LISA ELWELL *v.* WILLIAM BRADLEY KELLOGG
(AC 45296)

Prescott, Moll and Cradle, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, an attorney, for, inter alia, vexatious litigation in connection with the defendant's representation of W Co. in an effort to seek restitution from J, the plaintiff's now former husband. J, during his employment with W Co., had allegedly embezzled $220,000 from W Co. J agreed to sign a promissory note and make certain monthly payments, and J and the plaintiff executed a mortgage deed on their marital home to secure the note.

When J stopped making payments on the promissory note, W Co., through the defendant, commenced an action against J and the plaintiff in which W Co. sought to foreclose on the mortgage. During the pendency of the foreclosure action, a trial court dissolved the marriage of J and the plaintiff. In November, 2017, the plaintiff filed a bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut, which triggered an automatic bankruptcy stay in the foreclosure action pursuant to federal statute (11 U.S.C. § 362). After a trial in the foreclosure action and while the automatic bankruptcy stay was in effect, the foreclosure court issued a decision in December, 2017, concluding that, because the plaintiff's signature on the mortgage deed was the result of threats, there was a lack of consideration given for the mortgage deed, and the court ordered a foreclosure only as to the one-half interest in the marital home that J had quitclaimed to the plaintiff as a result of the dissolution proceeding. Thereafter, W Co. and the plaintiff entered into a settlement agreement and the foreclosure action was withdrawn in its entirety. In the separate action alleging vexatious litigation, a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and two other claims, the trial court granted the defendant's motion to strike the plaintiff's claim alleging a violation of CUTPA. The court thereafter denied the plaintiff's motion to bifurcate the trial to determine the issue of probable cause with respect to the vexatious litigation claim. The court granted the defendant's motion for summary judgment as to the plaintiff's three remaining claims and denied the plaintiff's motion for partial summary judgment. In granting summary judgment for the defendant on the vexatious litigation claim, the court concluded that there was no genuine issue of material fact that the foreclosure action had not terminated in the plaintiff's favor and the defendant had probable cause to commence the foreclosure action against the plaintiff and J. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court improperly denied her motion for partial summary judgment and granted the defendant's motion for summary judgment as to the plaintiff's claim of vexatious litigation:

a. The trial court did not err in denying the plaintiff's motion for summary judgment as to her vexatious litigation claim on the basis of its conclusion that collateral estoppel did not apply so as to establish a lack of probable cause: because the trial court issued the December, 2017 decision in the foreclosure action during the automatic bankruptcy stay and that decision constituted a core judicial function, that decision was void and without preclusive effect, making any findings therein not subject to collateral estoppel; moreover, the issues decided in the December, 2017 decision were not necessarily determined for purposes of collateral estoppel because the stipulated judgment rendered in November, 2018, in the foreclosure action, which adopted the findings of fact and conclusions of law set forth in the December, 2017 decision, did not empower the foreclosure court to render a void decision valid and final, as a stipulated judgment is not a judicial determination of any litigated right;

furthermore, even assuming that the December, 2017 decision was not void, the issues in the foreclosure action and the present action to which the plaintiff sought to apply collateral estoppel were not identical, the plaintiff having attempted to conflate the issue of insufficient or lack of legal consideration given for the mortgage deed in the foreclosure action with the issue of whether the defendant lacked probable cause to commence the foreclosure action, an issue that was not before the foreclosure court.

b. The plaintiff's claim that the trial court improperly rendered summary judgment for the defendant on the plaintiff's claim for vexatious litigation because the court erred as a matter of law in denying her motion to bifurcate and in failing to hold an evidentiary hearing on the issue of whether the defendant had probable cause to commence the foreclosure action was without merit; the plaintiff's reliance on the Supreme Court's decision in *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP* (281 Conn. 84), as support for her claim was misplaced, as the court expressly stated in that case that the determination of bifurcating a trial into separate phases was not at issue in that certified appeal, and the court did not discuss further the issue of bifurcating a probable cause determination, but, rather, addressed the legal standard that was to be applied to a probable cause determination in a vexatious litigation claim against an attorney.

2. The trial court did not err in granting the defendant's motion to strike the plaintiff's CUTPA claim, the plaintiff having failed to allege that the defendant engaged in deceptive acts or practices concerning the entrepreneurial aspects of the practice of law, allegations necessary for the entrepreneurial exception to an attorney's representational immunity under CUTPA; the plaintiff alleged only that the defendant advertised to clients that he specialized in recovering debts, but she did not allege that such advertisement was deceptive or that it related in some other way to the entrepreneurial aspects of the practice of law, and her allegation that the defendant used false and misleading information and unethical practices suggested only that the defendant engaged in specific professional conduct over the course of his representation of W Co. and did not concern the entrepreneurial aspects of the practice of law.

Argued March 7—officially released August 8, 2023

Procedural History

Action to recover damages for, inter alia, the defendant's alleged vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and transferred to the judicial district of Fairfield, where the court, *Stevens, J.*, granted in part the defendant's motion to strike; thereafter, the case was transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket, where the court,

Ozalis, *J.*, granted the defendant's motion for summary judgment, denied the plaintiff's motion for partial summary judgment, and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jay Christopher Rooney, with whom was *Meghan Buckley*, for the appellant (plaintiff).

Robert C. E. Laney, with whom were *Ryan V. Nobile*, and, on the brief, *Karen L. Allison*, for the appellee (defendant).

Opinion

MOLL, J. The plaintiff, Lisa Elwell, appeals from the judgment of the trial court rendered in favor of the defendant, William Bradley Kellogg. On appeal, the plaintiff principally claims that the court improperly (1) denied her motion for partial summary judgment and granted the defendant's motion for summary judgment directed to count two of her complaint sounding in vexatious litigation and (2) granted the defendant's motion to strike count three of her complaint asserting a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[1] We affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. In June, 2012, Allyson Forsythe, the sole owner and president of the Writers' Workshop (Workshop), a company that represents published authors, hired the defendant to represent the Workshop as its attorney in an effort to seek restitution from Jake Elwell,[2] the plaintiff's then husband. Elwell was employed as a literary agent for the Workshop between May, 1998, and

[1] See footnote 17 of this opinion.

[2] Although the record reflects that Jake Elwell's first name is "John," the parties and the trial court primarily have referred to him as "Jake." We will refer in this opinion to Jake Elwell by his surname and to Lisa Elwell as the plaintiff.

sometime prior to June, 2012, and was responsible for, inter alia, collecting from various publishers royalties that were owed to the Workshop. Forsythe hired the defendant to seek restitution from Elwell in the amount of $220,000, which Elwell allegedly embezzled during the course of his employment with the Workshop.

In the fall of 2012, the defendant, Forsythe, and Douglas Tween, Elwell's attorney, exchanged several email communications in which the defendant and Forsythe continually sought from Elwell, through Tween, payments in restitution toward the total amount of $220,000. In December, 2012, Elwell made two separate payments, totaling $28,100, to the Workshop. Thereafter, the defendant made several attempts to secure another payment in restitution or a payment plan from Elwell through Tween; however, by July, 2013, Elwell had neither made another payment nor agreed to a payment plan. On July 17, 2013, the defendant communicated via email to Tween that, "[a]s an alternative to litigation," Forsythe, on behalf of the Workshop, would enter "into an arrangement with [Elwell]" in which Elwell, among other things, would (1) sign a promissory note in the amount of $220,000, (2) make monthly payments of $1500 for two years, credited toward the total amount, at which point the principal balance of $184,000 would become due (balloon payment), and (3) secure the note by a mortgage deed in the principal amount of $220,000, executed by both Elwell and the plaintiff in favor of the Workshop on their jointly owned marital home located at 4 Pine Street in Darien.

On July 25, 2013, Elwell signed the promissory note, in which, as is relevant here, he agreed to (1) make monthly payments of $1500 for two years, totaling $36,000, beginning on August 1, 2013, and ending on August 1, 2015, at which point the balloon payment would become due, and (2) secure the note by executing a mortgage deed on his and the plaintiff's marital home,

where the mortgage deed would not be recorded unless Elwell defaulted on either the monthly or balloon payments. On that same day, Elwell and the plaintiff executed a mortgage deed in favor of the Workshop on their marital home.

The plaintiff made the $1500 monthly payments for the two year period set forth in the promissory note.[3] When the balloon payment became due on August 1, 2015, Elwell did not pay it then or at any time thereafter.[4] As a result, on September 3, 2015, the Workshop, through the defendant, commenced an action against Elwell and the plaintiff in which the Workshop, in its operative complaint, sought, inter alia, to foreclose the mortgage on their marital home. See *The Writers' Workshop, Inc.* v. *Elwell*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-15-6026560-S (foreclosure action).

The foreclosure action was tried to the court, *Hon. David R. Tobin*, judge trial referee, over the course of seven nonconsecutive days beginning on May 23, 2017, and concluding on September 8, 2017. The defendant was the Workshop's sole attorney in the foreclosure action until the first day of trial on May 23, 2017, when another attorney, Robert A. Lacobelle, filed an appearance on behalf of the Workshop in addition to the defendant.[5] Thereafter, on June 29, 2017, Lacobelle filed an

[3] Notwithstanding that Elwell executed the promissory note, it is undisputed that only the plaintiff made the $1500 monthly payments for the two year period.

[4] We take judicial notice that on August 25, 2015, the plaintiff filed an action for dissolution of marriage, which was finalized on October 28, 2016. Elwell agreed to quitclaim his interest in the marital home to the plaintiff within seven days following the judgment dissolving the marriage. The plaintiff agreed, inter alia, to list the marital home for sale no later than November 1, 2021, to retain 60 percent of the gross proceeds from the sale, and to give 40 percent of the gross proceeds to Elwell.

[5] On May 19, 2017, the plaintiff filed a motion in limine seeking to disqualify the defendant "from acting as a witness and an advocate" in violation of rule 3-7 (a) of the Rules of Professional Responsibility, which applies when a party's attorney is likely to be a necessary witness in the case. The court

appearance on behalf of the Workshop in lieu of the defendant.

On November 30, 2017, while the foreclosure action was pending, the plaintiff filed a voluntary chapter 13 petition for bankruptcy in the United States Bankruptcy Court for the District of Connecticut,[6] which triggered an automatic bankruptcy stay in the foreclosure action pursuant to 11 U.S.C. § 362.[7] On December 7, 2017, while the automatic stay was in effect, the trial court issued its memorandum of decision in the foreclosure action (December 7, 2017 decision), in which it ordered a foreclosure only as to Elwell's interest in the marital home, which he had quitclaimed to the plaintiff in 2016.[8] See footnote 4 of this opinion. On August 10, 2018, the plaintiff filed in the Bankruptcy Court a motion for relief from the automatic stay. On August 20, 2018, the Bankruptcy Court issued a written order granting relief to the plaintiff from the automatic stay, permitting her

granted the plaintiff's motion in limine, ordering that the defendant was precluded from acting as the Workshop's attorney while he was also a witness because it appeared likely that the defendant would be a necessary witness in the foreclosure action.

[6] Because it provides context for the present action, we take judicial notice of the record of the bankruptcy proceedings. See *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989) (taking judicial notice of relevant court pleadings in federal District Court even though they "were not formally made a part of the record"), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990).

[7] Title 11 of the United States Code, § 362 (a), provides in relevant part: "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5 (a) (3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."

[8] For the reasons set forth in part I of this opinion, the December 7, 2017 decision, including the findings of fact and conclusions of law set forth therein, is void.

"to exercise [her] rights, if any, with respect to a final judgment in [the foreclosure action] in accordance with applicable nonbankruptcy law . . . ."[9] On August 22, 2018, the plaintiff filed a notice of relief from the bankruptcy stay in the foreclosure action.

On September 28, 2018, Forsythe, on behalf of the Workshop, and the plaintiff entered into a settlement agreement, in which, relevant here, the Workshop agreed to release the plaintiff from the mortgage deed and to withdraw the foreclosure action as to both Elwell and the plaintiff. Forsythe also agreed to cooperate in a "companion case" to be brought by the plaintiff against the defendant, and, in doing so, to waive any attorney-client privilege between Forsythe and the defendant regarding the defendant's professional conduct during the relevant period. In addition, on September 28, 2018, Forsythe, on behalf of the Workshop, and the plaintiff, also entered into a "stipulation to enter final judgment," in which they stipulated, inter alia, that the foreclosure court may enter a final judgment "as to the claims by or between [the Workshop] and [the plaintiff] only."

On October 22, 2018, the defendant filed in the foreclosure action a motion for permission to be made a party for the limited purpose of filing an appeal from the December 7, 2017 decision.[10]

[9] In May, 2018, the plaintiff commenced two adversary proceedings in the Bankruptcy Court in connection with her petition for bankruptcy. The plaintiff's August 10, 2018 motion for relief from the automatic stay and the Bankruptcy Court's August 20, 2018 written order granting relief to the plaintiff from the automatic stay were filed in one of the adversary proceedings. The adversary proceedings are not germane to this appeal.

[10] The defendant also filed an appearance form indicating that he was appearing (1) as a proposed intervening party and (2) on behalf of the Workshop in addition to Lacobelle; however, the record in the foreclosure action does not reflect any filings by the defendant on the Workshop's behalf after October 22, 2018.

On October 31, 2018, while the foreclosure action remained pending, the plaintiff commenced the present action against the defendant by way of a four count complaint. The plaintiff asserted claims for abuse of process (count one), statutory vexatious litigation under General Statutes § 52-568 (count two), violation of CUTPA (count three), and civil conspiracy (count four). Most relevant to this appeal, with respect to her vexatious litigation claim, the plaintiff alleged that the defendant had commenced the foreclosure action against her without probable cause and with malice.

On November 26, 2018, the plaintiff filed in the foreclosure action an amended motion for stipulated judgment.[11] On the same day, the court, *Genuario*, *J.*, granted the plaintiff's motion and rendered judgment in accordance with the stipulation. On December 18, 2018, the court denied the defendant's motion for permission to be made a party to the foreclosure action.[12] On February 4, 2019, the Workshop withdrew the foreclosure action in its entirety.

[11] The plaintiff filed an original motion for judgment on August 23, 2018, which predated the settlement agreement and the stipulation that she had executed with the Workshop.

[12] On December 21, 2018, the defendant filed a motion to reargue the denial of his motion for permission to be made a party to the foreclosure action, which the court denied on December 28, 2018. On January 9, 2019, the defendant filed an appeal with this court from the trial court's denial of his motion for permission. On January 25, 2019, the defendant filed a writ of error with our Supreme Court challenging the trial court's denial of his motion for permission, which our Supreme Court transferred to this court on February 14, 2019. On May 7, 2019, this court granted motions filed by the plaintiff seeking to dismiss the defendant's appeal and his writ of error. On May 10, 2019, the defendant filed motions for reconsideration en banc, which this court denied without prejudice to the defendant filing a motion for permission to file a late writ of error with our Supreme Court challenging the trial court's December 7, 2017 decision. On May 13, 2019, the defendant filed with our Supreme Court a motion for permission to file a late writ of error from the December 7, 2017 decision, which our Supreme Court denied on September 11, 2019. On October 23, 2019, the defendant filed a motion for reconsideration en banc, which our Supreme Court denied on November 21, 2019.

On July 23, 2019, the defendant filed in the present action a motion, accompanied by a supporting memorandum of law, seeking to strike count three of the plaintiff's complaint asserting a violation of CUTPA. On August 22, 2019, the plaintiff filed a memorandum of law in opposition to the defendant's motion to strike. On September 23, 2019, the defendant filed a reply memorandum. On September 27, 2019, with leave of the court, *Stevens*, *J.*, the plaintiff filed a surreply memorandum. On January 16, 2020, the court issued a memorandum of decision striking count three of the plaintiff's complaint.[13] On February 5, 2020, the defendant filed a motion for judgment on the stricken third count, contending that the plaintiff had failed to file a new pleading within fifteen days after the court had stricken that count. See Practice Book § 10-44 ("in those instances where . . . any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within [fifteen days after the granting of any motion to strike], the judicial authority may, upon motion, enter judgment against said party on said stricken . . . count"). On February 17, 2020, the court granted the defendant's motion for judgment.

On February 24, 2021, pursuant to General Statutes § 52-205[14] and Practice Book § 15-1,[15] the plaintiff filed a motion, accompanied by a supporting memorandum

[13] The defendant also sought to strike the prayer for relief in the plaintiff's complaint insofar as the plaintiff sought attorney's fees and punitive damages. The court granted the defendant's request to strike the portion of the prayer for relief seeking attorney's fees, but it denied his request to strike the portion of the prayer for relief seeking punitive damages.

[14] General Statutes § 52-205 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the court may order that one or more of the issues joined be tried before the others."

[15] Practice Book § 15-1 provides in relevant part: "In all cases, whether entered upon the docket as jury cases or court cases, the judicial authority may order that one or more of the issues joined be tried before the others. . . ."

of law, seeking to bifurcate the issue of probable cause vis-à-vis her vexatious litigation claim and requesting that the court hold a separate pretrial evidentiary hearing for the court to determine that issue. On March 29, 2021, the court, *Ozalis*, *J.*, denied the plaintiff's motion to bifurcate.

On May 26, 2021, with leave of the court, the defendant filed an amended answer and asserted four special defenses. As special defenses, the defendant alleged that (1) the plaintiff's abuse of process claim was time barred by the limitation period of General Statutes § 52-577, (2) the plaintiff's civil conspiracy claim failed to state a claim upon which relief could be granted, (3) the plaintiff's claims were precluded by the litigation privilege, and (4) the plaintiff's damages were "illusory and nonexistent."[16]

On July 19, 2021, the plaintiff filed a motion for partial summary judgment, accompanied by a supporting memorandum of law and exhibits, as to counts one and two of her complaint. As we explain more fully in this opinion, the plaintiff argued in her motion that, with respect to the lack of probable cause element of her vexatious litigation claim, she was entitled to partial summary judgment. Specifically, the plaintiff contended, on the basis of collateral estoppel, that the foreclosure court's finding—that there was no consideration received by the plaintiff for the mortgage deed—was binding on the defendant and that, therefore, as a matter of law, the defendant lacked probable cause in bringing the foreclosure action against the plaintiff.

[16] The defendant filed his original answer and special defenses on February 24, 2020, which asserted the first three special defenses set forth in his amended pleading. On April 9, 2020, the plaintiff filed a reply denying the allegations of the three special defenses in the original pleading. The plaintiff did not file a reply to the defendant's amended pleading. See Practice Book § 10-61 ("[i]f the adverse party fails to plead further [following an amendment to a pleading], pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading").

That same day, the defendant filed a motion for summary judgment, accompanied by a supporting memorandum of law and exhibits, as to counts one, two, and four of the plaintiff's complaint. On August 30, 2021, the defendant filed a memorandum of law in opposition to the plaintiff's motion for partial summary judgment, accompanied by exhibits. On the same day, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment, accompanied by exhibits. On September 13, 2021, the parties filed reply memoranda, accompanied by exhibits. On January 21, 2022, following a hearing held on November 3, 2021, the court issued a memorandum of decision denying the plaintiff's motion for partial summary judgment as to counts one and two of her complaint and granting the defendant's motion for summary judgment as to counts one, two, and four of the plaintiff's complaint. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff principally claims that, with respect to her vexatious litigation claim in count two, the trial court improperly (1) denied her motion for partial summary judgment,[17] and (2) granted the defendant's motion for summary judgment.[18] These claims are unavailing.

[17] The plaintiff states in her principal appellate brief that she is not appealing from the denial of her motion for summary judgment as to her claim for abuse of process asserted in count one of her complaint. Accordingly, we address the court's denial of the plaintiff's motion for partial summary judgment only as to her claim for vexatious litigation.

[18] The plaintiff also claims that the court erred in granting the defendant's motion for summary judgment on her claims of abuse of process and civil conspiracy asserted in counts one and four of her complaint, respectively.

Having carefully reviewed the plaintiff's principal appellate brief, we conclude that the plaintiff's challenge regarding her abuse of process claim is inadequately briefed. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims

Before we address these claims on appeal, we set forth the standard of review and relevant legal principles. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021).

The plaintiff devotes only one paragraph of her principal appellate brief to her abuse of process claim and seeks to incorporate by reference her memorandum of law in opposition to the defendant's motion for summary judgment filed in the trial court on August 30, 2021, which is thirty-four pages long and has more than 500 pages of exhibits attached. The plaintiff's attempt to incorporate a trial court pleading by reference into her principal appellate brief is not procedurally proper. Permitting litigants to incorporate by reference legal claims set forth in trial court pleadings into an appellate brief would enable circumvention of the word limitations set forth in Practice Book § 67-3A. See id., 612–13 (explaining that it "is not procedurally proper" to evade page limitations set forth in Practice Book § 67-3, and declining "to review any legal claims raised" in trial court pleading "that the plaintiff has not independently and adequately briefed in [the] principal appellate brief"). The plaintiff's brief is otherwise devoid of legal analysis or citation to legal authority as to this claim. Therefore, the plaintiff has failed to adequately brief this claim, and, accordingly, we decline to review it.

We next briefly address the plaintiff's claim on appeal concerning her civil conspiracy claim. The court rendered summary judgment for the defendant on the plaintiff's civil conspiracy claim because, given that civil conspiracy is not an independent cause of action; see *Terracino* v. *Buzzi*, 121 Conn. App. 846, 857 n.5, 1 A.3d 115 (2010) ("We note that there is no independent claim of civil conspiracy. Rather, [t]he action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself. . . . Thus, to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort." (Internal quotation marks omitted.)); the plaintiff's civil conspiracy claim was untenable following the court's determinations that the defendant was entitled to summary judgment on the plaintiff's vexatious litigation and abuse of process claims. Because we (1) affirm the summary judgment rendered in favor of the defendant on the plaintiff's vexatious litigation claim, and (2) decline to review the merits of the plaintiff's abuse of process claim, we necessarily conclude that the court properly rendered summary judgment for the defendant on the plaintiff's civil conspiracy claim.

. . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him [or her] to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rozbicki* v. *Sconyers*, 198 Conn. App. 767, 773, 234 A.3d 1061 (2020).

"In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Emphasis omitted; internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, 207 Conn. App. 525, 533, 262 A.3d 885 (2021).

The following additional, undisputed facts and procedural history are relevant to this claim on appeal. Between approximately the fall of 2012 and July, 2013, the defendant communicated with Tween via email regarding the progress of Tween's efforts to secure a payment in restitution or payment plan from Elwell. On March 21, 2013, when Elwell had only made restitution in the total amount of $28,100, the defendant, on

behalf of the Workshop, prepared a writ of summons and complaint, naming Elwell as the only defendant, which were served on March 29, 2013. The complaint alleged one count of conversion, one count of larceny, one count of breach of fiduciary duty, and one count of fraudulent concealment. The defendant did not return the complaint to court by the May 7, 2013 return date. On April 16, 2013, however, after the writ of summons and complaint had been served, but before the May 7, 2013 return date, Elwell signed (1) a "waiver of statute of limitations," allowing the Workshop to commence a civil action against him beyond the applicable limitation period to recover damages stemming from his alleged embezzlement, and (2) an "acknowledgement of debt," in which he "acknowledge[d] that [he is] indebted to [the Workshop] . . . in the amount of [$196,900], which debt arose from [his] conduct in the management of the affairs of [the Workshop] . . . ."

By July, 2013, Elwell still had not made another restitution payment. On July 1, 2013, the defendant prepared another writ of summons and complaint, which were served on July 2, 2013, with a return date of July 30, 2013. On July 17, 2013, the defendant proposed via email to Tween that Elwell sign a promissory note and mortgage deed.

On July 24, 2013, when Tween was unable to confirm whether the plaintiff would sign the mortgage deed, the defendant notified Tween via email that "[Forsythe] is taking [a] hard line on this, and will file [a civil action] unless she gets a commitment from the [plaintiff and Elwell] on this today." On July 25, 2013, Elwell signed the promissory note, where, relevant here, he agreed (1) to make monthly payments of $1500, totaling $36,000, beginning on August 1, 2013, and ending on August 1, 2015, at which point the balloon payment would become due, and (2) to secure the note by a mortgage deed

executed in the Workshop's favor on his and the plaintiff's marital home. On that same day, Elwell and the plaintiff executed a mortgage deed in favor of the Workshop on their marital home.

After Elwell failed to make the balloon payment that became due on August 1, 2015, the Workshop, through the defendant, commenced the foreclosure action on September 3, 2015. On June 28, 2017, the plaintiff asserted various special defenses. Relevant here, the plaintiff alleged in her special defenses that there was insufficient or illegal consideration given for the mortgage deed because she was told that unless she signed it, the Workshop "would report [Elwell] publicly including civilly and criminally . . . ."[19]

After the conclusion of the trial in the foreclosure action, the court, *Hon. David R. Tobin*, judge trial referee, issued the December 7, 2017 decision.[20] The foreclosure court concluded that the plaintiff's signature on the mortgage deed was a result of "the threats to bring criminal prosecution or the threats of civil litigation made in such a manner as to constitute a potential abuse of process" and, therefore, the plaintiff had established that there is a "lack of consideration/illegal consideration . . . ." The foreclosure court ultimately found for the plaintiff on her special defense of "lack of consideration/illegal consideration" and against the Workshop. It further concluded that the plaintiff had "presented no defense with respect to the one-half interest in her [marital home] which she acquired from . . .

[19] The record reflects that the defendant and the plaintiff never communicated directly, and, consequently, the plaintiff learned about Elwell's alleged embezzlement, and information regarding the communications between Tween and the defendant, through Tween and Elwell.

[20] As noted previously and as discussed herein, the December 7, 2017 decision is void. See footnote 8 of this opinion. We discuss the findings of fact and conclusions of law set forth therein in order to provide the proper context in which we review the claims before us.

Elwell in connection with the dissolution of their marriage. Further proceedings are required to establish the amount of the debt secured by the mortgage on that one-half interest as well as the value of that interest and whether the foreclosure will be by sale or strict foreclosure."

On November 30, 2017, before the court had released the December 7, 2017 decision, the plaintiff filed the bankruptcy petition, which triggered an automatic bankruptcy stay in the foreclosure action pursuant to 11 U.S.C. § 362. On August 10, 2018, the plaintiff filed a motion for relief from the automatic stay in the Bankruptcy Court, and on August 20, 2018, the Bankruptcy Court issued a written order granting the plaintiff's motion, terminating the stay to permit the plaintiff "to exercise [her] rights, if any, with respect to a final judgment in [the foreclosure action] in accordance with applicable nonbankruptcy law . . . ." On August 22, 2018, the plaintiff filed a notice of relief from the automatic stay in the foreclosure action.[21]

On September 28, 2018, Forsythe, on behalf of the Workshop, and the plaintiff, entered into a settlement agreement, in which, inter alia, (1) they agreed "that the [foreclosure court] may enter a final judgment in the [f]oreclosure [a]ction," (2) the Workshop agreed not to file an appeal in the foreclosure action, (3) the Workshop agreed to release the plaintiff, but not Elwell, from the mortgage deed,[22] (4) the Workshop agreed to withdraw the foreclosure action against both Elwell and the plaintiff, and (5) Forsythe agreed to waive any

[21] We take judicial notice that on February 14, 2020, the Bankruptcy Court dismissed the plaintiff's bankruptcy petition. That dismissal is not germane to this appeal.

[22] The settlement agreement stated that "nothing herein or in the attachments is intended to release . . . Elwell from any legal obligation, debt or judgment he may owe to the . . . Workshop, including his [p]romissory [n]ote of July 25, 2013."

attorney-client privilege between her and the defendant regarding the defendant's professional conduct toward the plaintiff during his representation of the Workshop in order to cooperate in a "companion case" to be brought by the plaintiff against the defendant. The settlement agreement resolved all claims between the Workshop and the plaintiff.

On September 28, 2018, Forsythe, on behalf of the Workshop, and the plaintiff, entered into a "stipulation to enter final judgment," in which they stipulated in relevant part that (1) the December 7, 2017 decision issued by the foreclosure court (a) found "in favor of [the plaintiff] on her defenses" and against the Workshop, and (b) "disposed of all pending claims and defenses" between the Workshop and the plaintiff, and (2) the foreclosure court "may enter [a] final judgment as to the claims by or between" the Workshop and the plaintiff. On November 26, 2018, the plaintiff filed an "amended motion for stipulated judgment in conformity with [the] stipulation of the parties" in the foreclosure action, and attached, inter alia, the settlement agreement, the stipulation, and the release of mortgage deed. On the same day, the court, *Genuario*, *J.*, granted the plaintiff's amended motion and ordered that "[j]udgment shall enter in accordance with the stipulation."[23] Thereafter, the Workshop withdrew the foreclosure action in its entirety.

A

Against this backdrop, the plaintiff claims that the court erred in denying her motion for summary judgment as to her vexatious litigation claim on the basis of its conclusion that collateral estoppel did not apply

[23] The trial court case detail for the foreclosure action contains an entry indicating that a "judgment by stipulation before trial commenced" was rendered on November 26, 2018.

so as to establish the lack of probable cause.[24] For the reasons that follow, we disagree.

"Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. . . . Before collateral estoppel applies [however] there must be an identity of issues between the

[24] We conclude, as a threshold matter, that the denial of the plaintiff's motion for partial summary judgment is an appealable final judgment for two, independent reasons. First, the denial of a motion for summary judgment predicated on the doctrine of collateral estoppel is an appealable final judgment. See *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 346, 272 A.3d 677 (2022) ("[O]rdinarily, the denial of a motion for summary judgment is not an appealable final judgment. . . . When the decision on a motion for summary judgment, however, is based on the doctrine of collateral estoppel, the denial of that motion does constitute a final judgment for purposes of appeal." (Internal quotation marks omitted.)). Second, because the trial court granted the defendant's motion for summary judgment, we have subject matter jurisdiction to entertain the plaintiff's claims as to the denial of her partial motion for summary judgment. See *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 533 n.1, 285 A.3d 1128 (2022) ("[t]he denial of a motion for summary judgment is ordinarily not an appealable final judgment; however, if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal" (internal quotation marks omitted)).

prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . In other words, collateral estoppel has no application in the absence of an identical issue. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Emphasis omitted; internal quotation marks omitted.) *Peterson* v. *iCare Management, LLC*, 203 Conn. App. 777, 790–91, 250 A.3d 720 (2021).

In moving for summary judgment on count two of her complaint alleging vexatious litigation, the plaintiff argued, inter alia, that "[the foreclosure court's] decision that there was no consideration is binding on [the defendant] in [the present action] based on the doctrine of collateral estoppel . . . ." Specifically, regarding the application of collateral estoppel, the plaintiff argued that the issue of whether there was consideration given for the mortgage deed was (1) actually litigated because she raised it as a special defense in the foreclosure action, (2) necessarily determined by the foreclosure court, and (3) identical to the issue of whether the defendant had probable cause to bring the foreclosure action, because it "would have been evident to a reasonable attorney considering the filing of" a foreclosure action that there was no probable cause with which to commence such action in light of the insufficient or lack of consideration given for the mortgage deed.

In objecting to the plaintiff's motion for partial summary judgment, the defendant argued that the December 7, 2017 decision is void because it was issued during the automatic bankruptcy stay that was in effect at the time, and, therefore, collateral estoppel cannot apply as the plaintiff suggests. The defendant also argued, inter alia, that, even if the decision were not void, whether there was consideration given for the mortgage

deed and whether there was probable cause to commence the foreclosure action are not identical issues for purposes of collateral estoppel.

In denying the plaintiff's motion for partial summary judgment, the court determined that collateral estoppel did not apply so as to establish the lack of probable cause for purposes of her vexatious litigation claim because, inter alia, (1) the December 7, 2017 decision is void and not subject to preclusive effect, and (2) the issues in the foreclosure action and in the present action are not identical.[25] The court concluded that the December 7, 2017 decision "was issued after the November 30, 2017 automatic stay entered in the bankruptcy proceeding" pursuant to 11 U.S.C. § 362 and was, therefore, "void and a legal nullity and . . . not subject to . . . collateral estoppel." In support of that conclusion, the court explained that the rendering of the December 7, 2017 decision "was a core judicial function, not a mere ministerial or administrative act which affected" the plaintiff's marital home.

The court also concluded that there is "no identity of issues between the foreclosure action and the issues in the present action. . . . These issues were not resolved in the foreclosure action, as that action involved the adjudication of whether the . . . mortgage was enforceable and whether or not [the plaintiff] had a bona fide special defense prohibiting enforcement of the mortgage. . . . [T]he controversy in the foreclosure action centered around a dispute between the . . .

[25] In concluding that collateral estoppel was inapplicable, the court further determined that (1) the defendant was not in privity with the Workshop, and (2) the defendant did not have an opportunity to seek appellate review vis-à-vis the December 7, 2017 decision. The plaintiff challenges these determinations on appeal; however, we need not address these issues further in light of our conclusion that the court properly determined that (1) the December 7, 2017 decision is void, and (2) there was no identity of issues in the foreclosure action and in the present action.

Workshop and [the plaintiff] over whether or not the . . . Workshop's mortgage could be foreclosed against property held by [the plaintiff]. The [issue] of . . . probable cause in the instant litigation and [the plaintiff's] special defense of . . . lack of consideration in the foreclosure action are not identical." (Citation omitted.)

The plaintiff contends that the court improperly concluded that collateral estoppel did not apply vis-à-vis the lack of probable cause element of her claim for vexatious litigation because (1) the December 7, 2017 decision was not rendered void as a result of the automatic bankruptcy stay that was in effect at that time, (2) even if it is assumed that the December 7, 2017 decision is void, the stipulated judgment rendered by the foreclosure court revived and incorporated the findings and conclusions set forth in the decision, and (3) the issue of probable cause in the present action and the issue of consideration in the foreclosure action are identical. We disagree for two independent reasons.

First, we conclude that the December 7, 2017 decision is void and not subject to preclusive effect. "Pursuant to 11 U.S.C. § 362, the filing of a bankruptcy petition creates an automatic stay of execution against the commencement or continuation of all actions against the debtor that were, or could have been, filed against the debtor prior to the bankruptcy filing." (Internal quotation marks omitted.) *Simms* v. *Zucco*, 214 Conn. App. 525, 544, 280 A.3d 1226, cert. denied, 345 Conn. 919, 284 A.3d 982 (2022). "Generally . . . the filing of [a] bankruptcy petition operate[s] as an automatic stay of the plaintiff's foreclosure action." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 41, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020). "The automatic stay provision in . . . § 362 . . . stays any and all postpetition filing. Any filing constitutes a judicial act directed

toward the disposition of the case in violation of the automatic stay. . . . The stay of [§] 362 is extremely broad in scope and . . . should apply to almost any type of formal or informal action against the debtor or the [debtor's] property . . . . The Bankruptcy Court has the power to grant relief from the automatic stay. . . . The Bankruptcy Court . . . is authorized to grant a creditor relief from the stay for cause by terminating, annulling, modifying, or conditioning the stay." (Citations omitted; internal quotation marks omitted.) *Astoria Federal Mortgage Corp.* v. *Genesis Holdings, LLC*, 159 Conn. App. 102, 113, 122 A.3d 694 (2015).

"[M]inisterial acts undertaken in the course of a state judicial proceeding while an automatic stay is in effect do not violate the automatic stay. . . . [A]cts undertaken in the course of carrying out the *core judicial function* are not ministerial and, if essayed after bankruptcy filing, will be deemed to violate the automatic stay. . . . Any actions taken in violation of the stay are void and without effect." (Citations omitted; emphasis added; internal quotation marks omitted.) *Krondes* v. *O'Boy*, 69 Conn. App. 802, 810, 796 A.2d 625 (2002).

The plaintiff contends that the December 7, 2017 decision is not void because the foreclosure court found in favor of her special defense of insufficient or lack of legal consideration, such that the December 7, 2017 decision was not "against her" and, thus, did not violate the automatic bankruptcy stay. However, 11 U.S.C. § 362, by its express terms, does not carve out an exception for judicial actions that are adjudicated in the debtor's favor in a proceeding brought against that debtor. Rather, relevant here, 11 U.S.C. § 362 (a) applies to an entire *action* or *proceeding* brought against the debtor prior to the filing of a bankruptcy petition. Moreover, a judgment that disposes of the action as to that debtor, and which finds in the debtor's favor, constitutes a core

judicial function. *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 391, 180 A.3d 611 (explaining that it is within trial court's broad discretion to decide whether to order judgment of foreclosure), cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018). Because the foreclosure court undertook a core judicial function when it issued the December 7, 2017 decision after the automatic stay had taken effect and before the Bankruptcy Court had terminated the stay, that decision is void and without preclusive effect, making any findings therein not subject to collateral estoppel.

The plaintiff alternatively claims that, even if the December 7, 2017 decision was void on the day it was issued, the stipulated judgment rendered on November 26, 2018, adopted the findings of fact and conclusions of law set forth in the decision, giving them preclusive effect. That a stipulated judgment entered in the foreclosure action—regardless of whether the plaintiff and the Workshop agreed as to the findings of fact and conclusions of law set forth in the December 7, 2017 decision—did not empower the foreclosure court to render a void decision valid and final. "[A] stipulated judgment is not a judicial determination of any litigated right . . . [and] may be defined as a contract . . . . The essence of the judgment is that the parties to the litigation have *voluntarily entered into an agreement* setting their dispute or disputes at rest . . . . [A stipulated] judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Customers Bank* v. *CB Associates, Inc.*, 156 Conn. App. 678, 687–88, 115 A.3d 461 (2015). Accordingly, we conclude that the issues decided in the December 7, 2017 decision were not necessarily determined for purposes of collateral estoppel.

Second, even assuming arguendo that the December 7, 2017 decision was not void, the issues in the foreclosure action and in the present action to which the plaintiff seeks to apply collateral estoppel are not identical. "[C]ollateral estoppel has no application in the absence of an identical issue. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Internal quotation marks omitted.) *Peterson* v. *iCare Management, LLC*, supra, 203 Conn. App. 791. The plaintiff attempts to conflate the issues of consideration in the foreclosure action and probable cause vis-à-vis the claim for vexatious litigation in the present action. In the foreclosure action, the relevant issue was whether there was insufficient or lack of legal consideration given for the mortgage deed, which concerns that "which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . [It] consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Rockstone Capital, LLC* v. *Caldwell*, 206 Conn. App. 801, 815, 261 A.3d 1171, cert. denied, 339 Conn. 914, 262 A.3d 136 (2021). In the present action, the relevant issue is whether the defendant lacked probable cause to commence the foreclosure action. A defendant lacks probable cause if he lacks "a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, supra, 207 Conn. App. 534. Indeed, the court concluded that the issue of probable cause was unrelated to whether the "mortgage was enforceable and whether or not [the plaintiff] had a bona fide special defense prohibiting enforcement of the mortgage. . . . [T]he controversy in the foreclosure action centered around a dispute . . . over whether or not the . . . mortgage could be foreclosed against property held by

[the plaintiff]." (Citation omitted.) Whether the defendant lacked probable cause to bring the foreclosure action—or, in other words, whether the defendant in that action lacked a "good faith belief in the facts alleged and the validity of the claims asserted"; *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, supra, 534;—was not before the foreclosure court and is not identical to the issue of consideration for the mortgage deed in the foreclosure action.

In sum, we conclude that the December 7, 2017 decision is void and, therefore, not subject to collateral estoppel. Moreover, even if that decision were not void, we further conclude that the issues in the foreclosure action and the present action are not identical. Accordingly, the court did not err in denying the plaintiff's motion for partial summary judgment as to her claim for vexatious litigation.

B

The plaintiff next claims that the court erred in rendering summary judgment in favor of the defendant as to the plaintiff's claim for vexatious litigation because the court erred as a matter of law in denying her motion to bifurcate the issue of whether the defendant had probable cause to commence the foreclosure action.[26] We disagree.

[26] The plaintiff also claims that the court improperly rendered summary judgment in favor of the defendant on her vexatious litigation claim because it (1) improperly concluded that the foreclosure action did not terminate in her favor, and (2) "made only passing reference to facts or to the very extensive record made in the foreclosure and in discovery in this case" and "[i]n concluding that there was consideration . . . further erred in basing [its] legal conclusion on three [appellate] cases, none of which apply to the material facts of this case."

As previously stated, the foreclosure action terminated on the basis of the Workshop's withdrawal of the action after the foreclosure court had rendered judgment in accordance with the stipulation entered into between the Workshop and the plaintiff. Therefore, the foreclosure action did not terminate in the plaintiff's favor. See *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, supra, 207 Conn. App. 531 ("the law in Connecticut is that a civil action that ends in a negotiated settlement is not considered

At the outset, we set forth the standard of review that applies to the plaintiff's claim. Although we ordinarily review the bifurcation of a civil trial under an abuse of discretion standard; see *Rockwell* v. *Rockwell*, 178 Conn. App. 373, 385, 175 A.3d 1249 (2017) ("[w]hen a trial court exercises its discretion to bifurcate a civil trial, appellate review is limited to a determination of whether this discretion has been abused" (internal quotation marks omitted)), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018); the plaintiff in the present case claims that the court erred as a matter of law in denying her motion to bifurcate the issue of whether the defendant had probable cause to commence the foreclosure action. Because the issue before us—i.e., whether *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 912 A.2d 1019 (2007), requires a trial court to conduct a pretrial evidentiary hearing to resolve the element of probable cause—is a question of law, our review is plenary. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, 219 Conn. App. 1, 11, 293 A.3d 955 ("[f]or pure questions of law, plenary review should be applied" (internal quotation marks omitted)), cert. denied, 346 Conn. 1028, 295 A.3d 945

to have terminated in favor of either party and, thus, cannot support a subsequent vexatious litigation claim"); cf. *DeLaurentis* v. *New Haven*, 220 Conn. 225, 251, 597 A.2d 807 (1991) ("we have never required a plaintiff in a vexatious suit action to prove a favorable termination either by pointing to an adjudication on the merits in his favor or by showing affirmatively that the circumstances of the termination indicated his innocence or nonliability, *so long as the proceeding has terminated without consideration*" (emphasis added)).

Turning to the plaintiff's next claim, we conclude that the court set forth in its decision the relevant facts and circumstances of the foreclosure action that it considered in rendering summary judgment in favor of the defendant on the plaintiff's vexatious litigation claim. Furthermore, we conclude that the court did not render summary judgment in favor of the defendant on the plaintiff's vexatious litigation claim on the basis of the facts of the three cases at issue but, rather, explained its reasoning through relevant case law that pertains to either the issue of consideration given for a mortgage or seeking restitution for money that was wrongfully taken.

(2023), and cert. granted, 346 Conn. 1029, 295 A.3d 944 (2023).

The following procedural history is relevant to our resolution of this claim. On February 24, 2021, the plaintiff filed a motion to bifurcate the trial pursuant to § 52-205 and Practice Book § 15-1, along with a supporting memorandum of law, seeking to bifurcate the issue of probable cause and requesting that the court hold a separate pretrial evidentiary hearing to determine that issue. In her motion to bifurcate the trial, the plaintiff argued, inter alia, that bifurcation of the issue of probable cause was appropriate because (1) our Supreme Court has determined that a court, not a jury, should determine the issue of whether a defendant has probable cause to commence an action vis-à-vis a claim for vexatious litigation, and (2) the facts relevant to the issue of probable cause had been found by the foreclosure court and set forth in the December 7, 2017 decision, and, therefore, could not be in dispute. The plaintiff also contended that the only other evidence necessary in such an evidentiary hearing would be the defendant's "supplemental testimony."

On March 15, 2021, the defendant filed an objection to the plaintiff's motion to bifurcate the trial, arguing, inter alia, that (1) bifurcation would result in two redundant trials because at least some of the evidence necessary to determine the issue of probable cause would also be necessary for the plaintiff's remaining claims, resulting in judicial inefficiency, and (2) a motion for summary judgment was the appropriate vehicle by which the court could decide the issue of probable cause.

In denying the plaintiff's motion to bifurcate the trial, the court determined that because there were three pending claims against the defendant—vexatious litigation, abuse of process, and civil conspiracy—the early

"resolution of the probable cause issue will not result in judicial efficiency, as even if the plaintiff prevails on the probable cause issue, a jury trial will still need to be conducted on the remaining claims of abuse of process and civil conspiracy, with the same witnesses and overlapping evidence. . . . [T]his issue is best presented in a motion for summary judgment, for if as the plaintiff contends, the issues are not in dispute, the issue of probable cause can be resolved by the court as a matter of law prior to trial. If there are genuine disputed issues of material fact relating to the issue of probable cause, the matter will be tried before a jury without bifurcation as a mixed question of fact and law." The court further concluded that the plaintiff "may move for summary judgment on the issue of probable cause prior to trial." Thereafter, the court rendered summary judgment for the defendant on the plaintiff's vexatious litigation claim, concluding that there was no genuine issue of material fact that (1) the foreclosure action did not terminate in the plaintiff's favor, and (2) the defendant had probable cause to commence the foreclosure action against the plaintiff and Elwell.

On appeal, the plaintiff claims that the court erred as a matter of law in denying her motion to bifurcate the trial and failing to hold a separate evidentiary hearing on the issue of probable cause. According to the plaintiff, our Supreme Court concluded in its decision in *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 84, that a separate hearing is required for the court to determine the issue of probable cause in the context of a vexatious litigation claim. We disagree.

In *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 86, a common-law and statutory vexatious litigation action, following a bench trial on the bifurcated issue of probable cause, the trial court rendered judgment in favor of the defendant law firm

based on its determination that the plaintiff had failed to prove a lack of probable cause in bringing a prior action. Id., 86. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly had bifurcated the trial into separate phases. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 465, 874 A.2d 266 (2005), aff'd, 281 Conn. 84, 912 A.2d 1019 (2007). We concluded that the plaintiff had waived that claim by having agreed to bifurcation. Id., 466. Thereafter, on certified appeal, our Supreme Court expressly stated that "[t]hat determination [was] not at issue in this certified appeal," and the court did not discuss further the issue of bifurcating a probable cause determination. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 92 n.8. Rather, the court addressed the legal standard that is to be applied to a probable cause determination in a vexatious litigation claim against an attorney.

In light of the foregoing, we conclude that the plaintiff's claim that the trial court was required, as a matter of law, under our Supreme Court's decision in *Falls Church Group, Ltd.*, to bifurcate the issue of probable cause and hold a separate evidentiary hearing on that issue is without merit.

II

The plaintiff next claims that the trial court erred in granting the defendant's motion to strike her CUTPA claim asserted in count three of her complaint. The plaintiff maintains that she pleaded sufficient facts to allege that the defendant's conduct during the relevant period related to the entrepreneurial aspects of the practice of law and that, therefore, her claim fell within the entrepreneurial exception to CUTPA immunity for an attorney's representation of a client. We disagree.

We begin by setting forth our standard of review and relevant legal principles. "Because a motion to strike

challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Dressler* v. *Riccio*, 205 Conn. App. 533, 537–38, 259 A.3d 14 (2021).

The following procedural history is relevant to our resolution of this claim. In support of her CUTPA claim, the plaintiff alleged in relevant part that (1) "[the defendant] advertises to clients that he specializes in recovering debts," and (2) "[i]n collecting the debt as part of his practice, [the defendant] used false and misleading information and unethical practices." In his memorandum of law in support of his motion to strike, the defendant argued that the plaintiff failed to allege "any deceptive, unfair, immoral or unscrupulous acts or omissions that relate to the entrepreneurial aspects of the practice of law." The defendant also argued that, to the extent that the plaintiff alleged that the defendant used "misleading information and unethical practices" in "collecting the debt," it was "merely a complaint about the way [the defendant] prosecuted the [foreclosure action]" and was "not an allegation that he engaged in deceptive advertising or billing practices." In her memorandum of law in opposition to the defendant's motion to strike, the plaintiff argued in relevant part that the defendant's conduct (1) amounted to extortion, such that she had pleaded sufficient facts to allege a violation of CUTPA, and (2) should be subject to CUTPA liability as a matter of public policy.

In granting the defendant's motion to strike, the court, *Stevens*, *J.*, determined that "the plaintiff's allegations

are insufficient to support a claim that the defendant engaged in entrepreneurial as compared to representational conduct necessary for CUTPA liability. An attorney's actions to recover money purportedly owed to a client does not remove the attorney-client relationship, and the present matter is distinct from situations where courts have held that an attorney's unfair billing practices fit within the entrepreneurial exception to an attorney's representational immunity under CUTPA. Specifically, the plaintiff provides no controlling or pertinent legal authority to support her contention that an attorney representing a client seeking to collect a debt somehow subjects the attorney to CUTPA liability. . . . Thus, the defendant's motion to strike count three of the complaint asserting a claim under CUTPA is granted." (Citations omitted.)

"Pursuant to CUTPA, [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. General Statutes § 42-110b (a). Our Supreme Court has stated that, in general, CUTPA applies to the conduct of attorneys. . . . The statute's regulation of the conduct of any trade or commerce does not totally exclude all conduct of the profession of law. . . . Nevertheless, [our Supreme Court has] declined to hold that every provision of CUTPA permits regulation of every aspect of the practice of law . . . . [Our Supreme Court has] stated, instead, that, only the entrepreneurial aspects of the practice of law are covered by CUTPA." (Internal quotation marks omitted.) *Dressler* v. *Riccio*, supra, 205 Conn. App. 539.

"[A]lthough all lawyers are subject to CUTPA, most of the practice of law is not. The entrepreneurial exception is just that, a specific exception from CUTPA immunity for a well-defined set of activities—advertising and bill collection, for example. . . . It is not a catch-all provision intended to subject any arguably improper

attorney conduct to CUTPA liability. . . . Our CUTPA cases illustrate that the most significant question in considering a CUTPA claim against an attorney is whether the allegedly improper conduct is part of the attorney's professional representation of a client or is part of the entrepreneurial aspect of practicing law." (Citations omitted; internal quotation marks omitted.) Id., 540.

Guided by these principles, we conclude that the plaintiff failed to plead a viable CUTPA claim because she did not allege that the defendant engaged in deceptive acts or practices concerning the entrepreneurial aspects of the practice of law. In support of count three of her complaint asserting a violation of CUTPA, the plaintiff first alleged that the defendant "advertises to clients that he specializes in recovering debts," but she did not allege that such advertisement was deceptive or that it related in some other way to the entrepreneurial aspects of the practice of law. The plaintiff next alleged that the defendant "used false and misleading information and unethical practices," which suggests only that the defendant engaged in specific professional conduct over the course of his representation of the Workshop and which does not concern the entrepreneurial aspects of the practice of law. See *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 79, 717 A.2d 724 (1998) (attorney professional conduct in context of client representation "does not fall under CUTPA" (internal quotation marks omitted)).

In sum, we conclude that the court properly granted the defendant's motion to strike count three of the plaintiff's complaint asserting a violation of CUTPA.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN T. COCHRAN *v.* DEPARTMENT OF TRANSPORTATION (AC 45531)

Alvord, Moll and Cradle, Js.

Syllabus

Pursuant to statute (§ 31-307 (a)), "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

The defendant appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner awarding the plaintiff temporary total disability benefits, pursuant to § 31-307 (a), to commence retroactively. The plaintiff, who sustained a compensable back injury in 1994 while employed by the defendant, accepted an incentivized early retirement benefits package from the defendant in 2003. The plaintiff had no intention of returning to the workforce upon leaving state service and taking his retirement and did not ever return to the workforce. In 2015, he sought a workers' compensation hearing to discuss medical treatment, reimbursement of expenditures, and settlement. The commissioner determined that the plaintiff was entitled to, inter alia, temporary total disability benefits commencing December 30, 2017, reasoning that he had established through nonphysician vocational rehabilitation expert testimony that he was unemployable as of that date. *Held* that the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on December 30, 2017: the plain and unambiguous language of § 31-307 (a) did not entitle the plaintiff to temporary total disability benefits when he had elected early retirement and never intended to reenter the workforce because it could not be said that his injury resulted in his total incapacity to work or that he had any wage loss or experienced any loss of earning power; moreover, the plaintiff's claim that § 31-307 (a) indicates that an injured worker "shall" be paid a weekly compensation regardless of the reason for leaving the workforce and without having demonstrated any intention to return was unreasonable, as that construction disregarded the prefatory language of the provision that requires that, for an injury to be eligible, it must result in "total incapacity to work"; furthermore, because the statutory purpose of an award of temporary total disability benefits pursuant to § 31-307 (a) is to compensate a claimant for wage loss or loss of earning power, an award to the plaintiff, who elected to retire with no intention of returning to the workforce, would not effectuate the statutory purpose.

Argued May 16—officially released August 8, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District awarding certain disability benefits to the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Cynthia Sheppard, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Joshua Perry*, solicitor general, for the appellant (defendant).

James H. McColl, Jr., for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, the Department of Transportation, appeals from the decision of the Compensation Review Board (board) affirming the award of benefits under General Statutes § 31-307 (a), by the Workers' Compensation Commissioner for the Third District (commissioner)[1] to the plaintiff, Stephen T. Cochran, to commence retroactively on December 30, 2017, and for a three month period following a surgery in April, 2013. On appeal, the defendant claims that the board erred in upholding the commissioner's decision to award temporary total disability benefits because the plaintiff, pursuant to the language of § 31-307 (a), was

[1] We note that, in 2021, the legislature enacted No. 21-18 of the 2021 Public Acts (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.

not entitled to those benefits. We agree with the defendant and, accordingly, reverse the decision of the board.[2]

The following facts, as found by the commissioner or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On November 9, 1967, the plaintiff began working as a laborer/part-time driver for the defendant as an entry-level employee. Throughout his term of employment with the defendant, the plaintiff was promoted on several occasions and held various positions including transportation general supervisor, operations superintendent, maintenance operations supervisor, and transportation maintenance director.

In June, 1993, the plaintiff was working as a transportation general supervisor and was responsible for overseeing one garage with a crew of thirty employees. That year, the plaintiff underwent two noncompensable back surgeries, the first in June, 1993, and the second in October, 1993.[3] Following each of those surgeries, the plaintiff returned to work with the defendant.

In January, 1994, while in the role of transportation general supervisor, the plaintiff sustained an injury to

[2] In support of its claim that the board erred in affirming the commissioner's decision to retroactively award the plaintiff a three month period of § 31-307 (a) benefits following his April, 2013 surgery, the defendant renews its claim that the plaintiff is not entitled to any temporary total disability benefits. In the alternative, the defendant claims that "this court should reverse the board's award" because "[b]enefits are unavailable after unauthorized out-of-state treatment absent a . . . [commissioner's] determination that the treatment was reasonable, necessary, and unavailable in Connecticut . . . [and] [n]o such determination was made here." In light of our conclusion that the plaintiff was not entitled to temporary total disability benefits commencing on December 30, 2017, for the reasons set forth in this opinion, the plaintiff necessarily was precluded from entitlement to § 31-307 (a) benefits following his April, 2013 surgery, and, thus, we need not address the defendant's alternative claim on appeal. See footnotes 8 and 10 of this opinion.

[3] It is undisputed that the plaintiff never sought any workers' compensation benefits related to these 1993 surgeries.

his lumbar spine while lifting a tractor-trailer tire weighing 300 to 400 pounds over a Jersey barrier[4] on Interstate 84. In the process of lifting the tire, the plaintiff fell over the Jersey barrier. When he stood up, the plaintiff felt a twinge in his back. That night, the plaintiff filed an accident report, and some time thereafter, he sought medical treatment at a designated facility for a workplace injury (January, 1994 injury).[5] The plaintiff continued to work following the January, 1994 injury.

In June, 1994, the plaintiff experienced an onset of severe back pain. Shortly thereafter, the plaintiff underwent lower back surgery, performed by Glenn Taylor, an orthopedic surgeon, which the defendant accepted (June, 1994 surgery). Following the June, 1994 surgery, the plaintiff was out of work for approximately six weeks. The plaintiff then returned to work in his regular position with the defendant. The plaintiff began pain management treatment with Mark Thimineur, a physician, in 1995. The plaintiff stopped the pain management treatment with Dr. Thimineur in 2016.

In April, 1995, the plaintiff had another back surgery performed by Dr. Taylor, to remove hardware that had been implanted in his back, which the defendant accepted. The plaintiff then returned to work one week later in his regular position with the defendant.

On April 12, 1995, the defendant issued a voluntary agreement form accepting the plaintiff's January, 1994

[4] A Jersey barrier is "a concrete slab [thirty-two] inches high with slanted sides that is used in tandem with others to block or reroute traffic or to divide highways." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 671.

[5] We note that the record reflects conflicting dates regarding the date of the plaintiff's January, 1994 injury, a discrepancy that the board also noted. The voluntary agreement identifies the date of injury as January 1, 1994. The plaintiff testified that, although the report indicates the incident occurred on January 1, 1994, it did not occur on that date, but it did occur in January, 1994. Accordingly, we refer to the injury as occurring in January, 1994, throughout this opinion.

injury as compensable and acknowledging that the plaintiff was entitled to a permanent partial disability award of 29.5 percent to the lumbar spine.

On April 1, 2003, the plaintiff, who was then fifty-four years old, accepted an incentivized early retirement benefits package offered by the defendant. At that point, the plaintiff had worked for the defendant for thirty-six years, and he was employed as a transportation maintenance director. The plaintiff had no intention of returning to the workforce upon leaving state service and taking his retirement.

In 2005, the plaintiff obtained two workers' compensation administrative hearings in which he sought a return visit to Dr. Taylor and reimbursement for his payments for pain medication. The defendant authorized the medical care and payments and agreed to cover additional testing and follow-up care recommended by Dr. Taylor.

On March 14, 2012, the plaintiff sought treatment from Federico P. Girardi, a surgeon, at the Hospital for Special Surgery in Manhattan, New York. It is undisputed that the plaintiff did not seek authorization or notify the defendant prior to seeking treatment with Dr. Girardi. The plaintiff scheduled a back surgery with Dr. Girardi for June, 2012, but later cancelled the surgery. In January, 2013, the plaintiff returned to Dr. Girardi for a surgical consult because his back pain had returned. On April 2, 2013, the plaintiff underwent back surgery with Dr. Girardi (April, 2013 surgery).

On March 15, 2015, the plaintiff sought a workers' compensation hearing to discuss medical treatment, reimbursement of expenditures, and settlement. The commissioner held evidentiary hearings on October 31, 2019, and February 27, July 22, September 8 and October 5, 2020. During the hearings, the commissioner heard testimony from the plaintiff and the plaintiff's

wife. The parties also introduced into evidence various exhibits, the majority of which were evaluations, reports, and deposition testimony from various providers whom the plaintiff had seen since he sought the workers' compensation hearing in March, 2015. Additionally, the commissioner took administrative notice of several prior notices for hearings and filings.

During the hearings, when asked by his counsel whether his "back symptomology" impacted his job duties prior to his retirement, the plaintiff testified that "[i]t just got to a point where I was in pain all day and I was taking these medications. Eventually, it would have got me in big trouble, you know, taking all this medication on company time." Additionally, the plaintiff testified that the defendant "offered an early retirement" and he took a "regular retirement as opposed to a disability retirement." The plaintiff acknowledged that his retirement involved his acceptance of an incentivized early retirement benefits package, a "golden handshake," and that his acceptance of the incentivized early retirement benefits package meant that "[t]here was more money." Moreover, when asked by counsel for the defendant whether he "intend[ed] to work anywhere else after leaving state service and taking [his] state retirement," he responded, "No." He further testified that, since his retirement, he had not had any contact with the defendant. Specifically, he indicated that he had not asked the defendant to rescind his retirement, whether he could work 120 days per year, whether he could work part-time, or whether he could work from home. Additionally, he testified that, prior to retiring, he had not asked the defendant to "perform a less arduous duty search for [him]" or "accommodate [him] so that [he] could continue to work." Moreover, he testified that, since he retired, he had not sought rehabilitation services for assistance in finding a sedentary job or requested assistance from anyone in finding a job

he could do part-time or from home. The plaintiff's wife testified that, when the plaintiff retired in 2003, "he was still pretty functional . . . . He got up, got ready, went to work." Additionally, she testified that, since the plaintiff retired, his back condition has deteriorated over time.

On July 24, 2017, Phillip S. Dickey, a neurosurgeon, performed a commissioner's examination of the plaintiff and reviewed medical records as part of his examination, following which he concluded that the plaintiff had "the lightest of work capacity." On December 12, 2017, Albert Sabella, a rehabilitation counselor, performed a vocational assessment of the plaintiff at the office of the plaintiff's attorney. On December 30, 2017, Sabella authored a report in which he opined that, "[b]ased on [his] review of the medical record, assessment interview, occupational and labor market analysis, it is [his] opinion that [the plaintiff] has formidable employment barriers including substantial physical restrictions, age, prolonged absence from the workforce, no useful transferable or marketable vocational ability and ongoing chronic pain. He continues to take narcotic medication and would not pass a drug screen. . . . [I]t is more likely than not, that based on [the plaintiff's] vocational profile, he is unable to compete for appropriate work within his physical capabilities, find an employer who will hire him, or to maintain employment on a sustainable basis."

Following the hearings, both parties submitted posttrial briefs, in which the plaintiff sought, inter alia, "temporary total disability benefits retroactive to 2003, and/or postspecific wage loss benefits," and the defendant contested the plaintiff's claim for benefits and "asserted that any temporary total [disability] benefits owed would be offset by [the plaintiff's] retirement Social Security benefits [and] contested the compensability of

the [April, 2013] surgery, as well as the nature and extent of the [plaintiff's] current disability."

On April 23, 2021, the commissioner issued her findings and decision. The commissioner concluded that the plaintiff "is entitled to temporary total [disability] benefits for the three month period following his 2013 surgery . . . [and] is entitled to temporary total [disability] benefits commencing December 30, 2017." The commissioner stated that she "do[es] not award benefits pursuant to General Statutes § 31-308a [governing benefits for partial permanent disability] as [the plaintiff] did not meet his burden in establishing that he was willing to perform work in the state, nor did he establish he is currently able to perform work in the state." She found "that for the three month period subsequent to his [April, 2013] surgery, [the plaintiff] is entitled to temporary total [disability] benefits as he demonstrated through medical testimony that he was totally disabled during this time and that the surgery was related to his 1994 date of injury." Additionally, she found "that, from April 1, 2003, until December 30, 2017 (with the exception of the three month post [April, 2013 surgery] time period . . .), [the plaintiff] did not meet his burden in proving he was entitled to temporary total [disability] benefits as he did not demonstrate he actively sought employment during this time but could not secure any, nor did he demonstrate through persuasive nonphysician vocational rehabilitation expert or medical testimony that he was unemployable during this time period." Therefore, the commissioner concluded that, "[b]ased on the totality of the evidence submitted, [the plaintiff] established that his condition deteriorated over time since 2003, and he has met his burden that he is entitled to temporary total [disability] benefits as of December 30, 2017, because he established through persuasive nonphysician vocational rehabilitation expert testimony that he was unemployable as of that

date."[6] In support of her findings, the commissioner found "the opinion of . . . Sabella persuasive to the issues before [her] because his opinion, from a vocational perspective, that [the plaintiff] is without a work capacity is consistent with the balance of the record, including the [functional capacity evaluation] evidence, and Dr. Dickey's opinion that [the plaintiff] has 'the lightest of work capacities.' "[7]

On May 11, 2021, the defendant appealed to the board, claiming, inter alia,[8] that the commissioner misapplied

[6] The commissioner also ordered the defendant "to pay benefits to compensate [the plaintiff] for the increased permanent partial disability to his lumbar spine." In support of her decision, the commissioner found that, "[b]ased on the totality of the evidence submitted, [the plaintiff] has met his burden that, as of July 24, 2017, the permanent partial disability to his lumbar spine increased to 40 percent" and specifically credited Dr. Dickey's opinion "that the [plaintiff] has sustained an increased permanent partial disability to his lumbar spine."

[7] On April 26, 2021, the defendant filed a motion to correct, in which it requested that the commissioner correct several of her findings and amend her conclusions, the majority of which were directed at the commissioner's determination that the defendant was responsible for the plaintiff's April, 2013 surgery with Dr. Girardi. The plaintiff filed an objection to the defendant's motion to correct. On April 28, 2021, the commissioner granted the defendant's motion to correct to the extent that it sought a correction of a scrivener's error, but denied the remainder of the defendant's requests as "unnecessary."

[8] The defendant also claimed that the "commissioner misapplied the law when she ordered the payment of [temporary] total disability benefits following unauthorized medical treatment from an out-of-network, out-of-state provider." The board disagreed, stating that the "determination of what constitutes reasonable or necessary medical care is a factual determination [which] . . . is squarely within the purview of the trial commissioner." The board noted that the commissioner had "conclude[d] that the [plaintiff] had established his eligibility for three months of postsurgery temporary total disability benefits by way of persuasive medical testimony demonstrating that he was totally disabled during this time period and that 'the surgery was related to his 1994 date of injury.' " Therefore, the board concluded that "it may be reasonably inferred that the decision of the [commissioner] to award temporary total disability benefits for this time period was logically predicated on her conclusion that the [April, 2013] surgery constituted reasonable and necessary medical treatment."

The defendant also raises this claim on appeal and argues that "[b]enefits are unavailable after unauthorized out-of-state treatment absent [a commis-

the law when she "ordered the payment of [temporary] total disability benefits ad infinitum despite the [plaintiff] having taken a voluntary incentive retirement program in 2003 and not having suffered any loss of earning capacity."

On May 6, 2022, the board affirmed the commissioner's decision. The board disagreed with the defendant's claim that the award of ongoing temporary total disability benefits as of December 30, 2017, was erroneous because the award contravenes the original intent of § 31-307 and the plaintiff acknowledged that he had no intention of returning to the workforce following his retirement. The board stated that § 31-307 "in its current form imposes no constraints on a claimant's ability to collect temporary total disability benefits due to retirement status; rather it mandates that the injured claimant '*shall* be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of injury.' . . . Given that we do not consider this statutory language in any way ambiguous, we are therefore compelled by the provisions of General Statutes § 1-2z to give the 'plain language' of the statute its full force and effect." (Emphasis in original; footnote omitted.) Moreover, the board concluded that the portions of the evidentiary record that the commissioner found persuasive, namely Sabella's vocational report and deposition testimony, which were introduced into evidence by the plaintiff, in addition to the testimony of the plaintiff and his wife, provided an adequate basis for supporting the award. Finally, the board noted that our Supreme Court's decision in *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 801 A.2d

sioner's] determination that the treatment was reasonable, necessary, and unavailable in Connecticut. No such determination was made here." Because we reverse the board's decision affirming the commissioner's award of temporary total disability benefits following the plaintiff's April, 2013 surgery, we need not address the defendant's claim. See footnote 2 of this opinion.

783 (2002), further supported the commissioner's decision. Specifically, the board pointed to language in *Laliberte* in which our Supreme Court stated that "§ 31-307 (a) contains no provision permitting the discontinuance of the total disability benefits of an injured employee based on his incarceration . . . [and] that it is not the court's role to acknowledge an exclusion when the legislature painstakingly has created such a complex statute. . . . The complex nature of the workers' compensation system requires that policy determinations be left to the legislature, not the judiciary." (Citations omitted; internal quotation marks omitted.) Therefore, the board concluded that "we find no error on the part of the [commissioner] in awarding ongoing temporary total disability benefits to the [plaintiff] consistent with the evidentiary record in this matter." This appeal followed.

The defendant claims that the board erred in affirming the commissioner's decision awarding the plaintiff ongoing temporary total disability benefits, pursuant to § 31-307 (a), beginning on December 30, 2017. Specifically, the defendant argues that "the 'plain and unambiguous' meaning of . . . § 31-307 denies [temporary total disability] benefits to voluntary retirees, like [the plaintiff], who have no wages to replace and whose departure from the workforce initially resulted from their own choice, not their disability." Although the plaintiff agrees that the language of § 31-307 (a) is plain and unambiguous, he argues that the statute mandates temporary total disability benefits and points to the language "shall be paid" to support his assertion that the defendant is "attempting to insert barriers to temporary total disability benefits that the legislature considered but did not include within § 31-307." We agree with the defendant.

We first set forth our standard of review. "The principles that govern our standard of review in workers'

compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Clark* v. *Waterford*, *Cohanzie Fire Dept.*, 346 Conn. 711, 724, 295 A.3d 889 (2023). "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Whe[n] . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision. . . . Because this appeal raises an issue of statutory construction that is of first impression for this court, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Bergeson* v. *New London*, 269 Conn. 763, 769, 850 A.2d 184 (2004).

Our review of the defendant's claim is guided by the well established principles of statutory construction. "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 . . . . In seeking to determine that meaning . . . § 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." (Internal quotation marks omitted.) *Vitti* v. *Milford*, 336 Conn. 654, 660, 249 A.3d 726 (2020). "Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *In re Amanda C.*, 218 Conn. App. 731, 741, 292 A.3d 1269, cert. denied, 347 Conn. 904, A.3d (2023). "Furthermore, it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results. . . . Consequently, [i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended . . . and, further, if there are two [asserted] interpretations of a statute, we will adopt the . . . reasonable construction over [the] one that is unreasonable." (Citations omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010).

In accordance with § 1-2z, we begin our analysis with the plain language of § 31-307 (a), which provides in relevant part that, "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

We conclude that the plain and unambiguous language of § 31-307 (a) requires that, in order to be eligible for temporary total disability benefits, a claimant's "injury . . . [result] in total incapacity to work." General Statutes § 31-307 (a). "Our Supreme Court has defined total

incapacity to work as the inability of the employee, *because of his injuries*, to work at his customary calling or at any other occupation he might reasonably follow." (Emphasis added; internal quotation marks omitted.) *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 550, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013). Accordingly, the plaintiff, who elected to retire from employment and thereby received an incentivized early retirement benefits package and affirmatively conceded that he had no intention of returning to the workforce, was not entitled to temporary total disability benefits pursuant to the statute.

The plaintiff testified that the defendant offered him an incentivized early retirement benefits package, which he accepted at age fifty-four. He further testified that, following his retirement on April 1, 2003, he had no intention of returning to the workforce. Additionally, the commissioner found that, "from April 1, 2003, until December 30, 2017 . . . [the plaintiff] did not meet his burden in proving that he was entitled to temporary total [disability] benefits, as he did not demonstrate he actively sought employment during this time, but could not secure any . . . ." The commissioner's finding is supported by the plaintiff's testimony that he did not pursue any rehabilitation services, did not request alternative working conditions from the defendant, such as part-time work, and did not request to rescind his retirement. The commissioner determined, however, that, as of December 30, 2017, the plaintiff was entitled to § 31-307 (a) benefits "because he established through persuasive nonphysician vocational rehabilitation expert testimony that he was unemployable as of that date." Although "[w]e will not, on appeal, disturb the commissioner's credibility determinations"; *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 construction given to the workers' compensation statutes by the commissioner and [the] board . . . is not entitled . . . to special deference when [their] determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Bergeson* v. *New London*, supra, 269 Conn. 769. Accordingly, we conclude that the plain and unambiguous language of § 31-307 (a) does not entitle the plaintiff to temporary total disability benefits where he elected to take an incentivized early retirement benefits package and never intended to reenter the workforce because it cannot be said that his injury *resulted* in his total incapacity to work. Therefore, we agree with the defendant that the board's affirmance of the commissioner's determination that the plaintiff was entitled to ongoing § 31-307 (a) benefits beginning on December 30, 2017, was contrary to the plain and unambiguous language of the statute.

Additionally, our plain language analysis is supported by the relationship between § 31-307 and other pertinent statutes in the Workers' Compensation Act, General Statutes § 31-275 et seq.; see General Statutes § 1-2z; and precedent from our Supreme Court. "Benefits available under the [Workers' Compensation Act] serve the dual function of compensating for the disability arising from the injury *and for the loss of earning power* resulting from that injury. . . . Compensation for the disability takes the form of payment of medical expenses . . . and specific indemnity awards . . . . *Compensation for loss of earning power* takes the form of partial or total incapacity benefits." (Citations omitted; emphasis added; internal quotation marks omitted.) *Starks* v. *University of Connecticut*, 270 Conn. 1, 8–9, 850 A.2d 1013 (2004). Our Supreme Court has "recognized a distinction between benefits awarded under the [Workers' Compensation Act] to *compensate for wage loss* and those awarded to compensate for the loss, or

loss of use, of a body part. . . . Total or partial incapacity benefits fall into the first category. See General Statutes §§ 31-307 and 31-308 (a)." (Citations omitted; emphasis added.) *Pizzuto* v. *Commissioner of Mental Retardation*, 283 Conn. 257, 267, 927 A.2d 811 (2007). Our Supreme Court further has distinguished between "permanent partial disability" benefits pursuant to § 31-308 and "temporary total incapacity" benefits pursuant to § 31-307. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 193, 8 A.3d 507 (2010) (The court noted that, because §§ 31-307 and 31-308 benefits "compensate an employee for distinct losses, entitlement to the two benefits is triggered by different factors. Entitlement to incapacity benefits depends on the employee's capacity to work. General Statutes §§ 31-307 (a) and 31-308 (a).").

Where a claimant elects to retire with no intention of returning to the workforce, fails to pursue any employment, and subsequently seeks § 31-307 (a) benefits, an award of temporary total disability benefits would not effectuate the statutory purpose of compensating the claimant for "wage loss"; *Pizzuto* v. *Commissioner of Mental Retardation*, supra, 283 Conn. 267; or " 'loss of earning power . . . .' " *Starks* v. *University of Connecticut*, supra, 270 Conn. 8. In the present case, the plaintiff elected an incentivized early retirement benefits package in April, 2003. It was the plaintiff's testimony that he had no intention of returning to the workforce upon retirement and, in fact, he did not pursue or intend to pursue any employment thereafter. Accordingly, at the time the commissioner determined in 2021 that the plaintiff was retroactively entitled to temporary total disability benefits, as of December 30, 2017, it cannot be said that the plaintiff had any "wage loss" or that he had experienced any "loss of earning power."

The plaintiff argues that the plain and unambiguous language of § 31-307 (a) mandates an award for temporary total disability benefits by emphasizing the phrase in the statute, "the injured worker *shall be paid* a weekly compensation." (Emphasis in original.) The plaintiff's singular focus on that phrase of the statute ignores the prefatory language of § 31-307 (a), "injury . . . results in total incapacity to work." As previously set forth, the operative provision of § 31-307 (a), which we are tasked with interpreting, requires that, to be eligible for temporary total disability benefits, the claimant's "injury . . . results in total incapacity to work." A construction of the statute that effectively disregards the "results in total incapacity to work" provision, in favor of an interpretation that an injured worker "shall" under all circumstances, regardless of his reason for leaving the workforce and without having demonstrated any intention to return, be entitled to § 31-307 (a) benefits would be unreasonable. See *State* v. *Courchesne*, supra, 296 Conn. 710 ("if there are two [asserted] interpretations of a statute, we will adopt the . . . reasonable construction over [the] one that is unreasonable" (internal quotation marks omitted)).[9]

Additionally, the plaintiff relies on our Supreme Court's opinion in *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 181, to support his argument that "there are no restrictions on temporary total disability benefits contained within § 31-307, whether for incarceration or retirement." We are not persuaded. In *Laliberte*, our Supreme Court was tasked with determining, as a matter of first impression, "whether workers' compensation benefits for temporary total disability [pursuant to § 31-307 (a)] may be discontinued when the recipient is incarcerated." (Footnote omitted.) Id., 182–83.

[9] The plaintiff briefly suggests that other provisions in the statutory scheme support his interpretation of § 31-307 (a). Our review of his arguments does not impact our conclusion that his interpretation is unreasonable.

Following a second work-related injury, the plaintiff was awarded benefits pursuant to § 31-307 (a) in 1990. Id., 184. In 1999, the defendant Second Injury Fund sought to discontinue the plaintiff's benefits because he was incarcerated at that time. Id. On appeal, the defendant claimed that "the plaintiff's incarceration permits [it] to discontinue workers' compensation benefits because his inability to work is caused by his incarceration." Id. The plaintiff argued that "it [was] his disability, and not his imprisonment, that preclude[d] him from working." Id. Our Supreme Court agreed, stating that "§ 31-307 (a) contains no provision permitting the discontinuance of total disability benefits of an injured employee based on his incarceration. . . . The plaintiff has been found to be, and remains, totally incapable of working due to his disability. The statute does not address inability to work because of incarceration. As a result, no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself." Id., 186.

As the plaintiff acknowledges, the facts in *Laliberte* are discernably different from the present case. The defendant aptly distinguishes the present case from *Laliberte* by stating, "The *Laliberte* claimant was totally disabled by injury before his . . . incarceration and remained totally disabled throughout. If he had not been incarcerated, he still would have been out of the workforce—even if he wanted to work and sought work. In contrast, [the plaintiff] removed himself from the workforce. He was working full duty when he chose to retire. The reason he has no wages to replace is that he chose to take his pension and Social Security retirement benefits instead." Our Supreme Court's repeated use of the phrase "discontinuance of benefits" in *Laliberte* summarizes the distinction between the claimant in that case and the plaintiff in the present

case and further underscores the validity of our interpretation of § 31-307 (a). In *Laliberte*, the plaintiff's work injury resulted in his removal from the workforce, and, at that time, he began receiving his § 31-307 (a) benefits, which the defendant sought to *discontinue* when the plaintiff subsequently was incarcerated. *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 184. The fact that the plaintiff in *Laliberte* became incarcerated while he was receiving § 31-307 (a) benefits, however, did not permit the defendant to discontinue payment of the plaintiff's temporary total disability benefits because his injury initially resulted in his total incapacity to work and he would have been unable to seek and/or obtain employment at any point in time, whether or not he was incarcerated for a period of time. Id., 186. The circumstance of the plaintiff in the present case is completely different. He elected to remove himself from the workforce, where he had no intention of returning, and more than ten years later sought to *obtain* § 31-307 (a) benefits. We cannot conclude that the plaintiff is entitled to § 31-307 (a) benefits when he removed himself from the workforce with no intention of returning.

For the foregoing reasons, we conclude that the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on December 30, 2017.[10]

The decision of the Compensation Review Board is reversed and the case is remanded to the board with

[10] The defendant also claims that the board erred in affirming the commissioner's decision to retroactively award the plaintiff temporary total disability benefits pursuant to § 31-307 (a) for a three month period following his April, 2013 surgery because "[the plaintiff] is not entitled to any temporary total [disability] benefits." We agree with the defendant and, accordingly, conclude that the plaintiff also was not entitled to § 31-307 (a) benefits following his April, 2013 surgery for the same reason that he was not entitled to ongoing benefits retroactive to December 30, 2017. See footnote 2 of this opinion.

direction to reverse the decision of the commissioner with respect to the award of temporary total disability benefits to the plaintiff.

In this opinion the other judges concurred.

LOUIS MARTINOLI *v.* STAMFORD POLICE DEPARTMENT ET AL.
(AC 45229)

Alvord, Moll and Cradle, Js.

Syllabus

The defendant appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner awarding the plaintiff temporary total disability benefits pursuant to statute (§ 31-307 (a)), to commence retroactively. In January, 1999, the plaintiff, a former member of the defendant police department, established a compensable claim for coronary artery disease, hypertension, and congestive heart failure pursuant to statute (§ 7-433c). Thereafter, in October, 1999, the plaintiff retired from the defendant with no intention of ever returning to the workforce. In 2015, when he was eighty years old, the plaintiff developed atrial fibrillation and sustained a stroke, which the commissioner concluded was compensable. The commissioner subsequently determined that the plaintiff was entitled to temporary total disability benefits commencing July 15, 2015. *Held* that, on the basis of this court's reasoning in *Cochran* v. *Dept. of Transportation* (220 Conn. App. 855), which held that, where a claimant retires without any intention of returning to the workforce and does not return to the workforce, he or she is not entitled to temporary total disability benefits pursuant to § 31-307 (a) because it cannot be said that the claimant's injury resulted in total incapacity to work, the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on July 15, 2015, the plaintiff having previously elected to retire from his employment with the defendant with no intention to return to the workforce after retirement.

Argued May 16—officially released August 8, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District awarding the plaintiff certain disability benefits, brought to the

Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Reversed*; *judgment directed*.

Scott W. Williams, for the appellants (defendants).

Andrew J. Morrissey, for the appellee (plaintiff).

Opinion

ALVORD, J. The named defendant,[1] the Stamford Police Department (department), appeals from the decision of the Compensation Review Board (board) affirming the award of benefits under General Statutes § 31-307 (a), by the Workers' Compensation Commissioner for the Seventh District (commissioner)[2] to the plaintiff, Louis Martinoli, to commence retroactively on July 15, 2015. On appeal, the defendant claims, inter alia, that the board erred in affirming the commissioner's decision to award temporary total disability benefits because the plaintiff, pursuant to the language of § 31-307 (a), was not entitled to those benefits.[3] We agree

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

[2] We note that, in 2021, the legislature enacted No. 21-18, §1, of the 2021 Public Acts (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.

[3] On appeal, the defendant also raises, in the alternative, two other claims. First, the defendant claims that the board erred in determining that temporary total disability benefits shall be paid pursuant to a minimum compensation rate as of July 15, 2015, the date of total incapacity, as opposed to January 19, 1999, the date of injury. Second, the defendant claims that the board failed to find that any temporary total disability benefits paid to the claimant after the May 10, 2016 date of maximum medical improvement would be a credit against the increase in the permanent partial impairment award. In light of our conclusion that the plaintiff was not entitled to tempo-

with the defendant and, accordingly, reverse the decision of the board.

The following facts, as found by the commissioner or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On November 26, 1975, the plaintiff became a "regular member" of the department. On January 19, 1999, the plaintiff established a compensable claim for coronary artery disease, hypertension, and congestive heart failure pursuant to General Statutes § 7-433c.[4] On March 3, 1999, the plaintiff underwent quadruple bypass surgery performed by Daniel M. Rose, a surgeon.

On October 15, 1999, at age sixty-four, the plaintiff retired from the department. Following his retirement, the plaintiff never intended to return to the workforce, and he has not worked for any employer since that date.

On July 15, 2015, when he was eighty years old, the plaintiff "was admitted to the hospital with mid-abdominal pain after eating a heavy meal of fatty foods, developed atrial fibrillation, and proceeded to sustain a stroke" (July, 2015 events). The defendant contested compensability of the July, 2015 events "based on the fact that the atrial fibrillation and subsequent stroke

rary total disability benefits commencing on July 15, 2015, we need not address the defendant's alternative claims.

[4] General Statutes § 7-433c (a) provides, in relevant part, that, "in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment . . . ."

manifested after retirement." On May 4, 2018, following a formal hearing, the commissioner concluded that the plaintiff's "claim for compensability and benefits for his atrial fibrillation and stroke is compensable as it flowed from the underlying accepted claims of hypertension, coronary artery disease, and congestive heart failure."[5]

At some point thereafter, the plaintiff sought benefits, pursuant to § 31-307, from the defendant. On September 1 and November 10, 2020, the commissioner held hearings to determine whether the plaintiff was entitled "to temporary total disability benefits in light of the fact that his total disability status commenced at a time when he was retired." The parties stipulated that the plaintiff "has been temporary totally disabled since July 15, 2015," but disagreed as to whether the plaintiff was entitled to § 31-307 benefits. During the hearings, the commissioner heard testimony from the plaintiff and the plaintiff's daughter. Additionally, the plaintiff introduced into evidence six exhibits consisting of reports from various medical providers.

On March 11, 2021, the commissioner issued her findings and decision.[6] The commissioner concluded that "§ 31-307 is clear. If a claimant becomes totally disabled, they 'shall' receive weekly benefits. . . . Pursuant to

[5] The defendant appealed from the commissioner's decision to the board, which affirmed the commissioner's determination. See *Martinoli* v. *Stamford Police Dept.*, 6271 CRB 7-18-5 (April 24, 2019). The defendant appealed from the board's affirmance to this court but subsequently withdrew its appeal following the release of our Supreme Court's decision in *Dickerson* v. *Stamford*, 334 Conn. 870, 224 A.3d 1156 (2020), which allowed for flow-through causation in § 7-433c cases.

[6] Therein, the commissioner found that, "[p]ursuant to a stipulated finding and award approved on September 7, 2018, the [plaintiff] was paid an increased 19.25 [percent] permanent partial impairment to the heart, for a then total impairment of 63 [percent], utilizing a May 10, 2016 date of maximum medical improvement."

. . . § 31-307, it is irrelevant whether or not the claimant was working at the time he becomes totally disabled. . . . The [plaintiff] has been totally disabled since July 15, 2015." Accordingly, the commissioner determined that "[t]he [defendant] shall provide the [plaintiff] with temporary total disability benefits commencing July 15, 2015 . . . ."[7]

On March 24, 2021, the defendant appealed to the board, claiming, inter alia, that the commissioner "erred in determining that the [plaintiff] was entitled to temporary total disability benefits after retiring and having no intention to ever reenter the workforce." Oral argument before the board was held on July 30, 2021.

On January 11, 2022, the board affirmed the commissioner's decision. The board reiterated the defendant's argument "that the phrase in [§ 31-307] 'total incapacity to work' implies that the claimant, at the time of their injury and/or disability, was either working or seeking work, and to compensate someone not seeking employment in the same manner as those who were creates an absurd or bizarre result." The board disagreed, stating that "binding precedent interpreting this statute has eliminated the necessity to be available for work in order to be eligible for temporary total disability benefits."

In support of its conclusion, the board found controlling our Supreme Court's decision in *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 801 A.2d 783 (2002). Specifically, the board pointed to language in which the court stated, "It is evident that § 31-307 (a) contains no provision permitting the discontinuance of the total

[7] On March 22, 2021, the defendant filed a motion to correct, in which it requested that the commissioner include an additional finding and amend her conclusions. On March 23, 2021, the commissioner issued an amended decision in which she corrected a scrivener's error and included an additional conclusion calling for future hearings to discuss the applicability of a statutory cap pertaining to the award of § 31-307 benefits.

disability benefits of an injured employee based on his incarceration. . . . The statute does not address inability to work because of incarceration. As a result, no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself." Id., 186. Additionally, the board declined the defendant's invitation to adopt the law from other states because it found Connecticut precedent on point. The board concluded by stating, "We believe a reasonable interpretation of the precedent governing eligibility for § 31-307 benefits is that once the claimant proves that he is medically incapable of performing work, his willingness to obtain employment is irrelevant." This appeal followed.

The defendant claims, inter alia, that the board erred in affirming the commissioner's decision awarding the plaintiff temporary total disability benefits, pursuant to § 31-307 (a), commencing on July 15, 2015. The defendant argues that to construe the statutory language of § 31-307 (a), such that a "retiree" with "no intent to return to the workforce" is eligible for temporary total disability benefits, "leads to an unreasonable or bizarre result." The defendant directs this court to case law from other jurisdictions in which courts have "determined that when a claimant is injured, subsequently voluntarily leaves the labor market through retirement, and thereafter has a recurrence or aggravation of their injury that causes total disability, they are not entitled to temporary total disability benefits unless they had re-entered the labor force at the time of the new period of total disability." See *Cutright* v. *Weyerhaeuser Co.*, 299 Or. 290, 302, 702 P.2d 403 (1985); see also *McCoy* v. *Dedicated Transport, Inc.*, 97 Ohio St. 3d 25, 35, 776 N.E.2d 51 (2002). In sum, the defendant argues that, "[f]or the [plaintiff] to be paid, at age eighty, temporary total disability benefits . . . for a loss of earnings from employment when he never planned nor intended to

be employed again . . . leads to a bizarre and unreasonable result."

In response, the plaintiff argues that § 31-307 (a) "is clear and unambiguous" and points to language in § 31-307 (a) that states "the injured worker *shall* be paid a weekly compensation." (Emphasis added.) Additionally, he argues that "[our] Supreme Court and Compensation Review Board have consistently held that, once a claimant proves he is medically incapable of performing work, he *shall* receive this benefit, and willingness or ability to obtain work are irrelevant." (Emphasis added.) We agree with the defendant.

We addressed the plain and unambiguous language of § 31-307 (a) in *Cochran* v. *Dept. of Transportation*, 220 Conn. App. 855, A.3d (2023), also released today,[8] in which the parties raised similar claims and arguments. Applying the principles of statutory interpretation in that case, we concluded that "the plain and unambiguous language of § 31-307 (a) requires that, in order to be eligible for temporary total disability benefits, a claimant's 'injury . . . result[s] in total incapacity to work.' " Id., 867. We held that where a claimant retires without any intention of returning to the workforce and does not return to the workforce, he or she is not entitled to temporary total disability benefits pursuant to § 31-307 (a) because it cannot be said that the claimant's " 'injury . . . results in total incapacity to work.' " Id., 867–68. Accordingly, we reversed the decision of the board affirming the commissioner's award of temporary total disability benefits. Id., 873. Like the plaintiff in *Cochran*, the plaintiff here elected to retire from his employment with the defendant. Moreover, the plaintiff testified in September, 2020, that he never

[8] On October 17, 2022, this court ordered that this case and *Cochran* v. *Dept. of Transportation*, supra, 220 Conn. App. 855, "be heard on the same day before the same panel." The two cases were heard before the same panel on May 16, 2023.

intended to return to the workforce after retirement, his intention was to "stay retired" and "enjoy retirement," and he has not worked for any employer since he retired in October, 1999. We see no reason to repeat the analysis set forth in *Cochran* v. *Dept. of Transportation*, supra, 855. For the reasons stated therein, we conclude that the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on July 15, 2015.

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner.

In this opinion the other judges concurred.