IN RE AMANI O.*
(AC 46293)
(AC 46327)

Cradle, Suarez and Clark, Js.

Syllabus

The respondent father and the petitioner, the Commissioner of Children and Families, filed separate appeals to this court challenging the trial

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

court's order granting an emergency motion filed by the attorney for the minor child, A, that required the Department of Children and Families to cease reunification efforts with respect to the father and A. The father also appealed from the trial court's order rejecting the petitioner's proposed permanency plan for A, which called for reunification with the father. After A had been adjudicated neglected and committed to the care and custody of the petitioner, her attorney filed the emergency motion because A had been diagnosed with a reactive airway disease and it was unclear whether there was secondhand smoke in the father's apartment, which would exacerbate her condition. The petitioner filed a motion for reconsideration of the emergency order, arguing that the department was statutorily (§ 17a-111b) required to make reasonable efforts to reunify A with her parents. The trial court denied the motion and instructed the department to consider how to protect A from secondhand smoke. The trial court also indicated that it was returning the matter of the permanency plan to the petitioner for the filing of a different permanency plan. *Held*:

1. The trial court exceeded its authority under § 17a-111b (a) when it ordered the department to cease reunification efforts, and, accordingly, this court vacated the order: the plain language of § 17a-111b required the department to make reasonable efforts to reunify the respondent father with A unless certain specific conditions were met, the trial court did not make any findings that would satisfy the conditions enumerated in § 17a-111b, and the parties did not dispute that none of the exceptions applied; moreover, contrary to the argument of A's attorney, although a trial court does have broad authority pursuant to statute (§ 46b-121 (b) (1)) to issue orders that are necessary and appropriate for the welfare, protection, proper care, and suitable support of a child, nothing in the text of that statute indicated that the authority granted therein superseded the department's mandate under § 17a-111b to make reasonable reunification efforts.

2. This court dismissed the respondent father's claim that the trial court abused its discretion by rejecting the petitioner's proposed permanency plan for lack of subject matter jurisdiction because the rejection did not satisfy the second prong of the test established in *State* v. *Curcio* (191 Conn. 27) and, therefore, was not a final judgment, as the father would not suffer irreparable harm in the absence of an immediate appeal:
   a. The father's argument that his claim satisfied the second prong of *Curcio* because the trial court's failure to revoke the commitment of A to the petitioner following the permanency hearing was functionally the same as an extension of the commitment of A to the care and custody of the petitioner was unavailing as, under the statutory scheme, the permanency plan did not implicate a right that was then held by the father but, instead, set a goal that would not influence his custodial rights until a future date; moreover, the father's argument that, because the trial court, during a permanency hearing, could revoke commitment

if a cause for it no longer existed and it was in the best interests of A, any decision following a permanency hearing, other than the revocation of commitment, implied that the trial court decided that revocation of commitment was not in the best interests of A was unpersuasive because it failed to account for the plain language of the statute, which provided that commitment could be revoked at any time.

b. The father's argument that his claim satisfied the second prong of *Curcio* because the trial court's rejection of the permanency plan impaired his custodial rights as to A was unavailing: rejection of the permanency plan did not necessitate that the petitioner propose a permanency plan with a goal other than reunification, as nothing in the language of § 17a-111b suggested that the trial court's rejection of the permanency plan foreclosed the possibility of the petitioner including that same goal in subsequent proposed permanency plans, it merely required the trial court to approve a permanency plan that would be in the best interests of A and that would take into consideration A's need for permanency; moreover, the trial court's rejection of a permanency plan did not affect the department's duty to make reasonable efforts toward reunification.

Argued May 23—officially released August 10, 2023**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *C. Taylor, J.*; judgment adjudicating the minor child neglected and committing her to the custody of the petitioner; thereafter, the court, *C. Taylor, J.*, granted the emergency motion filed by the attorney for the minor child to cease reunification efforts with the respondents and rejected the petitioner's proposed permanency plan for reunification of the minor child with the respondent father; subsequently, the court, *C. Taylor, J.*, denied the petitioner's motion for reconsideration of the emergency order to cease reunification efforts, and the petitioner and the respondent father filed separate appeals with this court.

** August 10, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Reversed in part; *order vacated*; *appeal dismissed in part in Docket No. AC 46293.*

James P. Sexton, assigned counsel, with whom was *Gail Oakley Pratt*, assigned counsel, for the appellant in Docket No. AC 46293 and the appellee in Docket No. AC 46327 (respondent father).

Evan O'Roark, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellant in Docket No. AC 46327 (petitioner).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee in Docket No. AC 46293 (petitioner).

Joshua Michtom, senior assistant public defender, for the minor child in both appeals.

Opinion

CRADLE, J. In these two related appeals, the respondent father, Carlos O., and the petitioner, the Commissioner of Children and Families, appeal from the trial court's order granting the emergency motion filed by the attorney for the minor child, Amani O., to cease reunification efforts with the respondent.[1] The respondent also appeals from the court's order rejecting the petitioner's proposed permanency plan for Amani, which called for reunification with the respondent. In their respective appeals, the respondent and the petitioner claim that the court exceeded its authority when

[1] Amani's mother, Rebecca T., is a party in the underlying proceedings before the trial court. Rebecca T., however, is not participating in this appeal. Accordingly, any reference to the respondent in this opinion is to Carlos O. only.

The respondent's appeal is docketed before this court as AC 46293, and the petitioner's appeal is docketed as AC 46327. We address the claims of these related appeals together.

it ordered that the Department of Children and Families (department) cease reunification efforts with the parents.[2] The respondent also claims that the court improperly rejected the petitioner's proposed permanency plan, which, he argues, will irreparably prejudice him in the pending trial proceedings. We agree with the respondent and the petitioner that the court exceeded its authority by ordering the department to cease reunification efforts and, therefore, reverse and vacate the court's judgment as to that order. We further conclude that the court's rejection of the petitioner's proposed permanency plan was not an appealable final judgment and, therefore, dismiss the portion of the respondent's appeal that challenges that action.

The following procedural history is relevant to this appeal.[3] Shortly after Amani was born in 2020, the department, acting on behalf of the petitioner, invoked a ninety-six hour hold on her, filed a neglect petition, and moved for an order of temporary custody. The court granted—and later sustained—temporary custody. Meanwhile, the petitioner proposed, and the court accepted, a permanency plan with a goal of revocation of commitment and reunification of Amani with her parents. On February 10, 2021, the court, *C. Taylor*, *J.*, adjudicated Amani neglected and committed her to the care and custody of the petitioner. On April 6, 2022, the attorney for the minor child filed an emergency motion to cease increasing visitation with the parents because she was unsure whether they had stopped

[2] The respondent also claims that the court improperly denied the petitioner's motion to reconsider the order. Because we conclude that the court exceeded its authority in granting the order, we need not decide whether the court abused its discretion in denying the motion to reconsider.

[3] Because we decide, as to the first claim, that the court exceeded its statutory authority in granting the order to cease reunification efforts and, as to the second claim, that we lack subject matter jurisdiction, we need not discuss the facts underlying the pending motion to revoke commitment and permanency proceedings. See footnote 5 of this opinion.

smoking tobacco, thus posing a health risk to Amani, who is diagnosed with reactive airway disease. Judge Taylor held a hearing on that motion that same day. The court temporarily granted the emergency motion to cease increasing visitation, ordered that visitation not take place in the parents' homes, and appointed a guardian ad litem for the limited purpose of examining the respondent's apartment to determine whether secondhand smoke was present.

On April 14, 2022, the attorney for the minor child filed an emergency motion to cease reunification with the respondent, arguing that it was still unknown whether the respondent had quit smoking.[4] The court held a hearing on the emergency motion on April 22, 2022, during which the guardian ad litem reported that she "did not smell or observ[e] any active smoking" but noticed a "stale odor of cigarette smoke that . . . permeated from the carpet, the furniture, [and] . . . the walls" of the respondent's home. During the hearing, the respondent argued that the emergency motion should be denied because the guardian ad litem's report demonstrated no evidence of secondhand smoke, only a stale smell of smoke. The court granted in part the emergency motion to cease reunification efforts by ordering that Amani no longer visit the respondent parents in their respective homes "until [the court addressed] the issue of secondhand smoke" at a more extensive hearing to be scheduled for a later date. Then, on July 26, 2022, the petitioner filed a motion for review of a permanency plan, seeking to reunify Amani with the respondent. Rebecca T. and the attorney for the

[4] The attorney for the minor child requested that the court issue "an order to prevent the [department] to stop the reunification process until such time as the parents are able to care for this minor child adequately or any other equitable relief that the court believes is in the best interest of the minor child." In his brief to this court, the attorney for the minor child clarified that the request was for a temporary cessation of the department's reunification efforts.

minor child objected to the permanency plan. The court heard arguments on the motion for review of the permanency plan as part of the proceedings on the emergency motion to cease reunification efforts.

Subsequent hearings on the motion to cease reunification efforts were held over five nonconsecutive days spanning from May to November, 2022. On January 19, 2023, the court issued an order that stated: "The court grants the child's emergency motion to cease reunification efforts with the parents." On January 31, 2023, the petitioner filed a motion for reconsideration of the emergency order to cease reunification efforts, arguing that the department is statutorily required to make reasonable efforts to reunify the child with the parents. The court denied that motion on March 8, 2023, without explanation, and instructed the department to "consider how to protect the child from secondhand smoke." Also on January 19, 2023, the court rejected the petitioner's proposed permanency plan for reunification of Amani with the respondent and returned the matter to the petitioner "for the filing of a different permanency plan."[5]

These expedited appeals followed.[6] On May 3, 2023, the court issued an articulation of its judgment granting the emergency motion to cease reunification efforts, in which it cited to *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020), explaining that its order was necessary to safeguard the health of the child.[7] Additional facts and procedural history will be set forth as necessary.

[5] Instead of appealing this decision, on February 28, 2023, the petitioner filed a motion to revoke commitment and order a period of protective supervision in the juvenile court. That same day, the attorney for the minor child filed an objection to the motion. Trial in the motion to revoke commitment and permanency proceedings are ongoing at the time of this decision.

[6] Both the petitioner and the respondent filed motions to expedite their respective appeals on April 19, 2023. This court granted both motions the following day.

[7] In its articulation, the court did not explicitly cite to General Statutes § 46b-121 (b) (1) but, instead, relied on *In re Ava W.*, supra, 336 Conn. 545,

I

The petitioner and the respondent claim that the court exceeded its statutory authority under General Statutes § 17a-111b (a) by ordering the department to cease reunification efforts.[8] The attorney for the minor child argues that the court properly exercised its authority under General Statutes § 46b-121 (b) (1). We agree with the petitioner and the respondent.

This claim presents a question of statutory interpretation, over which we exercise plenary review. See *Cerame* v. *Lamont*, 346 Conn. 422, 426, 291 A.3d 601 (2023). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable

to support its assertion that it had authority to order that the department cease reunification efforts. In *In re Ava W.*, our Supreme Court concluded that the trial court has authority to order posttermination visitation under § 46b-121 (b) (1). See id., 568. In so concluding, the court stated that § 46b-121 (b) (1), in the absence of limiting language, "broadly enables the court to issue any order that it deems not only 'necessary' but also 'necessary or appropriate . . . .' " (Emphasis omitted.) Id., 572. Nowhere in the court's opinion, however, does it address the language of General Statutes § 17a-111b or whether the mandate set forth therein limits the authority granted by § 46b-121 (b) (1).

[8] The petitioner and the respondent argue in the alternative that, even if the court had the authority to order the department to cease reunification efforts, it abused its discretion by doing so here. Because we conclude that the court exceeded its statutory authority, the court did not have discretion to act as it did. Therefore, we need not further address this facet of the petitioner's and the respondent's claims.

results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id. "Further, in construing statutes, we presume that there is a purpose behind every sentence, clause or phrase used in an act, and that no part of a statute is superfluous." (Internal quotation marks omitted.) *Carpenter* v. *Daar*, 346 Conn. 80, 103 n.17, 287 A.3d 1027 (2023).

We therefore must first consider the text of the relevant statutes. Section 17a-111b provides in relevant part: "(a) The Commissioner of Children and Families *shall make reasonable efforts to reunify a parent with a child* unless the court (1) determines that such efforts are not required pursuant to subsection (b)[9] of this section or subsection (j) of section 17a-112,[10] or (2) has

[9] General Statutes § 17a-111b (b) provides in relevant part: "The court may determine that such efforts are not required if the court finds upon clear and convincing evidence that: (1) The parent has subjected the child to the following aggravated circumstances: (A) The child has been abandoned . . . or (B) the parent has inflicted or knowingly permitted another person to inflict sexual molestation or exploitation or severe physical abuse on the child or engaged in a pattern of abuse of the child; (2) the parent has killed, through deliberate, nonaccidental act, another child of the parent or a sibling of the child, or has requested, commanded, importuned, attempted, conspired or solicited to commit or knowingly permitted another person to commit the killing of the child, another child of the parent or sibling of the child, or has committed or knowingly permitted another person to commit an assault, through deliberate, nonaccidental act, that resulted in serious bodily injury of the child, another child of the parent or a sibling of the child; (3) the parental rights of the parent to a sibling have been terminated within three years of the filing of a petition pursuant to this section, provided the commissioner has made reasonable efforts to reunify the parent with the child during a period of at least ninety days; (4) the parent was convicted by a court of competent jurisdiction of sexual assault . . . or (5) the child was placed in the care and control of the commissioner pursuant to the provisions of sections 17a-57 to 17a-60, inclusive, and section 17a-61."

[10] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition [for termination of parental rights] if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . unless the court finds in this proceeding that the parent is unable or unwilling to benefit

approved a permanency plan other than reunification pursuant to subsection (k) of section 46b-129. . . .” (Emphasis added; footnotes added.)

The plain language of § 17a-111b requires the department to make reasonable efforts to reunify the parent with the child unless certain specific conditions are met. In the present case, the court did not make any findings that would satisfy the exceptions enumerated in § 17a-111b, and the parties do not dispute that none of those exceptions applies. Because none of the exceptions to the statutory mandate of § 17a-111b applies in the present case, the court did not have authority to order that the department cease reunification efforts.

The attorney for the minor child, however, argues that the court had the authority to order “a temporary cessation of [reunification] efforts to protect the child’s well-being, pursuant to the trial court’s broad authority under . . . § 46b-121 (b) (1) . . . .” Assuming, arguendo, that the court relied on § 46b-121 (b) (1) in issuing its order for the department to cease reunification efforts with the parents, we nonetheless conclude that the court exceeded its authority. Section 46b-121 (b) (1) provides in relevant part: “In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . guardians, custodians or other adult persons owing some

from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .”

legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families. . . ."

"A plain reading of § 46b-121 (b) (1) in its current form quite apparently grants the Superior Court comprehensive authority to issue orders in juvenile matters. The statute broadly enables the court to issue any order that it deems not only necessary but also necessary or appropriate . . . . The language also enables the court to issue orders directed at a broad range of actors and does not limit the scope of the statute to biological parents; rather, it extends it to any other adult persons owing some legal duty to a child . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 572.

Although § 46b-121 (b) (1) endows the court with broad authority to issue orders that are necessary and appropriate for the welfare, protection, proper care, and suitable support of a child committed to the care of the petitioner; id.; nothing in the text of § 46b-121 (b) (1) indicates that the authority granted therein supersedes the department's mandate, under § 17a-111b, to make reasonable reunification efforts. "Our case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have [on] any one of them." (Internal quotation marks omitted.) *Daley* v. *Kashmanian*, 344 Conn. 464, 485 n.16, 280 A.3d 68 (2022). To read such a grant of authority into the text of § 46b-121 (b) (1) would render the limited exceptions set forth in § 17a-111b superfluous. Although § 46b-121 provides broad authority for a court to issue an order necessary or appropriate to

secure the welfare, protection, proper care and suitable support of a child, such order cannot be inconsistent with the specific requirements our legislature has set forth in the General Statutes. Therefore, the argument advanced by the attorney for the minor child is unavailing. See *Seramonte Associates, LLC* v. *Hamden*, 202 Conn. App. 467, 479, 246 A.3d 513 (2021) ("[i]t is well settled that the legislature is always presumed to have created a harmonious and consistent body of law" (internal quotation marks omitted)), aff'd, 345 Conn. 76, 282 A.3d 1253 (2022). Accordingly, we conclude that the court improperly ordered the department to cease reunification efforts.

II

The respondent also claims that the court improperly rejected the petitioner's proposed permanency plan for reunification. As a threshold issue, the parties disagree as to whether the approval or rejection of a permanency plan pursuant to General Statutes § 46b-129 is an appealable final judgment.[11] Because we determine that the rejection of a permanency plan is not a final judgment, we dismiss this claim.

[11] Although none of the parties addressed subject matter jurisdiction in their principal appellate briefs, this court, sua sponte, ordered supplemental briefing on this threshold issue. See *Iacurci* v. *Sax*, 139 Conn. App. 386, 398 n.3, 57 A.3d 736 (2012) ("an appellate court, in its sound discretion, may order supplemental briefing related to issues that are relevant to the disposition of an appeal, but are not adequately addressed in the parties' initial briefs"), aff'd, 313 Conn. 786, 99 A.3d 1145 (2014). This court's order, in Docket No. AC 46293, dated May 31, 2023, stated: "It is hereby ordered, sua sponte, that the parties shall file supplemental briefs of no more than 4000 words on or before June 14, 2023, addressing whether the portion of the respondent father's appeal challenging the trial court's rejection of the petitioner's proposed permanency plan should be dismissed for lack of subject matter jurisdiction because the acceptance or rejection of a permanency plan is not an appealable final judgment." The respondent, in his supplemental appellate brief, argued that approval or rejection of a permanency plan is an appealable final judgment, while the petitioner, in her supplemental brief, argued that it is not. The attorney for the minor child adopted the supplemental brief of the respondent.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear." (Internal quotation marks omitted.) *In re Marcquan C.*, 202 Conn. App. 520, 528, 246 A.3d 41, cert. denied, 336 Conn. 924, 246 A.3d 492 (2021).

"The right of appeal is purely statutory. . . . The statutory right to appeal is limited to appeals by aggrieved parties from final judgments." (Citations omitted.) *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983). "An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. "[T]he court may deem an interlocutory order or ruling to have the attributes of a final judgment if the ruling or order falls within either of the two prongs of the test set forth in *Curcio*." *In re Marcquan C.*, supra, 202 Conn. App. 531.

The respondent argues that this court has subject matter jurisdiction over this appeal because the court's rejection of the petitioner's proposed permanency plan satisfies the second prong of *Curcio*.[12] "[F]or an interlocutory ruling in either a criminal or a civil case to be immediately appealable under the second prong of *Curcio*, certain conditions must be present. There must be (1) a colorable claim, that is, one that is superficially well founded but that may ultimately be deemed invalid, (2) to a right that has both legal and practical value,

[12] None of the parties argues that the respondent's claim satisfies the first prong of *Curcio*.

(3) that is presently held by virtue of a statute or the state or federal constitution, (4) that is not dependent on the exercise of judicial discretion and (5) that would be irretrievably lost, causing irreparable harm to the [appellant] without immediate appellate review. . . . The second prong of the *Curcio* test focuses on the nature of the rights involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal. . . . One must make at least a colorable claim that some recognized statutory or constitutional right is at risk." (Citation omitted; internal quotation marks omitted.) Id., 533–34.

Section 46b-129 (k) governs permanency plan procedures and provides in relevant part: "(1) (A) Nine months after placement of the child or youth in the care and custody of the commissioner . . . the commissioner shall file a motion for review of a permanency plan . . . . The court shall hold evidentiary hearings in connection with any contested motion for review of the permanency plan . . . . The commissioner shall have the burden of proving that the proposed permanency plan is in the best interests of the child or youth. After the initial permanency hearing, subsequent permanency hearings shall be held not less frequently than every twelve months . . . .

"(2) At a permanency hearing held in accordance with the provisions of subdivision (1) of this subsection, the court shall approve a permanency plan that is in the best interests of the child or youth and takes into consideration the child's or youth's need for permanency. The child's or youth's health and safety shall be of paramount concern in formulating such plan. Such permanency plan may include the goal of (A) revocation of commitment and reunification of the child or youth

with the parent or guardian, with or without protective supervision; (B) transfer of guardianship or permanent legal guardianship; (C) filing of termination of parental rights and adoption; or (D) for a child sixteen years of age or older, another planned permanent living arrangement ordered by the court . . . .

"(4) At a permanency hearing held in accordance with the provisions of subdivision (1) of this subsection, the court shall (A) (i) ask the child or youth about his or her desired permanency outcome . . . . The court may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth. . . ."

In support of his assertion that his claim satisfies the second prong of *Curcio*, the respondent advances two arguments. First, although none of the parties requested revocation of commitment prior to the filing of the present appeal, the respondent argues that any decision other than revocation of commitment, following a permanency hearing, is effectively an extension of the commitment of the minor child to the petitioner, which this court has previously stated is an appealable final judgment. See *In re Todd G.*, 49 Conn. App. 361, 365, 713 A.2d 1286 (1998). Second, the respondent argues that rejection of a permanency plan of reunification impairs the respondent's custodial right as to his child and will not be appealable following the disposition of the underlying proceedings.[13] We address each argument in turn.

[13] The respondent also argues that approval of a permanency plan other than reunification similarly impairs the parent's custodial right as to the minor child. Because the respondent appeals from the court's rejection of a proposed permanency plan, and we determine that such judicial action was not a final judgment, this appeal does not present an opportunity to decide whether an approval of a different permanency plan would be a final judgment. See *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 27–28, 287 A.3d 557 (2023) ("Connecticut courts will rule only on live controversies—i.e., those in which the parties before us require resolution. . . . Like the federal courts, [w]e do not give advisory opinions; we do not

A

The respondent first argues that his claim satisfies the second prong of *Curcio* because the court's failure to revoke the commitment of the minor child to the petitioner following the permanency hearing—even though none of the parties requested revocation of commitment—was functionally the same as an extension of the commitment of the child to the care and custody of the petitioner. Relying on cases holding that " '[a]n extension of commitment is an immediately appealable final judgment' "; *In re Jeisean M.*, 270 Conn. 382, 404, 852 A.2d 643 (2004); the respondent argues that, because the court may revoke commitment upon making certain findings at a permanency hearing, "the question of whether the court should revoke a child's commitment to the petitioner or extend it and approve a permanency plan to work [toward] in the future is an inherent part of every permanency [hearing]" and is therefore a final judgment. We disagree.

Considering that our analysis requires a comparison of the current revision of the relevant statute with previous revisions—which required the petitioner to move for extensions of commitment—the following legislative history and relevant case law are instructive. The statutorily required proceedings for the commitment of minor children to the care and custody of the department shifted in 1998 with the introduction of permanency plan procedures into § 46b-129. See Public Acts 1998, No. 98-241, § 5. Revisions of § 46b-129 predating the introduction of permanency plans included the following language: "Ninety days before the expiration of each twelve-month commitment . . . the Commissioner of Children and Families shall petition the court

sit as roving commissions assigned to pass judgment on the validity of legislative enactments . . . and we do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities." (Citations omitted; internal quotation marks omitted.)).

either to (1) revoke such commitment . . . or (2) terminate parental rights . . . or (3) *extend the commitment beyond such twelve-month period* on the ground that an extension is in the best interest of the child. . . .'' (Emphasis added.) General Statutes (Rev. to 1997) § 46b-129 (e). This court held that orders extending a minor child's commitment to the petitioner satisfied the second prong of *Curcio*—and were, therefore, final judgments—because an immediate appeal was the only reasonable method of ensuring protection of the parent's custodial right as to their child over the next twelve months of commitment. See *In re Todd G.*, supra, 49 Conn. App. 365.

After the legislature incorporated permanency plans into our statutory scheme for neglect proceedings in 1998; see Public Acts 1998, No. 98-241, § 5; the legislature, in 2001, amended the language of § 46b-129 to provide: ''Nine months after placement of the child or youth in the care and custody of the commissioner . . . the commissioner shall file a motion for review of a permanency plan *and to maintain or revoke the commitment*. . . .'' (Emphasis added.) Public Acts 2001, No. 01-142, §7. Our Supreme Court held that, like orders extending a minor child's commitment, an order granting a permanency plan *and* maintaining a minor child's commitment was also an appealable final judgment. See *In re Jeisean M.*, supra, 270 Conn. 404–405.[14]

In 2001, the legislature also removed the time limit on commitments and replaced it with the provision that the initial commitment of a minor child to the care and custody of the petitioner ''shall remain in effect until

[14] Our Supreme Court in *In re Jeisean M.* reviewed a challenge to an order extending the commitment of the child to the petitioner and ruling on the petitioner's permanency plan pursuant to a revision of § 46b-129 predating the 2001 amendment discussed in this opinion. *In re Jeisean M.*, supra, 270 Conn. 386 n.4.

further order of the court . . . provided such commitment may be revoked or parental rights terminated at any time by the court, or the court may vest such child's or youth's care and personal custody in any private or public agency which is permitted by law to care for neglected, uncared-for or dependent children or youth or with any person or persons found to be suitable and worthy of such responsibility by the court." Public Acts 2001, No. 01-142, § 6. Then, in 2006, the legislature removed the requirement that the petitioner file a motion to maintain or revoke commitment with a proposed permanency plan. Public Acts 2006, No. 06-102, § 9.

Relying heavily on precedent holding that extensions of commitment—and other temporary custody orders—are final judgments, the respondent argues that the failure to revoke commitment and, instead, to proceed with a permanency plan, "interferes with constitutionally safeguarded family integrity rights by prolonging the time a parent is without the custody of his or her child." Unlike the present case, the orders challenged in the cases cited by the respondent all implicated the immediate custody of the child following the ruling at issue. See, e.g., *In re Zakai F.*, 336 Conn. 272, 295–98, 255 A.3d 767 (2020) (determining that denial of reinstatement of guardianship implicated parental rights even if deprivation was only temporary); *In re Victoria B.*, 79 Conn. App. 245, 259 n.15, 829 A.2d 855 (2003) (noting that order extending commitment and finding that further reunification efforts were not appropriate was final judgment); *In re Todd G.*, supra, 49 Conn. App. 365 (holding that order extending commitment of child to petitioner was final judgment). The legislature has amended the relevant statute for implementing permanency plans such that they no longer implicate the immediate custody of the minor child. Indeed, under our current statutory scheme, once a

court adjudicates a child neglected and commits that child to the care and custody of the petitioner, "such commitment shall remain in effect," without the requirement that the petitioner move for the extension of the commitment. General Statutes § 46b-129 (j) (2) (A). Accordingly, although extensions of commitment—under the now defunct statutory scheme for custody—determined the immediate status of custody over the child, and therefore were appealable final judgments, the current statutory scheme for proposing permanency plans deals with future goals for custody of the child. In other words, because permanency plans do not, for the aforementioned reasons, implicate a right that is " 'presently held' " by the parent and, instead, set goals that will not influence the parent's custodial rights until a future date, this argument fails to satisfy the second prong of *Curcio*. See, e.g., *In re Marcquan C.*, supra, 202 Conn. App. 533. Accordingly, the respondent's argument that such cases, dealing with temporary deprivations of custodial rights, are controlling in the present case—and indicate that the court's rejection of the petitioner's permanency plan was a final judgment under the second prong of *Curcio*—is unavailing.

Furthermore, we find unpersuasive the respondent's argument that, because the court, during a permanency hearing, "may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child"; General Statutes § 46b-129 (k) (4); any decision, following a permanency hearing, other than revocation of commitment, implies that the court decided that revocation of commitment was not in the best interests of the minor child.[15] This argument fails to account for the plain language of the statute, that "commitment may be revoked . . . at any time by the

[15] We note that none of the parties moved for revocation of commitment before the trial court prior to the filing of this appeal, nor did the court explicitly deny revocation of commitment. See footnote 5 of this opinion.

court . . . .” General Statutes § 46b-129 (j) (2) (A). There is nothing in the language of § 46b-129 that would suggest that the court's authority to revoke commitment is any greater during a permanency hearing than it is at any other point during the proceedings. Indeed, the court may revoke commitment both before and after a permanency hearing, insofar as it does so in accordance with the procedures set forth in the statute. See *In re Nasia B.*, 98 Conn. App. 319, 329–30, 908 A.2d 1090 (2006). Therefore, any right implicated by the court's failure to revoke commitment during a permanency hearing would not be irrecoverable without an appeal because any party could move, at any time, to revoke commitment. Accordingly, this argument also fails to satisfy the second prong of *Curcio*. See, e.g., *In re Marcquan C.*, supra, 202 Conn. App. 533.

B

The respondent next argues that his claim satisfies the second prong of *Curcio* because the court's rejection of a permanency plan of reunification impairs his custodial right as to Amani. Specifically, the respondent argues that, because the department is no longer required to “make reasonable efforts to reunify a parent with a child [if] the court . . . (2) has approved a permanency plan other than reunification pursuant to subsection (k) of section 46b-129”; General Statutes § 17a-111b (a); the rejection of the petitioner's permanency plan for reunification satisfies the second prong of *Curcio* because it would lead to the department ceasing reunification efforts and impairing the respondent's ability to reunify with Amani.[16] We disagree.

[16] The respondent additionally argues that approval of a permanency plan for an objective other than reunification is also a final judgment. However, because we conclude that the challenged action of the court at issue in this appeal—rejection of the petitioner's permanency plan of reunification—was not a final judgment, this case does not present an opportunity for this court to decide whether approval of a permanency plan can be a final judgment. See also footnote 13 of this opinion.

The respondent is correct that, under § 17a-111b (a), the department would no longer be required to make reasonable efforts to reunify him with Amani if the court approves of a permanency plan that sets a goal other than reunification.[17] Rejection of a permanency plan of reunification, however, does not necessitate that the petitioner propose a permanency plan with a goal other than reunification. Indeed, the respondent's argument fails because it mistakenly presupposes that the petitioner cannot propose another permanency plan of reunification after the court has already rejected one.

Nothing in the language of the statute suggests that a court's rejection of a permanency plan forecloses the possibility of including that same goal in subsequent proposed permanency plans. It simply requires that the court "approve a permanency plan that is in the best interests of the child or youth and takes into consideration the child's or youth's need for permanency. . . ." General Statutes § 46b-129 (k) (2). Furthermore, § 46b-129 (k) (1) (A) establishes that the petitioner has the burden of proving that her proposed plan is in the best interests of the child. It follows then, that, under § 46b-129 (k), the petitioner must propose, and the court shall approve, whatever permanency plan is in the best interests of the child. If a court rejects a permanency plan for reunification, the petitioner need not propose a permanency plan for a goal she does not believe is in the child's best interests. Instead, the petitioner could simply file a new permanency plan for reunification that addresses the court's concerns.

Because the court's rejection of a permanency plan with a goal of reunification does not mandate that the

[17] We note, however, that the department also is not required to cease reunification efforts upon court approval of a permanency plan with a goal other than reunification. Under the statute, the department retains discretion to continue reunification efforts until there is a final disposition in the neglect proceedings.

petitioner propose a permanency plan with a different goal, this action does not affect the department's duty to make reasonable efforts toward reunification. Therefore, this argument also fails.

We conclude that the court's rejection of the petitioner's permanency plan for reunification does not satisfy the second prong of *Curcio* and, therefore, is not a final judgment because the respondent will not suffer irreparable harm in the absence of an immediate appeal. We therefore lack subject matter jurisdiction over the respondent's claim that such action was an abuse of discretion. Accordingly, we dismiss the respondent's appeal as to this order.

The judgment ordering the department to cease reunification efforts is reversed and that order is vacated; the portion of the appeal in AC 46293 challenging the order rejecting the petitioner's proposed permanency plan is dismissed.

In this opinion the other judges concurred.

TYRONE PIERCE *v.* COMMISSIONER OF CORRECTION (AC 44188)

Elgo, Cradle and Flynn, Js.

Syllabus

The petitioner, who had been convicted of various crimes, sought a writ of habeas corpus, claiming, in count of one of his petition, that the state failed to disclose exculpatory evidence at his criminal trial, and, in counts two and three, that he was deprived of the effective assistance of counsel at his criminal trial and at his first habeas trial. The habeas court dismissed, sua sponte, pursuant to the applicable rule of practice (§ 23-29), the first count of the third amended petition, without providing the petitioner with prior notice or an opportunity to be heard. After a trial on the remaining two counts of the amended petition, the court denied those counts of the petition. Thereafter, the court denied the

petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court abused its discretion in denying the petition for certification to appeal because, in light of our Supreme Court's decisions in *Brown* v. *Commissioner of Correction* (345 Conn. 1), and *Boria* v. *Commissioner of Correction* (345 Conn. 39), which held that a habeas court is required to provide prior notice to the petitioner of its intention to dismiss, sua sponte, a petition that it deems legally deficient and an opportunity to be heard, this court concluded that the resolution of the underlying claim of procedural error involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further.
2. The habeas court improperly dismissed the first count of the amended petition without first providing the petitioner with prior notice and an opportunity to submit a brief or written response addressing the proposed basis for dismissal: the Supreme Court's decisions in *Brown* and *Boria* governed the resolution of the merits of the petitioner's appeal and required reversal of the judgment with respect to the dismissal of count one; contrary to the claim of the respondent, the Commissioner of Correction, this court declined to permit the habeas court another opportunity to consider declining to issue the writ pursuant to the applicable rule of practice (§ 23-24), because counsel had been appointed and had filed the third amended petition on behalf of the petitioner prior to the court's dismissal of the first count, and it would strain logic to construe *Brown* as advising this court to direct the habeas court on remand to consider declining to issue a writ with respect to an amended petition that was filed after the writ had been issued; accordingly, on remand, should the habeas court again consider dismissal on its own motion pursuant to Practice Book § 23-29, the court must comply with the procedures set forth in *Brown* and *Boria* by providing the petitioner with prior notice and an opportunity to provide a written response.

Argued November 9, 2021—officially released August 15, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson*, *J.*; judgment dismissing the first count of the petition and denying the remaining counts of the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed in part*; *further proceedings.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Tamara Grosso*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Tyrone Pierce, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court dismissing sua sponte, pursuant to Practice Book § 23-29,[1] the first count of his third amended petition for a writ of habeas corpus.[2] On appeal, the petitioner argues that the court abused its discretion in denying his petition for certification to appeal because the court improperly dismissed the first count of his third amended petition in 2019 without first providing him with notice and an opportunity to be heard.[3] We agree with the petitioner

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

"(1) the court lacks jurisdiction;

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

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

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

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

[2] Following a trial, the court also denied the remaining two counts of the petitioner's third amended petition for a writ of habeas corpus. The petitioner does not challenge the judgment as to those two counts.

[3] Because we agree with the petitioner's claim that the habeas court improperly dismissed the first count of his petition without notice and an opportunity to be heard, and that claim is dispositive of the appeal, we need not, and do not, consider the petitioner's additional claim that the court erred in holding that his claim was barred by the doctrine of res judicata. The court, in its discretion, may choose to revisit this issue during the proceedings on remand, provided that it does so consistent with the procedure set forth in this opinion.

that the court abused its discretion in denying his petition for certification to appeal. Furthermore, in light of our Supreme Court's decisions in *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022), and in *Brown*'s companion case, *Boria* v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022), which were decided in 2022, after the habeas court's 2019 dismissal of the first count of the petitioner's third amended petition, we agree that the habeas court committed error in dismissing that count pursuant to § 23-29 without first providing him with prior notice of its intention to dismiss and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal. Accordingly, we reverse in part the judgment of the habeas court.

The following procedural history is relevant to this appeal. The petitioner was convicted, following pleas of nolo contendere, to kidnapping in the first degree, sexual assault in the first degree, assault in the second degree, and tampering with a witness, and received a total effective sentence of ten years of incarceration, followed by fifteen years of special parole, to be served consecutively to a sentence he was already serving for a violation of probation.

On December 18, 2013, the petitioner filed a petition for a writ of habeas corpus as a self-represented party. He simultaneously filed a request for the appointment of counsel and an application for the waiver of fees, both of which the court granted on January 17, 2014. The court issued the writ that same day. Appointed counsel filed an appearance on behalf of the petitioner on May 12, 2014. On April 1, 2019, the operative third amended petition was filed. In that three count petition, the petitioner claimed that his constitutional rights were violated because the state failed to disclose exculpatory evidence at his criminal trial, and that he was deprived

of the effective assistance of counsel at his criminal trial and his first habeas trial.

By order dated May 8, 2019, the court, *Newson, J.*, sua sponte dismissed the first count of the third amended petition pursuant to Practice Book § 23-29 (3). Prior to dismissing that count, the court did not provide the petitioner with an opportunity to be heard with respect to the dismissal. The petitioner filed a motion for reconsideration, which the court summarily denied. The petitioner filed a petition for certification to appeal in accordance with General Statutes § 52-470 (g),[4] which the court denied.

Following a trial on the remaining two counts of the third amended petition, the habeas court issued a memorandum of decision, on January 23, 2020, denying the petition. The petitioner filed a petition for certification to appeal, which the court denied. This appeal, challenging only the dismissal of the first count of the petitioner's third amended petition, followed.

On November 30, 2021, this court stayed this appeal pending a final resolution of the appeals in *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 1, and *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 39, which were then pending before our Supreme Court and involved similar claims. After our Supreme Court officially released its decisions in *Brown* and *Boria*, we ordered the parties to file supplemental briefs "addressing the effect, if any, of [*Brown* and *Boria*]

[4] General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

on this appeal, including whether, if the judgment of dismissal is reversed, the habeas court should be directed on remand 'to first determine whether any grounds exist for it to decline to issue the writ pursuant to Practice Book § 23-24.' "[5] The parties complied with our supplemental briefing order.[6]

As a threshold consideration, we must address the issue of whether the court abused its discretion in denying the petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the

[5] In *Brown*, our Supreme Court had directed this court to remand the case to the habeas court with direction to first consider whether any grounds existed for it to decline to issue the writ under Practice Book § 23-24. *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 17–18. Furthermore, in footnote 11 of its decision, the court in *Brown* also stated: "We are aware that there are other cases pending before this court and the Appellate Court that were decided without the benefit of this court's decision in *Gilchrist* [v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020) (analyzing interplay between Practice Book §§ 23-24 and 23-29)]. . . . In cases decided prior to *Gilchrist*, the most efficient process to resolve those cases is to remand them to the habeas court to determine first whether grounds exist to decline the issuance of the writ." (Citation omitted.) *Brown* v. *Commissioner of Correction*, supra, 17 n.11.

[6] We thereafter issued a second supplemental briefing order asking the parties to file supplemental briefs "addressing the effect, if any, of this court's opinion in . . . *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616 [285 A.3d 1194 (2022)], on this appeal." The parties also complied with this supplemental briefing order.

questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

In light of our Supreme Court's recent decisions in *Brown* and *Boria*, as discussed herein, we conclude that the resolution of the underlying claim of procedural error involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further. Accordingly, we agree with the petitioner that the habeas court's denial of the petitioner's petition for certification to appeal reflected an abuse of its discretion.

Our Supreme Court's decisions in *Brown* and *Boria* govern our resolution of the merits of the present appeal and require a reversal of the habeas court's judgment with respect to the dismissal of count one. In *Brown*, our Supreme Court held "that [Practice Book] § 23-29 requires the habeas court to provide prior notice of the court's intention to dismiss, on its own motion, a petition that it deems legally deficient and an opportunity to be heard on the papers by filing a written response. The habeas court may, in its discretion, grant oral argument or a hearing, but one is not mandated." *Brown* v. *Commissioner of Correction*, supra, 345 Conn. 4; see also *Boria* v. *Commissioner of Correction*, supra, 345 Conn. 43 (adopting reasoning and conclusions set forth in *Brown*). Here, the court dismissed the first count of the petitioner's third amended petition without providing him with an opportunity to submit either a brief or a written response. Accordingly, the proper remedy is for us to reverse the court's judgment with respect to that dismissal and to remand the case to the habeas court for further proceedings. If the habeas court, on remand, again chooses to consider dismissal on its own motion pursuant to § 23-29, the court must comply with the procedures set forth in *Brown* and *Boria* by providing the petitioner with prior notice of its proposed basis for dismissal and affording the petitioner an opportunity to provide a written response.

The respondent, the Commissioner of Correction, argues that, consistent with the rationale in footnote 11 of *Brown*; see footnote 5 of this opinion; we should permit the habeas court another opportunity to consider declining to issue the writ pursuant to Practice Book § 23-24. We decline to include this as part of our remand order. The court's dismissal in the present case occurred prior to the release of our Supreme Court's decision in *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 561, 223 A.3d 368 (2020).[7] In the present

[7] In *Gilchrist*, our Supreme Court explained that, "when a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted

case, however, counsel had been appointed and had filed the third amended petition on behalf of the petitioner prior to the habeas court's dismissal. As this court previously has clarified in declining to apply footnote 11 of *Brown* in similar cases, "[i]t would strain logic to construe footnote 11 of *Brown* as advising that we should direct the habeas court on remand to consider declining to issue the writ under § 23-24 vis-à-vis the amended petition, which was filed after the writ had been issued. Moreover, affording the habeas court on remand another opportunity to consider declining to issue the writ under § 23-24 vis-à-vis the original habeas petition, in effect, would vitiate the filing of the amended petition, which is not an outcome that we believe our Supreme Court in *Brown* intended." (Emphasis omitted.) *Hodge* v. *Commissioner of Correction*, supra, 216 Conn. App. 623–24; see also, e.g., *Villafane* v. *Commissioner of Correction*, 216 Conn. App. 839, 850–51, 287 A.3d 138 (2022).[8] "Although the present

to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. . . . If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to [Practice Book] § 23-24. . . . If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. *At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service.* . . . After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." (Citations omitted; emphasis added.) *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

[8] "In *Howard* v. *Commissioner of Correction*, 217 Conn. App. 119, 287 A.3d 602 (2022), we expanded upon our reasoning in *Hodge* and *Villafane*. In *Howard*, although counsel had been appointed for the petitioner, no amended petition was filed prior to the habeas court dismissing the petition

dismissal occurred prior to *Gilchrist*, we are not persuaded that we should apply the rationale in footnote 11 of *Brown* to the present case. Unlike in *Brown* and *Boria*, the dismissal in the present case occurred not merely after the writ had issued but after counsel had appeared on the petitioner's behalf and an amended petition was filed. . . . The fact that an amended petition had been filed at the time of the court's dismissal in this case leads us to conclude that the proper course on remand is not for the court to first consider whether declining to issue the writ under . . . § 23-24 is warranted." (Footnote omitted.) *Villafane* v. *Commissioner of Correction*, supra, 216 Conn. App. 849–50.

The judgment is reversed only with respect to the first count of the third amended petition and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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sua sponte pursuant to Practice Book § 23-29 without providing notice and an opportunity to be heard. Id., 132. This court concluded that the appointment of counsel alone provided a compelling reason not to apply footnote 11 of *Brown*, explaining: 'Our Supreme Court has explained that the purpose of appointing counsel in habeas actions, following the issuance of the writ, is so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced. . . . In the present case, the habeas court appointed counsel to represent the petitioner, and counsel will have an opportunity to address any potential deficiencies in the original petition that he filed in a self-represented capacity. In light of this fact, and the length of time in which the habeas action has been pending on the court's docket, we conclude that permitting the court on remand to decline to issue the writ pursuant to Practice Book § 23-24 could lead to an unjust outcome that our Supreme Court would not have intended.' . . . Id., 133." *Leffingwell* v. *Commissioner of Correction*, 218 Conn. App. 216, 225–26 n.6, 291 A.3d 641 (2023).

GMAT LEGAL TITLE TRUST 2014-1, U.S. BANK, NATIONAL ASSOCIATION, LEGAL TITLE TRUSTEE *v.* VITO CATALE ET AL.
(AC 45332)

Alvord, Clark and DiPentima, Js.

Syllabus

The original plaintiff, G Co., sought to foreclose a mortgage on certain real property owned by the defendants. The complaint also sought a deficiency judgment. The note and mortgage had been assigned several times prior to the commencement of the present action, and a predecessor in interest to the original plaintiff, C Co., had brought a separate action to foreclose on the mortgage in 2011 that was dismissed for dormancy in 2017. The defendants filed an answer and special defenses in the present action asserting eight special defenses, and G Co. filed a motion to strike all of them. G Co. then filed a motion for summary judgment as to liability. The court granted the motion to strike as to seven of the special defenses, but it could not adjudicate the summary judgment motion because the defendants were permitted to file a revised answer and special defenses. The defendants subsequently amended their answer and special defenses to include five special defenses, including bad faith settlement practices, unclean hands as to C Co. and G Co., that G Co. was not the holder in due course of the note, and the inapplicability of the accidental failure of suit statute. The defendants also appended to their amended answer and special defenses an exhibit purporting to be a mediator's report describing mediation sessions between the defendants and C Co. in the prior foreclosure action. The defendants alleged that the mediation report showed that C Co. flagrantly flouted its mediation obligations in the prior action. G Co. again filed a motion to strike all of the defendants' special defenses, and the court granted the motion to strike as to bad faith settlement practices, unclean hands, and the inapplicability of the accidental failure of suit statute. The court found that, although the allegations described a failed mediation between C Co. and the defendants, the allegations were insufficient to state a defense for bad faith or unclean hands. In addition, the court found that the accidental failure of suit statute did not apply on the basis that the prior foreclosure action was dismissed for dormancy and not on a substantive basis. The court rendered summary judgment for G Co. as to liability. G Co. subsequently assigned the mortgage to R Co., and R Co. was substituted as the plaintiff. R Co. filed a motion for a judgment of strict foreclosure, and the court held a hearing on the motion. At the hearing, R Co. admitted into evidence, over the objection

of the defendants' counsel, documents evidencing the history of the note and mortgage, including transactions prior to G Co.'s ownership of the mortgage, under the business records exception to the hearsay rule. After the hearing, the court rendered a judgment of strict foreclosure, and the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court erred in rendering a judgment of strict foreclosure because it relied on inadmissible hearsay evidence to determine the status of the note: pursuant to *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC* (334 Conn. 374), when a party introduces a document that contains data that was provided by another business, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information, and, in the present case, R Co. sufficiently demonstrated that the challenged data became a part of its own business records as part of a transaction with the prior servicer, which had a business duty to transmit accurate information to R Co.'s current loan servicer; accordingly, the trial court did not err in admitting the challenged documents under the business record exception to the hearsay rule.
2. The trial court properly granted G Co.'s motion to strike with regard to the defendants' special defenses of bad faith settlement practices and unclean hands: even if this court assumed that the alleged misconduct of C Co. during a mediation session in a prior foreclosure action could affect R Co.'s rights in this foreclosure action and that the defendants were not precluded from raising these special defenses because they failed to file a motion for sanctions pursuant to statute (§ 49-31n (c)), the defendants failed to allege facts sufficient to state a defense of unclean hands or bad faith settlement practices, as the facts alleged by the defendants essentially showed a failed mediation, not bad faith on the part of C Co., and the defendants did not sufficiently allege that C Co. engaged in wilful misconduct or in conduct that involved a dishonest purpose or was of such character as to be condemned by honest and fair-minded people.
3. This court reversed the portion of the trial court's ruling that granted the plaintiff's motion to strike as to the defendants' special defense of the inapplicability of the accidental failure of suit statute to the deficiency judgment: on the basis of this court's ruling in *U.S. Bank, National Assn.* v. *Moncho* (203 Conn. App. 28), it is clear that a defendant's special defense regarding the applicability of the savings statute as it pertains to a deficiency judgment becomes ripe for adjudication only after a plaintiff files a motion for a deficiency judgment, and, here, the defense of the inapplicability of the accidental failure of suit statute was not ripe for adjudication because the plaintiff had not yet filed a motion for a deficiency judgment and may never elect to do so; accordingly, the

trial court should have dismissed the motion to strike as it pertained to that special defense.

Argued April 12—officially released August 15, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spader*, *J.*, granted in part the plaintiff's motion to strike the special defenses filed by the named defendant et al.; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, RMS Series Trust 2020-1 was substituted as the plaintiff; thereafter, the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the substitute plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Reversed in part*; *judgment directed*; *further proceedings*.

Douglas R. Steinmetz, for the appellants (named defendant et al.).

Paul N. Gilmore, with whom, on the brief, was *Olivia L. Benson*, for the appellee (substitute plaintiff).

Opinion

CLARK, J. This residential mortgage foreclosure action returns to this court for a second time.[1] This

[1] During the underlying proceedings, the original plaintiff, GMAT Legal Title Trust 2014-1, U.S. Bank National Association, as Legal Title Trustee, filed an amended ex parte application for a prejudgment remedy. On June 2, 2020, the court, *Spader*, *J.*, issued an order granting the ex parte application. The defendants timely appealed that order on June 9, 2020. On July 12, 2022, this court affirmed the trial court's judgment with respect to the court's jurisdiction over the ex parte application and dismissed the remainder of the appeal as moot. *GMAT Legal Title Trust 2014-1*, *U.S. Bank*, *National Assn.* v. *Catale*, 213 Conn. App. 674, 696, 278 A.3d 1057, cert. denied, 345 Conn. 905, 282 A.3d 980 (2022). The disposition of that appeal has no bearing on the claims before us in this appeal.

time, the defendants Vito Catale (Vito) and Maria Catale[2] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff RMS Series Trust 2020-1.[3] They claim that the judgment of strict foreclosure must be reversed because (1) the plaintiff did not "lay the foundation required to rely on the hearsay evidence of the loan's history provided by the plaintiff's predecessors in interest" and, therefore, the judgment is premised entirely on inadmissible evidence, and (2) the court improperly struck their "key special defenses," including, inter alia, their defenses of unclean hands, bad faith settlement practices, and the inapplicability of the accidental failure of suit statute. For the reasons that follow, we reverse the judgment of the trial court only with respect to the granting of the motion to strike the defendants' special defense claiming the inapplicability of the accidental failure of suit statute because that special defense was not ripe for adjudication. We affirm the judgment in all other respects.

The record reveals the following facts and procedural history. In 2006, Vito executed a promissory note in favor of WMC Mortgage Corporation (WMC) in the original principal amount of $600,000. As security for the

[2] The foreclosure complaint named the following parties as additional defendants by virtue of an interest held in the mortgaged property subsequent in right to that of the plaintiff: Mortgage Electronic Registration Systems, Inc., as nominee for WMC Mortgage Corp.; WMC Mortgage Corp.; Cavalry SPV I, LLC; Advanced Radiology Consultants, LLC; the Department of Revenue Services; and Connecticut Distributors, Inc. None of these additional defendants is participating in the present appeal, and, thus, all references to the defendants in this opinion are to Vito Catale and Maria Catale only.

[3] On August 4, 2021, RMS Series Trust 2020-1 filed a motion to substitute itself for the original plaintiff, GMAT Legal Title Trust 2014-1, U.S. Bank National Association, as Legal Title Trustee, after the subject note and mortgage were assigned to it. The trial court, *Spader, J.*, granted the motion to substitute on August 23, 2021. Accordingly, all references to the plaintiff in this opinion are to RMS Series Trust 2020-1.

note, the defendants executed a mortgage in favor of WMC on property that they own in Monroe. The note and mortgage have been subject to a series of assignments.

In 2011, Consumer Solutions, LLC, one of the plaintiff's predecessors in interest, brought an action to foreclose on the mortgage (first foreclosure action). See *Consumer Solutions, LLC* v. *Catale*, Superior Court, judicial district of Fairfield, Docket No. CV-11-6018401-S. That action, however, was dismissed for dormancy in January, 2017. See id.

On August 1, 2017, GMAT Legal Title Trust 2014-1, U.S. Bank, National Association, as Legal Title Trustee (GMAT), commenced the present action via a one count complaint seeking to foreclose on the mortgage. The complaint also sought a deficiency judgment. With respect to the request for a deficiency judgment, the complaint alleged, inter alia, that the request was not time barred because of the accidental failure of suit statute; see General Statutes § 52-592; or, alternatively, because of the defendant's acknowledgement of the debt within six years of the commencement of the action. See General Statutes § 42a-3-118; see also *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 461, 802 A.2d 887 ("[a] general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute [of limitations]"), cert. denied, 262 Conn. 918, 812 A.2d 861 (2002).

On July 30, 2018, the defendants filed their answer and special defenses in which they asserted eight special defenses, including, inter alia, that Consumer Solutions, LLC, engaged in bad faith settlement practices and had unclean hands stemming from the mediation process in the first foreclosure action and that the accidental failure of suit statute did not apply because the trial court dismissed the first foreclosure action due to

the inexcusable failure of Consumer Solutions, LLC, to prosecute the action.

On August 22, 2018, GMAT filed a motion to strike all eight of the defendants' special defenses. It then filed a motion for summary judgment as to liability on November 20, 2018, relying in part on the arguments and authorities set forth in its memorandum in support of its previously filed motion to strike the defendants' special defenses that had not yet been decided.

On March 13, 2020, the court, *Spader*, *J.*, granted the motion to strike as to seven of the defendants' special defenses. The court explained that, although the plaintiff had also moved for summary judgment and the court believed that GMAT had set forth a prima facie case, it could not adjudicate GMAT's summary judgment motion at that time because the defendants were permitted an opportunity to file a revised answer and special defenses pursuant to Practice Book § 10-44.

On April 15, 2020, the defendants filed a substitute answer and special defenses, this time asserting five special defenses, including, inter alia, bad faith settlement practices, unclean hands, and the inapplicability of the accidental failure of suit statute. On April 28, 2020, GMAT filed a motion to strike all of the special defenses of the substitute answer.

On January 28, 2021, the court granted the motion to strike as to the defendants' bad faith settlement practices and unclean hands defenses, explaining that, although the allegations described a failed mediation between the plaintiff's predecessor in interest and the defendants, the allegations were insufficient to state a defense for bad faith or unclean hands. The trial court also struck the defendants' special defense that the accidental failure of suit statute did not apply on the basis that the first foreclosure action "was dismissed for dormancy and not on a substantive basis." The court

denied the motion to strike the special defense asserting that GMAT was not a holder in due course of the note because the defendants had, in the court's view, alleged facts sufficient to state such a defense.

On April 16, 2021, the court rendered summary judgment in favor of GMAT as to liability, concluding that it had established a prima facie case for foreclosure and that the defendants had not set forth the existence of a genuine issue of material fact or a viable defense that would prevent the granting of the motion for summary judgment. The court rejected the defendants' objections that claimed that GMAT's affidavits were defective and contained inadmissible hearsay to which the business record exception did not apply.

The plaintiff, after being substituted for GMAT on August 23, 2021, filed a motion for a judgment of strict foreclosure on September 1, 2021. On December 2, 2021, and February 10, 2022, the court held a hearing on the plaintiff's motion for a judgment of strict foreclosure. On February 10, 2022, the trial court, *Hon. Dale W. Radcliffe, judge trial referee*, rendered a judgment of strict foreclosure and set the law day for April 26, 2022. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendants first claim that the court erred in rendering a judgment of strict foreclosure because the court relied on inadmissible hearsay evidence to determine the date of default, the amount due on the note, interest accrued, and penalty calculations. Specifically, the defendants contend that the court incorrectly admitted into evidence certain records of Rushmore Loan Management Services, LLC (Rushmore), the plaintiff's current loan servicer, under the business records exception to the hearsay rule because the plaintiff did not "lay the foundation required to rely on the hearsay

evidence of the loan's history provided by the plaintiff's predecessors in interest." They contend that the note and mortgage passed through many hands before they were assigned to the plaintiff and that the plaintiff "has no evidence generated by itself [concerning the defendants' payment history for the period of time prior to when] . . . it took the loan [on] August 4, 2021." In their view, because Rushmore's loan history records contain information premised on information from prior holders or servicers, "controlling case law" required the plaintiff to present evidence from each and every prior owner or servicer of the note in order to demonstrate that each had a duty to transmit accurate information regarding the records to the next holder.

Although the defendants do not clearly identify in their principal appellate brief the specific records or portions of records that they are challenging on appeal, it appears, from their objections in the trial court, that their focus is on the admission of exhibits 18 and 19.[4] Exhibit 18 is a loan activity history for 2014 created by Rushmore. Exhibit 19 is a Rushmore "customer activity statement" for the period January, 2015, to October,

[4] Although the defendants suggest in their reply brief that their objections before the trial court encompassed exhibits 18, 19, *and 20*, our review shows that exhibits 18 and 19 are the only documents to which they objected. With respect to exhibit 18, the defendants' counsel stated: "Perhaps I can expedite the process. Defendants object not to any information on this document that was created by Rushmore in the course of its business. We do object to any information that was onboarded from a previous servicer or holder . . . ." As to exhibit 19, the defendants' counsel objected, stating: "I would ask the same question as to what information on this document is generated by Rushmore from Rushmore's own records as opposed to information [that] is onboarded from a prior servicer, to which we object." With respect to exhibit 20, the plaintiff's counsel stated: "I move for the admission of exhibit 20." The court asked if there was an objection. The defendants' counsel responded: "No objection, Your Honor." We therefore reject any suggestion by the defendants that their objections encompassed exhibit 20. See *Dept. of Social Services* v. *Freeman*, 197 Conn. App. 281, 296, 232 A.3d 27 ("[i]n order to preserve an evidentiary ruling for review, trial counsel must object properly"), cert. denied, 335 Conn. 922, 233 A.3d 1090 (2020).

2017.[5] The plaintiff counters that the court properly admitted the business records of its loan servicer and that it was not required to lay a foundation in the manner advanced by the defendants. The plaintiff argues that it satisfied its burden under the business records exception to the rule against hearsay because it sufficiently demonstrated that the relevant data became part of its own business records through its transaction with the previous servicer, which had a business duty to transmit accurate information. We agree with the plaintiff.

General Statutes § 52-180, which has been incorporated as § 8-4 of the Connecticut Code of Evidence, is colloquially referred to as the business records exception to the hearsay rule. Section 52-180 (a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." "To the extent [that admissibility] of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay . . . [is a] legal [question] demanding plenary review." *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 388, 222 A.3d 950 (2020). "A trial court's decision to admit evidence, if premised on a correct view of the law, however, calls for the abuse

[5] During the hearing, Anthony Younger, an officer of Rushmore, testified that exhibit 19 is essentially the same type of document as exhibit 18, but that it covers a different period of time. Younger testified that exhibit 19 looks different from exhibit 18 because Rushmore updated its formatting, but he explained that exhibit 18 and exhibit 19 were created and maintained in the same way.

of discretion standard of review." (Emphasis omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653, 137 A.3d 1 (2016).

In *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 390–91, our Supreme Court clarified the application of the business records exception in foreclosure actions. The court explained that, "[w]hen a party introduces a document that it did not create but that it received from a third party, the business records exception will apply only if the information contained in the document is based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant. . . . Where the prior owner of the note had a legitimate business duty to provide to the next holder the information used to generate the payment history, the printout of that information was the business record of the present holder. . . . If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." (Citations omitted; internal quotation marks omitted.) Id.

Our Supreme Court further explained "that—regardless of whether supporting documentation or testimony from the third party is offered—it is the third party's duty to report [the information] in a business context which provides the reliability to justify [the business records exception to the hearsay rule]." (Internal quotation marks omitted.) Id., 392. "This reliability is further strengthened . . . when the entity receiving the information from a third party, with a business duty to report it, subsequently integrates that information into the

entity's own business records and has a self-interest in [ensuring] the accuracy of the outside information . . . ."[6] (Internal quotation marks omitted.) Id.

Following *Jenzack Partners, LLC*, this court was presented with a similar claim in *U.S. Bank, National Assn.* v. *Moncho*, 203 Conn. App. 28, 54, 247 A.3d 161, cert. denied, 336 Conn. 935, 248 A.3d 708 (2021). In *Moncho*, the defendants, like the defendants in the present case, "objected to the introduction of the payment history into evidence, claiming that there was no way to verify the loan history that was supplied to [the current loan servicer] by the prior servicer." Id., 55. The trial court "overruled the defendants' objection on the ground that [the employee of the current servicer] had testified extensively about the boarding process and how [the current servicer] checked the records to ensure that they were accurate before they were kept as business records." Id., 56. On appeal to this court, the defendants

[6] In *Jenzack Partners, LLC*, our Supreme Court found persuasive the analysis by the United States Court of Appeals for the First Circuit in *U.S. Bank Trust, N.A.* v. *Jones*, 925 F.3d 534 (1st Cir. 2019). In *Jones*, the bank "sought to establish the total amount owed on the loan account by introducing a computer printout [maintained by the current loan servicer of the borrower's account] that contained an account summary and a list of transactions related to the loan." Id., 536. The record in *Jones* included "prior entries [that] were created by two other loan servicers . . . and were integrated into [the current loan servicer's] database when [the current loan servicer] succeeded them as servicer." Id., 537. Noting that "there is no categorical rule barring the admission of integrated business records under [the business records exception] based only on the testimony from a representative of the successor business," the court relied on the fact that the previous loan servicers had a business duty to report the mortgage history to the current loan servicer and that the current loan servicer's own financial interests were at stake by relying on the records. Id., 537–38. The court further explained that the borrower "did not dispute the transaction history by claiming overbilling or unrecorded payments, as she surely could have done if the records were inaccurate." (Internal quotation marks omitted.) Id., 538. On those facts, the First Circuit held that the computer printout evidencing the account summary was admissible under the federal business records exception to the hearsay rule. Id., 539–40.

claimed that the court erred by admitting into evidence the note's payment history. Id., 54.

Relying on *Jenzack Partners, LLC*, this court rejected the defendants' arguments and concluded that the court properly admitted the note's payment history because the employee of the current servicer testified that the prior owner of the loan "had a duty to provide [the current loan servicer] with accurate records during the loan transfer process." Id., 57. This court explained that, "[w]hen [the current loan servicer] received this information, it went through [its] boarding process, whereby [it] reviewed the documents and analyzed them. The information that [the prior owner of the note] provided to [the current loan servicer] was used to create the payment history that the plaintiff introduced into evidence at trial." Id. Accordingly, this court concluded that, pursuant to *Jenzack Partners, LLC*, the payment history in question qualified as a business record. Id.

The defendants' arguments in this case are plainly at odds with our Supreme Court's decision in *Jenzack Partners, LLC*, and this court's decision in *Moncho*. Nothing in those cases, or any other case to which the defendants have directed us, suggests that, in order for the business records exception to the hearsay rule to apply to its servicer's business records, the plaintiff was required to lay a foundation through the presentation of evidence from each and every prior holder or servicer of the note.[7] See, e.g., *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 604, 717 A.2d

[7] At oral argument before this court, the defendants' counsel was asked whether, had there been twenty prior loan owners or servicers, the plaintiff would be required to present a witness from each and every one of them in order for the business records exception to apply to the records in question. The defendants' counsel responded in the affirmative, stating that he believed that would be required under our Supreme Court's decision in *Jenzack Partners, LLC*.

713 (1998) ("a proponent need not establish a chain of custody in order to authenticate a business record"). To reiterate, "[i]f part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, *the proponent does not have to lay a foundation concerning the preparation of the data it acquired* but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." (Emphasis added.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 391; see also *U.S. Bank, National Assn.* v. *Moncho*, supra, 203 Conn. App. 57.

In the present case, the court properly admitted the challenged documents as business records because the plaintiff introduced evidence that the challenged data became a part of its own business records pursuant to a transaction in which the previous loan servicer had a business duty to transmit accurate information to Rushmore. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 392 ("[t]he key question is whether the records in question are reliable enough to be admissible" (internal quotation marks omitted)). At the hearing, Anthony Younger, an officer of Rushmore, testified about the loan servicing process, including the "boarding process," which he described as the process of taking over the servicing of a loan from another servicer. He testified that the boarding process is comprised of, among other things, reviewing the information received from the previous servicer, mapping that information into Rushmore's computer system, and auditing the information received, including the status of the loan and the amounts shown. Younger further testified that the loans are reviewed and checked to make sure that the status of each loan is correct before the loans become live and Rushmore's

servicing begins. He testified that "prior servicers have an obligation to transfer the information—accurate information from their system to [Rushmore] so [it] can input that information in our system."

Younger further testified that exhibits 18 and 19 are Rushmore records that contain information from the prior servicer, in addition to information Rushmore generated after it became the servicer. He made clear that Rushmore relied on the information that the predecessor servicer provided when creating its own records. As the plaintiff correctly notes, this is precisely the scenario contemplated in *Jenzack Partners, LLC*. Because the plaintiff sufficiently demonstrated that the challenged data became a part of its own business records as part of a transaction with the prior servicer, which had a business duty to transmit accurate information to Rushmore, the trial court did not err in admitting exhibits 18 and 19 as business records.[8]

II

The defendants next claim that the court erroneously granted GMAT's motion to strike with respect to their special defenses of unclean hands, bad faith settlement practices, and the "inapplicability of the accidental failure of suit statute." We address their arguments in turn.

[8] We note that, even if exhibits 18 and 19 had been improperly admitted into evidence, the admission of those records would not constitute reversible error because they were cumulative of other evidence presented. See *Kovachich* v. *Dept. of Mental Health & Addiction Services*, 344 Conn. 777, 819, 281 A.3d 1144 (2022) ("[i]t is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error" (internal quotation marks omitted)). Indeed, exhibit 20, which is a customer activity statement spanning August, 2016, to November, 2021, was admitted without objection and contains information about the outstanding principal balance, the total amount of escrow advances made by the mortgagee for real estate taxes and hazard insurance, the interest rate charged under the loan throughout the history of loan servicing, and the date on which the defendants stopped making payments. Exhibit 22, which also was admitted without objection, contains the amount of attorney's fees paid.

"[A]ppellate review of a trial court's decision to grant a motion to strike is plenary." *HSBC Bank USA, National Assn.* v. *Nathan*, 195 Conn. App. 179, 193, 224 A.3d 1173 (2020). That is "[b]ecause a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, 192 Conn. App. 159, 164, 217 A.3d 649 (2019). "In determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense." *County Federal Savings & Loan Assn.* v. *Eastern Associates*, 3 Conn. App. 582, 585, 491 A.2d 401 (1985).

The following additional facts and procedural history are relevant to the defendants' claims. On April 15, 2020, the defendants filed a substitute answer and special defenses, in which they asserted five special defenses: (1) bad faith settlement practices; (2) unclean hands as to the actions of Consumer Solutions, LLC; (3) unclean hands as to the actions of GMAT; (4) that "GMAT is not the holder in due course of the note"; and (5) the "inapplicability of [the] accidental failure of suit statute." With respect to their bad faith settlement practices and unclean hands defenses, the defendants alleged, inter alia, that Consumer Solutions, LLC, one of the plaintiff's predecessors in interest, "committed bad faith settlement practices" and that, "[a]bsent said bad

faith, the first foreclosure action would have been successfully resolved via mediation." In support of these broad assertions, the defendants appended to their answer and special defenses an exhibit purporting to be a mediator's report from December 23, 2011, describing four mediation sessions between the defendants and Consumer Solutions, LLC. The defendants alleged that the mediation report showed that Consumer Solutions, LLC, "flagrantly flouted its mediation obligations."

The report itself stated as follows: "The parties have met four times to attempt to negotiate a settlement of this case on [August 4, September 14, November 10 and December 8, 2011]. The [August 4] and [September 14] mediations were spent soliciting documents from the borrowers for review and updating/completing the submission of those documents.

"The parties met for mediation on [November 10, 2011] in order to determine if the borrowers' financial situation would warrant the bank making a modification offer. The [August 4] and [September 14] submissions indicated that the borrowers now have significantly more income than they had when they fell behind on the loan. Based upon these circumstances, the bank tendered a tentative offer to the borrowers that was conditioned upon the borrowers coming up with a significant contribution. The bank would modify their loan so that their monthly payment would be more affordable. The modification would have a three month trial period along with a significant contribution. The borrowers indicated that they would have no trouble making the trial payments, but they only had 40 [to] 50 [percent] of the down payment on hand. There was the possibility that they could come up with the total amount with the help of a third party. Mediation was adjourned until [December 8, 2011] with the borrower[s] and the servicer's underwriter pledging to continue

discussions regarding the timing and amount of the contribution to be paid.

"The parties met again for mediation on [December 8, 2011]. Mediation began with the underwriter informing everyone that the proposed modification was only on the table through [December 10, 2011]. The borrowers indicated [that] they would not have the full amount of the down payment until the second week of January due to their having to acquire it from a third party and the third party's year-end financial obligations. The mediator proposed that, since the offer was to include a trial period anyway, the borrowers could submit [one third] of the down payment plus the scheduled monthly trial payment on each of the scheduled payment dates. This would allow for them to pay the amount they had on hand immediately and allow for the time need[ed] for them to receive assistance from friends/family. This proposal would also place the lender in the same position after the trial period as their initial proposal. The borrower[s] said this would be no problem for them. The underwriter repeatedly and categorically refused to convey this new proposal to the investor. The borrowers attempted to give the lender safeguards against their failure to pay resulting in further delays in the foreclosure process. The underwriter continued to refuse to forward the offer to the investor. The financial [documents] of the borrowers indicate an ability to support a modification if the investor will negotiate with them."

On January 28, 2021, the court granted in part and denied in part GMAT's motion to strike the defendants' special defenses, striking all the defenses except for the defendants' fourth special defense, which asserted that GMAT was not the holder in due course of the note. The court explained, inter alia, that, although the mediator's report indicated some frustration with Consumer Solutions, LLC, the allegations were "not a bad

faith settlement practice as plead[ed]." The court further explained that the facts the defendants alleged showed a failed mediation, not bad faith on the part of Consumer Solutions, LLC. It similarly concluded that the defendants' unclean hands special defenses, which were predicated largely on the same fact pattern as the defendants' bad faith claim, did not set forth facts consistent with the defense of unclean hands against either Consumer Solutions, LLC, or GMAT. The court also rejected the defendants' special defense claiming that the accidental failure of suit statute did not apply, explaining that "the previous matter was dismissed for dormancy and not on a substantive basis."

A

The defendants first claim that the court erroneously granted GMAT's motion to strike the defendant's special defenses of bad faith settlement practices and unclean hands because "[t]hese defenses arose from . . . conduct [by Consumer Solutions, LLC] during the mandatory mediation process, wherein the mediator expressed what appears to be frustration at [the] . . . failure [of Consumer Solutions, LLC] to continue when a deal nearly was at hand." The plaintiff disagrees, arguing, inter alia, that these defenses alleged conduct by a third party in a separate lawsuit and failed to allege facts establishing successor liability, that these defenses were waived because the defendants did not file a motion for sanctions pursuant to General Statutes (Rev. to 2015) § 49-31n (c)[9] during the mediation process in the prior foreclosure action, and, more fundamentally, that these defenses failed to allege facts sufficient to state a defense of bad faith or unclean hands. For the reasons that follow, we agree with the plaintiff.

[9] General Statutes (Rev. to 2015) § 49-31n (c) (2) provides in relevant part: "The court may impose sanctions on any party or on counsel to a party if such party or such counsel engages in intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program. Any sanction that is imposed shall be proportional

"[W]e note that an action to foreclose a mortgage is an equitable proceeding. . . . It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply." (Citations omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310–11, 777 A.2d 670 (2001). Indeed, "[t]he party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked. . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the

to the conduct and consistent with the objectives of the mediation program. Available sanctions shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines. . . ."

Hereinafter, all references to § 49-31n in this opinion are to the 2015 revision of the statute.

action producing the injury but the resulting injury also must be intentional." (Citation omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 747, 196 A.3d 328 (2018).

Similarly, bad faith generally "implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *J & M Holdings, LLC*, 143 Conn. App. 340, 348, 70 A.3d 156 (2013).

With these principles in mind, and construing the factual allegations in a manner most favorable to the defendants, we conclude that the trial court properly granted GMAT's motion to strike the defendant's bad faith settlement practices and unclean hands special defenses. Indeed, even if we assume, without deciding, that the alleged misconduct of the plaintiff's predecessor in interest (multiple times removed) during a mediation process that occurred in a prior foreclosure action can affect the plaintiff's rights in this foreclosure action and that the defendants were not precluded from raising these special defenses because they failed to file a motion for sanctions pursuant to § 49-31n (c) during the challenged mediation process, the defendants still have not alleged facts sufficient to state a defense of unclean hands or bad faith settlement practices.[10] Simply put, there is nothing in the defendants' special

[10] We note that, in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 676 n.16, 212 A.3d 226 (2019), our Supreme Court considered a plaintiff's argument claiming that the statutory sanctions in § 49-31n (c) (2) were the only proper remedy to address misconduct during mediation and that mediation conduct could not serve as a special defense in a foreclosure action. Our Supreme Court explained that the facts of that case involved an alleged pattern of misconduct that commenced long before the filing of the foreclosure action and continued during mediation and that it had "no

defenses that sufficiently allege that the plaintiff's predecessor in interest engaged in wilful misconduct or in conduct that involved a dishonest purpose or is of such character as to be condemned by honest and fair-minded people. As the trial court correctly observed, what the defendants essentially allege "is a failed mediation." Accordingly, we conclude that the court properly struck the defendants' special defenses of unclean hands and bad faith settlement practices.

B

The defendants' final claim is that the court improperly granted the motion to strike their fifth special defense, which asserted the "inapplicability of the accidental failure of suit statute." They claim that the court applied the incorrect legal standard when it concluded that the plaintiff could avail itself of the savings statute because the first foreclosure action was not dismissed on the merits. They argue that, because their special defense was improperly stricken, "the statute of limitations bars the plaintiff's deficiency claim."

The plaintiff points out that the judgment from which the defendants are appealing is the judgment of strict foreclosure and that the accidental failure of suit statute is irrelevant to the plaintiff's right to foreclose on the mortgage. The plaintiff also argues that the defendants have not specifically pleaded a statute of limitations defense and, therefore, have waived any such defense. It further contends that, even if the defendants had pleaded a statute of limitations defense to the deficiency judgment component of the complaint, that defense would not yet be ripe for adjudication.

occasion, therefore, to consider whether the availability of [the sanctions set forth in § 49-31n (c) (2)] reflects a legislative intent to occupy the field when the misconduct is limited to the mediation period." Id. We, too, need not decide that question today.

We conclude that the motion to strike the defendant's special defense directed at the plaintiff's prayer for relief seeking a deficiency judgment and alleging that such relief was time barred was not ripe for adjudication. As a starting point, "[j]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Emphasis in original.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86, 952 A.2d 1 (2008). Because the plaintiff raises an issue regarding the justiciability of the defendants' fifth special defense, our appellate review is plenary. See *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004) ("because an issue regarding justiciability raises a question of law, our appellate review is plenary").

This court's decision in *U.S. Bank, National Assn.* v. *Moncho*, supra, 203 Conn. App. 28, is relevant for present purposes. In *Moncho*, the defendants asserted a special defense claiming that the applicable statute of limitations barred the plaintiff from obtaining a deficiency judgment. Id., 47. The trial court "determined that because 'the plaintiff has not made a motion for deficiency judgment to this point in the proceedings . . . this defense is premature and may be addressed during any subsequent proceedings.' " Id. On appeal to this court, we agreed with the trial court, explaining that, because the plaintiff in that case had yet to file a motion for a deficiency judgment, "[t]he defendants' claim that any attempt by the plaintiff to seek a deficiency judgment is barred by the statute of limitations is thus a claim contingent upon some event that has not and indeed may never transpire." (Internal quotation marks omitted.) Id., 48. This court therefore concluded that the trial court correctly declined to adjudicate the

defendants' statute of limitations defense prior to the plaintiff filing a motion for a deficiency judgment. Id.

In light of *Moncho*, we conclude that the court in the present case improperly granted the motion to strike the defendants' fifth special defense because the defendants' "inapplicability of the accidental failure of suit statute" defense was not ripe for adjudication. See id. ("[i]n the present case, we conclude that the defendants' statute of limitations defense is not ripe for review"). As in *Moncho*, the plaintiff has not yet filed a motion for a deficiency judgment and may never elect to do so. See id. On the basis of this court's decision in *Moncho*, it is clear that a defendant's special defense regarding the applicability of the savings statute as it pertains to a deficiency judgment becomes ripe for adjudication only after a plaintiff files a motion for a deficiency judgment. Either party can then challenge the court's adjudication of the defense on appeal once the court renders judgment on the motion for a deficiency judgment.[11] Accordingly, the court should have dismissed the motion to strike as it pertains to the defendants' fifth special defense.

[11] To the extent that the defendants' arguments can be construed as suggesting that the savings statute had some application to the plaintiff's action for strict foreclosure, that suggestion is without merit. It is well known that "[t]he accidental failure of suit statute applies only to actions barred by an otherwise applicable statute of limitations." *McKeever* v. *Fiore*, 78 Conn. App. 783, 795, 829 A.2d 846 (2003). Because there is no applicable statute of limitations for a mortgage foreclosure, the accidental failure of suit statute is inapplicable. See *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 815, 873 A.2d 1003 ("the rule in Connecticut, as far back as the early nineteenth century, is that a statute of limitations does not bar a mortgage foreclosure"), cert. denied, 275 Conn. 902, 882 A.2d 670 (2005); see also *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 42, 257 A.3d 360 ("[t]his court previously has rejected the argument that § 42a-3-118 applies to a mortgage foreclosure"), cert. denied, 338 Conn. 913, 259 A.3d 653 (2021); 2 D. Caron & G. Milne, Connecticut Foreclosures: An Attorney's Manual of Practice and Procedure (12th Ed. 2022) § 32–3:14, p. 666 ("[s]ince a foreclosure is an action sounding in equity, there is no statute of limitations defense to a mortgage foreclosure").

The judgment is reversed only with respect to the granting of the motion to strike the defendants' fifth special defense and the case is remanded with direction to render judgment dismissing that portion of the motion to strike and for the purpose of setting new law days; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

NADEZHDA PENCHEVA-HASSE *v.* MICHAEL HASSE (AC 45268)

Elgo, Suarez and Seeley, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial and custody orders. Following a trial, the court found, inter alia, that the defendant's financial disclosures were not credible, as he reported that he had an income of $612 per week, despite operating a thriving legal practice, owning several real estate properties, and spending $643 per week on his minor child's activities and care. Although the plaintiff requested that the court compare the defendant's bank records and tax statements to his financial disclosures to determine the defendant's earning capacity, the court declined to conduct what it claimed was a forensic audit without testimony from an expert witness skilled in such matters. In addition, the court found that the defendant had withdrawn large sums of money from his bank accounts during the pendency of the dissolution, totaling $342,000, in violation of the automatic stay. The court awarded the plaintiff a lump sum and the marital property and awarded the defendant a lump sum, in addition to the $342,000, which he withdrew during the litigation, as well as all the properties he solely owned before his marriage to the plaintiff. The court also ordered that the parties share joint legal custody of their minor child and ordered a shared equal parenting time custody schedule. *Held*:

1. Contrary to the defendant's claim, the trial court properly applied the child support guidelines: the court did not err in calculating the presumptive child support amount by improperly calculating the parties' incomes or err in its deviation from the child support guidelines, as the court properly determined the presumptive child support amount based on the parties' stated weekly incomes, did not rely on the defendant's potential earning capacity, and utilized its broad discretion to deviate from that presumptive amount on the basis of its finding that that amount would be inequitable and inappropriate because the parties would be

enjoying a shared parenting schedule pursuant to the applicable state regulation (§ 46b-215a-5c (b) (6)) and because it found that the defendant's disclosures of his income were not credible and were understated; accordingly, the trial court properly exercised its discretion and ordered the defendant to pay the plaintiff $70 per week as child support and ordered the parties to divide equally any unreimbursed medical expenses.

2. The defendant could not prevail on his claim that the trial court's custody orders were not in the best interests of the minor child: although the defendant claimed that the split parenting schedule could interfere with the child's extracurricular activities because the plaintiff might inhibit the child's participation when she was scheduled to have time with the child, the trial court stated that it had fully considered the criteria of the applicable statutes (§§ 46b-56 and 46b-56c) and, on that basis, found that joint legal custody and a parenting schedule that provided equal parenting time was in the best interests of the child, and this court does not retry facts or evaluate the credibility of witnesses.

3. The trial court did not abuse its discretion in its orders related to property distribution: the distribution was not grossly disproportionate, particularly in light of the court's finding that the defendant violated the automatic orders by withdrawing $342,000 from marital assets during litigation, and, in considering the criteria set forth in the statute (§ 46b-81) regarding the division of marital property, as well as the defendant's advancing age and self-reported income deficiency, the trial court exercised its broad discretion to award the marital home to the plaintiff and to award all of the real estate the defendant solely owned prior to the marriage to him; moreover, contrary to the defendant's assertion, the trial court did not find that the defendant had dissipated assets, rather, that court found that the defendant was not credible in how he spent, used, or dissipated the $342,000 that he had withdrawn from bank accounts during the pendency of the litigation, and, although the court concluded that the defendant violated the automatic orders by withdrawing this vast amount of money to prop up his solely owned real estate, the court did not make a downward adjustment in the defendant's share of the marital assets.

Argued February 6—officially released August 15, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Shluger*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

Michael Hasse, self-represented, the appellant (defendant).

Opinion

SUAREZ, J. The defendant, Michael Hasse, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Nadezhda Pencheva-Hasse.[1] On appeal, the defendant claims that the court (1) improperly applied the child support guidelines, (2) abused its discretion in adopting the guardian ad litem's custody recommendations, and (3) abused its discretion in its property distribution orders.[2] We affirm the judgment of the court.

[1] The plaintiff did not file a brief or otherwise participate in the present appeal. On November 22, 2022, this court ordered that the appeal be considered on the basis of the defendant's brief, the defendant's oral argument, and the record only.

[2] Although the defendant raises fourteen claims in his statement of issues, he addresses only eleven of those claims in his brief to this court. He claims that the court erred in calculating the presumptive child support in violation of the child support guidelines; failed to identify the mandatory child support obligation; erred in its calculation of the parties' incomes; erred in finding his imputed earning capacity; erred in its calculation of the plaintiff's income and should have deviated from the child support guidelines on the basis of the defendant's extraordinary educational expenses for the child and his extraordinary medical expenses; erred in treating the defendant's pendente lite expenses as dissipation; erred and abused its discretion when it found that the defendant understated his income; erred in its property division by awarding the plaintiff the marital home and personalty; abused its discretion when it issued custody orders that are not in the best interest of the child; and violated his constitutional rights to due process, abused its discretion or otherwise erred in not considering several motions filed by him pendente lite and not conducting the trial so that he could hear the proceedings. Additionally, the defendant claims that the "[plaintiff] proffered false and unreliable evidence to support her [claim that the] defendant's intemperance is conduct requiring equitable consideration in the discretion of this court and remand." The defendant does not purport to raise an error of law or fact on the part of the trial court with respect to this claim.

Before analyzing the defendant's claims, we note that he has raised numerous claims that are inadequately briefed, are germane only to another claim that is inadequately briefed or are inadequately articulated to warrant review. "As appellate courts repeatedly have cautioned, [m]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones." (Internal quotation marks omitted.) *Kammili* v. *Kammili*,

The following facts, as found by the court, and procedural history are relevant to our resolution of this appeal. The parties were married on December 4, 2009, in Key West, Florida. They are the parents of one minor child. On February 13, 2020, the plaintiff commenced this dissolution action with a return date of March 17, 2020. In her complaint, the plaintiff sought, inter alia, a dissolution of marriage, joint legal custody of their child, child support, alimony, and a division of property. On May 4, 2021, the court, *Shluger*, *J.*, commenced a trial that continued over four nonconsecutive days. On December 17, 2021, the court issued a memorandum of decision in which it made findings of facts and issued orders dissolving the marriage.

In its memorandum of decision, the court found that, at the time of the marriage, the plaintiff was twenty-four years old and a citizen of Bulgaria with few assets.

197 Conn. App. 656, 657–58 n.1, 232 A.3d 102 (quoting *State* v. *Pelletier*, 209 Conn. 564, 566–67, 552 A.2d 805 (1989)), cert. denied, 335 Conn. 947, 238 A.3d 18 (2020); see also *LeBlanc* v. *New England Raceway, LLC*, 116 Conn. App. 267, 280 n.4, 976 A.2d 750 (2009) ("a multiplicity of issues can foreclose the appellant's opportunity to provide a fully reasoned discussion of the pivotal issues on appeal"). In the present appeal, we decline to review two of the defendant's claims because they are inadequately briefed. Specifically, we decline to review the defendant's claims that the court violated his due process rights and that the plaintiff proffered false and unreliable evidence to support her claim of the defendant's intemperance. As to the claim that the court violated his due process rights by not considering several pendente lite motions, the defendant has not identified the motions the court allegedly did not consider. With respect to his claim that the court conducted the trial in a way that he could not hear the proceedings, he devotes, at best, no more than a few sentences and provides no legal analysis. "[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." (Internal quotation marks omitted.) *In re James O.*, 160 Conn. App. 506, 527, 127 A.3d 375, aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

We understand the defendant's appeal to challenge the court's child support, child custody, and property distribution orders. For the sake of clarity and consistency of analysis, we have reorganized and restated his claims consistent with their substance as set forth in the defendant's brief. We will address them in turn.

The plaintiff came to the United States on a temporary visa and rented a room with other Bulgarian citizens in a home owned by the defendant. She began working at the law office of the defendant, and, while she was not paid a salary, she was given bonuses whenever he completed a successful case. In 2012, she was put on the payroll at a rate of $300 per week. At the time of trial, the plaintiff was working at Home Depot earning $448 per week gross and $366 per week net.

The court found that, at the time of trial, the plaintiff had the following assets. She had accounts in Bulgaria totaling $12,000, a Liberty Bank account totaling $7000, a Navy Federal Credit Union account totaling $57,000, and a PayPal account with a balance of $500. She also owned a property in Bulgaria valued at $12,000 without a mortgage.

The court found the defendant to be fifty-one years old at the time of marriage and a prominent attorney. He was the sole proprietor of a busy criminal and personal injury law practice and served as appointed counsel in the federal court system. He maintained a law practice in New London and Puerto Rico. The court further found that the defendant "claim[ed] to earn only $612 per week as gross income from what appears to be a thriving legal practice. His April 30, 2021 financial affidavit showed that he earned $1730 per week in profits. Curiously, the [defendant] showed gross receipts on his tax return for 2017 of $537,000, gross receipts for 2018 of $441,000, and gross receipts for 2019 as $410,000. According to his tax returns, he never had 'profit' in excess of $36,000 per year." The court did not find the defendant's financial disclosures credible and specifically found that he "understat[ed] his income." The court noted that "[i]t strains the credulity of the court that this experienced and capable trial attorney earns no income and is, in fact, working at a loss. And, while earning no income, he spends $115 per

week for his son's activities, $152 per week for his child's camps, $326 per week for his child's private school, and $50 per week for his child's allowance or, [in total], $643 per week ($33,436 per year)."

As additional assets, the court found that, prior to the marriage, the defendant owned numerous parcels of real estate. He owned a three-family home in Mystic, three condominiums in Puerto Rico, a condominium in Bulgaria, and two office condominiums in New London. The court found the value of the real estate to be approximately $1.4 million but that the properties were encumbered with mortgages of "an undisclosed amount." At the time of judgment, there was a marital residence, which was purchased after the marriage, located in Mystic with a value of $325,000 and without a mortgage.

The court further found that, just prior to, and during the pendency of, the litigation, the defendant withdrew large sums of money from his bank accounts. Just prior to the commencement of the dissolution action, the court also found that the defendant had a bank account with the Navy Federal Credit Union with a balance of $496,000, and, at the time of trial, the balance in the account was $250,000. The court further found that, at the commencement of the litigation, the defendant had a bank account at Chelsea Groton Bank with an approximate balance of $102,000, and, as of June 15, 2021, the account balance was approximately $35,000. In addition to the Navy Federal Credit Union and the Chelsea Groton Bank accounts, the court found that the defendant had a Liberty Bank account totaling $2000, a retirement account at the Navy Federal Credit Union totaling $65,000, a life insurance policy valued at $3000, and a Voya stock account valued at $3000. The court found that the defendant failed to adequately explain "how he had used, spent, or dissipated" these funds. The court concluded that the defendant had "violated the

automatic orders[3] by withdrawing vast sums of money from his bank accounts . . . .'' (Footnote added.)

The court further found that, although the defendant had had numerous orthopedic surgeries and suffered pain from increased activity, at the time of trial he was in good health and was still able to work full-time and to manage his real estate investments here and abroad.

At trial, the plaintiff argued and urged the court to find that the defendant had a much greater earning capacity than what he was reporting as his actual income. She argued that the court should simply compare his stated income and expenses to the several years of bank records and tax returns that were submitted as exhibits. The court, however, declined to conduct what it claimed to be a forensic audit without testimony from an expert witness skilled in such matters.

The court found, however, that, ''utilizing [his] stated gross [income of] $612 and the [plaintiff's] stated gross income of $448 per week, the presumptive child support would be $128 per week from the [defendant] or $94 per week from the [plaintiff]. The court further found that ''applying this figure would be inequitable and inappropriate because [the parties would] be enjoying a shared parenting schedule and because the court [found] the [defendant's] figures to be highly suspect and unreliable.''

The court made the following relevant findings regarding the child. The child attended private school and was a good student. The plaintiff and the defendant

[3] Practice Book § 25-5 sets forth various automatic orders upon service of a dissolution complaint and provides in relevant part: ''(b) . . . (1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action. . . .''

supported the child in a plethora of interests including hockey, baseball, piano, guitar, and the arts. The parties were good, loving parents to the child and were both highly bonded with him. Prior to the dissolution of the marriage, "[t]he child [did] very well without either parent having more time than the other or [either parent] having final decision-making authority." The defendant was heavily involved with the child's extracurriculars and coached the child's hockey team. The defendant's relationship with the child was more of a peer, while the plaintiff had established a more structured parent-child relationship. The court found her to be more likely to ensure that the child focused on his schoolwork.

The guardian ad litem recommended that it was in the child's best interest that the court order a shared parenting plan in which the child would spend equal time living with each party. The guardian ad litem recommended that in week one the plaintiff would have the child from Sunday at 9 a.m. until Wednesday at 9 a.m., and in week two, the plaintiff would have the child from Thursday at 9 a.m. until Sunday at 9 a.m.

In its December 17, 2021 memorandum of decision, after stating that it "fully considered" the criteria of General Statutes (Rev. to 2021) § 46b-56[4] and General Statutes §§ 46b-56c, 46b-62, 46b-81, 46b-82 and 46b-84, "the [applicable rules of practice] as well as the evidence, applicable case law, the demeanor and credibility of the witnesses, and arguments of counsel" and setting forth the relevant law, the court issued the following relevant orders. It ordered that the parties share joint legal and physical custody of the child and ordered that, in week one, the plaintiff "shall have the child

[4] We note that § 46b-56 was amended by the legislature in 2021 during the events underlying this appeal. See Public Acts 2021, No. 21-78, § 9. All references herein to § 46b-56 are to the 2021 revision of the statute.

from Sunday at 9 a.m. until Wednesday at 9 a.m. and the [defendant] shall have the child from Wednesday at 9 a.m. until Sunday at 9 a.m." In week two, the court ordered that the plaintiff "shall have the child from Sunday at 9 a.m. until Thursday at 9 a.m. and the [defendant] shall have the child from Thursday at 9 a.m. until Sunday at 9 a.m." The court further ordered that "the parents shall share the summertime with the child in two week blocks to permit [the child's] trips to Bulgaria with the [plaintiff] . . . or frequent hockey camps with the [defendant]." In the event of a conflict with the summer vacations, the court ordered that "the [plaintiff's] schedule shall take priority in odd years and the [defendant's] schedule shall take priority in even years." The court ordered the defendant to pay the plaintiff $70 per week in child support and the parties to divide any unreimbursed medical, optical, ophthalmological, psychological, orthodontic, dental, or work-related day care costs equally.

The court ordered that the defendant quit claim all of his rights, title, and interest in the marital residence to the plaintiff, who was to be solely responsible for all the expenses associated with the home. Additionally, the court ordered that the defendant was to retain the remaining real estate, his bank accounts, brokerage accounts, and retirement accounts, his law practice, and his life insurance policy. On the basis of this division of assets, the court determined that the plaintiff's share of the marital estate was $425,000 and the defendant's share was $832,500, plus the $342,000 that the defendant withdrew from his bank accounts during the pendency of the litigation. The defendant's total share of the marital estate was, therefore, $1,174,500. This appeal followed.

We begin by setting forth our standard of review in dissolution matters. "An appellate court will not disturb a trial court's orders in domestic relations cases unless

the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Ray* v. *Ray*, 177 Conn. App. 544, 551–52, 173 A.3d 464 (2017).

I

We first address the defendant's claim that the court improperly applied the child support guidelines. See General Statutes § 46b-215b. He argues that the court erred in calculating the presumptive child support amount by improperly calculating the parties' incomes and erred in its deviation from the child support guidelines. He further argues that the evidence in the record did not support a finding of his earning capacity. See footnote 2 of this opinion. We are not persuaded.

Before turning to the merits of the claim, we set forth the following legal principles. Although, as we have stated previously, the trial court is vested with broad discretion in domestic relations matters, with respect to child support "the parameters of the court's discretion have been somewhat limited by the factors set forth in the child support guidelines." *Colbert* v. *Carr*, 140 Conn. App. 229, 240, 57 A.3d 878, cert. denied, 308 Conn. 926, 64 A.3d 333 (2013). Section 46b-84 (a) provides in relevant part that "the parents of a minor child of the marriage, shall maintain the child according to their

respective abilities, if the child is in need of maintenance. . . .'' General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines, which must be updated every four years, ''to ensure the appropriateness of criteria for the establishment of child support awards . . . .'' ''In support of the application of these guidelines . . . § 46b-215b (a) provides: 'The . . . guidelines issued pursuant to [§] 46b-215a . . . shall be considered in all determinations of child support amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. *A specific finding on the record that the application of the guidelines would be inequitable or inappropriate* in a particular case . . . shall be required in order to rebut the presumption in such case.' '' (Emphasis in original.) *Moore* v. *Moore*, 216 Conn. App. 179, 190–91, 283 A.3d 994 (2022).

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

[5] ''The criteria enumerated in § 46b-215a-5c (b) of the regulations are: (1) Other financial resources available to a parent . . . (2) [e]xtraordinary expenses for care and maintenance of the child . . . (3) [e]xtraordinary parental expenses . . . (4) [n]eeds of a parent's other dependents . . . (5) [c]oordination of total family support . . . [and] (6) [s]pecial circumstances. . . . Shared physical custody is considered a special circumstance

"Our courts have interpreted this statutory and regulatory language as requiring three distinct findings in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation." (Footnote altered; internal quotation marks omitted.) Id., 191–92.

"Under the guidelines, the child support obligation first is determined without reference to earning capacity, and earning capacity becomes relevant only if a deviation from the guidelines is sought under § 46b-215a-5c (b) (1) (B) of the Regulations of Connecticut State Agencies. . . . [Section] 46b-215a-3 (b) (1) (B) [of the Regulations of Connecticut State Agencies, now § 46b-215a-5c (b) (1) (B)] allows deviation from the guidelines on the basis of a parent's earning capacity. . . .

"Given this regulatory framework, a court errs in calculating child support on the basis of a parent's earning capacity without first stating the presumptive support amount at which it arrived by applying the guidelines and using the parent's actual income *and* second finding application of the guidelines to be inequitable or inappropriate." (Citations omitted; emphasis in original;

that justifies deviation when (i) such arrangement substantially: (I) reduces expenses for the child, for the parent with the lower net weekly income, or (II) increases expenses for the child, for the parent with the higher net weekly income; and (ii) sufficient funds remain for the parent receiving support to meet the needs of the child after deviation; or (iii) both parents have substantially equal income. . . . The [b]est interests of the child is also considered a special circumstance that justifies deviation." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Moore*, supra, 216 Conn. App. 191 n.5.

internal quotation marks omitted.) *Keusch* v. *Keusch*, 184 Conn. App. 822, 829, 195 A.3d 1136 (2018).

In the present case, the court, in applying the child support guidelines, found the presumptive child support amount utilizing the defendant's stated income of $612 per week and the plaintiff's stated income of $448 per week. The court did not rely on an earning capacity finding as the defendant argues. Utilizing those figures, the court found that the presumptive child support amount would be $128 per week from the defendant or $94 per week from the plaintiff. Having established the presumptive child support amount pursuant to the child support guidelines, the court specifically found that such amount was inequitable and inappropriate because the parties would be enjoying a shared parenting schedule pursuant to § 46b-215a-5c (b) (6) of the Regulations of Connecticut State Agencies and because it found the defendant's disclosures of his income not credible and understated. Exercising its discretion, the court ordered the defendant to pay the plaintiff $70 per week as child support and ordered the parties to equally divide any unreimbursed medical, optical, ophthalmological, psychological, orthodontic, dental, or work-related day care costs.

On the basis of our review of the record, we conclude that the court properly determined the presumptive child support amount based on the parties' stated weekly incomes and utilized its broad discretion to deviate from that presumptive amount based on recognized deviation criteria established by the child support guidelines.

II

The defendant next claims that the court's custody orders were an abuse of its discretion. Specifically, he

argues that the court's custody orders were not in the best interests of the child.[6] We are not persuaded.

"The authority of a trial court to render custody, visitation and relocation orders is set forth in . . . § 46b-56 (a), which provides in relevant part that [i]n any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . . [Section] 46b-56 (c) directs the court, when making any order regarding the custody, care, education, visitation and support of children, to consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of [sixteen enumerated] factors.[7] . . . The court is not required

[6] The defendant also contends, in one sentence of his appellate brief, that the guardian ad litem's parenting plan was "simply adopted by the court in an improper delegation of its authority to someone who presented and relied on facts that were unsupported in the record." He provides no authority in support of this argument nor an explanation as to why the court's decision to adopt the recommended parenting plan was an "improper delegation of its authority." To the extent that this is an attempt to claim that the court improperly delegated its authority, it is inadequately briefed. We, therefore, decline to address it. *Margarum* v. *Donut Delight, Inc.*, 210 Conn. App. 576, 580, 270 A.3d 169 (2022) ("[w]e consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)).

[7] General Statutes (Rev. to 2021) § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the

to assign any weight to any of the factors that it considers. . . .

"Our standard of review of a trial court's decision regarding custody [and] visitation . . . orders is one of abuse of discretion. . . . [I]n a dissolution proceeding the trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion

parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers."

can warrant our interference." (Citation omitted; footnote added; footnote omitted; internal quotation marks omitted.) *M. S.* v. *P. S.*, 203 Conn. App. 377, 396–98, 248 A.3d 778, cert. denied, 336 Conn. 952, 251 A.3d 992 (2021).

The defendant avers that the split parenting schedule ordered by the court may prevent the child from participating in activities, which span both of the parties' allocated times and is, therefore, not in the child's best interests.[8] Specifically, the defendant argues that, without safeguards to ensure that the child participates in his extracurricular activities, the plaintiff may interfere with the child's participation when she is scheduled to have time with the child. Additionally, he argues that the court failed to consider the child's preferences and the dispositions of the parents to understand and meet the needs of the child. This, he asserts, further demonstrates that the court's custody orders were not in the best interests of the child.

The defendant's assertion that the court's custody orders are not in the best interests of the child due to the court's failure to consider factors set forth under § 46b-56 (c) is unavailing. In its memorandum of decision, the court noted that it had "fully considered the criteria of . . . [§§] 46b-56 [and] 46b-56c . . . as well as the evidence, applicable case law [and] the demeanor and credibility of the witnesses . . . in reaching the decisions reflected in the orders that [it] issue[d] in [its] decision." On that basis, the court ordered the parties to share joint legal custody and ordered a parenting plan that provides equal parenting time with each party. The court found that to be in the best interests of the child. "The defendant essentially requests that we

[8] In its memorandum of decision, the court noted that "[t]he parties are not very far apart on their custody and access proposals. Each of them is seeking an order of joint legal and physical custody, and each parent is seeking approximately one day more than the other of access."

reweigh the evidence in his favor. [W]e do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 848, 263 A.3d 972, cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

Accordingly, we are not persuaded that the court abused its discretion in its custody orders.

III

The defendant next claims that the court abused its discretion in its orders related to property distribution. Specifically, the defendant argues that the court did not consider the defendant's lifelong financial contributions in obtaining the assets prior to the marriage, as it is required to do, and that the court incorrectly found that the defendant dissipated assets.[9] We are not persuaded.

"In dissolution proceedings, the court must fashion its financial orders in accordance with the criteria set forth in . . . § 46b-81 (division of marital property) . . . ." (Internal quotation marks omitted.) *Riccio* v. *Riccio*, 183 Conn. App. 823, 826, 194 A.3d 337 (2018). Pursuant to § 46b-81 (c), the court "shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. *The court shall also*

[9] In his brief, the defendant also argues that "[the] court must determine at the outset which of the parties' resources are subject to division. In this case, [this] step was not undertaken." He cites no authority to support this argument and provides no analysis applying the law to the facts of this appeal. We, therefore, decline to address it further. *Margarum* v. *Donut Delight, Inc.*, 210 Conn. App. 576, 580, 270 A.3d 169 (2022) ("[w]e consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)).

consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." (Emphasis added.)

"While the trial court must consider the delineated statutory criteria . . . no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . A trial court . . . need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor. . . .

"Importantly, § 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other. . . . On the basis of the plain language of § 46b-81, there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria. . . . Additionally, [i]ndividual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements." (Citations omitted; internal quotation marks omitted.) *Riccio* v. *Riccio*, supra, 183 Conn. App. 826–27. As previously noted in this opinion, we "will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented." Id., 825.

In the present case, the court specified in its memorandum of decision that it considered the criteria set forth in § 46b-81 and the evidence before it. "[W]hen a trial court states in its memorandum of decision that

it has considered the factors listed in § 46b-81 (c) in fashioning an order distributing marital property, the judge is presumed to have performed [his or her] duty unless the contrary appears [from the record]." (Internal quotation marks omitted.) *Kammili* v. *Kammili*, 197 Conn. App. 656, 672, 232 A.3d 102, cert. denied, 335 Conn. 947, 238 A.3d 18 (2020).

In its memorandum of decision, the court found that the defendant did not want to pay alimony or child support and that he wanted to retain the real estate that was his before the marriage, the marital home, his bank accounts and his retirement accounts. The court concluded that, based on the defendant's advancing age and the curious and sudden income deficiency, it was fairer and more appropriate to order a property settlement rather than a long-term alimony order. The court further concluded that the defendant had a greater opportunity than the plaintiff to relocate to another residence. On that basis, the court exercised its broad discretion to award the marital home to the plaintiff and to award all of the real estate that the defendant owned prior to the marriage to him.

The defendant further asserts that the court erred when it determined that he dissipated assets. Contrary to the defendant's assertion, the court did not find that he dissipated assets. Rather, the court found that the defendant was not credible as to "how he had used, spent, or dissipated $342,000 from . . . two [bank] accounts during the pendency of the litigation." The court noted that "it appears that the defendant has been making sizable withdrawals to prop up his solely owned real estate from the bank accounts, which money would normally be divisible marital property." Although the court concluded that the defendant violated the automatic orders by withdrawing this vast amount of money to prop up his solely owned real estate, the court did not make a downward adjustment in the defendant's

share of the marital assets. The court allowed him to retain all of his solely owned property. Moreover, as the court noted, the plaintiff's total share of the marital estate was $424,000 and the defendant's share was $832,500, without accounting for the $342,000 withdrawn in violation of the automatic orders.

Consequently, we conclude that the court did not abuse its discretion in its orders related to the property distribution as the distribution was not grossly disproportionate, particularly in light of the court's finding that the defendant violated the automatic orders by withdrawing $342,000 from marital assets. Having considered the defendant's arguments in support of this claim, we conclude that he has failed to demonstrate that the court's orders distributing assets were an abuse of its discretion. In reaching this conclusion, we are mindful that, even if a different conclusion as to how the parties' assets should have been distributed could have been reached, "[t]here is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 441–42, 175 A.3d 601 (2017).

The judgment is affirmed.

In this opinion the other judges concurred.

ANGELINE BUCHENHOLZ *v.* CURT BUCHENHOLZ (AC 45226)

Prescott, Moll and Cradle, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial orders. The plaintiff alleged in her complaint that the sole ground for the dissolution of the marriage was that it had broken down irretrievably.

At trial, the plaintiff testified regarding several incidents of physical and sexual abuse by the defendant, which testimony the trial court found to be credible. In its memorandum of decision, the court stated that it was dissolving the parties' marriage on the ground that it had broken down irretrievably as a result of the defendant's behavior. It further found that the defendant had an earning capacity in excess of his pension and disability benefits, in light of testimony from both parties that he previously had earned additional income by repairing and selling chainsaws and firearms, and awarded the plaintiff alimony in an amount that reflected such additional earning capacity. *Held*:

1. The defendant's claim that the trial court abused its discretion by amending the plaintiff's complaint to allege intolerable cruelty as the ground for the dissolution of the parties' marriage was unavailing: the trial court did not state that it dissolved the parties' marriage on the ground of intolerable cruelty and there was nothing in its decision demonstrating that it had amended the plaintiff's complaint to allege intolerable cruelty, as its statement that it had "amend[ed] the [complaint] to conform to the extensive proof of the defendant's fault," when read in the context of its decision as a whole, merely demonstrated that the court recognized the plethora of evidence establishing that the defendant was at fault for the irretrievable breakdown of the parties' marriage; moreover, the trial court's finding that the defendant was at fault for the irretrievable breakdown of the marriage was a proper finding for the court to make.
2. The defendant's claim that his state and federal due process rights were violated because he did not receive adequate notice that the plaintiff would introduce testimony at trial to support her allegation of intolerable cruelty was unavailing: the plaintiff did not allege intolerable cruelty as the ground for dissolution in her complaint and there was nothing in the record supporting the defendant's position that the plaintiff was alleging intolerable cruelty as the ground for dissolution; moreover, the plaintiff's testimony regarding the physical and sexual abuse that she suffered at the hands of the defendant was relevant to the issue of fault in the breakdown of their marriage; furthermore, the record revealed that the defendant had sufficient time to conduct discovery and to prepare a defense with respect to the plaintiff's testimony regarding the incidents of abuse, as the plaintiff's attorney referenced such incidents in his opening statement and the plaintiff testified as to the incidents during the first day of trial, the defendant's attorney did not object to such testimony and had a full opportunity to, and did, cross-examine the plaintiff, and the trial took place over a period of approximately six months, during which time the defendant had the opportunity to either put forth additional evidence and secure additional witnesses or file a motion for a continuance for the purpose of conducting additional discovery.
3. The trial court did not abuse its discretion in its award of alimony payments to the plaintiff: the court's finding that the defendant had an additional

earning capacity of $90 in gross weekly income in excess of his pension and disability benefits was not improper, as testimony from both parties supported the court's finding that the defendant previously had earned income by repairing and selling chainsaws and firearms, and, although the parties gave conflicting testimony as to whether the defendant was able to continue to earn additional income in such a manner, the trial court expressly found that he could, and this court declined to disturb its credibility determination; moreover, the trial court did not abuse its discretion in awarding the plaintiff $425 per week in alimony for a period of nine years because it expressly considered the relevant statutory (§ 46b-82 (a)) factors in fashioning its award and concluded that the defendant did not account credibly for the reduction in his personal checking and savings accounts during the pendency of the trial, that the defendant's net weekly earnings were substantially more than the sum of his weekly expenses and liabilities, and that the defendant could, and previously had, earned more than he reported at the time of the trial.

Argued April 25—officially released August 15, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *J. Moore*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed*.

David V. DeRosa, for the appellant (defendant).

Steven H. Levy, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Curt Buchenholz, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Angeline Buchenholz. On appeal, the defendant claims that (1) the court abused its discretion when it purportedly amended the plaintiff's complaint to allege intolerable cruelty, rather than the irretrievable breakdown of the marriage, as the ground for dissolution, (2) he did not receive adequate notice that the plaintiff would introduce testimony at trial in support of the purported ground of intolerable cruelty, and (3) the court abused its discretion in awarding alimony

to the plaintiff.[1] We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The parties were married in July, 2006. No children were born of the marriage.

By complaint dated February 5, 2020, the plaintiff brought this action seeking dissolution of the parties' marriage. The sole ground for dissolution alleged in the complaint was that the marriage had broken down irretrievably.[2] On February 11, 2020, the plaintiff filed a motion for pendente lite alimony in which she requested alimony and a "[c]ontribution to [l]iving expenses." On March 6, 2020, the court, *Danaher*, *J.*, issued an order approving the parties' temporary agreement for pendente lite alimony, pursuant to which the defendant would pay the plaintiff $400 per month in pendente lite alimony, the plaintiff was permitted to spend up to $1200 per month using the parties' joint credit card in order to pay for "necessary expenses," and the defendant would be responsible for paying the credit card balance.

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

[2] General Statutes § 46b-40 (c) provides: "A decree of dissolution of a marriage or a decree of legal separation shall be granted upon a finding that one of the following causes has occurred: (1) The marriage has broken down irretrievably; (2) the parties have lived apart by reason of incompatibility for a continuous period of at least the eighteen months immediately prior to the service of the complaint and that there is no reasonable prospect that they will be reconciled; (3) adultery; (4) fraudulent contract; (5) wilful desertion for one year with total neglect of duty; (6) seven years' absence, during all of which period the absent party has not been heard from; (7) habitual intemperance; (8) intolerable cruelty; (9) sentence to imprisonment for life or the commission of any infamous crime involving a violation of conjugal duty and punishable by imprisonment for a period in excess of one year; (10) legal confinement in a hospital or hospitals or other similar institution or institutions, because of mental illness, for at least an accumulated period totaling five years within the period of six years next preceding the date of the complaint."

The matter was tried to the court, *J. Moore*, *J.*, on April 8, April 21, May 13, June 24 and October 27, 2021. The parties were the only witnesses who testified at trial, and several exhibits were admitted into the record.

On December 23, 2021, the court issued a memorandum of decision in which it dissolved the parties' marriage on the ground that the marriage had broken down irretrievably. In connection with the dissolution of the parties' marriage, the court ordered, inter alia, that (1) the defendant pay the plaintiff $425 per week in alimony for a period of nine years, and (2) "[e]ach party may keep all firearms . . . presently in their possession . . . . [T]he plaintiff may keep firearms presently in her possession or control that the defendant claims to be his." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claims that (1) the trial court abused its discretion when it purportedly amended the plaintiff's complaint to allege intolerable cruelty as the ground for dissolution of the parties' marriage, and (2) he did not receive adequate notice that the plaintiff would introduce testimony to support the ground of intolerable cruelty, such that his rights to due process pursuant to the federal and state constitutions were violated. These claims are unavailing.

The following additional facts and procedural history are relevant to our resolution of the defendant's claims. As stated previously, both parties testified at trial. The court determined that the plaintiff's testimony was credible and concluded that the plaintiff was not at fault for the irretrievable breakdown of the parties' marriage. Specifically, the court found credible the plaintiff's testimony regarding several incidents of violent sexual intercourse with the defendant and an incident of spousal sexual assault that occurred in May, 2007 (May, 2007

incident). The court also found that "[t]he defendant physically abused the plaintiff on at least one occasion" and that, "[n]ear the end of their time living together, the defendant would often disappear, lie about his whereabouts, and return to the marital home intoxicated."[3] The court determined that the defendant's testimony was not credible, stating that "the court simply cannot believe the defendant's testimony as to the [May, 2007 incident]." The court also found the defendant's testimony regarding the other incidents between the parties to be "a weak and unsuccessful attempt to distract the court from the substantive issue of whether he participated in such violent [encounters]."

The court ultimately concluded that "the defendant's behavior [was] the primary cause of the irretrievable breakdown of the parties' . . . marriage" and dissolved the marriage "on the ground of irretrievable breakdown caused . . . by the defendant's fault." In concluding that the parties' marriage had broken down irretrievably on the basis of the defendant's fault, the court explained "that the cause of the irretrievable breakdown . . . is the defendant's physical and sexual abuse of the plaintiff. An irretrievable breakdown may result from abusive behavior. . . . Moreover, although fault was not [pleaded by the plaintiff], the court has the authority to amend [the complaint] to conform to the proof even after the evidence has been concluded. . . . The court amends the [complaint] to conform to the extensive proof of the defendant's fault." (Citations omitted.)

A

The defendant claims that the court abused its discretion when it purportedly amended the plaintiff's complaint to allege intolerable cruelty as the ground for

[3] The plaintiff first testified to the incidents of physical and sexual abuse on the first day of trial, April 8, 2021.

the dissolution of the parties' marriage. We are not persuaded.

Ordinarily, we review a claim concerning an amendment to a pleading for an abuse of discretion. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 718, 218 A.3d 596 (2019) ("[a] trial court has wide discretion in granting or denying amendments to the pleadings and only rarely will this court overturn the decision of the trial court" (internal quotation marks omitted)), aff'd, 341 Conn. 750, 267 A.3d 753 (2022). Resolving the defendant's claim, however, "requires us to interpret the court's judgment. The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . [W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) *In re November H.*, 202 Conn. App. 106, 118, 243 A.3d 839 (2020).

Put simply, there is nothing in the court's decision demonstrating that the court amended the plaintiff's complaint to allege intolerable cruelty, pursuant to General Statutes § 46b-40 (c) (8), as the ground for dissolution in the present case. The court did not state that it had dissolved the parties' marriage on the ground of intolerable cruelty. See *Evans* v. *Taylor*, 67 Conn. App. 108, 114, 786 A.2d 525 (2001) ("[w]hether intolerable cruelty exists or not in a particular case is ordinarily a conclusion of fact for the trier to draw" (internal quotation marks omitted)). Instead, the court expressly

stated that it had dissolved the marriage "on the ground of irretrievable breakdown," which was the sole ground for dissolution alleged in the plaintiff's complaint.[4] The court further determined that "the primary cause of the irretrievable breakdown" was the "defendant's behavior," namely, his physical and sexual abuse of the plaintiff as evinced by the plaintiff's testimony, which the court found to be credible. In other words, the court found the defendant to be at fault for the irretrievable breakdown of the marriage, which was a proper finding for the court to make. See, e.g., *Sweet* v. *Sweet*, 190 Conn. 657, 659–60, 462 A.2d 1031 (1983) (rejecting claim that, because irretrievable breakdown was only ground alleged in plaintiff's dissolution complaint, court was prohibited from considering fault in awarding alimony and assigning property); id., 660 ("[U]nder the statutes governing the assignment of the property of the parties or the award of alimony in a contested proceeding, the court is required to consider the causes for the dissolution of the marriage. General Statutes §§ 46b-81, 46b-82.[5] These statutes are not inconsistent with those establishing the grounds for a dissolution. . . . If . . . the parties choose to litigate the issues of alimony or division of property the causes for the dissolution must be considered by the court. The contention of the defendant, therefore, that a determination of irretrievable breakdown precludes the court from considering the causes of the dissolution in making financial awards is erroneous." (Footnote added.)).

[4] The plaintiff did not move for leave to file an amended complaint.

[5] General Statutes § 46b-81 (c) provides in relevant part: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider . . . the causes for the . . . dissolution of the marriage . . . ."

General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider . . . the causes for the . . . dissolution of the marriage . . . ."

Insofar as the court stated that it had "amend[ed] the [complaint] to conform to the extensive proof of the defendant's fault," we do not construe this statement to reflect that the court substituted intolerable cruelty as the ground for dissolution in the present case. Read in the context of the court's decision as a whole, this statement demonstrates that the court recognized the plethora of evidence establishing that the defendant was at fault for the irretrievable breakdown of the parties' marriage.

In sum, we conclude that the court did not amend the plaintiff's complaint to allege intolerable cruelty as the ground for dissolution in the present case. Instead, the decision reflects that, on the basis of the evidence in the record, the court dissolved the parties' marriage pursuant to § 46b-40 (c) (1) because it had broken down irretrievably as a result of the defendant's abusive behavior toward the plaintiff.

B

The defendant also claims that his rights to due process pursuant to the federal and state constitutions were violated because he did not receive adequate notice that the plaintiff would introduce testimony supporting the ground of intolerable cruelty. Specifically, the defendant contends that, had he received adequate notice of the plaintiff's testimony concerning incidents of abuse perpetrated by him against the plaintiff, he would have been able to conduct discovery and more adequately prepare a defense. This claim fails.

We exercise plenary review over the defendant's claim. See *Petrucelli* v. *Meriden*, 197 Conn. App. 1, 14, 231 A.3d 231 ("[w]hether a party was deprived of his due process rights is a question of law to which appellate courts grant plenary review" (internal quotation marks omitted)), cert. denied, 335 Conn. 923, 233 A.3d 1091 (2020).

As we stated previously, the plaintiff neither alleged intolerable cruelty as the ground for dissolution in her complaint nor amended her complaint to allege that ground. Indeed, there is nothing in the record that supports the defendant's position that the plaintiff was alleging intolerable cruelty as the ground for dissolution. Insofar as the plaintiff testified as to detailed incidents of physical and sexual abuse by the defendant, as we explain in part I A of this opinion, such testimony was germane to the issue of fault in the breakdown of the parties' marriage. See *Greco* v. *Greco*, 70 Conn. App. 735, 737–38, 799 A.2d 331 (2002).

In addition, the record reveals that the defendant had sufficient time to conduct discovery and to prepare a defense with respect to the plaintiff's testimony regarding incidents of abuse. First, after the plaintiff's attorney forecasted during opening statements the substance of what was to follow, the plaintiff testified to incidents of abuse on the first day of trial, April 8, 2021. Significantly, the defendant's trial counsel did not object either to the plaintiff's testimony regarding the May, 2007 incident or to her testimony regarding other incidents of abuse. Moreover, the defendant's trial counsel had a full opportunity to, and did, cross-examine the plaintiff.

Second, the trial occurred over approximately six months, between April 8 and October 27, 2021. In that regard, the defendant had several months after the plaintiff had first testified to these incidents either to put forth additional evidence and to secure additional witnesses, or to file a motion for continuance for the purpose of conducting discovery. For these reasons, the defendant's claim that he did not have the opportunity to conduct discovery and to prepare an adequate defense with respect to the plaintiff's testimony must fail.

II

The defendant next claims that the trial court abused its discretion in awarding the plaintiff $425 per week in alimony for a period of nine years.[6] We disagree.

"The standard of review in domestic relations cases is well established. [T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption

[6] The defendant also claims that the court, in fashioning its orders, abused its discretion in permitting the plaintiff to keep a particular firearm with sentimental value to the defendant. Having reviewed the defendant's principal appellate brief, we conclude that this 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 of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (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 defendant's brief is devoid of legal analysis or citation to legal authority as to this claim. Therefore, the defendant has failed to adequately brief this claim, and, accordingly, we decline to review it.

in favor of the correctness of its action." (Citations omitted; internal quotation marks omitted.) *Carten* v. *Carten*, 203 Conn. App. 598, 601, 248 A.3d 808 (2021). "Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Greco* v. *Greco*, supra, 70 Conn. App. 737.

Subsection (a) of § 46b-82 provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

"The court is to consider these factors in making an award of alimony, but it need not give each factor equal weight. . . . We note also that [t]he trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case. . . . There is no additional requirement that the court specifically state how it weighed the statutory criteria or explain in detail the importance assigned to each statutory factor." (Internal quotation marks omitted.) *Ingles* v. *Ingles*, 216 Conn. App. 782, 795, 286 A.3d 908 (2022).

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a

person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . [I]t also is especially appropriate for the court to consider whether the defendant has wilfully restricted his earning capacity to avoid support obligations . . . . Moreover, [l]ifestyle and personal expenses may serve as the basis for imputing income where conventional methods for determining income are inadequate." (Internal quotation marks omitted.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 517–18, 195 A.3d 458 (2018).

The following additional facts and procedural history are relevant to our resolution of the defendant's claims. During the pendency of the dissolution proceedings, the parties each submitted three financial affidavits stating, inter alia, their weekly incomes and expenses. The defendant filed his three financial affidavits with the court on March 5, 2020, January 15, 2021, and April 8, 2021.

The court concluded that the defendant's testimony at trial regarding his finances was not credible. The court explained that, on the basis of the defendant's three financial affidavits, there was a reduction of $27,344.69 in his personal checking and savings accounts over that approximate thirteen month period, where the defendant had averred that he had a total of $31,337.30 in his personal checking and savings accounts in the March 5, 2020 financial affidavit and only $3992.61 in those accounts in the April 8, 2021 financial affidavit. The court noted that, in each of the three financial affidavits, "the defendant's net weekly earnings are substantially more than the sum of his weekly expenses and weekly liabilities, even taking into account the pendente lite alimony payment shown on the last two [financial affidavits]." The court ultimately

concluded that "the defendant did not account credibly for the [$27,344.69] dissipation of these assets . . . ."[7]

The court also made factual findings as to the parties' health and incomes. The court found that the defendant "is in below average health" and that he "has been the primary financial supporter . . . throughout the parties' marriage." The court also concluded that "[t]he defendant can earn and has earned more than he presently does or reports as his income. At the present time, the defendant receives a [Veterans' Affairs] pension and Social Security disability benefits. At the time trial began, the defendant's gross weekly income was $1145.62 and his net weekly income was $1109.39. At the time of trial, the defendant's weekly expenses not deducted from pay, and not taking into account pendente lite alimony, were $551.50." Regarding the plaintiff, the court found that she "is in poor health" and that she "has, in the past, been employed as a waitress and a certified nursing assistant" but that "she can no longer perform either of those two jobs because of her back and neck issues, as each job involves heavy lifting or moving." The court also found that "[t]he last time the plaintiff was employed was in November, 2011. . . . Upon the entry of judgment in this case, the plaintiff will be stripped of her health insurance coverage. . . . The plaintiff presently has no source of income. The court, however, imputes a minimum wage earning capacity and a thirty hour work week to the plaintiff." The court found that the plaintiff has a gross weekly income earning capacity of $390.

[7] The defendant testified that the $27,344.69 reduction resulted from "[g]eneral use" and attorney's fees related to the dissolution action. The court found, however, that the defendant had paid only $10,000 in attorney's fees as of October 30, 2021, and that he had likely paid at least some of those fees after the filing of the April 8, 2021 financial affidavit. As a result, the court concluded that the payment of attorney's fees could not account for the entire $27,344.69 reduction.

The court also found, on the basis of the testimony of both the plaintiff and the defendant, that the defendant (1) "has, in the past, repaired chainsaws, and has bought and flipped chainsaws for a higher price," and (2) has "sold, repaired and assembled firearms for pay."[8] The court determined that "the defendant could earn additional income by repairing, buying and flipping chainsaws and by selling, repairing and assembling firearms. The defendant has the ability and talent to perform these tasks for compensation." The court also "impute[d] an earning capacity of an additional $90 a week gross income to the defendant for" his work related to chainsaws and firearms, amounting to a gross weekly income of $1235.62.[9] On the basis of its findings, the court ordered that the defendant pay the plaintiff $425 per week in alimony for a period of nine years.

The defendant asserts that the court improperly imputed an additional $90 in gross weekly income to him on the basis of its finding that he "could earn additional income by repairing, buying and flipping chainsaws and by selling, repairing and assembling firearms," such that the alimony award is flawed. The defendant maintains that the court failed to credit his testimony that he is unable to earn additional income repairing and selling chainsaws and firearms. This contention warrants little discussion.

On the basis of our review of the record, testimony from each party supports the court's finding that the defendant has, in the past, earned additional income repairing and selling chainsaws and firearms. Although

[8] In addition, the court admitted into evidence several exhibits offered by the plaintiff consisting of various text messages between the defendant and different individuals. In those text messages, the defendant discusses his repair of those different individuals' chainsaws or firearms.

[9] The court also concluded that the defendant could earn additional income without affecting his Social Security disability payments.

the record reflects that the parties had conflicting testimony as to whether the defendant is currently able to earn additional income repairing and selling chainsaws and firearms, the court expressly found that the defendant "has the ability and talent to perform these tasks" and is currently able to earn additional income from performing them. See *Blum* v. *Blum*, 109 Conn. App. 316, 330 n.13, 951 A.2d 587 (trial court's decision may include "implicit findings that it resolved any credibility determinations and any conflicts in testimony in a manner that supports its ruling"), cert. denied, 289 Conn. 929, 958 A.2d 157 (2008). Furthermore, relevant exhibits; see footnote 8 of this opinion; support the court's finding that the defendant is both experienced in chainsaw and firearm repair and that he is able to earn additional income by completing these tasks. Insofar as the defendant argues that his testimony undermines the court's finding, we decline to disturb the court's credibility determinations on appeal. See *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 489, 144 A.3d 447 (2016) ("[T]he [trial] court was free to credit or reject all or part of the testimony [presented] . . . . On review, we do not reexamine the court's credibility assessments."). Therefore, we conclude that the court did not improperly find that the defendant has an earning capacity of an additional $90 in gross weekly income.

The defendant also contends that the court's award of $425 per week in alimony for a period of nine years constitutes an abuse of discretion because he has limited income through Social Security disability payments and his pension, the length of the alimony award exceeds one half of the length of the parties' fifteen year marriage, and the court's imputed gross weekly income of $1235.62, and a $425 per week alimony payment, leaves him with a "lower percentage of his net income . . . ." We are not persuaded.

The court expressly considered the factors enumerated in § 46b-82 (a) in fashioning its alimony award, including that the plaintiff (1) was married to the defendant for a period of fifteen years; (2) was not at fault for the irretrievable breakdown of the marriage; (3) is in poor health; (4) is unable to perform her former jobs as a result of her health issues; (5) would lose her health insurance upon the dissolution of the parties' marriage; (6) has not been employed since November, 2011; (7) has no current source of income; and (8) has a minimum wage earning capacity of $390 in gross weekly income. On the other hand, the court expressly concluded that the defendant "did not account credibly" for the reduction in his personal checking and savings accounts and that his "net weekly earnings are substantially more than the sum of his weekly expenses and weekly liabilities, even taking into account the pendente lite alimony payment . . . ." The court also concluded that the defendant can, and has, earned more than he had reported at the time of trial. In light of the court's findings and reasoning, we conclude that the court did not abuse its discretion in awarding the plaintiff $425 per week in alimony for a period of nine years.

The judgment is affirmed.

In this opinion the other judges concurred.

TAMMY GERVAIS, ADMINISTRATRIX (ESTATE OF RAYMOND GERVAIS), ET AL. *v.* JACC HEALTHCARE CENTER OF DANIELSON, LLC, ET AL.
(AC 44757)

Moll, Cradle and Harper, Js.

Syllabus

Pursuant to statute (§ 52-190a (a)), a complaint sounding in medical malpractice must be accompanied by a good faith certificate and "a written and

signed opinion of a similar health care provider, as defined in section 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

The plaintiffs sought to recover damages from the defendants, J Co., a nursing facility, and D, a registered nurse, for medical malpractice in connection with the death of the decedent, a resident of J Co. The plaintiffs attached to their complaint an opinion letter authored by "RN, BSN," which the parties construed to mean that the author was a registered nurse with a Bachelor of Science degree in nursing. The defendants filed a motion to dismiss the complaint on the ground that the opinion letter was deficient pursuant to § 52-190a because it failed to state the author's qualifications and, therefore, it could not be determined whether the author was a "similar health care provider" to D under the applicable statute (§ 52-184c (b)). The plaintiffs filed an objection to the motion to dismiss and a request to amend the complaint in order to include further attachments to the opinion letter elucidating the author's qualifications. The trial court granted the defendants' motion to dismiss, concluding that the opinion letter was deficient pursuant to § 52-190a because it failed to sufficiently identify the author's qualifications, thereby depriving the court of the ability to determine whether the author was a "similar health care provider" under § 52-184c (b). The trial court also concluded that it lacked the authority to grant the plaintiffs' request to amend their complaint to supplement their opinion letter because the statute of limitations had expired. From the judgment thereon, the plaintiffs appealed to this court, which affirmed the judgment of the trial court. Our Supreme Court, after granting the plaintiffs certification to appeal, vacated this court's decision and remanded the case to this court with direction to reconsider in light of its recent decision in *Carpenter* v. *Daar* (346 Conn. 80), in which it concluded that the opinion letter requirement of § 52-190a is not jurisdictional, held that a trial court retains the authority to permit the amendment or supplementation of a challenged opinion letter, and established that the sufficiency of an opinion letter is to be determined solely on the basis of a broad, realistic reading of the allegations of the complaint. *Held* that, reconsidering this appeal in light of *Carpenter*, this court concluded that the trial court improperly determined that it lacked the authority to permit the plaintiffs to amend their opinion letter in response to the defendants' motion to dismiss: our Supreme Court in *Carpenter* established, and the defendants' counsel agreed at oral argument before this court on remand, that trial courts retain the authority to permit amendments or supplementation of a challenged opinion letter in response to a motion to dismiss, even after the expiration of the statute of limitations; moreover, contrary to the defendants' argument that the trial court's denial of the request to amend was not an abuse of its discretion because the plaintiffs did not comply with established precedent to provide a sufficient opinion letter, that court never exercised

its discretion but, rather, concluded that it lacked the authority to permit the amendment and, therefore, this court could not determine whether the trial court abused its discretion by denying the request to amend.

Argued May 16—officially released August 15, 2023

Procedural History

Action seeking damages for the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Windham, where the defendants filed a motion to dismiss; thereafter, the court, *Lynch*, *J.*, denied the plaintiffs' request to amend their complaint and granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court, *Moll*, *Cradle* and *Harper*, *Js.*, which affirmed the trial court's judgment; thereafter, on the granting of certification, the plaintiffs appealed to the Supreme Court, which ordered the judgment of this court vacated and remanded the case to this court for reconsideration. *Reversed*; *further proceedings*.

Raymond Trebisacci, for the appellants (plaintiffs).

Cristin E. Sheehan, with whom, on the brief, was *Thomas Anderson*, for the appellees (defendants).

Opinion

HARPER, J. This appeal returns to us on remand from our Supreme Court. *Gervais* v. *JACC Healthcare Center of Danielson, LLC*, 346 Conn. 910, 289 A.3d 596 (2023). The plaintiffs, Tammy Gervais and Cassandra Gervais,[1] appealed to this court from the judgment of the trial court granting the motion to dismiss filed by the defendants, JACC Healthcare Center of Danielson, LLC (JACC), and Beth Davis. The trial court, in its order dismissing the plaintiffs' medical malpractice action,

[1] Tammy Gervais commenced the present action both as administratrix of the estate of the decedent, Raymond Gervais, and in her individual capacity. We collectively refer to Tammy Gervais, in both capacities, and to Cassandra Gervais as the plaintiffs.

concluded that (1) the opinion letter attached to the plaintiffs' complaint was deficient pursuant to Connecticut's good faith opinion letter statute, General Statutes § 52-190a, because it failed to sufficiently identify the author's qualifications, thereby depriving the court of the ability to determine whether the author was a "similar health care provider," as defined by General Statutes § 52-184c; and (2) it lacked the authority to grant the plaintiffs' request to amend the complaint, filed in response to the defendants' motion to dismiss, that sought to include two new attachments to the opinion letter elucidating the qualifications of the author. This court, by memorandum decision, affirmed the judgment of the trial court. *Gervais* v. *JACC Center of Danielson, LLC*, 212 Conn. App. 902, 273 A.3d 749 (2022). Thereafter, the plaintiffs petitioned our Supreme Court for certification to appeal. Our Supreme Court granted certification, vacated the decision of this court, and remanded the case to this court with direction to reconsider in light of its recent decision in *Carpenter* v. *Daar*, 346 Conn. 80, 287 A.3d 1027 (2023). *Gervais* v. *JACC Center of Danielson, LLC*, supra, 346 Conn. 910. Reconsidering this appeal in light of *Carpenter*, we now conclude that the trial court improperly concluded that it lacked authority to permit the plaintiffs to amend the opinion letter in response to the defendants' motion to dismiss. Accordingly, we reverse the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. In November, 2020, the plaintiffs, pursuant to the accidental failure of suit statute, General Statutes § 52-592,[2] commenced the present

[2] In March, 2019, the plaintiffs commenced a prior medical malpractice action against the defendants. See *Gervais* v. *JACC Center of Danielson, LLC*, Superior Court, judicial district of New London, Docket No. CV-19-6040146-S. The trial court granted the defendants' motion to dismiss that action on the ground that the opinion letter supporting the complaint was not authored by a similar health care provider pursuant to § 52-190a because the allegations of the complaint were against a registered nurse, whereas

medical malpractice action against the defendants. In their two count complaint, the plaintiffs alleged that, in March, 2017, the decedent was a resident of a nursing facility "owned, controlled, and/or operated by" JACC "by and through its employees, staff, and other representatives." They further alleged that, on March 10, 2017, the decedent, who was a known fall risk, fell and hit his head while at the nursing facility. They alleged that Davis, a registered nurse, pronounced the decedent dead and that the cause of death was cardiopulmonary arrest. In count one, Tammy Gervais, in her capacity as administratrix of the decedent's estate, claimed that the decedent's death was caused by the negligent conduct of the defendants in that they failed to: properly supervise, restrain, assist, and monitor him; continue to resuscitate him; have his injuries properly evaluated; and send him for hospital care. In count two, Tammy Gervais, in her individual capacity as the wife of the decedent, and Cassandra Gervais, as the daughter of the decedent, claim that they suffered emotional distress because: despite being initially informed that the decedent would be transferred to a hospital, they were later told that the decedent was not being brought to the hospital because he had died; when they arrived at the nursing facility, they were told that the decedent had fallen out of bed; and they observed the decedent with a towel against his head that was soaked with blood.

The plaintiffs attached to their complaint an opinion letter, dated November 11, 2020, authored by an "RN, BSN."[3] At the outset of the opinion letter, the author,

the opinion letter was authored by a licensed practical nurse. The plaintiffs did not appeal from the trial court's dismissal of their prior action and, instead, commenced the present action pursuant to § 52-592.

[3] The plaintiffs also attached to their complaint a second opinion letter, authored by a licensed practical nurse, that supported their prior action against the defendants, which was found to be deficient by the trial court in the prior action. See footnote 2 of this opinion. The plaintiffs do not address this letter on appeal and, therefore, we do not discuss it further.

whose personal identifying information was redacted at all relevant times, stated that they had reviewed the facts surrounding the death of the decedent on March 10, 2017, at the nursing facility owned by JACC. The author then listed the facts supporting their opinion, which essentially mirrored the factual allegations of the plaintiffs' complaint. Next, the author expressed their professional opinion, based on a reasonable degree of certainty, that Davis and the staff at the nursing facility were negligent and breached the standard of care that resulted in the death of the decedent by failing to: properly supervise, restrain, assist, and monitor him; continue to resuscitate him; have his injuries properly evaluated; and send him for hospital care. The author did not expressly identify the state that issued their license, the qualifications required to obtain that license, their training or experience, and whether they were actively involved in the practice or teaching of medicine. Instead, the author is identified through an initialism on the signature line as an "RN, BSN," which the parties construe to mean that the author is a registered nurse with a Bachelor of Science degree in nursing.

On January 26, 2021, the defendants filed a motion to dismiss the complaint on the ground that the opinion letter was deficient pursuant to § 52-190a because it failed to state the author's qualifications and, therefore, it cannot be determined whether the author was a "similar health care provider," as defined by § 52-184c (b). In their memorandum of law in support of their motion to dismiss, the defendants contended that this court's decisions in *Bell* v. *Hospital of Saint Raphael*, 133 Conn. App. 548, 561, 36 A.3d 297 (2012), and *Lucisano* v. *Bisson*, 132 Conn. App. 459, 465–66, 34 A.3d 983 (2011), required that an opinion letter include the qualifying information of the author. The defendants argued that, although the opinion letter was authored by a registered nurse and the allegations of the complaint were directed

at Davis, a registered nurse, the opinion letter was deficient because it "include[d] absolutely no reference whatsoever to the author's qualifications, education, or training."

On March 5, 2021, the plaintiffs filed an objection to the defendants' motion to dismiss and a memorandum of law in support of their objection. Therein, the plaintiffs argued that the opinion letter was not deficient pursuant to § 52-190a because the author adequately indicated their qualifications as a registered nurse with a Bachelor of Science degree in nursing. The plaintiffs further argued that the opinion letter need not express all of the qualifications of the author, and that those details would be provided to the defendants through discovery. On May 14, 2021, the plaintiffs filed a supplemental memorandum of law in opposition to the motion to dismiss in which they argued that the opinion letter was not deficient because "in short, one RN is similar to another RN," and they indicated that, regardless, they were contemporaneously filing a request to amend the complaint to include additional qualifications of the author attached to the opinion letter. Also on May 14, 2021, the plaintiffs filed a request to amend the complaint in which they appended two new attachments to the opinion letter. The first attachment was the resume of the author that demonstrated their education and work history since July, 1998. Specifically, the resume showed that the author received both an associate degree and a Bachelor of Science degree in nursing, and that they have worked at various medical facilities as a staff nurse, certified nursing assistant instructor, certified nursing assistant program director, and nursing supervisor. The second attachment was a screenshot from the website of the Department of Health of the state of Rhode Island that showed the author's nurse license registration, which included details with respect

to the license number, type, status, as well as the issuance and expiration dates of the license.

On May 17, 2021, the court, after hearing oral argument from the parties,[4] issued a written order granting the defendants' motion to dismiss. The court determined that the opinion letter was deficient because "the only reference to the qualifications of its author are 'RN, BSN.' There is absolutely no other reference to the author's qualifications, education, or training. Insufficient information was provided for this court to conclude that the author was a 'similar health care provider' as required by statute. The opinion letter is thus legally insufficient under § 52-184c (b)." In the same order, the court denied the plaintiffs' request to amend their complaint to supplement their opinion letter. In particular, the court reasoned that this court's decisions in *Gonzales* v. *Langdon*, 161 Conn. App. 497, 501, 128 A.3d 562 (2015), and *Carpenter* v. *Daar*, 199 Conn. App. 367, 369–70, 236 A.3d 239 (2020), rev'd, 346 Conn. 80, 287 A.3d 1027 (2023), held that a court has the authority to allow an amendment to an opinion letter *only* if a plaintiff seeks to amend within the applicable statute of limitations. Accordingly, the court concluded that it lacked the authority to permit the amendment because the request to amend was filed "five months after the expiration of time allowed under the accidental failure of suit statute."

The plaintiffs appealed to this court, claiming that the trial court improperly concluded that the opinion letter attached to their complaint was deficient pursuant to § 52-190a because the opinion letter was not authored by a "similar health care provider," as defined by § 52-184c. The defendants responded that the court

[4] Although the defendants did not file a written opposition to the plaintiffs' request to amend, the defendants' counsel, at oral argument before the trial court, contended that the court should deny the request to amend on the ground that it was filed outside of the statute of limitations.

properly concluded that the opinion letter was deficient because it was devoid of the author's qualifications as required by *Bell* v. *Hospital of Saint Raphael*, supra, 133 Conn. App. 560, and *Lucisano* v. *Bisson*, supra, 132 Conn. App. 465–66. On May 24, 2022, this court affirmed the judgment of the trial court in a memorandum decision, stating in full: "Per Curiam. The judgment is affirmed. See *Bell* v. *Hospital of Saint Raphael*, [supra, 560]; *Lucisano* v. *Bisson*, [supra, 465–66]." *Gervais* v. *JACC Center of Danielson, LLC*, supra, 212 Conn. App. 902.

On June 22, 2022, the plaintiffs filed a petition for certification with our Supreme Court. On February 1, 2023, our Supreme Court officially released its decision in *Carpenter* v. *Daar*, supra, 346 Conn. 83, which, as we subsequently explain in greater detail: reversed its prior precedent and concluded that the opinion letter requirement of § 52-190a is nonjurisdictional; id., 87; held that a trial court retains authority to permit the amendment or supplementation of a challenged opinion letter; id., 126; and established that the sufficiency of an opinion letter is to be determined solely on basis of a broad and realistic reading of the allegations of the complaint as compared to the opinion letter. Id., 128. On March 1, 2023, our Supreme Court granted the plaintiffs' petition for certification to appeal in the present case, vacated the judgment of this court, and remanded the case to this court with direction to reconsider in light of *Carpenter* v. *Daar*, supra, 346 Conn. 80. *Gervais* v. *JACC Healthcare Center of Danielson, LLC*, supra, 346 Conn. 910.

On remand, this court, sua sponte, ordered the parties to file supplemental briefs addressing the impact of *Carpenter* v. *Daar*, supra, 346 Conn. 80, on the present appeal. In their supplemental brief, the plaintiffs argued, inter alia, that *Carpenter* now permits trial courts the authority to allow an amendment or supplementation

of an opinion letter in response to a motion to dismiss and, thus, "all information provided in the [trial] court in this case, through supplementation, requested amendment, and responses to discovery requests provided sufficient facts to show that the opinion letter submitted with the complaint was authored by a similar health care provider . . . ." Furthermore, during oral argument before this court on remand, the plaintiffs' counsel maintained that *Carpenter* established that the court improperly denied the plaintiffs' motion to amend.[5] In response, the defendants in their supplemental brief acknowledged that *Carpenter* "makes clear that the trial court may exercise its discretion to consider amendments or a supplement [to the opinion letter in response] to a [challenge by a] motion to dismiss." Nevertheless, the defendants argued that this court should affirm the trial court's decision denying the plaintiffs' request to amend on the ground that it did not constitute an abuse of discretion because the "plaintiffs repeatedly did not comply with established precedent to provide a sufficient opinion letter in accordance with § 52-190a . . . ."[6] Reconsidering the present appeal in

[5] In their principal appellate brief and at the original oral argument before this court on May 16, 2022, the plaintiffs' counsel expressly waived the plaintiffs' claim regarding the court's denial of their request to amend as foreclosed by our appellate case law. On remand, however, the plaintiffs in their supplemental brief, and the plaintiffs' counsel at oral argument before this court, contended that our Supreme Court in *Carpenter*, by and through its reversal of prior precedent, resurrected this claim. Although the plaintiffs' appellate submissions in support of this claim leave much to be desired, we are compelled, in light of our Supreme Court's remand order, to consider this claim in light of *Carpenter*.

[6] The defendants also contend in their supplemental brief that this court should again apply the reasoning set forth in our decisions in *Bell* v. *Hospital of Saint Raphael*, supra, 133 Conn. App. 560, and *Lucisano* v. *Bisson*, supra, 132 Conn. App. 65–66, to hold that the opinion letter was deficient because it failed to elucidate the qualifications of the author. See *Carpenter* v. *Daar*, supra, 346 Conn. 117 n.24 (expressly declining request from Connecticut Trial Lawyers Association to overrule *Bell* and *Lucisano*, stating that "we leave this request for another day in a case in which the issue is squarely presented by the parties"). Our conclusion that the court improperly determined that it lacked the authority to permit the plaintiffs to amend their

light of *Carpenter*, we hold, for the reasons we subsequently explain, that the court improperly denied the plaintiffs' request to amend their complaint to supplement their opinion letter in response to the defendants' motion to dismiss.

We begin our analysis by setting forth the relevant statutory provisions. Section 52-190a (a) provides in relevant part: "To show the existence of . . . good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . ." Section 52-190a (c) then provides: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." In turn, § 52-184c contains two definitions applicable to determine whether a defendant is a "similar health care provider."[7]

opinion letter is dispositive of this appeal and, thus, we need not determine whether the original opinion letter complied with § 52-190a. Neither party on appeal advances an argument as to whether the amended opinion letter complied with § 52-190a.

[7] General Statutes § 52-184c (b) provides: "If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

We next turn to *Carpenter* v. *Daar*, supra, 346 Conn. 87–88, in which our Supreme Court recently addressed the trial court's authority to permit the cure of an opinion letter not in compliance with § 52-190a. Prior to *Carpenter*, our Supreme Court in *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011), held that the opinion letter requirement implicated the court's personal jurisdiction because the failure to comply with § 52-190a constituted insufficient process. In *Carpenter*, our Supreme Court concluded that appellate case law had deviated from the legislature's intention that § 52-190a "prevent frivolous [medical] malpractice actions but not serve as a sword to defeat otherwise facially meritorious claims." (Internal quotation marks omitted.) *Carpenter* v. *Daar*, supra, 84–85. The court held that the opinion letter requirement of § 52-190a is "a unique, statutory procedural device that does not implicate the court's jurisdiction in any way" and, consequently, the court expressly overruled precedent to the contrary, specifically including its prior decision in *Morgan*. Id., 87. Expanding on this conclusion, the court stated "that *Morgan* is clearly wrong and should be overruled to the extent that it holds that the opinion letter implicates the court's personal jurisdiction. Particularly with respect to the difficulty of *amending flawed opinion letters*, the jurisdictional body of case law spawned by *Morgan* has created roadblocks for otherwise meritorious cases that are squarely at odds

General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider'."

with the legislature's limited goal of ensuring an adequate, good faith investigation and eliminating only frivolous cases. Put differently, categorizing the opinion letter in any way as jurisdictional has had the effect of elevating the credential of the authoring health care provider to a jurisdictional prerequisite and turned what the legislature intended to be a simple prelitigation documentation of the plaintiff's good faith inquiry into, in essence, a trap under which even meritorious suits are subject to dismissal. Instead, we conclude that the legislative history and text indicate that dismissal under § 52-190a is a unique statutory remedy intended to strengthen the existing good faith inquiry and to expedite the disposition of obviously frivolous medical malpractice actions." (Emphasis added; footnote omitted.) Id., 124–25.

One of the primary roadblocks that our Supreme Court sought to remove by shifting the nature of the § 52-190a inquiry was the "restricted curative options—beyond resort to the accidental failure of suit statute following dismissal; see General Statutes § 52-592 . . . that are available to plaintiffs given the jurisdictional implications of defective opinion letters under § 52-190a, as interpreted by *Morgan*." (Citation omitted.) *Carpenter* v. *Daar*, supra, 346 Conn. 119. The court highlighted a series of decisions from this court, including "[t]he leading decision of *Gonzales* v. *Langdon*, supra, 161 Conn. App. 518–19 and n.9, [which] holds that the amendment of the complaint and opinion letter . . . is available only when the request for leave to amend—whether discretionary or as of right within thirty days of the return day—is filed prior to the running of the applicable statute of limitations." *Carpenter* v. *Daar*, supra, 346 Conn. 119. Observing that these restrictions "are wholly unjustifiable in light of the legislature's intent in enacting § 52-190a"; id., 115; the court in *Carpenter* abrogated *Gonzales*, and held that,

"[b]ecause the opinion letter is not itself process, to the extent that the opinion letter itself is legally insufficient or defective under § 52-190a, *trial courts retain the authority to permit amendments or supplementation of a challenged letter in response to a motion to dismiss*, as the legislature itself evidently contemplated." (Emphasis added.) Id., 126.

Our Supreme Court recognized that the shift in the inquiry "render[ed] inapplicable to the § 52-190a motion to dismiss the rules of practice and applicable case law governing the pleading and proof of jurisdictional facts," and, accordingly, the court "provide[d] two more points of procedural clarification as to the adjudication of motions to dismiss under § 52-190a . . . ." Id., 125. First, the court clarified that "the inquiry under § 52-190a is squarely and solely framed by the allegations in the complaint, rendering the only question at the motion to dismiss stage whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint and described in the opinion letter. . . . Thus . . . there simply is no place in the § 52-190a inquiry for the consideration of affidavits or other materials intended to inject factual disputes beyond the adequacy of the pleadings and the annexed letter. Because the opinion letter is not itself process, to the extent that the opinion letter itself is legally insufficient or defective under § 52-190a, trial courts retain the authority to permit amendments or supplementation of a challenged letter in response to a motion to dismiss, as the legislature itself evidently contemplated." (Citations omitted.) Id., 125–26. Second, the court emphasized that its "ultimate holding in *Morgan*, namely, that a motion to dismiss for failure to file an opinion letter pursuant to § 52-190a remains waivable, including by inaction, remains good law. . . . [C]onsistent with the legislature's intent of screening out frivolous malpractice

actions early in the litigation process, the order of the pleadings provided by Practice Book §§ 10-6 and 10-7 continues to render dismissal under § 52-190a waivable for failure to file a timely motion to dismiss . . . and requires that the motion to dismiss be filed early in the action, as the legislature envisioned in enacting the statute." (Citations omitted; footnote omitted.) Id., 126.

With respect to the standard of review, although we ordinarily review a court's decision on a request to amend a pleading for an abuse of discretion; see *KDM Services, LLC* v. *DRVN Enterprises, Inc.*, 211 Conn. App. 135, 140, 271 A.3d 1103 (2022); in the present case, the issue is whether the court properly concluded that it had the authority in the first instance to permit the amendment, which is a question of law over which we exercise plenary review. See, e.g., *Foisie* v. *Foisie*, 335 Conn. 525, 530, 239 A.3d 1198 (2020); *State* v. *Shawn G.*, 208 Conn. App. 154, 190, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021).

In the present case, the defendants filed a motion to dismiss challenging the sufficiency of the opinion letter attached to the plaintiffs' complaint pursuant to § 52-190a. In response, the plaintiffs filed memoranda in opposition arguing that the opinion letter was sufficient and a request to amend the complaint to include two new attachments to the opinion letter to elucidate the qualifications of the author, particularly, the author's resume and nurse license registration.[8] The court

[8] Although our Supreme Court in *Carpenter* considered the opinion letter in that case in conjunction with a supplemental correspondence by the author; *Carpenter* v. *Daar*, supra, 346 Conn. 89 and n.7; the court also held that "the only question at the motion to dismiss stage [is] whether the author of the opinion letter is a similar health care provider to the defendant as their respective qualifications are pleaded in the complaint *and described in the opinion letter*." (Emphasis added.) Id., 125. Accordingly, to comply with the new test established by *Carpenter*, we emphasize that the best practice for a plaintiff to amend an opinion letter is to revise and/or supplement the actual language of the letter rather than attaching additional documents thereto.

denied the plaintiffs' request to amend their opinion letter on the ground that it lacked authority to permit an amendment after the expiration of the statute of limitations pursuant to *Gonzales* v. *Langdon*, supra, 161 Conn. App. 501–502, and *Carpenter* v. *Daar*, supra, 199 Conn. App. 369–70. Subsequently, however, our Supreme Court in *Carpenter* abrogated *Gonzales* and reversed this court's decision in *Carpenter* as inapposite to our legislature's intention in enacting § 52-190a.[9] *Carpenter* v. *Daar*, supra, 346 Conn. 88, 126. In contrast to these decisions, our Supreme Court in *Carpenter* established that trial courts retain the authority to permit amendments or supplementation of a challenged letter in response to a motion to dismiss, even after the expiration of the statute of limitations. Id., 126.

The defendants do not contest this point on appeal. In their supplemental brief, the defendants expressly acknowledge that the Supreme Court's decision in *Carpenter* "makes clear that the trial court may exercise its discretion to consider amendments or a supplement [to the opinion letter in response] to a [challenge by a] motion to dismiss." At oral argument before this court on remand, the defendants' counsel agreed that *Carpenter* now permits trial courts to allow an amendment to an opinion letter after the expiration of the statute of limitations. Consequently, in light of *Carpenter*, we conclude that the court improperly concluded that it did not have the authority to permit the plaintiffs to amend their opinion letter because the statute of limitations had expired.

The defendants nevertheless argue that this court should affirm the trial court's decision on the ground that its denial of the plaintiffs' request to amend did

[9] We recognize that the trial court reached its decision without the benefit of our Supreme Court's decision in *Carpenter*, which represented a shift in the law and was not officially released until almost two years after the trial court denied the plaintiffs' request to amend.

not constitute an abuse of its discretion because the "plaintiffs repeatedly did not comply with established precedent to provide a sufficient opinion letter in accordance with § 52-190a . . . ." The problem with the defendants' argument is that the court never exercised its discretion, rather, it concluded that it lacked the authority to permit the amendment. Indeed, it is possible that the court, if it concluded that it had such authority, would have exercised its discretion to grant the plaintiffs' request to amend. Therefore, we cannot determine whether the trial court abused its discretion by denying the plaintiffs' request to amend. See, e.g., *State* v. *Juan J.*, 344 Conn. 1, 13, 276 A.3d 935 (2022) (appellate courts cannot determine whether trial court abused its discretion in situation where trial court never exercised its discretion); *State* v. *Fernando V.*, 331 Conn. 201, 213, 202 A.3d 350 (2019) ("[w]e cannot determine whether the trial court abused an exercise of discretion that it neither made nor was asked to make").

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JUAN MIELES
(AC 45281)

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

Syllabus

Convicted, on a plea of guilty, of the crime of risk of injury to a child in connection with inappropriate sexual contact with the victim, the defendant appealed to this court from the trial court's granting of the state's motion for a standing criminal protective order pursuant to statute (§ 53a-40e). During the defendant's criminal proceedings, he made phone calls to the victim's grandmother, which prompted the trial court to order that the defendant have no contact with the victim or her family. At sentencing, an order of no contact was imposed as a condition of probation. Nearly nine years after the defendant's sentencing, the state

filed a motion to impose a standing criminal protective order as to the victim, on the ground that the victim's mother was erroneously under the impression that a standing criminal protective order was already in place and that she was fearful that the defendant would contact her daughter once the defendant's term of probation ended. In granting the state's motion, the trial court noted that the defendant had not done anything to trigger additional criminal proceedings, and, citing *State* v. *Alexander* (269 Conn. 107), determined that the imposition of the order did not increase the defendant's term of imprisonment and was not punitive to the defendant and, thus, it did not affect the terms of the defendant's sentence. Further, the trial court found that the sentencing court's failure to impose a standing criminal protective order, despite the understanding of the victim's mother that one would be imposed, implicated the integrity of the criminal justice system. *Held* that the defendant could not prevail on his claim that the imposition of the standing criminal protective order was a modification of the judgment of conviction and that there was no change in circumstances that would justify opening the judgment and imposing the order: the trial court did not abuse its discretion in imposing the standing criminal protective order pursuant to § 53a-40e (a), as neither the defendant's sentence nor the criminal judgment were modified when the order was imposed, and the order was an exercise of judicial discretion separate and apart from the defendant's sentence, with the purpose of protecting the victim and the public, and, in accordance with precedent established by *Alexander*, this court declined to construe the imposition of the order as a modification of the judgment of conviction under which the defendant was sentenced; moreover, § 53a-40e clearly articulated the discretionary standard for trial courts when imposing standing criminal protective orders, and the defendant did not claim that the trial court failed to abide by the statutory standard, and, accordingly, this court declined to address whether the trial court satisfied the standard set forth in § 53a-40e (a) when it imposed the order; furthermore, the defendant could not prevail on his claim that the trial court's authority to issue a standing criminal protective order had a temporal element, as there was no legal basis to distinguish *Alexander* based on how much time had elapsed since the judgment of conviction had become final nor a practical basis for determining when the trial court's granting of a postjudgment motion was sufficiently close in time to the judgment to be permissible; additionally, *Alexander* did not stand for the principle that a showing of changed circumstances was required before a court may impose a standing criminal protective order, rather, the court in *Alexander* held that the trial court had jurisdiction to impose such an order without violating due process or the protection against double jeopardy.

(*One judge dissenting*)

Argued January 18—officially released August 15, 2023

Procedural History

Information charging the defendant with the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the defendant was presented to the court, *Devlin*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *Russo*, *J.*, granted the state's motion for a standing criminal protective order as to the victim, and the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Juan Mieles, appeals following the issuance of a standing criminal protective order as to the victim,[1] imposed after he began serving his sentence for the crimes he perpetrated against the victim. The defendant claims that the trial court (1) abused its discretion in imposing the standing criminal protective order because there was no change in circumstances that would justify opening the judgment, (2) lacked jurisdiction to modify the defendant's sentence, and (3) violated constitutional protections against double jeopardy. We affirm the judgment of the court.

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

The following facts and procedural history are relevant to this decision. On February 2, 2012, the defendant pleaded guilty to one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2),[2] pursuant to a plea agreement under which he would be sentenced to fifteen years of incarceration, suspended after five years, and twenty-five years of probation. At the plea hearing, the state provided the following factual basis for the plea agreement: "[O]n June 7th, 2011, at about 5:10 p.m., [the victim's] mother in this case, [J], allowed her daughter, who was age seven, and her son . . . permission to walk to [a park in Bridgeport] with [the] defendant. [The] defendant was [a friend] of the family. . . . [He] had [frequent] contact with, not only [J], but with the two children as well on previous occasions.

"[J] went to the park shortly thereafter to meet them, but she could not locate them. After riding around the neighborhood for approximately an hour, [J] saw them walking down [a street in Bridgeport], with the defendant carrying . . . the [victim] on . . . his back piggyback style.

"When [J] pulled over, the young girl ran up to her and indicated [that] the defendant hurt [her]. She indicated something about his pee pee, to do like this. At that point in time, the young girl was making a motion with her hand going up and down. [J] checked the young girl's genital area and observed a redness.

[2] General Statutes § 53-21 provides in relevant part: "(a) Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

"[J] then took the [victim] to [a hospital], where she met [with] the Bridgeport Police Department. In actuality, [J] . . . forced [the defendant] to get into the car with her, when they drove to the hospital. And, at the hospital, the police were able to speak with [the defendant] at that point in time. [The defendant] told the [officer who] interviewed him that he took [J's] kids to his house . . . [a]nd that they started wrestling, and he could have mistakenly touched the young girl's crotch area while wrestling. He added that, while wrestling, he did unintentionally have an erection.

"Further on . . . [the defendant] admitted that [he] did rub [the victim's] genital areas. . . . He also stated that he rubbed his penis on her vagina through her clothing.

"The . . . lab did an examination. . . . [T]he lab did find some spermatozoa on the undergarments of the young girl as well as on one of the vaginal swabs . . . ."

During the plea hearing, it came to light that the defendant had been making telephone calls to the victim's grandmother, and the following exchange took place between the court, *Devlin*, *J.*, and J:

"The Court: I'm going to enter an order today—

"[J]: Mm-hmm.

"The Court: —that this defendant have absolutely no contact with your mother's telephone number.

"[J]: Mm-hmm.

"The Court: He should not be contacting you.

"[J]: Mm-hmm.

"The Court: And he should not have third persons contact you. It should—

"[J]: Exactly.

"The Court: There should be no contact whatsoever. And you're absolutely entitled to that protection from the court. This is the first I've heard about this.

"[J]: Mm-hmm."

The court proceeded to canvass the defendant, during which it reiterated the terms of the plea agreement. After canvassing the defendant, the court accepted the defendant's guilty plea, ordered a presentence investigation, and imposed a no contact order as a condition of the defendant's bond, prohibiting the defendant from having any contact with the victim, her relatives, or anyone associated with the victim. The court then continued the matter for sentencing.

On April 13, 2012, the court sentenced the defendant to fifteen years of incarceration, execution suspended after five years, and twenty-five years of probation. The court imposed standard conditions of probation as well as special conditions of probation, which included sex offender treatment and a condition that he have no contact with the victim or any other minor without the permission of the probation department.

The defendant was released from incarceration on April 8, 2016, and placed in the January Center, a residential placement for homeless sex offenders. On May 5, 2016, the defendant was arrested, pursuant to a warrant, charging him with violation of probation, for stating that he was going to "burn the [January Center] to the ground and drag everyone in it to hell with him." The defendant admitted to violating the conditions of his probation, and the court, *Devlin*, *J.*, sentenced him to ten years of incarceration, execution suspended after one year, and twenty-four years of probation with all original conditions of probation reimposed. The defendant was released from incarceration on March 30, 2017, and he was charged with violation of probation again

in May, 2017.[3] The defendant admitted to violating his probation, and, on July 17, 2019, the court, *Alexander*, *J.*, sentenced him to nine years of incarceration, execution suspended after three years, and twenty years of probation with all original conditions of probation reimposed.[4]

On March 12, 2021, the state filed a motion to impose a standing criminal protective order on the defendant. In its motion, the state argued that "[t]he grounds for the motion are that, at the time of the defendant's sentencing, although a no contact order was issued, a protective order was not. [J] was erroneously under the impression that a standing criminal protective order was in place. The defendant is currently on supervised parole and will eventually be placed on probation, however [J] is afraid that, once the defendant is done with probation, there will be nothing preventing him from having contact with her daughter. ln addition, [J] moves

[3] A May 31, 2017 arrest warrant application for the defendant stated that the defendant was "in violation of the following court-ordered conditions: abide by all conditions of probation, abide by all sex offender registration rules/regulations, participate with special sex offender conditions, as well as the standard condition, 'keep the probation officer informed of where you are, tell your probation officer immediately about any changes to your legal name, address, telephone number, cell phone number, beeper number, employment and allow the officer to visit you as he or she requires,' and the sex offender conditions, 'you will notify your probation officer of any new or existing romantic or sexual relationship, your place of residence must be approved by a probation officer. You will not move from your place of residence or sleep elsewhere overnight without a probation officer's prior knowledge and permission,' and 'you will participate in any other treatment program as directed by a probation officer.' "

[4] Initially, after the defendant admitted to violating his probation, the court, *Devlin*, *J.*, ordered him to attend a treatment program. The matter was continued several times while the defendant attended treatment, and progress reports were submitted to the court. After the defendant failed to appear in court on April 20, 2018, the court ordered his rearrest. As a result, the defendant was charged with failure to appear in the first degree, to which the defendant pleaded guilty. The defendant was then sentenced to one year of incarceration on the charge of failure to appear in the first degree, to run concurrently with his sentence for violation of probation.

quite frequently, and has previously resided in New Haven. She is aware that the defendant is currently on supervised parole and residing in New Haven. She is fearful for her daughter's safety and would request the added protection of a standing criminal protective order at the present time."

The court, *Russo*, *J.*, held a hearing on the motion on August 24, 2021. At the hearing, the state reasserted the grounds stated in its motion, namely, that J was under the impression that a standing criminal protective order already was in effect, and she was concerned for her daughter's safety should she move to an area close to where the defendant resides.[5] The court then noted that, "according to *State* [v.] *Alexander*, [269 Conn. 107, 847 A.2d 970 (2004)], the imposition of an order like this does not change the sentence. It's an added layer of protection." The defendant argued that the present case is distinguishable from the facts of *Alexander* because he was sentenced more than nine years earlier, whereas the defendant in *Alexander* was sentenced less than one month prior to the standing criminal protective order. The defendant also expressed his disagreement with the outcome of *Alexander*, arguing that "a standing criminal [protective] order subjects [the defendant] to a heightened criminal legal liability. A potential violation of that would expose him to another felony charge, [and] potentially more incarceration."

In ruling on the motion, the court began by stating that the defendant has not done anything to trigger additional criminal proceedings. The court went on to reason that *Alexander* "instructs [the court] to . . . understand that the imposition of a standing [criminal protective] order, which the state has requested through

[5] During the hearing, the state noted that it "would have brought this forward slightly sooner . . . [but] the defendant was incarcerated, he was in a halfway house and then absconded, so we weren't able to bring him in sooner. And that also added to the victim's fears that he was out and about."

its motion, one, is not punitive to you. Two, that it serves the purpose of protecting . . . victims. It does not increase the term of imprisonment that you either have already served or are presently serving. Nor does it impose any type of additional monetary fine. And . . . finally, [*Alexander*] does settle with the following language: Because the passage of the act is not punitive in law or in fact, we conclude that the court's imposition of a standing criminal [protective] order upon the defendant did not affect his sentence." Further, the court found that the sentencing court's failure to impose a standing criminal protective order, despite the understanding of the victim's mother that one would be imposed, implicated "the integrity of our criminal justice system." On the basis of the foregoing, the court granted the state's motion to impose a standing criminal protective order and imposed an order the same day. This appeal followed.

On appeal, the defendant claims that the court (1) abused its discretion in imposing the standing criminal protective order because there was no change in circumstances that would justify opening the judgment, (2) lacked jurisdiction to modify his sentence, and (3) violated constitutional protections against double jeopardy. As to the defendant's second and third claims, we conclude—and the defendant conceded at oral argument—that our Supreme Court's decision in *Alexander* controls. See *State* v. *Alexander*, supra, 269 Conn. 119–20 (holding that trial court had jurisdiction to impose standing criminal protective order after sentencing and that such order did not violate protections against double jeopardy). We are bound by the result in *Alexander* and, therefore, cannot find in favor of the defendant as to these claims. See *State* v. *Gonzalez*, 214 Conn. App. 511, 522–23 n.10, 281 A.3d 501 ("It is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable

to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). Accordingly, our review of this appeal is limited to the defendant's first claim.

We begin our analysis by setting forth the relevant legal principles and standard of review. General Statutes § 53a-40e (a) controls the imposition, modification, and repeal of standing criminal protective orders and provides in relevant part: "If any person is convicted of . . . a violation of . . . subdivision (1) or (2) of subsection (a) of section 53-21 . . . the court may, in addition to imposing the sentence authorized for the crime under section 53a-35a or 53a-36, if the court is of the opinion that the history and character and the nature and circumstances of the criminal conduct of such offender indicate that a standing criminal protective order will best serve the interest of the victim and the public, issue a standing criminal protective order which shall remain in effect for a duration specified by the court until modified or revoked by the court for good cause shown. . . ."

Based on the foregoing, § 53a-40e (a) grants the court discretionary authority over the imposition of standing criminal protective orders. "Our review of such discretionary determinations is well settled, under which the trial court's order will be upset only for a manifest abuse of discretion. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it

did." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Arthur H.*, 288 Conn. 582, 595, 953 A.2d 630 (2008).

The defendant claims that the court abused its discretion in imposing the standing criminal protective order because there was no change in circumstances that would justify opening the judgment of conviction and imposing the order. As a predicate to this claim, the defendant maintains that the court's imposition of the standing criminal protective order should be construed as a modification of the judgment. The defendant asks that we construe the imposition of the standing criminal protective order as a modification of the judgment because, he alleges, the imposition of such an order modified his sentence.[6] The construction of a judgment presents a question of law subject to plenary review. *Bauer* v. *Bauer*, 308 Conn. 124, 131, 60 A.3d 950 (2013). "In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) Id.

[6] In support of his argument that the standing criminal protective order was effectively a modification of the judgment, the defendant cites to the legislative history of § 53a-40e and statutes that the defendant construes as "similar" to § 53a-40e. Moreover, the defendant advocates for a "narrow interpretation of § 53a-40e." Insofar as the defendant asks this court to engage in statutory interpretation of § 53a-40e to determine whether a standing criminal protective order is a modification of the judgment, we note that we are bound by the interpretation of § 53a-40e set forth in *State* v. *Alexander*, supra, 269 Conn. 119 ("the court's imposition of a standing criminal [protective] order upon the defendant [does] not affect his sentence"), and decline to do so. See *Parrott* v. *Colon*, 213 Conn. App. 375, 384, 277 A.3d 821 (2022) ("we are bound by our previous judicial interpretations of the language and the purpose of the statute" (internal quotation marks omitted)).

The crux of the defendant's argument is that the "addition" of the standing criminal protective order to the defendant's sentence constituted a modification of the judgment. In support of his argument, the defendant cites an array of civil and criminal precedent from this court, and our Supreme Court, to provide examples of circumstances under which our appellate courts have held that a trial court must make explicit findings prior to modifying a judgment.[7] In his principal appellate brief, the defendant concludes his argument for his first claim by emphasizing that "[t]his case offers this court the opportunity to articulate the appropriate standards for the entry of a standing criminal protective order after a case has already gone to judgment." The defendant asserts that "the standard for modification of a judgment, the legislative history, and common sense dictate that the state or proponent of the change should have the burden of establishing by a preponderance of the evidence that there has been a change in circumstances justifying a change in the judgment." Contending that the court failed to make such a finding, the defendant claims that it abused its discretion in imposing the standing criminal protective order.

[7] None of the cases cited by the defendant provides any authority for construing the trial court's imposition of the standing criminal protective order in the present case as a modification of the judgment. Instead, the defendant apparently cites these cases in an attempt to analogize the burdens articulated therein with the burden of imposing a standing criminal protective order.

For example, citing, inter alia, *Jenks* v. *Jenks*, 232 Conn. 750, 753, 657 A.2d 1107 (1995), the defendant argues that the court was required to make a factual determination as to whether mutual mistake was the cause of the sentencing court's failure to impose the challenged order in the first instance. The defendant also cites *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 74–75, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021), to support the assertion that "[m]odification of a judgment usually requires a showing of change in circumstances." Additionally, the defendant points out that modifications of probation must be preceded by a hearing, at which the state must demonstrate good cause for the modification. See *State* v. *Suzanne P.*, 208 Conn. App. 592, 603–604, 265 A.3d 951 (2021).

The defendant's argument fails as a matter of law, because, as established in *State* v. *Alexander*, supra, 269 Conn. 118–19, a standing criminal protective order is separate and distinct from the criminal judgment setting forth the defendant's sentence.[8] A standing criminal protective order "neither increases the term of imprisonment already imposed upon the defendant nor imposes an additional fine" and is not punitive in law or in fact. *State* v. *Alexander*, supra, 269 Conn. 118–19. Consequently, neither the sentence nor the criminal judgment is modified when a standing criminal protective order is imposed after sentencing.[9] For this reason, the defendant's reliance on modification of judgment cases in both criminal and civil contexts is misplaced. Moreover, the court emphasized at the hearing on the state's motion that, under *Alexander*, standing criminal protective orders do not affect the defendant's sentence. This statement reflects the court's acknowledgment of what the order was—an exercise of judicial

[8] We note that, in *Alexander*, our Supreme Court refers to the defendant's "standing criminal restraining order" throughout its analysis of § 53a-40e. See, e.g., *State* v. *Alexander*, supra, 269 Conn. 119. In 2010, § 53a-40e (a) was amended to substitute "standing criminal protective order" for "standing criminal restraining order." See Public Acts 2010, No. 10-144, § 5. This technical change to the statute does not affect our Supreme Court's analysis in *Alexander*. Accordingly, for the sake of clarity, we refer to the order at issue in *Alexander* as a standing criminal protective order.

[9] In support of his assertion that the court must find a change in circumstances before imposing a standing criminal protective order after sentencing, the defendant also cites to *Kaplan* v. *Kaplan*, 8 Conn. App. 114, 510 A.2d 1024 (1986). In *Kaplan*, the defendant in a divorce case moved to modify the court's judgment of dissolution of marriage nearly ten years after the judgment was rendered. Id., 114–15. The trial court denied the motion, and the defendant appealed. Id., 116. This court reversed the judgment of the trial court, stating that the coalescence of several factors established the "showing of a substantial and unforeseen change of circumstances" required to permit modification. Id., 119.

Kaplan, like much of the other precedent on which the defendant's argument relies, is distinguishable from the present case in that it concerns an order that impacts the prior judgment. As established, "the court's imposition of a standing criminal [protective] order upon the defendant [does] not affect his sentence." *State* v. *Alexander*, supra, 269 Conn. 119.

discretion separate and apart from the defendant's sentence—and the purpose that it served—protection of the victim and the public. Therefore, in accordance with *Alexander*, we decline to construe the imposition of the standing criminal protective order as a modification of the judgment of conviction under which the defendant was sentenced.[10]

Further, we disagree with the defendant's assertion that § 53a-40e (a) fails to provide any guidance as to the standard applicable to a trial court's imposition of such orders. As already stated in this opinion, § 53a-40e (a) provides that a trial court may impose a standing criminal protective order "if the court is of the opinion that the history and character and the nature and circumstances of the criminal conduct of such offender indicate that a standing criminal protective order will best serve the interest of the victim and the public." The language of § 53a-40e (a) clearly articulates the discretionary standard for trial courts when imposing standing criminal protective orders. The defendant, however, has not challenged the imposition of the contested order on the ground that the court failed to abide by the statutory standard. "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Verderame* v. *Trinity Estates Development Corp.*, 92 Conn. App. 230, 232,

[10] The defendant attempts to draw a distinction between the judgment of conviction and the court's sentencing of the defendant. We are not persuaded. "The appealable final judgment in a criminal case is ordinarily the imposition of sentence." (Internal quotation marks omitted.) *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). The exceptions to this rule in criminal cases are limited to rulings made prior to the imposition of sentence that meet one of the two circumstances identified in *Curcio*. Id. Those exceptions do not apply in the present case.

883 A.2d 1255 (2005). Furthermore, "our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014); see also *State* v. *Henderson*, 312 Conn. 585, 597, 94 A.3d 614 (2014) ("Although [the court] did not expressly state that [it] was of the opinion that the defendant's serious and violent criminal history indicated that extended incarceration would 'best serve the public interest,' this court has never required the talismanic recital of specific words or phrases if a review of the entire record supports the conclusion that the trial court properly applied the law. . . . Rather, this court presumes that the trial court properly applied the law in the absence of evidence to the contrary." (Citations omitted.)). Accordingly, we do not address whether the trial court satisfied the standard set forth in § 53a-40e (a) when it imposed the standing criminal protective order.

Finally, the defendant attempts to distinguish *Alexander* from the present case. In *Alexander*, the state filed a request for a standing criminal protective order against the defendant with respect to one of the victims after the defendant made threats during his sentencing hearing. *State* v. *Alexander*, supra, 269 Conn. 109–11. The motion requesting the standing criminal protective order was filed after the defendant had been sentenced. Id., 109. The trial court granted the request and imposed the standing criminal protective order, from which the defendant appealed. Id. In affirming the trial court's imposition of the standing criminal protective order, our Supreme Court held that such an order was not punitive in law or in fact. Id., 119. Therefore, the court concluded that the imposition of a standing criminal

protective order, pursuant to § 53a-40e (a), did not affect the defendant's sentence. Id.

The defendant argues that *Alexander* is distinguishable from the present case in two ways. First, the defendant contends that whereas the standing criminal protective order in *Alexander* was imposed one month after sentencing, the order in the present case was not imposed until nearly nine years after sentencing. Second, the defendant asserts that, in *Alexander*, because the standing criminal protective order was requested after the defendant made threats during the sentencing hearing, there was a change in circumstances that justified granting the request. We are not persuaded by either argument.

First, there is nothing in § 53a-40e (a) or in the court's decision in *Alexander* that suggests that a trial court's authority to issue a standing criminal protective order has a temporal element to it. *Alexander* makes clear that such orders may enter after the judgment of conviction has become final following sentencing. Id., 118. We see neither a legal basis to distinguish the holding in *Alexander* based on how much time has elapsed since the judgment of conviction has become final, nor a practical basis for determining when the court's granting of a postjudgment motion is sufficiently close in time to the judgment to be permissible.

Second, *Alexander* does not stand for the principle that a showing of changed circumstances is required before a court may impose a standing criminal protective order. Indeed, *Alexander* holds that such an order is separate from the defendant's sentence and, therefore, the court has jurisdiction to impose the same without violating due process or the protection against double jeopardy. Just as important, § 53a-40e (a) does not require a change in circumstances. It, instead, sets forth a clear test for the court to apply in deciding whether

to issue a standing criminal protective order. In the absence of a claim that the court failed to properly apply that test, there is no basis for this court to conclude that the court abused its discretion when issuing such an order.

The judgment is affirmed.

In this opinion BRIGHT, C. J., concurred.

MOLL, J., dissenting. General Statutes § 53a-40e (a) controls the issuance, modification, and revocation of standing criminal protective orders. Because this case involves the issuance of a standing criminal protective order in the context of a person convicted pursuant to General Statutes § 53-21 (a) (2), the statutory language that controls the issuing court's authority in the present case provides that the court may issue a standing criminal protective order only "*if the court is of the opinion that the history and character and the nature and circumstances of the criminal conduct of such offender* indicate that a standing criminal protective order will best serve the interest of the victim and the public . . . ." (Emphasis added.) General Statutes § 53a-40e (a). The record before us reveals that the issuing court, which was not the sentencing court, did not have an adequate record before it to make such a determination. Rather, the record reflects that, more than nine years after the judgment of conviction, the court issued the standing criminal protective order on the basis of essentially double hearsay, i.e., an out-of-court statement that was (1) made by the victim's mother to the victim's advocate that was (2) conveyed to a prosecutor (not the one who had handled the original matter) and passed along to the issuing court without any evidentiary foundation. The issuance of the forty year protective order occurred notwithstanding the fact that the defendant's original sentence included a twenty-five

year period of probation, a special condition of which was no contact with the victim. In light of these concerns, I respectfully dissent from the majority's decision affirming the judgment of the trial court.

The following comments by the issuing court reveal that it exclusively relied on the assumption of the victim's mother that a standing criminal protective order previously had issued. "Sir, let me first begin by saying there is nobody in this room who believes for a second that you have done anything wrong or criminal directed at this other party, all right. No one is suggesting that. As I sit here today, I don't think you have done anything to trigger additional criminal conduct." Upon reciting the legal principles set forth in *State* v. *Alexander*, 269 Conn. 107, 847 A.2d 970 (2004), and recognizing thereunder that it had jurisdiction to impose the requested order, the issuing court stated: "[W]hat was equally persuasive to me was this person who had been in contact with the victim's advocate and the state's attorney's office indicated that she was told at disposition that there would be a standing order as part of the disposition. Now there wasn't, but according to her and according to the state's attorney's office, somehow it was indicated to her that that would be done. And what that does is it triggers the integrity of our criminal justice system. And if a person was told that, there is some sort of obligation to make sure that that signal is carried out here in the courtroom . . . . So, I do think also that it does satisfy the integrity of our criminal justice system that we correct these slight misrepresentations that may have been made with blame towards no one, sir." The court further stated: "[T]here's no reason to believe you're going to contact this person."

In sum, these comments do not reflect a determination that the issuing court had arrived at "the opinion that the history and character and the nature and circumstances of the criminal conduct of such offender

indicate that a standing criminal protective order will best serve the interest of the victim and the public . . . .'' General Statutes § 53a-40e (a). Although the issuing court was not required to make such an express finding on the record, the comments made on the record reflect a rationale different from that required by the statute in connection with the issuance of a standing criminal protective order.

Moreover, the record reveals that the issuing court did not have before it—and, therefore, had not considered—the transcript from the April 13, 2012 sentencing hearing conducted by the court, *Devlin*, *J.*, which the defendant filed with this court. The sentencing transcript reflects the following. First, the prosecutor did not request or otherwise mention the issuance of a standing criminal protective order. Second, the court did not suggest that it was considering issuing a standing criminal protective order, such that it simply forgot to do so by the completion of the hearing. Third, the court addressed the victim's mother directly and gave her an opportunity to be heard. While the victim's mother expressed her hurt and frustration, she did not request the issuance of a standing criminal protective order. After hearing from the defendant's attorney and recognizing the defendant's right of allocution, the court went on to impose the sentence of fifteen years of incarceration, execution suspended after five years, followed by twenty-five years of probation, explaining, twice, that one of the special conditions of probation would be no contact with the victim.

The issuing court also did not have before it the transcript from the February 2, 2012 hearing in which the defendant entered his guilty plea, which the defendant filed with this court. That plea transcript reflects, inter alia, that the court, *Devlin*, *J.*, confirmed with the prosecutor that the victim's mother was aware of the proposed disposition and proceeded to hear from her.

The court addressed the victim's mother directly, thoughtfully explaining how it arrived at the proposed disposition. At the end of the court's explanation, the victim's mother stated: "If you think it's fair, Your Honor, I'm good with you." The court proceeded to canvass the defendant with respect to his guilty plea, and the plea was accepted. At no time did the court reference the possibility of issuing a standing criminal protective order.

Stated simply, a review of the plea and sentencing transcripts reveals that the sentencing court did not make any representations during the plea hearing or the sentencing hearing—to the victim's mother or anyone else—that a standing criminal protective order would issue. In the absence of some evidentiary showing that the sentencing court committed an oversight, in my view, the double hearsay on which the issuing court relied is insufficient as a matter of law to satisfy the statutory requirement that the court may issue a standing criminal protective order only "*if the court is of the opinion that the history and character and the nature and circumstances of the criminal conduct of such offender* indicate that a standing criminal protective order will best serve the interest of the victim and the public . . . ." (Emphasis added.) General Statutes § 53a-40e (a). On the basis of the foregoing, I conclude that the court abused its discretion in issuing the standing criminal protective order.[1]

[1] The majority concludes that, because the defendant unsuccessfully argues on appeal that the postjudgment issuance of the standing criminal protective order constituted a modification of the judgment of conviction, the defendant's first claim on appeal necessarily fails. The majority also concludes that the defendant "has not challenged the imposition of the contested order on the ground that the court failed to abide by the statutory standard." In doing so, the majority takes an overly myopic view of the defendant's claim on appeal, and I disagree with its determination that the defendant exclusively framed his first claim on appeal on the basis of the proposition that the issuance of the standing criminal protective order constituted a modification of the judgment. Threaded throughout the defendant's claim is his argument that the issuing court—which was different from

In light of the foregoing considerations, I respectfully dissent.[2]

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the sentencing court, a distinction the importance of which the defendant emphasizes—abused its discretion under § 53a-40e by issuing a postjudgment standing criminal protective order without any change in circumstances. It is this argument with which I agree under the circumstances of this case, namely, a standing criminal protective order being issued by a court different from the sentencing court.

[2] In the event our Supreme Court considers the issues raised by the defendant with respect to this claim, I would urge it to consider exercising its supervisory authority to provide guidance to trial courts in the context of a postjudgment motion for the issuance of a standing criminal protective order presented to a trial court that was not the sentencing court. See *State* v. *Fernando A.*, 294 Conn. 1, 4, 981 A.2d 427 (2009) (guidance provided concerning issuance and continuation of criminal protective order in family violence case pursuant to General Statutes § 54-63c (b)).