been to D.C. Moore that morning and did not know that the crew had found fireworks on the property. The police investigation "concluded that the [plaintiff] intentionally lit the explosive, but the explosion and subsequent injuries to [the plaintiff] were accidental."

The plaintiff sought workers' compensation benefits for his injuries. The defendant disputed the claim. Although the defendant acknowledged that the plaintiff's injuries had occurred within the course of his employment, it argued, inter alia, that the plaintiff's injuries did not arise out of his employment. The commissioner held evidentiary hearings on October 17, 2019, and January 20 and March 5, 2020. During the hearings, the commissioner heard testimony from the plaintiff and received several exhibits. Additionally, on the final day of the hearing, both parties agreed to submit Streeto's deposition transcript as an exhibit.

The plaintiff testified that he thought it was his duty to pick up the sphere and that he did not know that it was a mortar. Additionally, he testified that he believed the sphere was a smoke bomb and thought that he would light it and "throw it across the road and a little smoke would come out." Moreover, the plaintiff testified that he "didn't want to bring [the sphere] in the

bag, in the van, as a live smoke bomb. [Because] being a sphere, bags rip, there's holes in the bags, it can roll out and I know all the kids have lighters on them." The plaintiff further testified that, by lighting the sphere, he "thought [he] was taking care of it, as opposed to creating a dangerous situation for the kids in the van." The plaintiff testified that, prior to July 30, 2018, he had never come across fireworks while supervising the program and that he "had not been instructed what to do if he did come across any," although he had been instructed to call the fire department if he found needles or syringes.

Streeto testified during his deposition that the plaintiff should have called him when he found the sphere, so that they could have called the fire department or the police department. Streeto testified that, on the basis of his knowledge of the plaintiff from working together, he found the plaintiff to be "for a young guy . . . very adult and very serious." He testified that the "job was important to [the plaintiff] . . . he enjoyed doing it. And he was a good supervisor and he was a real good worker." Additionally, Streeto testified that, at the time of the incident, he "really believe[d] . . . that [the plaintiff] touched something, and something blew up, never thinking there was fireworks, or that he purposely, 'Oh, I found it, I'll light it,' you know, whatever." Moreover, when asked by the defendant's counsel whether "it would be fair to say [the plaintiff] should have known that this thing could blow up if he lit it," Streeto stated that he "would think so, yeah." Following the hearings, both parties submitted posttrial proposed findings of fact and memoranda of law.

On December 16, 2020, the commissioner issued her findings and a ruling dismissing the plaintiff's claim. The commissioner concluded that, although the injuries sustained by the plaintiff occurred while he was in the course of his employment with the defendant, "the

lighting of the wick of the sphere was not within the scope of the [plaintiff's] job duties with the [defendant], and the injuries the [plaintiff] sustained on July 30, 2018, did not arise out of his employment." Central to the commissioner's conclusion were her findings that "[c]leaning up the debris off the ground was within the scope of the [plaintiff's] job duties. . . . After picking up the sphere, [the plaintiff] held his personal lighter in his right hand and lit the wick on the sphere, which then exploded, thus causing catastrophic, life altering left hand amputation injuries. . . . At the moment the [plaintiff] lit the sphere, the chain of causation was broken."

In support of her findings, the commissioner credited Streeto's deposition testimony, the conclusions of the state police that "the lighting of the wick of the sphere was intentional, but the resulting injuries were accidental," and the plaintiff's testimony "confirming [that] he intentionally lit the wick of the sphere with his personal lighter." The commissioner noted, however, that she did "not find the [plaintiff's] testimony that he lit the wick of the sphere to protect the summer youth crew to be fully credible or persuasive."

On January 4, 2021, the plaintiff filed a motion to correct, in which he requested that the commissioner amend and/or delete several of her findings and conclude that, "while the lighting of the wick of the sphere was intentional, the action was within the [plaintiff's] scope of job duties. [Therefore], the injuries sustained on July 30, 2018, by the [plaintiff] arose from his employment and are compensable." On February 11, 2021, the commissioner denied, in a written decision, the plaintiff's motion to correct as submitted and proposed by him.

In her decision on the plaintiff's motion to correct, the commissioner clarified and elaborated on her credibility determinations. Specifically, the commissioner

clarified that she did "not find the [plaintiff's] testimony that he lit the wick of the sphere to protect the summer youth crew and/or prevent injury to those he supervised to be credible." The commissioner additionally stated that she found "no credible testimony or evidence in the record that the [plaintiff's] concern about the safety of his crew resulted in his decision to light the wick of the sphere. While [she did] find some portions of the [plaintiff's] testimony credible, overall, given the [plaintiff's] initial and continued lack of candor, [she found] the [plaintiff's] testimony unreliable and lacking credibility."

The plaintiff appealed to the board, claiming that the commissioner improperly determined that his injuries did not arise out of the course of his employment with the defendant. The plaintiff argued, inter alia, that the commissioner misapplied the law when she reached the conclusion that his "intentional act of lighting the wick broke the chain of proximate cause between the employment and the injury." He asserted that "[p]icking up the firework as garbage is within the scope of his employment because the [defendant] knew [the plaintiff] would be encountering fireworks on the property." Additionally, the plaintiff argued that lighting the wick was not outside the scope of his employment because he determined that "lighting the harmless smoke bomb and then gathering the remnants and throwing it in the garbage was the best way to disarm a smoke bomb." Finally, the plaintiff argued that the commissioner's conclusion that he knew the sphere could be dangerous "is not supported anywhere in the record" and was instrumental in her decision to deny him coverage.

On October 22, 2021, the board affirmed the commissioner's decision. The board disagreed with the plaintiff's argument that the commissioner misapplied the law in concluding that his "intentional act of lighting the wick broke the chain of proximate cause between

the employment and the injury." The board stated that "[t]he determination of whether the [plaintiff's] intentional conduct rises to the level of disqualification is a question of fact that won't be overturned unless it is clearly erroneous." On reviewing the record before the commissioner, the board stated that "it could . . . be inferred that the [plaintiff] participated in highly unreasonable conduct in a situation where danger was apparent. . . . Furthermore, the [plaintiff] was not truthful with the police or emergency personnel that treated him regarding the precipitating factors to the explosion. The inference could easily have been made, therefore, that the [plaintiff] was aware of his malfeasance." Accordingly, the board concluded, inter alia, that "it was well within the [commissioner's] authority to find that the [plaintiff's] actions rose to a level that would disqualify him from receiving benefits pursuant to the Workers' Compensation Act." See General Statutes § 31-275 et seq. This appeal followed.

The plaintiff's sole claim on appeal is that the board erred in affirming the commissioner's decision that his lighting of the wick of the sphere did not arise out of his employment with the defendant. The plaintiff argues, inter alia, that the commissioner "erred on several fronts when [she] concluded that [the plaintiff's] action in lighting the wick broke the chain [of] causal connection and, therefore, erred . . . [in finding he] was not entitled to workers' compensation benefits." Specifically, the plaintiff takes issue with the commissioner's conclusion that "the moment the [plaintiff] lit the sphere, the chain of causation was broken" and argues that "the conclusion . . . is not based upon facts or reasonable inferences." Additionally, he argues that his "intention to disarm a firework before placing it in a bag full of garbage was incidental to . . . fulfilling his employment obligations," and, accordingly, his

"injury should be covered by workers' compensation insurance." We are not persuaded.

"It is well settled that, because the purpose of the [Workers' Compensation Act (act)] is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment. . . . Proof that [an] injury arose out of the employment relates to the time, place and circumstances of the injury. . . . Proof that [an] injury occurred in the course of the employment means that the injury must occur (a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Daubert* v. *Naugatuck*, 267 Conn. 583, 588–89, 840 A.2d 1152 (2004). "The question of whether a plaintiff's injuries resulted from an incident that occurred in the course of his employment is a separate and distinct question from whether his alleged injuries arose out of his employment." Id., 591.

Because the defendant does not dispute that the plaintiff's injury occurred in the course of his employment, we confine our analysis to whether the injury also arose out of his employment. Accordingly, "we must determine whether there is a sufficient causal connection between the plaintiff's injury and [his] employment so as to bring [his] claim within the purview of the act. See General Statutes § 31-275 (1) (B) ('[a] personal injury shall not be deemed to arise out of the employment unless causally traceable to the

employment')." *Clements* v. *Aramark Corp.*, 339 Conn. 402, 413–14, 261 A.3d 665 (2021).

"The standard of review of a commissioner's decision on whether an injury arose out of a claimant's employment is well settled." (Internal quotation marks omitted.) *Ryker* v. *Bethany*, 97 Conn. App. 304, 308, 904 A.2d 1227, cert. denied, 280 Conn. 932, 909 A.2d 958 (2006). "As with the determination that an injury occurred in the course of employment, the question of whether an injury arose out of employment is one of fact." *Kolomiets* v. *Syncor International Corp.*, 252 Conn. 261, 272–73, 746 A.2d 743 (2000). "[I]n determining whether a particular injury arose out of and in the course of employment, the [commissioner] must necessarily draw an inference from what [she] has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the [commissioner's] inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the [commissioner] is factually questionable." (Internal quotation marks omitted.) *Ryker* v. *Bethany*, supra, 308–309. Additionally, "[t]he power and duty of determining the facts rests on the commissioner, who is the trier of fact. . . . This authority to find the facts entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered by lay and expert witnesses. . . . We will not, on appeal, disturb the commissioner's credibility determinations." (Citation omitted; internal quotation marks omitted.) *Britto* v. *Bimbo Foods, Inc.*, 217 Conn.

App. 134, 147, 287 A.3d 1140 (2022), cert. denied, 346 Conn. 921, 291 A.3d 1040 (2023).

The standard for determining whether the injury arose out of the employment is also well established. "The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." (Internal quotation marks omitted.) *Ryker* v. *Bethany*, supra, 97 Conn. App. 309. "[A]lthough we often state that traditional concepts of proximate cause govern the analysis of causation in workers' compensation cases, our case law makes clear that, with respect to primary injuries, the concept of proximate cause is imbued with its own meaning. In such cases, [t]he employment may be considered as causal in the sense that it is a necessary condition out of which, necessarily or incidentally due to the employment, arise the facts creating liability, and that is the extent to which the employment must be necessarily connected in a causal sense with the injury. If we run over the cases in which compensation has been awarded, it will be found to be rarely true—although it may be true—that the employment itself was, in any hitherto recognized use of the words in law, either the cause or the proximate cause; and yet the decisions are right, because, to the rational mind, the injury did arise out of the employment. The real truth appears to be that . . . [t]he causative danger need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that as a rational consequence. . . .

"Thus, [a]n injury arises out of an employment when it . . . is the result of a risk involved in the employment or incident to it, or to the conditions under which it is

required to be performed. . . . Sometimes the employment will be found to directly cause the injury . . . but more often it arises out of the conditions incident to the employment. But in every case there must be apparent some causal connection between the injury and the employment, or the conditions under which it is required to be performed, before the injury can be found to arise out of the employment." (Citation omitted; internal quotation marks omitted.) *Clements* v. *Aramark Corp.*, supra, 339 Conn. 414–15.

Here, the findings of the commissioner, as affirmed by the board, reasonably support the factual determination that the plaintiff's injuries did not arise out of his employment. The commissioner found that the act of "cleaning up the debris off the ground was within the scope of the [plaintiff's] job duties," however, the act of "lighting the wick of the sphere was not within the scope of the [plaintiff's] job duties." There was no evidence presented to the commissioner that the program workers ever set debris on fire in order to dispose of it. See *Clements* v. *Aramark Corp.*, supra, 339 Conn. 415 ("[a]n activity is incidental to the employment [and therefore compensable] . . . [i]f the activity is regularly engaged in on the employer's premises within the period of the employment, with the employer's approval or acquiescence" (internal quotation marks omitted)). Rather, Streeto's testimony, which the commissioner credited; see *Britto* v. *Bimbo Foods, Inc.*, supra, 217 Conn. App. 147; revealed that, when employees of the program encountered items such as needles or syringes, the supervisors would have called the fire department or the police department to dispose of the items. The plaintiff's argument that the act of lighting the wick was within the scope of his employment duties because it was his "intention to disarm a firework before placing it in a bag full of garbage,"[4] and thereby protect the

[4] The plaintiff also argues that he "didn't have the necessary background to know the difference between a harmless smoke bomb and a mortar. This

program workers is unavailing. The commissioner expressly stated that she did "not find the [plaintiff's] testimony that he lit the wick of the sphere to protect the summer youth crew and/or prevent injury to those he supervised to be credible," and "[w]e will not, on appeal, disturb the commissioner's credibility determinations." *Britto* v. *Bimbo Foods, Inc.*, supra, 147. Accordingly, the commissioner's factual finding that the injury that resulted from the plaintiff's act of lighting the sphere was not "the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed" is supported by the evidence and not inconsistent with the law.[5] (Internal

is very similar to a medically 'idiopathic' individual who is placed in a dangerous location at work and gets injured." In support of his argument, the plaintiff relies on our Supreme Court's analysis in *Clements* v. *Aramark Corp.*, supra, 339 Conn. 402, wherein the court noted that "the employer takes the employee as it finds that employee." (Internal quotation marks omitted.) Id., 441.

In *Clements*, our Supreme Court stated that "[a]n idiopathic fall is one that is brought on by a purely personal condition unrelated to the employment, such as [a] heart attack or seizure. . . . Idiopathic [falls] are generally noncompensable absent evidence the workplace contributed to the severity of the injury." (Internal quotation marks omitted.) Id., 420. We disagree with the plaintiff's contention that his "lack of knowledge and experience in fireworks" is similar to a health condition underlying an idiopathic fall or that his workplace contributed to his injury, such that the analysis of *Clements* would be applicable to this case. In particular, regardless of whether the plaintiff knew that the sphere was dangerous, it simply was not a part of his job to light it.

[5] The plaintiff argues that "[t]he town had knowledge of the dangerous condition of [the] property and, therefore, the associated risk incidental to employment needs to be analyzed for a determination if [the plaintiff's] action, which caused his injuries, arose out of the fulfilling [of] his employment duties." He asserts that, "[i]n performing his duty, [he] came across a firework, known to the town to be at that location, and, therefore, in the scope of his duties to clean up the area, he picked up the firework just like every other piece of garbage. This is the same method used by another crew a few hours before on the very same property." In support of his argument, he cites to *Gonier* v. *Chase Cos.*, 97 Conn. 46, 115 A. 677 (1921) for the proposition that, "[i]f the conditions of his employment . . . exposes him at the time . . . of the accident to the injury . . . then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, such accident arises out of his employment, as

quotation marks omitted.) *Clements* v. *Aramark Corp.*, supra, 339 Conn. 414.

Moreover, "our Supreme Court regularly has distinguished between injuries that arise out of employment and injuries that are proximately caused by an employee's action that is unrelated to employment. . . . If an employee temporarily deviates from the line of conduct established by his employment and subjects himself 'to an extraordinary peril quite outside of any risk connected with his employment,' injuries suffered during such conduct can no longer be considered to arise out of employment." (Citation omitted.) *Ryker* v. *Bethany*, supra, 97 Conn. App. 309–10; see also *Kolomiets* v. *Syncor International Corp.*, supra, 252 Conn. 272 ("[t]he rational mind must be able to trace resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery" (internal quotation marks omitted)). Here, the commissioner expressly found that, "at the moment the [plaintiff] lit the sphere, the chain of causation was broken," and that "the lighting of the wick of the sphere . . . was the proximate cause of the [plaintiff's] injuries." The commissioner's finding in this regard was reasonable and is conclusive. See *Ryker* v. *Bethany*, supra, 311 ("[i]f the commissioner, as in this case, reasonably finds an alternative action to be

incident, not to the . . . work, but to the . . . risks of the . . . position in which by the conditions of his employment he is obliged to work." (Internal quotation marks omitted.) Id., 53. We disagree.

First, we emphasize that it was the commissioner's finding that "the lighting of the wick of the sphere was not within the scope of the [plaintiff's] job duties," which is determinative. Accordingly, the harm that followed his act of lighting garbage on fire was not a risk of his employment position. See *Gonier* v. *Chase Cos.*, supra, 97 Conn. 53. Second, we reject the plaintiff's contention that his act of lighting the wick of the sphere was the "*same method* used by another crew" because the evidence before the commissioner revealed that the other program crew "*found used fireworks and disposed of them* in a dumpster" without lighting them. (Emphasis added.)

the proximate cause of the employee's injuries, we cannot say that [her] finding that the employment was not the proximate cause of the employee's injuries was unsupported by the evidence or inconsistent with the law"). Bearing in mind our customary deference to the commissioner's factual findings;[6] see *Kolomiets* v. *Syncor International Corp.*, supra, 252 Conn. 273; we conclude that the commissioner's finding that the plaintiff's injuries did not arise out of his employment with the defendant is legally and logically correct. The plaintiff's injuries therefore are not compensable. See General Statutes § 31-275 (1) (B).

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

FIORITA, KORNHAAS & COMPANY, P.C. *v.* JOSEPH VILELA ET AL.
(AC 45366)

Suarez, Clark and Seeley, Js.

Syllabus

Pursuant to statute (§ 49-51 (a)), "[a]ny person having an interest in any real or personal property described in any certificate of lien, which lien

[6] In his brief, the plaintiff argues that the board "constructed [a] circuitous argument to justify the [commissioner's] conclusion that [the plaintiff] testified the sphere was dangerous" by stating that the plaintiff's testimony "was inconsistent because first [he] testified, he believed the sphere was a harmless smoke bomb, but then [he] testified he lit the wick because he was worried that the teenagers in the work crew could have lit [the] sphere and that would have caused a dangerous situation." As previously set forth, it is axiomatic that both this court and the board must give deference to the commissioner's factual findings. See *Ryker* v. *Bethany*, supra, 97 Conn. App. 311 ("it bears remembering that a commissioner's inference that an injury did not arise out of employment is a finding of fact [and] [a]s such, it may be reversed only if it is not supported by the evidence or is inconsistent with the law"). Accordingly, and for the reasons as expressed in this opinion, we are unpersuaded that any allegedly "circuitous" analysis by the board undermines the commissioner's factual finding that the injury did not arise out of the plaintiff's employment.

is invalid but not discharged of record, may give written notice to the lienor'' requesting that the lienor discharge the lien. If the lien is not discharged within thirty days, the person requesting the discharge may apply to the Superior Court for such a discharge.

The plaintiff accounting corporation sought to foreclose a mortgage on certain real property owned by the defendant. In 2008, the defendant's aunt, A, who then owned the property, executed a mortgage with respect to the property in favor of the plaintiff to secure a note payable to it for a debt related to unpaid accounting fees. In 2019, prior to the commencement of the plaintiff's action, A transferred the property to the defendant by way of a quitclaim deed. The defendant filed a counterclaim against the plaintiff, alleging, inter alia, that the plaintiff had fraudulently induced A to execute the mortgage and note and had violated the code of professional conduct for the accounting profession, thus rendering the mortgage and note void or voidable. The trial court granted the plaintiff's motion to dismiss the defendant's counterclaim on the ground that the defendant had not complied with the notice provisions of § 49-51 pertaining to the discharge of invalid liens, thus depriving the court of subject matter jurisdiction. The defendant appealed to this court, claiming, inter alia, that the trial court improperly determined that § 49-51 applied to mortgages as well as liens and that the statute provided the exclusive path for his counterclaim. *Held* that the trial court improperly determined that the defendant was required to assert the allegations contained in the counterclaim via an action filed pursuant to § 49-51: as the language of § 49-51 does not include the word "mortgage" or define the terms "certificate of lien" or "lien," this court looked to the commonly approved usage of those terms and determined that there is no indication in the language that the legislature intended for the phrase "certificate of lien" to include a mortgage; moreover, the plaintiff could not prevail on its claim that references in other statutes that specifically described a mortgage as a type of lien indicated a legislative intent to include mortgages within the ambit of § 49-51.

Argued January 9—officially released June 13, 2023

Procedural History

Action to foreclose on a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the named defendant filed a counterclaim; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, dismissed the named defendant's counterclaim, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

John R. Weikart, with whom were *Emily Graner Sexton*, and, on the brief, *James P. Sexton*, for the appellant (named defendant).

Robert Wojciechowski, for the appellee (plaintiff).

Opinion

SEELEY, J. In this foreclosure action, the defendant Joseph Vilela appeals from the judgment of the trial court dismissing his counterclaim against the plaintiff, Fiorita, Kornhaas & Company, P.C.[1] On appeal, the defendant claims that the court improperly determined that his failure to comply with the notice provisions of General Statutes § 49-51, which pertains to the discharge of invalid liens, deprived the court of subject matter jurisdiction over his counterclaim seeking to void the mortgage that is central to this appeal. In particular, the defendant argues that § 49-51 applies only to liens and that a mortgage is not a lien for purposes of that statute. The defendant further claims that the court improperly concluded that it lacked subject matter jurisdiction to consider his challenge to the validity of the mortgage on the grounds of fraud and a violation of public policy and that it exceeded the scope of the plaintiff's motion to dismiss by exercising its discretion to conclude, sua sponte, that the defendant's declaratory judgment claim should not be permitted to proceed. We agree with the defendant's first claim and reverse the judgment of the trial court.

The record reveals the following facts and procedural history. In March, 2020, the plaintiff commenced a foreclosure action against the defendant. In its revised complaint dated September 22, 2021, the plaintiff set forth the following allegations. The plaintiff is a professional

[1] The plaintiff also named Rob Roc II, LLC, and Webster Bank, N.A., as defendants in its complaint. On November 8, 2021, these two entities were defaulted for failing to disclose a defense and have not participated in this appeal. We therefore refer to Joseph Vilela as the defendant.

corporation with a place of business in Danbury, and the defendant is the current owner of commercial property located in Newington (property). On December 22, 2008, Roberta Aronheim[2] was indebted to the plaintiff in the amount of $62,375, as evidenced by a note payable to the plaintiff. To secure that note, Aronheim executed a mortgage in favor of the plaintiff with respect to the property. The final maturity date of the note was December 22, 2011. The note is in default and payable in the full amount, plus interest and attorney's fees. The defendant is the owner and in possession of the property by way of a quitclaim deed dated July 15, 2019. The plaintiff requested a foreclosure of the mortgage, immediate possession of the property, interest, costs of the suit, attorney's fees and any other relief deemed to be appropriate.

On October 6, 2021, the defendant filed an answer, special defenses,[3] and a counterclaim. In the counterclaim, he alleged that the plaintiff had been Aronheim's personal and business accountant and provided her with accounting services for many years. He further alleged that, on or before December 22, 2008, the plaintiff made representations to Aronheim that, if the mortgage and note were signed, it would advance loan proceeds to her for use in her business. The defendant specifically alleged that the plaintiff failed to disclose that the mortgage and note were for unpaid fees for past accounting services it provided to Aronheim and alleged that the plaintiff fraudulently induced Aronheim to execute the mortgage and note. As a result, the defendant claimed that the mortgage and note are void or voidable.

[2] In its original complaint, the plaintiff set forth the following allegation: "Upon information and belief, [the defendant] is the nephew of Roberta Aronheim."

[3] The defendant filed revised special defenses on January 21, 2022.

The defendant further alleged that the plaintiff's conduct impaired its independence in providing accounting services in violation of the code of professional conduct for the accounting profession, subordinated public trust and service to personal gain and advantage, and created an adverse interest to its client. The defendant claimed, therefore, that the mortgage and note are contrary to public policy and, thus, void.

Finally, the defendant alleged that the outstanding balance had been paid in full on August 12, 2019, and that the debt was deemed to be paid in full as a result of a lengthy lapse during which no payment had been received or applied to the note and mortgage by the plaintiff. In his request for relief, the defendant sought a declaration that "(1) . . . said mortgage and note were given to the plaintiff in violation of public policy and/or were induced by fraud and misrepresentation and/or have been paid in full . . . (2) [the trial court] order said note be cancelled and that the mortgage be released on the land records [and] (3) . . . such further relief as this court may deem fair, just and equitable."

On November 16, 2021, the plaintiff filed a motion to dismiss the defendant's counterclaim, alleging that the court lacked subject matter jurisdiction.[4] Specifically, it argued: "The counterclaim seeks a discharge of a mortgage, which is a statutory proceeding with specific requirements that must be followed to maintain the action. Failure to comply with the statutory provisions, as [the defendant] has, deprives the court of subject matter jurisdiction." In the memorandum of law attached to its motion to dismiss, the plaintiff stated that an

[4] Practice Book § 10-30 provides in relevant part that "(a) A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter . . . .

"(c) This motion shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as to the facts not apparent on the record."

action to discharge a mortgage must be brought pursuant to either General Statutes § 49-13 or § 49-51.[5] It

[5] General Statutes § 49-13 provides in relevant part: "(a) When the record title to real property is encumbered (1) by any undischarged mortgage, and . . . (E) the mortgage has become invalid, and in any of such cases no release of the encumbrance to secure such note or evidence of indebtedness has been given . . . the person owning the property, or the equity in the property, may bring a petition to the superior court for the judicial district in which the property is situated, setting forth the facts and claiming a judgment as provided in this section. The plaintiff may also claim in the petition damages as set forth in section 49-8 if the plaintiff is aggrieved by the failure of the defendant to execute the release prescribed in said section. . . .

"(c) Such notice having been given according to the order and duly proven, the court may proceed to a hearing of the cause at such time as it deems proper, and, if no evidence is offered of any payment on account of the debt secured by the mortgage within a period set out in subsection (a) of this section, or of any other act within such a period as provided in said subsection (a) in recognition of its existence as a valid mortgage . . . the court may render a judgment reciting the facts and its findings in relation thereto and declaring the mortgage . . . invalid as a lien against the real estate, and may order payment of any balance of indebtedness due on the mortgage or foreclosure judgment to the clerk of the court to be held for the benefit of the mortgagee or the persons interested and to be paid to the mortgagee by the clerk of the court upon application of the mortgagee or persons interested following the execution of a release of mortgage.

"(d) Upon deposit of the balance of indebtedness with the clerk, such judgment shall issue, which judgment shall, within thirty days thereafter, be recorded in the land records of the town in which the property is situated, and the encumbrance created by the mortgage . . . shall be null and void and totally discharged. The town clerk of the town in which the real estate is situated shall, upon the request of any person interested, record a discharge of such encumbrance in the land records."

General Statutes § 49-51 provides in relevant part: "(a) Any person having an interest in any real or personal property described in any certificate of lien, which lien is invalid but not discharged of record, may give written notice to the lienor sent to him at his last-known address by registered mail or by certified mail, postage prepaid, return receipt requested, to discharge the lien. Upon receipt of such notice, the lienor shall discharge the lien by sending a release sufficient under section 52-380d, by first class mail, postage prepaid, to the person requesting the discharge. If the lien is not discharged within thirty days of the notice, that person may apply to the Superior Court for such a discharge, and the court may adjudge the validity or invalidity of the lien and may award the plaintiff damages for the failure of the defendant to make discharge upon request. If the court is of the opinion that such certificate of lien was filed without just cause, it may allow, in its discretion, damages to any person aggrieved by such failure to discharge, at the rate of one hundred dollars for each week after the expiration of

then contended that the court lacked subject matter jurisdiction with respect to § 49-13 as a result of the parties' dispute regarding the validity of the mortgage.[6] Turning to § 49-51, the plaintiff noted that this statute required the defendant to provide it with written notice to discharge the lien on the property. As the defendant failed to comply with this requirement, the plaintiff claimed that the court lacked subject matter jurisdiction to consider his claim to discharge the mortgage.[7]

On December 14, 2021, the defendant filed an objection to the plaintiff's motion to dismiss.[8] Therein, he argued that "[t]he counterclaim is expressly claiming relief equitable in nature and is entirely appropriate in a mortgage foreclosure, the quintessential equitable proceeding under Connecticut law." He further claimed that the counterclaim sought a declaratory judgment and noted that the Superior Court has subject matter jurisdiction over such suits, despite the adequacy of other legal remedies. Finally, he stated that, "[i]n addition to declaratory relief, as a court of equity, this court has the power to cancel the note, discharge the mortgage and in the case of mutual mistake, [order] repayment to the mortgagor."

such thirty days, but not exceeding in the whole the sum of five thousand dollars or an amount equal to the loss sustained by such aggrieved person as a result of such failure to discharge the lien, which loss shall include, but not be limited to, a reasonable attorney's fee, whichever is greater.

"(b) When a lien on real property is adjudged invalid or is otherwise discharged by the court, a certified copy of the judgment of invalidity or discharge recorded on the land records of the town where the certificate of lien was filed fully discharges the lien. . . ."

[6] See *Gordon* v. *Tufano*, 188 Conn. 477, 482–84, 450 A.2d 852 (1982) (purpose of § 49-13 is to provide simple method for declaring mortgage invalid and removed as cloud to title when undisputed that it is invalid, but it gives court no jurisdiction to determine validity or invalidity of mortgage); *Simonelli* v. *Fitzgerald*, 156 Conn. 49, 53–54, 238 A.2d 418 (1968) (same).

[7] See, e.g., *Metropolitan District Commission* v. *Marriott International, Inc.*, 216 Conn. App. 154, 176–77, 284 A.3d 985 (2022), cert. granted, 346 Conn. 918, 291 A.3d 108 (2023); *Commissioner of Public Works* v. *Middletown*, 53 Conn. App. 438, 443–44, 731 A.2d 749, cert. denied, 250 Conn. 923, 738 A.2d 654 (1999).

[8] See Practice Book § 10-31 (a).

The court, *Hon. Joseph M. Shortall*, judge trial referee, heard argument on the plaintiff's motion on January 31, 2022. At the outset, the plaintiff's counsel argued that the claims and relief sought in the counterclaim could be raised only pursuant to § 49-51, and not merely by invoking the court's equitable powers. The defendant's counsel acknowledged that he had not proceeded under § 49-51, but contended that the equitable powers of the court remained a viable path for the counterclaim. The court replied: "Well, how do you—how do you get around—I mean I—the court does have broad equitable powers in [a] foreclosure action but in—in a situation where there's a specific statute that sets out a procedure by which mortgages are—are requested or are made to—to void or discharge a mortgage, how does the court act in . . . in ignorance of that statute? Which I think is what you're asking the court to do."[9] The defendant's counsel replied that § 49-51 was not "mandatory" and that the equitable powers of the court provided it with subject matter jurisdiction to address the matters raised in the counterclaim. The defendant's counsel further stated that, in addition to seeking cancellation and discharge of the mortgage, the defendant also sought a declaratory judgment.[10]

[9] See, e.g., *Justin Development Corp.* v. *Donald J. Colasono Associates, P.C.*, 31 Conn. Supp. 209, 210–11, 326 A.2d 836 (1974) (plaintiff requested court to issue summary order discharging mechanic's lien on basis of equity jurisdiction of court and, in rejecting this argument, court stated that, given General Statutes §§ 49-37 and 49-51, it lacked legal authority to summarily discharge lien outside of those statutes).

[10] "The purpose of a declaratory judgment action, as authorized by General Statutes § 52-29 and Practice Book § [17-55], is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties. . . . Practice Book § 17-55 requires that the plaintiff be in danger of a loss or of uncertainty as to [his] rights or other jural relations and that there be a bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations . . . . Thus, [d]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. . . .

"Implicit in these principles is the notion that a declaratory judgment action must rest on some cause of action that would be cognizable in a

Later that day, the court issued the following written order granting the plaintiff's motion to dismiss: "While the equitable powers of the court are broad in a foreclosure action, they are not so broad as to allow it to ignore the fact that the legislature has established a statutory procedure to accomplish what the defendant seeks via his counterclaim; namely, [§] 49-51. See *Guilford Yacht Club Assn., Inc.* v. *Northeast Dredging, Inc.*, 192 Conn. 10, 13 [468 A.2d 1235] (1984). Moreover, treating the defendant's counterclaim as a declaratory judgment action, the court notes that, when there is 'another form of proceeding that can provide the party seeking the declaratory judgment immediate redress,' such as [§] 49-51, [Practice Book §] 17-55 (3)[11] requires that the court be of the opinion that the party 'should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure.' The court is not of that opinion in this case." (Footnote added.)

On February 16, 2022, the defendant filed a motion to reargue and for reconsideration pursuant to Practice Book § 11-11 and the "court's inherent equitable powers." The plaintiff objected to that motion, and, on February 24, 2022, the court, treating the defendant's

nondeclaratory suit. . . . To hold otherwise would convert our declaratory judgment statute and rules into a convenient route for procuring an advisory opinion on moot or abstract questions . . . and would mean that the declaratory judgment statute and rules created substantive rights that did not otherwise exist." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 756–57, 6 A.3d 726 (2010).

[11] Practice Book § 17-55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met: (1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations; (2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and (3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be

motion as one for reconsideration, granted it but saw "no reason to depart from its decision on the plaintiff's motion to dismiss the defendant's counterclaim." This appeal followed.[12]

The defendant contends in his appellate brief that "[t]he ultimate question before this court on appeal is whether the trial court lacked subject matter jurisdiction over the . . . counterclaim." The defendant presents three arguments in support of his claim that the trial court did not lack jurisdiction. First, the defendant argues that the court improperly determined that § 49-51 applies to mortgages as well as liens and that this statute provided the exclusive path for his counterclaim. The defendant contends that, as a result of this improper analysis, the court incorrectly determined that noncompliance with § 49-51[13] required dismissal of the counterclaim. Second, he argues that "the Superior

allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

[12] The granting of the plaintiff's motion to dismiss disposed of all the claims set forth in the defendant's counterclaim and, therefore, constitutes a final judgment for purposes of appeal. See Practice Book § 61-2; see also *Rocque* v. *DeMilo & Co.*, 85 Conn. App. 512, 514 n.1, 857 A.2d 976 (2004) (trial court's granting of motion to dismiss entire counterclaim was final judgment for appeal purposes).

[13] The defendant did not give written notice to the plaintiff at its last known address by registered mail or certified mail, postage prepaid, return receipt requested, to discharge the lien. "Not unlike the dissolution of an attachment, the discharge of a lien is a statutory proceeding . . . . The statute confers a definite jurisdiction upon a judge and it defines the conditions under which such relief may be given . . . . In such a situation jurisdiction is only acquired if the essential conditions prescribed by [the] statute are met. If they are not met, the lack of jurisdiction is [one] over the subject-matter and not over the parties. . . . The essential condition of an action under . . . § 49-51 is written notice to the lienor sent to him at his last-known address by registered mail or by certified mail, postage prepaid, return receipt requested, to discharge the lien in the office where recorded." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Guilford Yacht Club Assn., Inc.* v. *Northeast Dredging, Inc.*, supra, 192 Conn. 13; see also *Torrance Family Ltd. Partnership* v. *Laser Contracting, LLC*, 94 Conn. App. 526, 537, 893 A.2d 460 (2006).

Court has, and always had, jurisdiction to adjudicate the validity of mortgages'' and, therefore, even if § 49-51 applied to the present case, it did not constitute the sole procedural method for raising his counterclaim alleging that the mortgage was invalid on grounds including fraud and a violation of public policy. Third, the defendant maintains that the court improperly exceeded the scope of the plaintiff's motion to dismiss and exercised its discretion, sua sponte, to conclude that the defendant's declaratory judgment action should not be permitted to proceed. We agree with the defendant's first argument regarding the inapplicability of § 49-51 and, accordingly, reverse the judgment of the trial court.

"The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-30 (a) (1)] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the [counterclaim] in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the [counterclaim], including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Pickard* v. *Dept. of Mental Health & Addiction Services*, 210 Conn. App. 788, 792–93, 271 A.3d 178

(2022); see also *Derblom* v. *Archdiocese of Hartford*, 346 Conn. 333, 341, 289 A.3d 1187 (2023); *Fitzgerald* v. *Bridgeport*, 187 Conn. App. 301, 314, 202 A.3d 385 (2019). Additionally, we note that the Superior Court has jurisdiction to entertain both legal and equitable claims. See, e.g., *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 617, 59 A.3d 851 (2013); see also General Statutes § 52-1;[14] *Investment Associates* v. *Summit Associates, Inc.*, 132 Conn. App. 192, 201, 31 A.3d 820 (2011) (Superior Court is court of general jurisdiction), aff'd, 309 Conn. 840, 74 A.3d 1192 (2013).

In the present case, the court concluded that § 49-51 provided the exclusive procedure for the defendant's counterclaim alleging that, for various reasons, the mortgage and note are void or voidable, or that it had been repaid. It further reasoned that, as a result of his failure to comply with the requirements of § 49-51, it lacked jurisdiction to consider the defendant's counterclaim. The defendant argues on appeal, inter alia, that the court's jurisdictional conclusion is flawed because § 49-51 applies only to liens and not mortgages. We agree.

The issue presented, whether § 49-51 applies to mortgages, presents a question of statutory interpretation, subject to plenary review. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, *including the question of whether the language actually does apply*. . . . In

[14] General Statutes § 52-1 provides: "The Superior Court may administer legal and equitable rights and apply legal and equitable remedies in favor of either party in one and the same civil action so that legal and equitable rights of the parties may be enforced and protected in one action. Whenever there is any variance between the rules of equity and the rules of the common law in reference to the same matter, the rules of equity shall prevail."

seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Emphasis added; internal quotation marks omitted.) *Cerame* v. *Lamont*, 346 Conn. 422, 426, 291 A.3d 601 (2023); *Centrix Management Co., LLC* v. *Fosberg*, 218 Conn. App. 206, 210, 291 A.3d 185 (2023).

We begin our analysis with the relevant statutory language. Section 49-51, titled "Discharge of invalid lien," provides in relevant part: "(a) Any person having an interest in any real or personal property described in any certificate of lien, which lien is invalid but not discharged of record, may give written notice to the lienor sent to him at his last-known address by registered mail or by certified mail, postage prepaid, return receipt requested, to discharge the lien. Upon receipt of such notice, the lienor shall discharge the lien by sending a release sufficient under section 52-380d, by first class mail, postage prepaid, to the person requesting the discharge. If the lien is not discharged within thirty days of the notice, that person may apply to the Superior Court for such a discharge, and the court may adjudge the validity or invalidity of the lien and may award the plaintiff damages for the failure of the defendant to make discharge upon request. . . ."

A review of the statutory language reveals two important details. First, § 49-51 does not include the word "mortgage." Second, § 49-51 does not define the terms "certificate of lien" or "lien." We therefore look to the commonly approved usage of the relevant terms. See, e.g., *O'Dell* v. *Kozee*, 307 Conn. 231, 243, 53 A.3d 178 (2012); *K. D.* v. *D. D.*, 214 Conn. App. 821, 828, 282 A.3d 528 (2022). Our Supreme Court has instructed that

"[w]e may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme. . . . Further, [i]t is well established that, to construe technical legal terms, we look for evidence of their familiar legal meaning in a range of legal sources, including other statutes, judicial decisions, and the common law." (Citation omitted; internal quotation marks omitted.) *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 411, 246 A.3d 470 (2020); see also *L. H.-S.* v. *N. B.*, 341 Conn. 483, 491, 267 A.3d 178 (2021) (court may look to prior case law defining term at issue); see generally General Statutes § 1-1 (a) (in construction of statutes, "technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly"); 3A S. Singer, Sutherland Statutes and Statutory Construction (8th Ed. 2018) § 70:2, pp. 1006–13 (language of lien statutes construed in view of its purpose and language used given natural, plain, ordinary, contemporary commonly understood meaning unless term has acquired specific, peculiar or technical meaning as result of statutory definition, specialized usage, or judicial construction).

The plain language of § 49-51 provides that any person having an interest in real property described in a certificate of lien may request the discharge of an invalid lien. There is no indication in the language that the legislature intended for the phrase "certificate of lien" to include mortgages. See, e.g., *Carpenter* v. *Daar*, 346 Conn. 80, 107, 287 A.3d 1027 (2023); see generally *Mazzei* v. *Cantales*, 142 Conn. 173, 176, 112 A.2d 205 (1955) (statutory provisions concerning residence and domicile and service by order of notice, by their terms, pertained only to actions for divorce, and legislature manifested no intention they applied to actions for annulment).

Additionally, our plain language analysis is supported by precedent from our Supreme Court. See *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 186, 61 A.3d 505 (2013) (courts bound by prior judicial interpretation of language and purpose of statute when interpreting statutory language); *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 576–77, 986 A.2d 1023 (2010) (same). In *Stein* v. *Hillebrand*, 240 Conn. 35, 43 n.7, 43–44, 688 A.2d 1317 (1997),[15] the court explained the distinction between a mortgage and a lien. In that case, the defendant and her husband obtained a divorce, and, as part of the dissolution judgment, the court ordered the husband to mortgage his one-half interest in certain property located in Westport to the defendant as security for his unallocated alimony and child support obligation. Id., 37. The plaintiff, the husband's brother, also owned this property interest as a tenant in common. Id., 36. A mortgage deed was placed on the land records and specifically authorized the defendant to foreclose on the mortgage if her former husband defaulted on his support and alimony obligations. Id., 38.

The plaintiff subsequently filed an action to invalidate the defendant's mortgage. Id. In affirming the judgment of the trial court rendered in favor of the defendant, our Supreme Court addressed, inter alia, the plaintiff's claim that the statutes pertaining to postjudgment procedures limited the authority of the court to order a mortgage as security. Id., 42. The plaintiff argued that chapter 906 of the General Statutes, specifically §§ 52-350a through 52-400f, permitted the execution and foreclosure of a lien against a judgment debtor's property

[15] We note that "the legislature's passage of § 1-2z does not preclude a reviewing court from considering prior judicial interpretations of a statute that are not based on the plain meaning rule, when the case law predates the enactment of § 1-2z." *Doe* v. *West Hartford*, 328 Conn. 172, 181 n.9, 177 A.3d 1128 (2018).

only if a judgment creditor obtained an unsatisfied money judgment. Id. The statutory definition of " 'money judgment' " found in § 52-350a (13) specifically excluded family support judgments. Id. "The plaintiff [contended] that, because these statutes do not allow a party to obtain a postjudgment lien to secure alimony or [child] support payments, the dissolution court violated chapter 906 by ordering [the former husband] to mortgage his property to secure these payments." Id. In its analysis, the court stated that it presumed "that the legislature [used] the terms 'mortgage' and 'lien' to connote their different legal meanings." Id., 43. The court further stated: "*Although these terms are frequently conflated, the distinction between a mortgage and a judgment lien is more than semantic.* A mortgage is a form of contract, and, under Connecticut law,[16] immediately vests legal title in the mortgagee and equitable title in the mortgagor. . . . Foreclosure on a mortgage, moreover, is an equitable action that precludes further proceedings on the underlying debt and requires an unsatisfied mortgagee to pursue his rights through a deficiency

[16] "Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property. . . . As the holder of equitable title, also called the equity of redemption, the mortgagor has the right to redeem the legal title on the performance of certain conditions contained within the mortgage instrument. . . . The mortgagor continues to be regarded as the owner of the property during the term of the mortgage. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Generally, foreclosure means to cut off the equity of redemption, the equitable owner's right to redeem the property." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, 206 Conn. App. 509, 513, 260 A.3d 1240 (2021); see also *Groton* v. *Mardie Lane Homes, LLC*, 286 Conn. 280, 290, 943 A.2d 449 (2008) (title theory of mortgage is series of legal fictions serving as convenient means to define various estates to which conveyance may give rise but, despite this theory, in substance and effect and except for very limited purpose, mortgage is regarded as mere security and mortgagor is regarded for most purposes as sole owner of land, and, while mortgagee gains legal title, mortgagor remains true owner).

judgment. . . . A judgment lien, on the other hand, results from the unilateral act of a creditor and does not vest him with legal title to the subject property. . . . Foreclosure of a judgment lien is an action at law that does not extinguish the underlying debt." (Citations omitted; emphasis added; footnote added; internal quotation marks omitted.) Id., 43 n.7.[17] See also *First Constitutional Bank* v. *Harbor Village Ltd. Partnership*, 230 Conn. 807, 821, 646 A.2d 812 (1994) (lien is not agreement or contract between parties, but unilateral act in which lienor bears burden of demonstrating statutory compliance).

The plaintiff points to various statutes "where the term 'mortgage' is used in conjunction with, or otherwise described as a 'lien.' " See General Statutes §§ 49-7,

[17] The plaintiff argues that *Stein* v. *Hillebrand*, supra, 240 Conn. 35, "is not controlling law on the distinction between mortgages and liens, or, in the alternative, the *Stein* distinction is limited in its application." In support, the plaintiff directs us to *Rockstone Capital, LLC* v. *Sanzo*, 332 Conn. 306, 210 A.3d 554 (2019). In that case, the plaintiff held judgment liens against the defendants, and the parties later agreed to a consensual lien in the form of a mortgage to secure the debt. Id., 309. After the defendants defaulted on the mortgage payments, the plaintiff attempted to foreclose on the mortgage. Id. On appeal, the defendants claimed that they were entitled to the homestead exemption set forth in what is now General Statutes § 52-352b (21), which provides that "[t]he homestead of the exemptioner to the value of two hundred fifty thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it" shall constitute exempt property.

In *Rockstone Capital, LLC*, our Supreme Court concluded that, pursuant to the plain language of the statute, the homestead exemption did not apply to a consensual lien, and that, under our law, a mortgage constituted a consensual lien. Id., 315. "Therefore, we agree . . . that the homestead exemption does not apply." Id., 316.

We conclude that the present case is distinguishable from *Rockstone Capital, LLC* v. *Sanzo*, supra, 332 Conn. 306. In that case, the homestead exemption statute plainly and unambiguously provided that it did not apply to a consensual lien, and our law established that a mortgage constituted a consensual lien. Id., 315. With respect to the present case, § 49-51 does not include the term "consensual lien" so as to bring mortgages within the ambit of this statute. Rather, § 49-51 applies to "[a]ny person having an interest in any real or personal property described in any certificate of lien, which lien is invalid . . . ." We therefore are not persuaded by the plaintiff's efforts to distinguish *Stein* v. *Hillebrand*, supra, 240 Conn. 35.

49-8a (f), 49-13a, and 49-31b.[18] We note that several of these statutes expressly use the term "mortgage" to describe the "lien." In contrast, § 49-51 does not use the term "mortgage." We are cognizant that, "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its

[18] General Statutes § 49-7 provides: "Any agreement contained in a bill, note, trade acceptance or other evidence of indebtedness, whether negotiable or not, or in any mortgage, to pay costs, expenses or attorneys' fees, or any of them, incurred by the holder of that evidence of indebtedness or mortgage, in any proceeding for collection of the debt, or in any foreclosure of the mortgage, *or in protecting or sustaining the lien of the mortgage*, is valid, but shall be construed as an agreement for fair compensation rather than as a penalty, and the court may determine the amounts to be allowed for those expenses and attorneys' fees, even though the agreement may specify a larger sum." (Emphasis added.)

General Statutes § 49-8a (f) provides: "Such affidavit, when recorded, shall constitute *a release of the lien of such mortgage* or the property described therein." (Emphasis added.)

General Statutes § 49-13a (a) provides: "When record title to real property remains encumbered by any undischarged mortgage, and the mortgagor or those owning the mortgagor's interest therein have been in undisturbed possession of the property for at least twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, or for at least forty years from the recording of the mortgage if the mortgage does not disclose the time when the note or indebtedness is payable or the time for full performance of the conditions of the mortgage, unless a notice is recorded pursuant to subsection (b) of this section, *the mortgage shall be invalid as a further lien against the real property*, provided an affidavit, subscribed and sworn to by the party in possession, stating the fact of such possession, is recorded on the land records of the town in which the property is situated." (Emphasis added.)

General Statutes § 49-31b (a) provides: "A mortgage deed given to secure payment of a promissory note, which furnishes information from which there can be determined the date, principal amount and maximum term of the note, *shall be deemed to give sufficient notice of the nature and amount of the obligation to constitute a valid lien securing payment of all sums owed under the terms of such note*." (Emphasis added.)

action or non-action will have upon any one of them." (Internal quotation marks omitted.) *Jezouit* v. *Malloy*, 193 Conn. App. 576, 593, 219 A.3d 933 (2019). Furthermore, we are not persuaded by the plaintiff's contention that references in other statutes that specifically describe a mortgage as a type of lien or are limited to a specific context indicate a legislative intent to include mortgages within the ambit of § 49-51. For these reasons, we conclude that the court improperly concluded that the defendant was required to assert the allegations contained in the counterclaim via an action filed pursuant to § 49-51.[19]

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

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[19] Given our conclusion that the court improperly dismissed the counterclaim, we need not address in detail the other claims raised by the defendant in this appeal. We note that, to the extent that the counterclaim challenges the validity of the mortgage and seeks a release on the land records, the court had jurisdiction over such matters even if § 49-51 applied under these facts and circumstances. See *Gordon* v. *Tufano*, 188 Conn. 477, 484, 484 n.6, 450 A.2d 852 (1982) (stating that plaintiff could bring equitable action to quiet title even though court lacked subject matter jurisdiction pursuant to § 49-13, which did not apply because validity of mortgage was in dispute). Furthermore, the trial court was not required, at this state of the proceedings, to exercise its discretion to determine whether to permit the defendant to proceed with his declaratory judgment action.