IN RE GABRIELLA M. ET AL.*
(AC 46217)

Alvord, Moll and Lavine, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children on the ground that she had failed to achieve a sufficient degree of personal rehabilitation pursuant to statute (§ 17a-112). The mother had a history of substance abuse and mental health issues, and, at the time of trial, the children had not visited with her for more than three years. The children lived with the maternal grandmother, who stated her commitment to serve as a long-term resource for the children. After the petitioner, the Commissioner of Children and Families, filed petitions to terminate parental rights, the mother filed a motion to transfer permanent legal guardianship to the maternal grandmother. The trial court, having found by clear and convincing evidence that permanent transfer of legal guardianship was not in the children's best interests because it was not as permanent an option an adoption, and that adoption was possible and appropriate, granted the petitions to terminate the mother's parental rights and denied the motion to transfer permanent legal guardianship to the maternal grandmother. *Held* that the respondent mother could not prevail on her unpreserved claim that the trial court violated her right to substantive due process as guaranteed by the fourteenth

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

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

amendment to the United States constitution by terminating her parental rights as to the minor children without making a finding that termination was the least restrictive means by which the petitioner could achieve the state's compelling interest in protecting the safety of the children: even if this court assumed, without deciding, that the mother's right to substantive due process required the court to make a "least restrictive" determination, on the basis of the record in the present case, the mother's claim failed under the third prong of *State* v. *Golding* (213 Conn. 233) because it was evident that the trial court considered, but rejected, the transfer of permanent legal guardianship to the maternal grandmother as a less restrictive disposition, and, given the significant needs of the children and the mother's various shortcomings as found by the court, which findings the mother did not dispute, the record established that the court determined that nothing short of terminating the mother's parental rights would adequately protect the children's best interests.

Argued September 6—officially released October 11, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and consolidated with the respondent mother's motion to transfer permanent legal guardianship; thereafter, the cases were tried to the court, *Chavey, J.*; judgments terminating the respondents' parental rights and denying the motion to transfer permanent legal guardianship, from which the respondent mother appealed to this court. *Affirmed.*

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

Evan O'Roark, assistant solicitor general, with whom were *Nisa Khan* and *Albert J. Oneto IV*, assistant attorneys general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Ingrid Swanson, for the minor children.

** October 11, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

MOLL, J. The respondent mother, Gina N.,[1] appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights as to her minor children, G and A, on the ground that she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i). On appeal, the respondent claims that the court violated her right to substantive due process as guaranteed by the fourteenth amendment to the United States constitution by terminating her parental rights as to the children without making a finding that termination was the least restrictive means by which the petitioner could achieve the state's compelling interest in protecting the safety of the children. Assuming, without deciding, that the respondent's right to substantive due process required the court to make a "least restrictive" determination, we conclude, on the basis of the record in the present case, that the court necessarily determined that termination of the respondent's parental rights was the least restrictive disposition. Accordingly, we affirm the judgments of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. In April, 2019, following its investigation of reported "concerning behavior" by the respondent,[2] the

[1] The trial court also rendered judgments terminating the parental rights of the children's father, Anthony M., who filed a separate appeal from those judgments. Our decision in that appeal was also released today. See *In re Gabriella M.*, 221 Conn. App. 844, A.3d (2023). We refer in this opinion to Gina N. as the respondent.

[2] As the court found, "in April, 2019, [the Department of Children and Families] received anonymous reports of [the respondent's] concerning behavior. She reportedly had gone to the children's school with bloodshot eyes and smelling of alcohol; had stated that she was scared to go home because someone was trying to hurt her and the children; had stated that [the children's] father was able to see the children through the television if she turned it on; had asked for money to feed the children; and had stated she was going to kill herself."

Department of Children and Families (department) invoked ninety-six hour holds on the respondent's children. Thereafter, the petitioner applied for ex parte orders of temporary custody and filed neglect petitions. On April 25, 2019, the court, *Hon. Richard E. Burke*, judge trial referee, issued orders of temporary custody, which were sustained on May 10, 2019. On July 23, 2019, the court, *Conway, J.*, adjudicated the children neglected[3] and committed them to the petitioner's custody. Thereafter, the petitioner placed the children in the home of their maternal grandmother, Lorraine N. On December 15, 2020, the court approved permanency plans of permanent legal guardianship to the maternal grandmother.

On September 13, 2021, the petitioner filed motions to review and to approve permanency plans of termination of the respondent's parental rights and adoption of the children. On September 14, 2021, the petitioner filed petitions to terminate the parental rights of the respondent[4] on the ground that, under § 17a-112 (j) (3) (B) (i), the children had been found to be neglected, abused, or uncared for in a prior proceeding and the respondent had failed to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the children, she could assume a responsible position in their lives. On October 21, 2021, the court, *Hon. Shelley A. Marcus*, judge trial referee, approved the permanency plans of termination of parental rights and adoption.[5] On November 16, 2021, the respondent filed

[3] Previously, in 2017, the children were adjudicated neglected and placed under an order of protective supervision. The period of protective supervision expired in 2018.

[4] In the petitions, the petitioner also sought to terminate the parental rights of the children's father. The judgments terminating the father's parental rights are not at issue in this appeal. See footnote 1 of this opinion.

[5] On September 14, 2022, the court again approved permanency plans of termination of parental rights and adoption.

a motion to transfer permanent legal guardianship to the maternal grandmother.

By agreement of the parties, the court, *Chavey*, *J.*, consolidated the hearing on the respondent's motion to transfer permanent legal guardianship with the trial on the termination petitions, which the court conducted on August 31, September 14 and October 26, 2022. On November 28, 2022, the court issued a memorandum of decision terminating the respondent's parental rights and appointing the petitioner as the children's statutory parent. The court determined that the petitioner had demonstrated, by clear and convincing evidence, that the children had been adjudicated neglected on July 23, 2019, and that the respondent had failed to sufficiently rehabilitate under § 17a-112 (j) (3) (B) (i). The court also found that the petitioner had made reasonable efforts to locate the respondent and to reunify her with the children.[6] The court proceeded to determine that termination of the respondent's parental rights was in the children's best interests. The court thereafter denied the respondent's motion to transfer permanent legal guardianship to the maternal grandmother.[7] This appeal followed.[8]

At the outset, we set forth the following relevant legal principles. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision],

[6] The court determined that the petitioner had made reasonable efforts to reunify the respondent with the children prior to December 15, 2020, the date on which the permanency plans of permanent transfer of guardianship to the maternal grandmother had been approved. The court further determined that, as a result of the December 15, 2020 approval of permanency plans other than reunification, the petitioner was not required to demonstrate that it had made reasonable efforts at reunification after December 15, 2020, through the adjudicatory date; nevertheless, the court determined that the petitioner had made reasonable reunification efforts after December 15, 2020, through the adjudicatory date.

[7] In the November 28, 2022 decision, the court also denied a motion for visitation that the respondent had filed. The respondent does not challenge that decision on appeal.

[8] The attorney for the children has adopted the petitioner's appellate brief.

a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)][9] exists by clear and convincing

[9] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child; (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; (C) the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights; (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child; (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families; (F) the parent has killed through deliberate, nonaccidental act another child of the parent or has requested, commanded, importuned, attempted, conspired or solicited such killing or has committed an assault, through deliberate, nonaccidental act that resulted in serious bodily injury of another child of the parent; or (G) the parent committed an act that constitutes sexual assault as described in section 53a-70, 53a-70a, 53a-70c, 53a-71, 53a-72a, 53a-72b or 53a-73a or compelling a spouse or cohabitor to engage in sexual intercourse by the

evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun. . . .

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence. . . .

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)].[10]. . . The seven factors serve simply as guidelines

use of force or by the threat of the use of force as described in section 53a-70b of the general statutes, revision of 1958, revised to January 1, 2019, if such act resulted in the conception of the child."

[10] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable

for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Citations omitted; footnotes added; internal quotation marks omitted.) *In re Christina C.*, 221 Conn. App. 185, 215–17, A.3d (2023).

"[A] judicial termination of parental rights may not be premised on a determination that it would be in the child's best interests to terminate the parent's rights in order to substitute another, more suitable set of adoptive parents. Our statutes and [case law] make it crystal clear that the determination of the child's best interests comes into play only after statutory grounds for termination of parental rights have been established by clear and convincing evidence." (Internal quotation marks omitted.) Id., 217–18.

On appeal, the respondent does not challenge the factual findings or legal conclusions made by the court

efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

in terminating her parental rights, nor does she claim error with respect to the court's denial of her motion to transfer permanent legal guardianship to the maternal grandmother. The respondent's sole claim, as she frames it, "is comprised of two closely related elements: (1) there is a substantive constitutional entitlement [pursuant to the due process clause of the fourteenth amendment to the United States constitution] to a less restrictive alternative to termination [of parental rights] where one exists; and (2) the trial court cannot order termination of parental rights without finding by clear and convincing evidence that such [an] alternative does not exist." See *In re Azareon Y.*, 309 Conn. 626, 637, 72 A.3d 1074 (2013) (describing identical claim). As the respondent contends, (1) our statutory scheme governing the termination of parental rights fails to comport with this substantive due process requirement because it does not mandate that a trial court find, as a prerequisite to terminating parental rights, that a less restrictive alternative to termination does not exist, and (2) the court's failure to make such a finding before terminating her parental rights pursuant to this statutory scheme violated her right to substantive due process.[11]

As the respondent concedes, she did not raise her claim of error before the trial court, and, therefore, she

[11] "The due process clause of the fourteenth amendment to the United States constitution provides that no state shall 'deprive any person of life, liberty or property, without due process of law . . . .' The United States Supreme Court has held that the due process clause 'protects individuals against two types of government action. So-called substantive due process prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty . . . . When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. . . . This requirement has traditionally been referred to as procedural due process.' . . . *United States* v. *Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)." *State* v. *Anderson*, 319 Conn. 288, 309 n.33, 127 A.3d 100 (2015). The respondent claims a violation of her right to substantive due process.

seeks review of her unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Pursuant to *Golding*, a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Maliyah M.*, 216 Conn. App. 702, 707, 285 A.3d 1185 (2022), cert. denied sub nom. *In re Edgar S.*, 345 Conn. 972, 286 A.3d 907 (2023). The petitioner argues that the respondent's unpreserved claim (1) is unreviewable under the second prong of *Golding* because her claim is not of constitutional magnitude alleging the violation of a fundamental right or, in the alternative, (2) fails on the merits under the third prong of *Golding* because our statutory scheme governing the termination of parental rights, in operation, empowers trial courts to terminate parental rights only when termination is the least restrictive disposition.[12]

[12] The respondent contends, and the petitioner agrees, that the first prong of *Golding* is satisfied because the record is adequate to review the respondent's claim on the basis that a less restrictive alternative to termination of the respondent's parental rights was presented to the trial court by way of the respondent's motion to transfer permanent legal guardianship to the maternal grandmother. Cf. *In re Azareon Y.*, supra, 309 Conn. 636–42 (concluding that record was inadequate to review identical, unpreserved substantive due process claim).

It is well settled that, "as a jurisprudential matter, [our appellate courts] generally [avoid] an unnecessary determination of constitutional questions." *In re Brayden E.-H.*, 309 Conn. 642, 656, 72 A.3d 1083 (2013). Consistent with this legal tenet, our Supreme Court and this court previously have declined to resolve the question of whether a "least restrictive" determination is constitutionally mandated when the record has established that the trial court satisfied that standard. See id., 656–57 ("[W]e conclude that, because it is readily apparent from our review of the record that the respondent is not entitled to the relief that she seeks, we should reserve for another day the questions of whether substantive due process requires a determination that termination is the least restrictive means to protect a child's best interest and, if so, whether § 17a-112 violates that requirement. In the present case, even if we were to assume that such a right existed, the trial court's decision reveals that this standard was met."); *In re Daniel N.*, 163 Conn. App. 798, 806, 134 A.3d 624 ("We . . . conclude that in finding that termination of the parental rights was in the best interests of the children, the court necessarily found that termination was the least restrictive permanency plan required to protect the children's best interests. See *In re Brayden E.-H.*, [supra, 661] (in applying best interests standard, trial court necessarily found that termination was least restrictive permanency plan consistent with children's best interests). Accordingly, we conclude, as did our Supreme Court in *In re Brayden E.-H.*, that 'even if we were to assume, arguendo, such a least restrictive determination is constitutionally mandated . . . the respondent's claim fails because the record reflects that this standard was satisfied.'[13]" (Footnote in original.)),

[13] "In *In re Brayden E.-H.*, supra, 309 Conn. 656, the court eschewed deciding the constitutional question of whether the respondent had a substantive due process right to a determination that termination is the least restrictive means to protect a child's best interest. We do the same." *In re Daniel N.*, supra, 163 Conn. App. 806 n.4.

cert. denied, 321 Conn. 908, 135 A.3d 280 (2016).[14] Instructed by this precedent, we conclude that, even if we were to assume, arguendo, that the federal constitution imbued the respondent with a substantive due process right to a "least restrictive" determination as a prerequisite to the termination of her parental rights, the record in the present case demonstrates that the court necessarily made such a determination, thereby satisfying this standard. Accordingly, we further conclude that the respondent's claim fails under the third prong of *Golding*.

The following facts, with respect to which the respondent does not claim error on appeal, are relevant to our analysis. In the adjudicatory phase of the termination proceedings, the court determined that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i). In support of that determination, the court found that the respondent "has failed to overcome long-standing challenges, including mental health and substance use, affecting her ability to care responsibly for the children given their age[s] and needs, and has failed to gain insight into their needs." As to her mental health, the court found that the respondent "continues to have significant mental health issues," citing evidence in the record reflecting that (1) in April, 2022, the APT Foundation, a methadone treatment clinic that provides services for opioid users and addicted individuals, reported to the department that "its staff had observed [the respondent] having ongoing delusions and paranoia and had concerns with [her] mental stability," (2) in April, 2022, the respondent presented to Dr. Jessica Biren Caverly, the court-ordered psychological evaluator, as having " 'significant

[14] The substantive due process claim raised in *In re Brayden E.-H.* was preserved for appellate review; *In re Brayden E.-H.*, supra, 309 Conn. 655; whereas the respondent in *In re Daniel N.* sought *Golding* review of her unpreserved substantive due process claim. *In re Daniel N.*, supra, 163 Conn. App. 805.

mental illness' and indicating 'some sort of psychosis,' " and (3) as of April, 2022, the respondent " 'continue[d] to demonstrate symptoms of significant psychopathology that would require mental health treatment.' " In addition, while recognizing that the respondent successfully had completed an intensive outpatient program with Yale New Haven Hospital between July and August, 2022, and that she had testified that she intended to participate in a follow-up program to which she had been referred, the court expressed "[concern] that [the respondent] had reported to Dr. Caverly in April, 2022, that her 'mental health [was] addressed,' " that she was uncertain whether she needed to seek treatment with a therapist, and that she had " 'been very busy with a lot of things,' " which the court construed as reflecting that the respondent "did not appreciate the significance or urgency of her need to attend to her mental health on an ongoing basis."[15] In addition, commenting on her testimony at the termination trial, the court observed that the respondent "was at times overly defensive and hard to follow, and generally [made] assertions that were tangential, illogical or otherwise incredible. Additionally . . . [she] repeatedly sought to blame others, including [the department] and [the maternal grandmother], for her current situation."

As to her substance use, the court found that the respondent "has not made enough progress to attain the ability to care responsibly for the children." The court found that the respondent had tested positive for alcohol and fentanyl while in an intensive outpatient program with the APT Foundation in 2022, which positive tests she sought to deny or to minimize.

[15] The court further observed that, although the respondent's completion of the intensive outpatient program between July and August, 2022, was "commendable," the "[m]ere completion of a program is not sufficient; [the respondent] needed to have achieved stability in her mental health, which she has not done."

The court further found that the respondent had failed to gain insight into the reasons for the department's involvement vis-à-vis the children and the issues that needed to be addressed to reunite with the children, stating that the respondent (1) repeatedly told Dr. Caverly, and incredibly testified at trial, that she was " 'confused' as to the underlying child protection issues" and "even claimed not to know in April, 2022, that [the department] was seeking termination of parental rights," and (2) misrepresented to Dr. Caverly in 2022 that (a) she had produced " 'clean urines,' " notwithstanding a positive screen the prior week, and (b) she had completed all treatment programs to which she had been referred.

The court also found that "[b]oth children have significant needs: [G] has asthma, engages in attention-seeking behaviors, has been diagnosed with attachment disorder, and has symptoms of anxiety; [A] has severe eczema, is described as hyperactive, has been diagnosed with [post-traumatic stress disorder] and [attention deficit hyperactivity disorder], and 'has significant difficulties regulating his emotions and impulsivity.' These demanding physical and emotional needs require a caregiver who is sober, consistent and steady, and [the respondent] is in no position to be such a caregiver to these children." (Footnote omitted.)

In the dispositional phase of the termination proceedings, the court determined that termination of the respondent's parental rights was in the children's best interests. In support of that determination, the court made findings consistent with those it had made in the adjudicatory phase. The court further found that "[t]he children, who are just eight years old, have not visited with the [respondent] for over three years, and thus 'there is no ongoing relationship between the [respondent] and the children.' "[16] The court also stated that

[16] On October 8, 2019, the court, *Conway, J.*, granted a motion to cease visitation with the children filed by the petitioner. As the court, *Chavey, J.*,

the maternal grandmother has a ten year protective order against the respondent, with an exception for communications about the children.[17]

As the court further found, "[the respondent is] still not in a position to serve as [a] responsible [caregiver] for the children, due to [her] ongoing mental health and substance use needs . . . . Moreover, the children have lived with [their] maternal grandmother since the spring of 2019, when they were not yet five years old, and they also had lived with her periodically before that. The maternal grandmother has cared for the children's significant physical and emotional needs, and they are doing well. [The maternal grandmother] has stated her commitment to serving as a long-term resource for the children. As Dr. Caverly concluded, '[the children] must be in the care of a guardian who is capable of meeting their significant mental health needs, including taking them to all appointments and advocating for them in school.' The totality of the evidence . . . including but

explained in its November 28, 2022 decision, the motion to cease visitation "followed several incidents. First, [the respondent and the children's father] made an after-hours visit to the children's school on September 19, 2019, and their conduct . . . led not only to a lockdown at the school but also to arrests of both [the respondent and the father] for breach of the peace and interfering with an officer. They were both incarcerated for a period following those arrests, and a full no-contact protective order was issued in favor of the children. Second, [the department] had noted concerning behaviors by both parents at supervised visits at [the department's] office and in the community, leading [the department] to have concerns about the children's welfare. For example, the parents refused to leave at the end of visits and had inappropriate conversations with the children . . . [and the respondent] became irate and demanded that [the] children not leave with the maternal grandmother but instead go into foster care . . . . Third, after [the respondent and the father] missed a scheduled visit at the [department's] offices in early September, 2019, [the respondent and the father] had gone to the home of the maternal grandmother, with whom the children were placed, and were banging on the windows and screaming, leading the maternal grandmother to call 911." (Footnotes omitted.)

[17] The court also stated that the respondent had been incarcerated from approximately March to August, 2021, for "violating a protective order that prohibited her from contacting the maternal grandmother."

not limited to [the respondent's] inappropriate conduct at the children's school, expressions of apparent reluctance regarding mental health services, and continued significant substance use and mental health needs, makes clear that the respondent is [not] capable, now or in the foreseeable future, of serving as the responsible caregiver that the children's needs require." (Footnote omitted.)

After granting the petitioner's petitions to terminate the respondent's parental rights, the court addressed, and denied, the respondent's motion to transfer permanent legal guardianship to the maternal grandmother. Applying General Statutes § 46b-129 (j) (6),[18] the court found, inter alia, "by clear and convincing evidence that [permanent transfer of legal guardianship] is not in the

[18] General Statutes § 46b-129 (j) (6) provides: "Prior to issuing an order for permanent legal guardianship, the court shall provide notice to each parent that the parent may not file a motion to terminate the permanent legal guardianship, or the court shall indicate on the record why such notice could not be provided, and the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth and that the following have been proven by clear and convincing evidence:

"(A) One of the statutory grounds for termination of parental rights exists, as set forth in subsection (j) of section 17a-112, or the parents have voluntarily consented to the establishment of the permanent legal guardianship;

"(B) Adoption of the child or youth is not possible or appropriate;

"(C) (i) If the child or youth is at least twelve years of age, such child or youth consents to the proposed permanent legal guardianship, or (ii) if the child is under twelve years of age, the proposed permanent legal guardian is: (I) A relative, (II) a caregiver, or (III) already serving as the permanent legal guardian of at least one of the child's siblings, if any;

"(D) The child or youth has resided with the proposed permanent legal guardian for at least a year; and

"(E) The proposed permanent legal guardian is (i) a suitable and worthy person, and (ii) committed to remaining the permanent legal guardian and assuming the right and responsibilities for the child or youth until the child or youth attains the age of majority."

Section 46b-129 was amended since the events underlying this appeal by No. 21-15, § 117, of the 2021 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, we refer to the current revision of the statute.

children's best interest[s] because it is not as permanent an option as adoption. Termination of parental rights and adoption offer more long-term stability and consistency for the children than would a permanent legal guardianship, which is subject to being reopened and modified when statutory requirements are met. These children require that long-term permanency and stability in light of their significant needs . . . and [termination of parental rights] and adoption are best suited to provide [such long-term permanency and stability].''[19]

On the basis of the record before us, we conclude that the court necessarily found, by clear and convincing evidence, that termination of the respondent's parental rights was the least restrictive means to protect the children's best interests. It is evident that the court considered, but rejected, the transfer of permanent legal guardianship to the maternal grandmother as a less restrictive disposition. Given the significant needs of the children and the respondent's various shortcomings as found by the court, which findings the respondent does not dispute, the record establishes that the court determined ''that nothing short of terminating the respondent's [parental] rights would adequately protect the children's best interests.''[20] *In re Brayden E.-H.*,

[19] The court also found that adoption was possible and appropriate. See General Statutes § 46b-129 (j) (6) (B).

[20] During oral argument before this court, the respondent's counsel was asked to clarify his position by identifying the phase of a parental termination proceeding—adjudicatory or dispositional—during which a trial court must make the purported requisite finding that termination of parental rights is the least restrictive disposition. The respondent's counsel characterized the finding as a ''dispositional finding.'' Nevertheless, recognizing that the dispositional phase follows only after the court has determined during the adjudicatory phase that a statutory ground for termination exists, the respondent's counsel contended that the finding must be made during the adjudicatory phase in conjunction with the court's determination that there is a statutory ground for termination. We are not convinced by the proposition that a ''least restrictive'' determination, if constitutionally mandated, must be made during the adjudicatory phase of termination proceedings. As this court stated in *In re Daniel N.*, supra, 163 Conn. App. 798, this proposition ''finds no support in our law,'' and ''[w]e fail to discern the relevance of an

supra, 309 Conn. 662. Accordingly, we further conclude that the respondent's claim fails under the third prong of *Golding* because, assuming that a "least restrictive" determination is constitutionally required, the court did not violate the respondent's constitutional right to that determination.

The judgments are affirmed.

In this opinion the other judges concurred.

IN RE GABRIELLA M. ET AL.*
(AC 46214)

Alvord, Moll and Lavine, Js.

Syllabus

The respondent father appealed to this court following the trial court's judgments terminating his parental rights with respect to his minor children and denying a motion to transfer permanent legal guardianship to the children's maternal grandmother. The father's sole claim on appeal was that the trial court improperly denied the motion for a permanent transfer of guardianship. *Held* that this court lacked subject matter jurisdiction over the respondent father's appeal: the father lacked standing to bring the appeal because he was not aggrieved by the trial court's decision denying the motion for permanent transfer of guardianship to the maternal grandmother, as once the father's parental rights had been terminated, and, in the absence of any challenge to those final judgments, the father no longer had a specific, personal and legal interest that was specially and injuriously affected by the trial court's denial of the motion.

Argued September 6—officially released October 11, 2023**

alternative permanency plan to the threshold adjudication of parental fitness [made during the adjudicatory phase]." Id., 804 n.2.

* 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.

** October 11, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the cases were consolidated with the respondent mother's motion to transfer permanent legal guardianship; thereafter, the cases were tried to the court, *Chavey, J.*; judgments terminating the respondents' parental rights and denying the motion to transfer permanent legal guardianship, from which the respondent father appealed to this court. *Appeal dismissed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

Evan O'Roark, assistant solicitor general, with whom were *Nisa Khan* and *Albert J. Oneto IV*, assistant attorneys general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Ingrid Swanson, for the minor children.

Opinion

ALVORD, J. The respondent father, Anthony M., appeals following the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor children, G and A.[1] On appeal, the respondent claims that the court improperly denied a motion for transfer of permanent legal guardianship of the children to their maternal grandmother.[2] The

[1] The trial court also rendered judgments terminating the parental rights of the minor children's mother, Gina N., who filed a separate appeal from those judgments. Our decision in that appeal was also released today. See *In re Gabriella M.*, 221 Conn. App. 827, A.3d (2023). We refer in this opinion to Anthony M. as the respondent.

[2] The attorney for the minor children has filed a statement adopting the appellate brief of the petitioner.

respondent does not raise any claim on appeal challenging the termination of his parental rights. Because we conclude that the respondent is not aggrieved by the decision of the trial court denying the motion for permanent transfer of guardianship, we dismiss the appeal for lack of subject matter jurisdiction.

The following facts, which were found by the trial court, and procedural history are relevant to our resolution of this appeal. G and A were born in 2014 and were adjudicated neglected in 2017. An order of protective supervision was in place from December, 2017, to August, 2018. In April, 2019, the Department of Children and Families (department) received anonymous reports of "concerning behavior" regarding Gina N. On April 25, 2019, the petitioner filed motions for orders of temporary custody, which were granted ex parte that same day. Also on April 25, 2019, the petitioner filed neglect petitions. The court sustained the orders of temporary custody, and the children again were adjudicated neglected on July 23, 2019. Also on July 23, 2019, the court committed the children to the custody of the petitioner.

On September 14, 2021, the petitioner filed petitions for the termination of the respondent's parental rights.[3] Beginning on August 31, 2022, the court, *Chavey, J.*, held a trial on the petitions. The court rendered judgments terminating the respondent's parental rights on November 28, 2022. The court found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the children, he could assume a responsible position in their lives. In the dispositional phase of the proceedings,

[3] In the petitions, the petitioner also sought to terminate the parental rights of the minor children's mother. The judgments terminating the mother's parental rights are not at issue in this appeal. See footnote 1 of this opinion.

the court made findings as to each of the criteria set forth in General Statutes § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in the children's best interests. Accordingly, the court rendered judgments terminating the respondent's parental rights and appointing the petitioner as the children's statutory parent.

By agreement of the parties, the court consolidated the hearing on a motion for transfer of permanent legal guardianship to the children's maternal grandmother, Lorraine N., which was filed by Gina N. on November 16, 2021, with the trial on the termination petitions.[4] At trial, the respondent's counsel represented orally that the respondent joined Gina N.'s motion. In its memorandum of decision, the court denied the motion for transfer of permanent legal guardianship. It first found that an adjudicatory ground to terminate the parental rights of the respondent and Gina N. existed. It next found that the children have lived with their maternal grandmother since 2019 and that she "is a committed, long-term caregiver for the children, who clearly would be a suitable and worthy guardian." The court found that adoption "is clearly possible, as the maternal grandmother wishes to adopt the children, and both [the department] and counsel for the children support termination of parental rights, which would free the children for adoption." The court stated that "[a]doption is also appropriate because the maternal grandmother provides a safe, stable, and loving home for the children . . . ." Finally, the court rejected the suggestion made by the respondent and Gina N. "that adoption would be inappropriate because the grandmother is seeking to plan and provide financially for the children's future." The court found by clear and convincing evidence that the permanent transfer of guardianship was not in the children's best

[4] The court also heard motions for visitation filed by the respondent and Gina N. In its memorandum of decision, the court denied the motions.

interests "because it is not as permanent an option as adoption. Termination of parental rights and adoption offer more long-term stability and consistency for the children than would a permanent legal guardianship, which is subject to being reopened and modified when statutory requirements are met. These children require that long-term permanency and stability in light of their significant needs . . . and [termination of parental rights] and adoption are best suited to provide it." This appeal followed.

The respondent's sole claim on appeal is that the court improperly denied the motion for a permanent transfer of guardianship. Specifically, he argues that adoption was not appropriate in the present case and that the court "erred in finding that it was not in the best interests of the minor children when it denied the motion for permanent transfer of guardianship." The petitioner responds, inter alia, that the respondent's "claims challenging the court's denial of the motion for permanent transfer are moot because he fails to challenge the judgment[s] terminating his parental rights." Specifically, the petitioner argues that the respondent "asks this court to remand to the trial court with instructions to grant the permanent transfer or order additional evidentiary hearings." The petitioner contends that the respondent would lack standing on remand because his parental rights remain terminated. Therefore, the petitioner requests that this court dismiss the respondent's appeal.

The petitioner argues that the final judgments terminating the respondent's parental rights, and the respondent's failure to challenge those judgments, preclude him from challenging the court's denial of the motion for permanent transfer of guardianship, which implicates the doctrine of aggrievement. "Aggrievement, in essence, is appellate standing. . . . It is axiomatic that aggrievement is a basic requirement of standing, just

as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . The test for determining [classical] aggrievement encompasses a well settled twofold determination: first, the party claiming aggrievement must demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest shared by the community as a whole; second, the party claiming aggrievement must establish that this specific personal and legal interest has been specially and injuriously affected by the decision." (Internal quotation marks omitted.) *Russo* v. *Thornton*, 217 Conn. App. 553, 564, 290 A.3d 387, cert. denied, 346 Conn. 921, 291 A.3d 608 (2023). "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Healey* v. *Mantell*, 216 Conn. App. 514, 524, 285 A.3d 823 (2022).

In the present case, the respondent did not appeal from the judgments terminating his parental rights. "Termination of parental rights means the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent . . . . General Statutes § 17a-93 (5); accord General Statutes § 45a-707 (8). Severance of this legal relationship means that the constitutional right to direct the child's upbringing, as well as the statutory right to visitation, no longer exists . . . . In effect, the [biological parent] is a legal stranger to the child with no better claim to advance the best interests of the child than any remote stranger." (Citation omitted; internal quotation marks omitted.) *In re Riley B.*, 342 Conn. 333, 345, 269 A.3d 776 (2022).

The decision challenged by the respondent in the present case is the court's denial of the motion for

permanent transfer of guardianship to the maternal grandmother.[5] "Permanent guardianship" is defined as a guardianship "that is intended to endure until the minor reaches the age of majority without termination of the parental rights of the minor's parents . . . ." General Statutes § 45a-604 (8); see also *In re Brian P.*, 195 Conn. App. 582, 592, 226 A.3d 152 (2020) ("a permanent guardianship is intended to occur without the termination of parental rights"). Accordingly, we must determine whether the respondent is aggrieved by the trial court's denial of the motion for permanent transfer of guardianship, in light of his decision not to challenge the trial court's termination of his parental rights.

The respondent had an interest in the outcome of the motion for permanent transfer of guardianship when

[5] General Statutes § 46b-129 (j) (6) provides: "Prior to issuing an order for permanent legal guardianship, the court shall provide notice to each parent that the parent may not file a motion to terminate the permanent legal guardianship, or the court shall indicate on the record why such notice could not be provided, and the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth and that the following have been proven by clear and convincing evidence:

"(A) One of the statutory grounds for termination of parental rights exists, as set forth in subsection (j) of section 17a-112, or the parents have voluntarily consented to the establishment of the permanent legal guardianship;

"(B) Adoption of the child or youth is not possible or appropriate;

"(C) (i) If the child or youth is at least twelve years of age, such child or youth consents to the proposed permanent legal guardianship, or (ii) if the child is under twelve years of age, the proposed permanent legal guardian is: (I) A relative, (II) a caregiver, or (III) already serving as the permanent legal guardian of at least one of the child's siblings, if any;

"(D) The child or youth has resided with the proposed permanent legal guardian for at least a year; and

"(E) The proposed permanent legal guardian is (i) a suitable and worthy person, and (ii) committed to remaining the permanent legal guardian and assuming the right and responsibilities for the child or youth until the child or youth attains the age of majority."

Section 46b-129 was amended by No. 21-15, § 117, of the 2021 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, we refer to the current revision of the statute.

he joined that motion at the time of the trial, prior to the termination of his parental rights. This, however, does not end our inquiry. Once the respondent's parental rights had been terminated, and in the absence of any challenge to those final judgments, the respondent no longer had a specific, personal and legal interest that was specially and injuriously affected by the trial court's denial of the motion for permanent transfer of guardianship. In other words, in the context of this appeal, the court's order denying the motion for permanent transfer of guardianship does not interfere with any interest of the respondent, as his parental rights have been terminated.[6] In the absence of a successful challenge to the termination of his parental rights, the respondent is a "legal stranger to the child." (Internal quotation marks omitted.) *In re Riley B.*, supra, 342 Conn. 345. Accordingly, the respondent is not aggrieved by the court's decision.[7] Thus, this court lacks subject matter jurisdiction over the respondent's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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[6] The present appeal is unlike those situations in which a person whose parental rights have been terminated satisfies both the specific interest and specific injury prongs to overcome the aggrievement hurdle to appellate review, such as a denial of posttermination visitation. See, e.g., *In re Ava W.*, 336 Conn. 545, 557, 248 A.3d 675 (2020).

[7] It is significant that the respondent, in his reply brief, states: "If this court determines that the motion for permanent transfer of guardianship was improperly denied, then the appropriate remedy would be to remand the case back to the trial court with appropriate orders to grant the motion for permanent transfer of guardianship and *to obviously vacate the order on the termination of parental rights*." (Emphasis added.) In advocating for that remedy, he belatedly recognizes that the relief he seeks with respect to the permanent transfer of guardianship would necessitate reversal of the judgments terminating his parental rights, which he has not challenged on appeal. This circuitous attempt to reverse the judgments terminating his parental rights is impermissible.

JOHNNY MARTINEZ *v.* COMMISSIONER OF CORRECTION (AC 45795)

Moll, Seeley and Keller, Js.

Syllabus

The petitioner, who had been convicted of felony murder and various other crimes in connection with a robbery, sought a writ of habeas corpus, claiming that his trial counsel, B, had provided ineffective assistance. A few weeks after the robbery, the petitioner made a formal statement to the police regarding his involvement in the incident. He admitted that he had participated in the robbery of the victim, who had died as a result of blunt force trauma to his head, and stated that he had stomped on the victim's head after another individual had struck the victim in the head multiple times with a hard object. Prior to trial, the petitioner was offered a plea deal that would have required him to plead guilty to the charge of felony murder in exchange for capping his sentence at thirty-five years to serve. B discussed the plea offer with the petitioner several times, addressing the elements that the state needed to prove to convict the petitioner of the offenses he was charged with, the total exposure the petitioner faced, the state's evidence, and the strength of the state's case, which included the impact of the petitioner's incriminating statement to the police. B did not specifically recommend that the petitioner accept or reject the plea deal, as she believed that the decision needed to be made by the petitioner. The petitioner, who maintained his innocence despite his statement to the police, rejected the plea offer and was found guilty of felony murder and various other crimes. He was sentenced to a term of fifty years of imprisonment, and his conviction was affirmed on appeal. Thereafter, the petitioner filed a habeas petition claiming that B had failed to advise him adequately regarding the plea offer because she had failed to explain the elements of the crimes charged against him and to inform or advise him as to the strength of the state's case. The habeas court rendered judgment denying the habeas petition, concluding that the petitioner had failed to meet his burden of demonstrating both that B had performed deficiently and that he was prejudiced by B's performance. On the granting of certification to appeal, the petitioner appealed to this court, claiming that B performed deficiently by failing to offer her opinion as to whether he should have taken a pretrial plea offer from the state and that he was prejudiced by that performance. *Held* that the habeas court did not err in concluding that the petitioner failed to demonstrate that he was prejudiced by B's allegedly deficient performance, as was required pursuant to *Strickland* v. *Washington* (466 U.S. 668): contrary to the assertion of the respondent Commissioner of Correction, the petitioner's claim on appeal that B

improperly had failed to advise the petitioner of her opinion regarding whether he should accept or reject the plea offer was reviewable because it was sufficiently articulated during the habeas proceedings so as to give adequate notice to both the habeas court and the respondent, as, in his habeas petition, the petitioner made the general allegation that B had failed to advise him adequately regarding the plea offer in addition to claiming more specifically that B had provided ineffective assistance by failing to explain adequately the charges against the petitioner and the strength of the state's case and, during the habeas trial, testimony by B and the petitioner amply covered the issue and counsel for both parties addressed the claim during their respective closing arguments; moreover, the habeas court's determination that the petitioner failed to sustain his burden of proving that he would have accepted the plea deal but for B's constitutionally deficient performance was not erroneous because, during the habeas trial, both B and the petitioner testified that the petitioner had rejected the offer because he wanted to maintain his innocence, and the petitioner's testimony during his criminal trial supported the habeas court's finding that he was primarily concerned with proving his innocence; furthermore, the habeas court determined that the petitioner's testimony regarding whether he would have accepted the plea deal if he had received adequate advice and professional assistance from B was not credible, and it was not for this court to reevaluate that determination; accordingly, this court did not need to determine whether B's performance was deficient.

Argued September 7—officially released October 17, 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, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. Following the granting of his petition for certification to appeal, the petitioner, Johnny Martinez, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he alleged a claim of ineffective assistance of counsel. On appeal, the petitioner claims that his trial counsel, Attorney TaShun Bowden-Lewis, performed deficiently by failing to offer her opinion as to whether the petitioner should have taken a pretrial plea offer from the state and that he was prejudiced by trial counsel's deficient performance. We disagree and, accordingly, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. Shortly after 4 a.m. on November 2, 2010, the petitioner, Michael Mark, and Anthony Garcia were passengers in an automobile being driven by Manuel Vasquez. The four men were on their way to a "bootleg house" to purchase liquor that was sold when bars and package stores were not open for business. Around that time, the victim, Arnaldo Gonzalez, was walking to an election polling station where he was scheduled to work as a bilingual interpreter. Mark saw the victim and said that he intended to rob him. After Vasquez parked the automobile, both the petitioner and Mark exited the vehicle and followed the victim. Mark struck the victim in the back of the head with a hard object he had picked up from the ground. The victim immediately fell to the ground, and Mark struck him repeatedly. Thereafter, the petitioner stomped on the victim's head, causing blood to transfer onto one of the petitioner's sneakers. Mark took a backpack belonging to the victim, and he and the petitioner left the scene. The victim sustained multiple skull fractures and brain hemorrhaging and died as a result of blunt force trauma to his head.

In the following weeks, the petitioner received word that the Waterbury police wanted to speak with him regarding the incident. The petitioner subsequently went to the Waterbury Police Department and made a formal statement to the police about his involvement in the incident. In this statement, the petitioner admitted to the police that he had participated in the robbery of the victim and stomped on the victim's head after the victim had been struck in the head by Mark.

The petitioner was arrested on November 28, 2010, and charged with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c,[1] robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), robbery in the first degree in violation of § 53a-134 (a) (3), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, and tampering with physical evidence in violation of General Statutes § 53a-155.[2] On December 15, 2010, trial counsel was appointed to represent the petitioner. On July 14, 2011, the petitioner was offered a plea deal that called for the petitioner to plead guilty to the charge of felony murder, and, in exchange, his sentence would be capped at thirty-five years to serve, with a right to argue for no less than thirty-two years.

On September 14, 2011, the petitioner rejected the plea offer in court. The court, *Damiani, J.*, stated the terms of the plea and told the petitioner that "the state's going to be trying the case on the theory of felony murder. So, if there's a robbery completed or attempted

[1] General Statutes § 53a-54c was amended by No. 15-211, § 3, of the 2015 Public Acts, which made technical changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] General Statutes § 53a-155 was amended by No. 15-211, § 9, of the 2015 Public Acts, which made changes to the statute that are not relevant to this appeal. For convenience, we refer to the current revision of the statute.

. . . someone dies, you and the other person are equally culpable. That's the theory they're going to be going on; you understand that, right?'' The petitioner answered in the affirmative. The court further asked the petitioner whether his trial counsel had ''explained all this to [him]'' and whether he knew ''what the facts are, [and the] weaknesses and strengths of the state's case.'' The petitioner again answered in the affirmative. Finally, the court asked the petitioner whether he understood that the offer could not be renewed: ''So, you come back to trial, you can't say you want to take this offer. It's got to be something more; do you understand, sir?'' The petitioner indicated that he understood. A trial was held, and the petitioner was found guilty of felony murder, two counts of robbery in the first degree, conspiracy to commit robbery in the first degree, and tampering with evidence.[3] The petitioner was sentenced to a term of incarceration of fifty years, twenty-five years of which was a statutory mandatory minimum. The petitioner's conviction was affirmed on direct appeal. See *State* v. *Martinez*, 171 Conn. App. 702, 758, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

On April 8, 2021, the petitioner filed the operative amended petition for a writ of habeas corpus, in which he alleged in a single count that his trial counsel had provided ineffective assistance by failing to advise the petitioner adequately regarding the state's plea offer. Specifically, he alleged that trial counsel had failed to

[3] ''Additionally, the jury found the [petitioner] guilty of murder in violation of . . . § 53a-54a (a). At the time of sentencing, the court, pursuant to *State* v. *Miranda*, 145 Conn. App. 494, 508, 75 A.3d 742 (2013) (vacatur is proper remedy for double jeopardy violation caused by cumulative homicide convictions arising from killing of single victim), aff'd, 317 Conn. 741, 753–54, 120 A.3d 490 (2015), reasoned that it could not properly impose a sentence with respect to the murder and felony murder counts under which the [petitioner] was found guilty. Accordingly, the court vacated the [petitioner's] conviction of murder.'' *State* v. *Martinez*, 171 Conn. App. 702, 705 n.1, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

explain the elements of each of the crimes charged against him and to inform or advise him as to the strength of the state's case. A trial was held before the habeas court, *M. Murphy, J.*, on April 6, 2022, during which the petitioner was represented by counsel. The petitioner's trial counsel, the petitioner, and Attorney Frank Riccio, an expert witness who testified as to the best practices for advising a client as to a plea deal, each testified at the habeas trial.

The habeas court summarized the testimony of the petitioner's trial counsel as follows: "[Trial counsel] testified at the habeas trial that, at the time she represented the petitioner, she had been employed as a public defender for over a decade and had prior experience representing defendants facing murder charges. [Trial counsel] testified that she discussed the plea offer with the petitioner several times, in writing and verbally, at both the courthouse and the correctional facility at which the petitioner was housed. [Trial counsel] also testified that she had numerous discussions with the petitioner, both in writing and verbally, regarding what the state needed to prove for each offense he was charged with and the total exposure the petitioner faced as a result of the charges. [Trial counsel] further testified that she discussed the state's evidence and the strength of the state's case with the petitioner, including the incriminating statement the petitioner made to the police wherein he admitted to stomping the victim [on] the head. [Trial counsel] also testified that the decision to accept the plea or to go to trial was ultimately the petitioner's decision, but that she informed the petitioner of the strengths and weaknesses of his options given the fact that he was a young man with small children. [Trial counsel] testified that the petitioner ultimately rejected the plea offer approximately two months after it was conveyed to him."

The petitioner testified that his trial counsel had discussed with him what the state would need to prove for felony murder but that he did not understand it. The petitioner further testified that he had difficulty reading and understanding what his trial counsel had told him but could not remember whether he had told her that he had difficulty reading. The petitioner also testified that trial counsel had told him that, if he was found guilty at trial, his sentence could be up to double the state's plea offer of thirty-five years. He testified that, although he had difficulty remembering, he believed that his trial counsel had talked to him about the strength of the state's case.

In a memorandum of decision dated July 22, 2022, the habeas court rendered judgment denying the operative habeas petition. In doing so, the court concluded that the petitioner had failed to meet his burden of demonstrating that his trial counsel performed deficiently "in advising the petitioner about the plea offer." The court found that the petitioner's trial counsel "is an experienced public defender who testified credibly that she discussed the elements of the charged offenses that the state would have to prove to convict the petitioner, the potential sentences resulting from convictions of the charged offenses, the strength of the state's case, and the plea offer with the petitioner on numerous occasions, both verbally and in writing. [Trial counsel] also advised the petitioner concerning his options with the plea offer given the facts of his case and his personal circumstances. [Trial counsel] further indicated that there was no evidence that the petitioner did not understand their discussions. As a result, the court finds that [trial counsel's] advisement did not constitute deficient performance . . . [and] that the petitioner failed to sustain his burden of proving that the petitioner was prejudiced by trial counsel's performance." Thereafter,

the court granted the petition for certification to appeal, and the petitioner appealed to this court.

Before we begin our analysis of the petitioner's ineffective assistance of counsel claim, we must first address the argument of the respondent, the Commissioner of Correction, that the petitioner's claim on appeal is not reviewable. In the petitioner's operative amended petition for a writ of habeas corpus, he alleged that his trial counsel failed to properly advise him regarding the state's plea offer, including failing to explain to him adequately the elements of the charges he was facing and to inform him as to the strength of the state's case. On appeal, the petitioner argues that his trial counsel was ineffective in failing to advise him whether he should have accepted or rejected the plea offer. Specifically, the petitioner argues that his trial counsel's performance was deficient in that she did not offer her opinion as to whether the petitioner should have accepted the plea offer for the charge of felony murder, and that he was prejudiced by counsel's deficient performance. According to the respondent, this claim is being raised for the first time on appeal and, thus, is not reviewable. The petitioner counters that this underlying theory of deficient performance was presented and explored "throughout the case." As the petitioner noted in his appellate reply brief to this court, "[a]s part of [his] claim that the petitioner's trial counsel failed to adequately explain the strength of the state's case, the petitioner presented evidence that part of this duty was to provide a professional opinion as to whether the petitioner should accept or reject the plea offer." This was demonstrated, the petitioner argued, through the questioning of trial counsel during direct examination at the habeas trial regarding whether counsel had advised the petitioner to accept or to reject the plea offer.

"It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . As our Supreme Court has explained, principles of fairness dictate that both the opposing party and the trial court are entitled to have proper notice of a claim. . . . Our review of a claim not distinctly raised at the trial court violates that right to notice. . . . [A]ppellate review of newly articulated claim[s] not raised before the habeas court would amount to an ambuscade of the [habeas] judge . . . . Accordingly, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Citations omitted; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 298–99, 298 A.3d 636 (2023).

A review of the record before the habeas court reveals that the claim on appeal was sufficiently articulated during the habeas proceedings so as to give adequate notice to both the habeas court and the respondent. Although the petitioner alleged in his operative habeas petition that his trial counsel provided ineffective assistance by failing to explain adequately the charges against him and the strength of the state's case, the petitioner also made the more general allegation that

trial counsel had failed to advise him adequately regarding the plea offer. Also, during the habeas trial, the petitioner pursued, on multiple occasions, a theory that his trial counsel should have, but failed to, advise the petitioner as to her opinion regarding whether he should accept the plea offer.

The following exchanges from the habeas trial are informative. On direct examination, trial counsel was asked whether she had ever told the petitioner her "opinion as to whether the state would prevail at trial?" Trial counsel responded, "[n]o. But I let him know the weaknesses of our case, the strengths, that kind of a thing, and how—again, how damning the statement was, and if it was not going to be suppressed how that could definitely be very harmful." Trial counsel subsequently was asked, "[d]id you ever advise [the petitioner] to reject or accept the plea deal?" She responded, "[n]o. I let him know that was his decision, but I informed him of the, again, the strengths and weaknesses of what would happen, the options, if he chose to accept the offer or chose not to—to accept the offer." The respondent did not object to this line of questioning at any point.

The petitioner also testified during the habeas trial as to whether his trial counsel ever had advised him to accept the plea offer. On direct examination, the petitioner was asked, "[d]id [trial counsel] ever give you her thoughts as to whether the state would win at trial?" He responded, "[n]o, I don't think so. I don't know." He was then asked, "[d]id [trial counsel] ever discuss with you what your best option was to work out your case?" He responded, "[n]o. She left that to me to—if I want to take the deal—or the plea deal—excuse me—or to go to trial." The petitioner was then asked, "[s]o, did [trial counsel] ever advise you to accept the plea offer?" He responded, "[n]o." The petitioner was also questioned as to whether trial counsel had

advised him to reject the plea offer, to which he stated, "not that I know of. I don't remember." The petitioner also was asked whether his trial counsel had advised him to go to trial and whether he would have accepted the plea deal if recommended to do so by trial counsel, to which he responded, "I believe so . . . if she would have told me . . . listen, if I was you or if the best—best situation, I would take the plea—I would have took—I definitely would have listened to her if she would have told me to take the plea deal." Again, the respondent did not object to any of the questions regarding whether trial counsel had advised the petitioner to take the plea deal.

Finally, in closing arguments, the petitioner's counsel argued, citing *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 153 A.3d 8 (2016) (overruled by *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 298 A.3d 588 (2023)), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017), that "merely explaining the offer isn't enough . . . trial counsel must also provide her professional advice as to what is the best option, taking the plea or going to trial." (Citation omitted.) The respondent's counsel, in turn, rebutted this point, arguing in closing that "[w]hether or not the [petitioner] takes the deal is ultimately his decision . . . . [U]ltimately, [the petitioner] indicated he was innocent. . . . [E]ven if [trial counsel had] told him 'you have to take this particular offer' . . . there's nothing in the record to indicate that [the petitioner] would have, in fact, accepted that deal, given his belief that he was innocent."

The record shows that the examination of and testimony by both trial counsel and the petitioner during the habeas trial amply covered the issue of whether trial counsel had advised the petitioner as to whether he should have taken the plea deal. The petitioner and trial counsel both responded to questions concerning that issue, and the respondent had an opportunity to

cross-examine the witnesses on that point. Moreover, both the petitioner's and the respondent's counsel addressed the claim during their respective closing arguments. The record reflects that, although the petitioner did not list it as one of the grounds in his operative habeas petition, he considered trial counsel's failure to advise him regarding whether he should have accepted the plea offer as part of his claim of ineffective assistance of counsel. The habeas court also concluded that "the petitioner [had] failed to sustain his burden of proving that trial counsel's performance was deficient in advising the petitioner about the plea offer." Accordingly, we undertake a review of the petitioner's claim.[4]

Before we address the substance of the petitioner's ineffective assistance of counsel claim, we first set forth our standard of review and general principles governing ineffective assistance of counsel claims. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary . . . ." (Internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, supra, 220 Conn. App. 304. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland*

[4] We also note that the respondent has not been prejudiced by our review of this claim in light of our conclusion that the petitioner failed to meet his burden of demonstrating that he was prejudiced by the allegedly deficient performance of his trial counsel. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) ("[r]eviewing an unpreserved claim when the party that raised the claim cannot prevail is appropriate because it cannot prejudice the opposing party and such review presumably would provide the party who failed to properly preserve the claim with a sense of finality that the party would not have if the court declined to review the claim").

v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 780, 272 A.3d 189 (2022).

In the present case, the habeas court denied the petitioner's habeas petition on the ground that he failed to satisfy both the performance prong and the prejudice prong. On appeal, the petitioner challenges both grounds for the court's decision. We, however, need not decide whether the petitioner's trial counsel rendered deficient performance because, even if we assume that counsel's performance was deficient, the petitioner has failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance.[5] See *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667, 289 A.3d 1206 (2023) (failure of petitioner to satisfy either prong of *Strickland* is fatal to habeas petition); *Santiago* v. *Commissioner of Correction*, 213 Conn. App. 358, 366, 277 A.3d 924 ("[b]ecause both [the deficient performance and prejudice] prongs [of the *Strickland* test] . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's

[5] On August 10, 2023, this court, sua sponte, ordered the parties to file simultaneous supplemental briefs to address the impact of *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 298 A.3d 588 (2023), on the present appeal. In *Maia*, our Supreme Court addressed the issue of whether trial counsel provided ineffective assistance in failing to advise the petitioner in that case as to whether he should accept a plea offer from the court and, specifically, discussed the factors defense counsel must weigh in determining whether to make such a recommendation. Id., 461–63. In light of our determination in the present case that the petitioner failed to satisfy the prejudice prong of *Strickland*, which obviates any need for this court to address the performance prong and to determine whether counsel performed deficiently in failing to advise the petitioner as to whether he should have accepted or rejected the plea offer, we need not address the impact, if any, of *Maia* on the present appeal.

claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 345 Conn. 903, 282 A.3d 466 (2022).

"[T]o satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (Internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 352, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013); see also *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 355–56, 273 A.3d 680 (2022). Furthermore, "[i]n the context of rejected plea offers . . . the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous." *Barlow* v. *Commissioner of Correction*, supra, 357.[6] "A finding of fact

[6] In *Barlow*, our Supreme Court addressed the issue of whether a petitioner met his burden of establishing prejudice in the context of a rejected plea offer. *Barlow* v. *Commissioner of Correction*, supra, 343 Conn. 357. In doing so, the court addressed a claim raised by the respondent in that case that the habeas court, in finding that the petitioner was prejudiced by his trial counsel's deficient performance, did not comply with the recent dictates of the United States Supreme Court in *Lee* v. *United States*, 582 U.S. 357, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). *Barlow* v. *Commissioner of Correction*, supra, 362–66. In *Lee*, the petitioner alleged that his "counsel's deficient performance led him to accept a guilty plea rather than go to trial," which resulted in his conviction and mandatory deportation. *Lee* v. *United States*, supra, 360, 364. The issue on appeal before the United States Supreme Court

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." (Internal quotation marks omitted.) Id. With respect to the prejudice prong, the petitioner argues that the habeas court erroneously determined that he failed to sustain his burden of proving that he would have accepted the plea deal but for the constitutionally deficient performance of his trial counsel. The petitioner also asserts that the habeas court erred in finding that he was not credible on the issue of whether he would have accepted the plea deal. We are not persuaded.

During the habeas trial, trial counsel testified that the petitioner rejected the plea offer because he wanted to maintain his innocence. The petitioner also conceded this during the habeas trial when he was asked why he rejected the plea offer, as he responded, "I didn't do

was whether the petitioner established prejudice. Id., 360. In addressing that issue, the court stated: "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id., 369. The parties in *Barlow* disagreed as to whether the habeas court should have properly incorporated the contemporaneous evidence requirement of *Lee* to a case involving a rejected plea offer. *Barlow* v. *Commissioner of Correction*, supra, 362–63. Our Supreme Court in *Barlow* did not decide that question, however, because it determined that, even if the contemporaneous evidence requirement set forth in *Lee* did apply to rejected plea offers, "the record in [that] case contain[ed] sufficient contemporaneous evidence to substantiate the petitioner's after-the-fact testimony that he would have accepted the plea deal but for his attorney's deficient performance." Id., 365. In the present case, we do not find it necessary to reach this open question due to the fact that the habeas court's finding of no prejudice was based on its determination that the petitioner's testimony that he would have accepted the plea offer was not credible, which determination is " 'unassailable.' " *Heywood* v. *Commissioner of Correction*, 211 Conn. App. 102, 116, 271 A.3d 1086, cert. denied sub nom. *Tajay H.* v. *Commissioner of Correction*, 343 Conn. 914, 274 A.3d 866 (2022).

anything. I was innocent. So, I—I just wanted to go to—I wanted to prove my innocence."[7]

A review of the transcripts from the criminal trial, which were made a part of the record in the habeas proceedings, supports the habeas court's finding that the petitioner was primarily concerned with proving his innocence. On many occasions throughout the criminal trial, the petitioner declared his innocence. Notably, the petitioner testified (1) that it was Mark who had killed the victim, stating, "what Mark did is what [Mark] did, you know, we tried to stay—all of us tried to stay as far away as we [could] from that situation, that was his problem"; (2) that he was not present when Mark killed the victim, stating, "I wasn't there physically when the person died . . . I wasn't there physically"; and (3) that he had never stomped on the victim's head, despite his initial statement to the police in which he admitted to doing so. On the basis of this record, the habeas court's factual findings that "[t]he petitioner's primary concern at the time he rejected the plea offer was proving his innocence" and, therefore, that he would not have accepted the plea offer if he had received adequate advice and professional assistance from his trial counsel, were not clearly erroneous.

Furthermore, in its memorandum of decision, the habeas court stated that it did "not credit the petition-

[7] Although the petitioner stated during the habeas trial that he would have taken an *Alford* plea, there is no evidence that an *Alford* plea was ever offered and, if so, whether it would have been acceptable to the state. See generally *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (defendant who pleads guilty under *Alford* doctrine does not admit guilt but acknowledges that state's evidence against him is so strong that he is prepared to accept entry of guilty plea). The petitioner's counsel conceded this point during oral argument before this court. The petitioner's testimony, therefore, that he would have accepted an *Alford* plea does not demonstrate that he would have accepted the plea offer that was extended if trial counsel had provided effective assistance.

er's . . . testimony that, in retrospect, he would have accepted the plea offer." "As an appellate court, we do not reevaluate the credibility of testimony, nor will we do so in this case. The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . This court does not retry the case or evaluate the credibility of witnesses. Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316–17, 34 A.3d 1046 (2012); see also *Perez* v. *Commissioner of Correction*, 194 Conn. App. 239, 242, 220 A.3d 901 ("[a]ppellate courts do not second-guess [the habeas court, as] the trier of fact with respect to credibility" (internal quotation marks omitted)), cert. denied, 334 Conn. 910, 221 A.3d 43 (2019). The habeas court's determination that no prejudice had been established was based, in part, on its credibility assessment of the petitioner's testimony, and it is not for this court to reevaluate that credibility determination. Therefore, on the present factual record, "we will not second-guess the habeas court's credibility determination." *Barlow* v. *Commissioner of Correction*, supra, 343 Conn. 368.

Accordingly, we agree with the habeas court's conclusion that the petitioner failed to show that he was prejudiced by trial counsel's allegedly deficient performance.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN CHRISTIAN ET AL. *v.* PRIYA IYER ET AL. (AC 45350)

Prescott, Clark and Bear, Js.*

Syllabus

The plaintiffs sought to recover damages from the defendants for vexatious litigation in connection with the defendants' prior action against them for trespass, which resulted in a judgment for the plaintiffs. The plaintiffs owned residential property that was adjacent to that of the defendants. From their property, the plaintiffs had views of Long Island Sound that would be blocked if trees located on the defendants' property were not kept trimmed. As such, the prior owners of the defendants' property had allowed the plaintiffs to access their property to trim certain trees. When the defendants purchased the property, they were made aware of this informal oral agreement and continued to adhere to it until a dispute arose between the parties in 2011. Thereafter, the defendants sued the plaintiffs, alleging that the plaintiffs had intentionally trespassed on their property and cut down thirteen trees without their consent. Following a bench trial, the court found in favor of the plaintiffs, determining that the defendants gave the plaintiffs permission to cut down the trees and, accordingly, that the plaintiffs had established their defense of consent. Subsequently, the plaintiffs commenced the present action. The defendants raised a special defense, claiming that they had relied on the legal advice of counsel in prosecuting the trespass action. Without determining whether the plaintiffs had established the elements of their vexatious litigation claims, the trial court rendered judgment for the defendants, concluding that they had established their advice of counsel defense. On the plaintiffs' appeal to this court, *held*:

1. The trial court erred in concluding that the defendants had established the defense of good faith reliance on advice of counsel because the court failed to apply the correct legal standard and to make the requisite findings: instead of determining whether the defendants had made a full and fair disclosure of all material facts related to their potential trespass claim to P, the attorney who had instituted the trespass action on their behalf, the trial court incorrectly focused its analysis on M, the attorney who had replaced P as counsel for the defendants after the action had already been commenced; moreover, the sole finding that the trial court made with respect to P, namely, that he had concluded that the defendants had a good faith basis to pursue legal action against the plaintiffs, was immaterial to the defendants' defense because the subjective opinion of counsel as to whether to bring the action was not

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

an element of the defense; furthermore, the trial court failed to make any findings as to whether the defendants made a full and fair disclosure of all material facts to either P or M; accordingly, this court reversed the judgment of the trial court and remanded the case for a new trial.

2. The trial court did not err in failing to apply the doctrine of collateral estoppel because it was not applicable to the case: the plaintiffs erroneously conflated the issue of consent in the trespass action with the issues of full and fair disclosure and probable cause in the present action, as the issues were not identical and those asserted in the present action had not been litigated or decided in the trespass action; moreover, although the court in the trespass action found that the defendants had consented to the tree removal, that finding did not mean that the defendants had failed to disclose to counsel all of the material facts and circumstances underlying their potential claim or that they lacked probable cause to bring the trespass action; accordingly, contrary to the plaintiffs' claim, the court's finding of consent in the trespass action did not bar the trial court in the present action from finding that the defendants had made a full and fair disclosure to counsel of all material facts related to the trespass claim or that the defendants had probable cause to commence the trespass action.

Argued September 7—officially released October 17, 2023

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment for the defendants, from which the plaintiffs appealed to this court. *Reversed; new trial.*

Brendan J. O'Rourke, with whom, on the brief, was *Joseph M. Musco*, for the appellants (plaintiffs).

Thomas H. Houlihan, Jr., with whom, on the brief, was *Ashley A. Noel*, for the appellees (defendants).

Opinion

CLARK, J. In this vexatious litigation action, the plaintiffs, John Christian and Susan Christian, appeal from the judgment of the trial court, rendered following a bench trial, in favor of the defendants, Priya Iyer and

Chandrasekhar Narayanaswami. On appeal, the plaintiffs claim that the court erred (1) in concluding that the defendants established the defense of good faith reliance on advice of counsel because it failed to apply the correct legal standard or make the requisite findings, and (2) by failing to apply the doctrine of collateral estoppel on the basis of a judgment in their favor in a prior trespass action brought against them by the defendants. We agree with the plaintiffs with respect to their first claim, but we disagree as to their second claim. For the reasons that follow, we reverse the judgment of the court and remand the case for a new trial.

The following facts, either found by the court or undisputed by the parties, and procedural history are relevant to our resolution of this appeal. The defendants are the owners of property located at 83 Keelers Ridge Road in Wilton. The plaintiffs are the owners of an adjacent property, located at 97 Keelers Ridge Road. The plaintiffs' residence is at a higher elevation and is situated to the southwest of the defendants' residence. The plaintiffs' residence affords sweeping views of Long Island Sound over the rear of the defendants' property, a view that was at risk of being blocked if trees located on the defendants' property were not trimmed. When the defendants purchased the property, they were made aware of the previous informal oral agreement between the prior owners and the plaintiffs that allowed the plaintiffs to trim certain trees on the defendants' property in order to preserve their views. The defendants did not object to this agreement, and, from 2009 to 2011, the plaintiffs and the defendants communicated about trimming the trees on the defendants' property. In 2011, however, that prior arrangement gave rise to a dispute that resulted in litigation between the parties.

On September 12, 2013, the defendants sued the plaintiffs, alleging that, in 2011, the plaintiffs had intentionally trespassed onto their property and cut down thirteen trees without the defendants' consent (trespass

action). At the time the defendants initiated the trespass action, they were represented by Attorney Anthony Piazza. In 2014, during the pendency of the trespass action, Attorney Matthew Mason was substituted as counsel for the defendants.

A bench trial was held over five days during June and July, 2016. Following the trial, the court, *Lee*, *J.*, issued a memorandum of decision dated February 6, 2017, finding in favor of the plaintiffs.[1] The court concluded that the defendants could not prevail on their trespass claim because the plaintiffs had established their special defense of consent. Specifically, the court found that "Iyer gave her permission to [John] Christian to allow the cutting of the [pine trees located to the east of the plaintiffs' pool and those along the southern border of the plaintiffs' property] during their conversation on her property on September 15, 2011."

Subsequently, on April 24, 2017, the plaintiffs commenced the present vexatious litigation action against the defendants. In their operative complaint, the plaintiffs assert a common-law vexatious litigation claim and two statutory vexatious litigation claims pursuant to General Statutes § 52-568 (1) and (2).[2] On August 8, 2017, the defendants filed their answer and a special defense, which claimed that they relied on the legal advice of counsel in prosecuting the trespass action. The defendants also brought three counterclaims

[1] The court found in favor of the plaintiffs with respect to the defendants' trespass claim but against the plaintiffs with respect to their counterclaims, which asserted claims of adverse possession and prescriptive easement over the defendants' property.

[2] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

against the plaintiffs sounding in vexatious litigation, but they ultimately withdrew those counterclaims.

Following a bench trial,[3] the court, *Hon. Taggart D. Adams*, judge trial referee, issued a memorandum of decision dated February 23, 2022, finding in favor of the defendants. In its memorandum of decision, the court did not determine whether the plaintiffs had established the elements of the vexatious litigation claims; instead, it analyzed only whether the defendants had established their special defense of advice of counsel. The court ultimately concluded that the defendants had established their advice of counsel defense, and, therefore, it rendered judgment for the defendants on all of the plaintiffs' claims, reasoning that the defendants' advice of counsel defense was a complete defense to those claims. In reaching its conclusion, the court found the following facts: "Attorney [Mason] represented [the defendants] throughout their controversy with [the plaintiffs]. [Attorney] Mason has been a well regarded member of the Connecticut bar for forty years, representing clients in a wide range of legal matters including all phases of litigation. He is a principal with the Wilton, Connecticut law firm of Gregory and Adams . . . .

"In October, 2011, [Attorney] Mason was asked to assist the defendants in this case . . . in resolving issues with the [plaintiffs] over trees. . . . At that time [Attorney] Mason had worked to mediate a dispute between the plaintiffs and the defendants. In 2014, [Attorney] Mason took over representation of the defendants in their trespass action against the [plaintiffs]

[3] The trial took place over three days. The trial began on February 13, 2020, and continued on February 14, 2020. Additional trial days were scheduled for March 19 and 20, 2020, but were subsequently delayed due to the COVID-19 pandemic. The final day of trial eventually took place on July 21, 2021. This delay resulted in the plaintiffs submitting a motion for mistrial, which the court, *Hon. Taggart D. Adams*, judge trial referee, denied on May 13, 2021.

. . . substituting for Attorney [Piazza]. Attorney Piazza had concluded [that] the defendants had a good faith basis to pursue a legal action against the [plaintiffs] and had undertaken the defendants' representation until then.

"In connection with his assessment of the legal action, Attorney Mason reviewed Attorney Piazza's file and spoke with both defendants. . . . [Attorney] Mason testified at the trial of this case in a credible fashion. In his trial testimony, he testified that he found [Iyer] to be credible and determined that she and her husband had a 'viable' trespass claim that 'should be pursued.' . . .

"[Attorney] Mason further testified that he first learned in November, 2014, of a voicemail left by [Iyer] on [John] Christian's telephone on September 15, 2011. That voicemail is a major bone of contention in this case, and [John] Christian has characterized it as a 'smoking gun' in his favor. The voicemail referenced some workers who were 'cutting down' pine trees between Iyer's property on Keelers Ridge Road and the property of a neighbor, Al Nickel. [Iyer] has characterized her use of the phrase 'cutting down' as meaning reducing in size, not eliminating.

"In discussing the voicemail with Iyer, Attorney Mason understood that it could be interpreted to grant permission to the [plaintiffs] to remove some trees on her property. Nevertheless, [Attorney] Mason found [Iyer's] explanation that her meaning of cut down to mean 'reduce in size or amount' was 'truthful' and 'reasonable.' . . . At the same time [Attorney] Mason was 'absolutely' aware that the voicemail could be interpreted otherwise. . . . As described by the defendants' counsel, Attorney Mason was aware of all the case's 'warts.' . . . [Attorney] Mason further testified [that] he had 'great difficulty understanding' how the issue of

tree removal could be resolved without agreement on a 'whole host' of other issues such as replacement trees, planting, tree height, ownership and maintenance. . . . Attorney Mason further testified: '[The defendants] had opportunit[ies] to withdraw the case over a period of years, and whenever this issue would be raised by the [plaintiffs'] counsel we would discuss it and [Iyer] was adamant, and I found credible, that she had not given permission and needed to pursue the claim. . . . A reason they were pursuing this claim was their need to establish control over the property line. They were convinced about the trees having been removed without permission, further request[s] by the [plaintiffs] . . . to trim other trees, they were concerned about their property line not being respect[ed] . . . and that was a significant part of their motivation and desire in pursuing . . . the claim.' [Attorney Mason was asked] 'And if you believed that [the defendants] did not have a good faith basis to bring their trespass claim would you have continued to represent them?' [He answered] 'Absolutely not.' . . .

"As to whether [Iyer] gave consent for the [plaintiffs] to remove her trees, Attorney Mason testified: 'I believe she did not give consent. I understand Judge Lee found differently, but I believe she did not give consent and that . . . she had a good faith basis to pursue the claim.' . . .

"Attorney Mason further testified [that] he had yet to have a case where there was not 'good' evidence and 'bad' evidence for his clients and that he expected the voicemail would be used for the [plaintiffs'] 'benefit.' " (Citations omitted.)

Ultimately, the court found that "the evidence of Attorney Mason and his actions in connection with his representation of the defendants, and the defendants'

actions in accepting and relying on the advice and counsel of Attorney Mason in pursuing their lawsuit, have met the burden of proof the law imposes on the defendants in order to be successful in proving by a preponderance of the evidence their special defense of good faith reliance on advice of counsel." This appeal followed.

On May 16, 2022, the plaintiffs filed a motion for articulation, which the trial court issued on September 12, 2022. Additional facts will be set forth as necessary.

I

The plaintiffs first claim that the court erred in concluding that the defendants established the defense of good faith reliance on advice of counsel because it failed to apply the correct legal standard or make the requisite findings. In particular, the plaintiffs argue that the court failed to determine whether the defendants made a full and fair disclosure of all the material facts related to their potential trespass claim to Attorney Piazza, the attorney who instituted the trespass action on their behalf, and, instead, improperly evaluated the disclosures in relation to the defendants' second attorney, Attorney Mason. The plaintiffs further argue that, even if it were proper to look at what disclosures the defendants made to Attorney Mason for purposes of the advice of counsel defense, the court still erred by failing to apply the correct objective legal standard, instead giving weight to Attorney Mason's subjective assessment regarding the completeness and truthfulness of the defendants' disclosures and the validity of their claims. We agree with the plaintiffs.

We begin by setting forth our standard of review and the relevant legal standards governing vexatious litigation claims. The plaintiffs argue that the court failed to apply the correct legal standard for the good faith reliance on advice of counsel defense and, thus,

they present a question of law over which our review is plenary. "It is well established that [t]he . . . determination of the proper legal standard in any given case is a question of law subject to our plenary review." (Internal quotation marks omitted.) *Crosskey Architects, LLC* v. *Poko Partners, LLC*, 192 Conn. App. 378, 386, 218 A.3d 133 (2019).

The plaintiffs assert both common-law and statutory vexatious litigation claims. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice[4] and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Emphasis omitted; footnote added; internal quotation marks omitted.) *Carolina Casualty Ins. Co.* v. *Connecticut Solid Surface, LLC*, 207 Conn. App. 525, 533–34, 262 A.3d 885 (2021).

In response to the plaintiffs' vexatious litigation claims, the defendants asserted the defense of good faith reliance on advice of counsel. "Advice of counsel is a complete defense to an action of . . . [vexatious litigation] when it is shown that the [client] . . . instituted his [or her] civil action relying in good faith on

[4] "In a vexatious suit action, the defendant is said to have acted with malice if he acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . . Malice may be inferred from lack of probable cause." (Citation omitted; internal quotation marks omitted.) *Kazemi* v. *Allen*, 214 Conn. App. 86, 121, 279 A.3d 742 (2022), cert. denied, 345 Conn. 971, 286 A.3d 906 (2023).

such advice, given after a full and fair statement of all facts within his [or her] knowledge, or which he [or she] was charged with knowing." (Internal quotation marks omitted.) *Kazemi* v. *Allen*, 214 Conn. App. 86, 117, 279 A.3d 742 (2022), cert. denied, 345 Conn. 971, 286 A.3d 906 (2023). "[T]he defense [of advice of counsel] has five essential elements. First, the defendant must actually have consulted with legal counsel about his decision to institute a civil action . . . . Second, the consultation with legal counsel must be based on a full and fair disclosure by the defendant of all facts he knew or was charged with knowing concerning the basis for his contemplated . . . action . . . . Third, the lawyer to whom the defendant turns for advice must be one from whom the defendant can reasonably expect to receive an accurate, impartial opinion as to the viability of his claim . . . . The fourth element . . . is . . . that the defendant, having sought such advice, actually did rely upon it . . . . Fifth and finally, if all other elements of the defense are satisfactorily established, the defendant must show that his reliance on counsel's advice was made in good faith." (Internal quotation marks omitted.) Id., 116; see also *Rieffel* v. *Johnston-Foote*, 165 Conn. App. 391, 406–407, 139 A.3d 729, cert. denied, 322 Conn. 904, 138 A.3d 289 (2016).

"In determining whether a [client] gave a full and fair statement of the facts within his or her knowledge to counsel, reliance on whether the omitted information would have had any impact on counsel's decision to bring the allegedly vexatious action . . . is irrelevant . . . because, as a matter of law, showing an impact on an attorney's ultimate course of action is not an element of the defense of reliance on counsel. . . . In other words, a client should not be permitted to rely upon the defense of advice of counsel if the client did not disclose all of the material facts related to a potential claim, because the lawyer cannot render full and

accurate legal advice regarding whether there is a good faith basis to bring the claim in the absence of knowledge of all material facts. In such instances, a client's reliance on the advice of counsel is unreasonable regardless of whether the material facts would have altered counsel's assessment of the validity of the claim." (Internal quotation marks omitted.) *Kazemi* v. *Allen*, supra, 214 Conn. App. 117.

With those legal principles in mind, it is clear that the court, in determining whether the defendants had established their defense of advice of counsel,[5] was required to determine, inter alia, whether the defendants made a full and fair disclosure of all the material facts concerning the contemplated trespass action to Attorney Piazza, the attorney who instituted the trespass action on their behalf. On the basis of our review of the court's memorandum of decision, it is evident that the court's ultimate determination regarding the defendants' advice of counsel defense was predicated on considerations and findings immaterial to the ultimate question of whether the defendants made a full and fair disclosure of material facts to Attorney Piazza concerning the basis for their contemplated trespass action. The court made no such findings regarding that question and, instead, based its decision on ancillary considerations.

First, instead of determining whether the defendants made a full and fair disclosure of all material facts related to their potential claim to Attorney Piazza—the attorney who actually instituted the trespass action on behalf of the defendants—the court erroneously focused

[5] We note that, in a vexatious litigation claim, the plaintiffs carry the burden of proof; yet, in the present case, the court made no finding, express or implied, as to whether the plaintiffs had successfully made out their vexatious litigation claims. Instead, the court bypassed this initial inquiry and analyzed only the defendants' asserted defense of good faith reliance on advice of counsel.

its analysis on Attorney Mason, who replaced Attorney Piazza as counsel after the action had already been instituted. In vexatious litigation cases, the court generally looks to whether a party *commenced and prosecuted* an action without probable cause. See General Statutes § 52-568. Hence, with respect to the defense of advice of counsel, it is "a complete defense to an action of . . . [vexatious litigation] when it is shown that the [client] . . . *instituted* his [or her] civil action relying in good faith on such advice, given after a full and fair statement of all facts within his [or her] knowledge, or which he [or she] was charged with knowing." (Emphasis added; internal quotation marks omitted.) *Kazemi* v. *Allen*, supra, 214 Conn. App. 117. Thus, the question that the court was charged with answering was not whether the defendants *continued* the litigation in good faith on the advice of Attorney Mason but, rather, whether the defendants *instituted* the litigation in good faith on the advice of Attorney Piazza.

Although the court did make a single finding with respect to Attorney Piazza, stating that "Attorney Piazza had concluded the defendants had a good faith basis to pursue a legal action against the [plaintiffs]," that finding is immaterial to the defendants' defense because the subjective opinion of counsel as to whether to bring an action is not an element of the defense at issue. See *Kazemi* v. *Allen*, supra, 214 Conn. App. 117 ("[i]n determining whether a [client] gave a full and fair statement of the facts within his or her knowledge to counsel, reliance on whether the omitted information would have had any impact on counsel's decision to bring the allegedly vexatious action . . . is irrelevant . . . because, as a matter of law, showing an impact on an attorney's ultimate course of action is not an element of the defense of reliance on counsel" (internal quotation marks omitted)).

Second, even if we were to accept the defendants' argument that the court was correct in focusing on Attorney Mason, the court still failed to determine whether the defendants made a full and fair disclosure of all material facts to Attorney Mason. Indeed, the court made no findings as to whether there was a full and fair disclosure of all material facts to *either* of the defendants' counsel.[6] The court's findings regarding Attorney Mason, although more detailed than those regarding Attorney Piazza, concerned solely whether Attorney Mason found the defendants' disclosures to be credible,[7] and were therefore, irrelevant to the inquiry of whether the defendants actually made a full and fair disclosure to him. Although the court found that Attorney Mason subjectively believed that the defendants' disclosures were credible and that the defendants had a viable trespass action based on the facts communicated to him by the defendants, the court made no findings concerning whether the defendants in fact disclosed to him all of the material facts related to the potential claim. By making findings only as to the subjective beliefs of Attorney Mason, rather than examining what material facts were or were not disclosed to him, the court failed to apply the proper standard for determining the advice of counsel defense.

[6] In the plaintiffs' motion for articulation, the court was asked in reference to both defendants: "Did the court find Iyer disclosed all material facts within her knowledge to Attorney Mason?" and "Did the court find Narayanaswami disclosed all material facts within his knowledge to Attorney Mason?" In response to both questions, the court stated: "The court is not in a position to say it knows all the material facts, but generally, yes." The motion for articulation did not ask this question in regard to Attorney Piazza, nor did the court address whether a full disclosure was made to Attorney Piazza in its memorandum of decision.

[7] The court found that "[Attorney Mason] testified that he found [Iyer] to be credible and determined that she and her husband had a 'viable' trespass claim that 'should be pursued.' " Additionally, the court reviewed testimony from Attorney Mason regarding the credibility of the defendants and his opinion on the viability of their claims. Nowhere in the court's memorandum of decision does the court find that a full and fair disclosure of material facts had been made by the defendants to Attorney Mason.

In sum, the court, in determining whether the defendants proved their advice of counsel defense, was tasked with answering, inter alia, whether the defendants met their burden of proof in demonstrating that they made a full and fair disclosure of all material facts to Attorney Piazza, the attorney that instituted their trespass action. Instead of making those findings, the court improperly made multiple findings regarding the subjective beliefs and opinions of Attorney Mason and one finding regarding the subjective beliefs of Attorney Piazza, all of which are immaterial to whether there was a full and fair disclosure of all material facts to Attorney Piazza before he initiated the litigation. Because the court failed to apply the correct legal standard or make the material findings of fact, we are compelled to reverse and remand this case for a new trial.

II

Although our resolution of the plaintiffs' first claim is dispositive of the appeal, we address the plaintiffs' second claim because it is likely to arise on remand. Specifically, the plaintiffs claim that the court failed to apply the doctrine of collateral estoppel to the issue of full and fair disclosure to counsel in the present action on the basis of the finding of consent in the trespass action. In particular, the plaintiffs claim that, because the court in the trespass action found "that the defendants knowingly agreed to removal of the trees," the "defendants are precluded from claiming that telling their counsel that they did not consent to the removal of the trees, or even that a misunderstanding occurred, was [a] full and truthful disclosure to their attorneys." The plaintiffs also argue that the finding of consent in the trespass action bars the defendants from arguing that they had probable cause to initiate the trespass action. We disagree with the plaintiffs.

We first set forth our standard of review and the legal principles governing a claim of collateral estoppel. A

determination of whether collateral estoppel applies is a question of law over which our review is plenary. See *Wiacek Farms, LLC* v. *Shelton*, 132 Conn. App. 163, 168, 30 A.3d 27 (2011) ("[w]hether the trial court properly declined to invoke the doctrine of collateral estoppel is a question of law over which our review is plenary"), cert. denied, 303 Conn. 918, 34 A.3d 394 (2012).

"The doctrine of collateral estoppel prevents a party from relitigating issues and facts [that have been] actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them [on] a different claim . . . ." (Emphasis omitted; internal quotation marks omitted.) *Solon* v. *Slater*, 345 Conn. 794, 810, 287 A.3d 574 (2023). "To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . In other words, *collateral estoppel has no application in the absence of an identical issue*. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Emphasis added; internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 714, 200 A.3d 1118 (2019).

In the present case, the plaintiffs argue that the court's finding of consent in the trespass action serves to bar the court in the present action from finding that the defendants made a full and fair disclosure to counsel of all material facts related to their trespass claim or from finding that the defendants had probable cause to commence the trespass action. The plaintiffs, however, erroneously conflate the issue of consent in the trespass action with the issues of full and fair disclosure and probable cause in the present action. Although the finding of consent in the trespass action might appear similar to, or have some overlap with, the issues of probable cause or disclosure in the present action, the issues are

by no means identical. The issues of whether there was probable cause to bring the trespass action and whether a full and fair disclosure of material facts was made to the defendants' attorney were neither litigated nor decided in the trespass action. The judicial finding of consent in the trespass action was rendered by the court after weighing substantially conflicting evidence and deciding which evidence was most credible. In finding that the defendants consented to having the trees cut down, the court in the trespass action did not need to, nor did it, make findings regarding what facts were or were not disclosed by the defendants to Attorney Piazza or whether there was probable cause to initiate the trespass action. To suggest that the court should apply collateral estoppel to issues that were not litigated and findings that were not made goes against the principle that "collateral estoppel has no application in the absence of an identical issue." (Internal quotation marks omitted.) Id., 714.

Although the court in the trespass action ultimately found that the defendants consented to the tree removal, this finding does not necessarily mean that the defendants failed to disclose to counsel all the material facts and circumstances underlying their potential claim or that they lacked probable cause to bring the trespass action in the first instance.[8] See *Elwell* v. *Kellogg*, 220 Conn. App. 822, 846, 299 A.3d 1166 (2023) (collateral estoppel did not apply because issue of whether defendant lacked probable cause to bring foreclosure action was not identical to issue of consideration). Because the issues of probable cause and full and fair disclosure to counsel were not before the court

[8] As the defendants point out in their appellate brief, if a court in a vexatious litigation action was required to give preclusive effect to the findings of the court in the underlying action that gave rise to the vexatious litigation action, even when the issues were not identical, defendants who prevail in litigation almost always would prevail in a subsequent vexatious litigation action.

in the trespass action and are not identical to the issue of whether the defendants ultimately consented to the trees being cut down, collateral estoppel has no application here.[9]

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

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[9] In their principal appellate brief, the plaintiffs suggest that this court can and should reach the issue of whether the defendants had probable cause to bring the trespass action. The trial court, however, specifically stated that it made no findings regarding the issue of probable cause. In the plaintiffs' motion for articulation, the court was asked, "[d]id the court find that, absent their advice of counsel special defense, the defendants had probable cause to bring the 2013 trespass action?" In its articulation, the court answered, "[n]o such finding was made." Additionally, both parties conceded at oral argument before this court that the trial court did not make a finding as to the issue of probable cause, and, thus, it would be inappropriate for this court to decide the issue for the first time on appeal. We agree that it would be inappropriate for us to reach that issue. See *Lee* v. *Stanziale*, 161 Conn. App. 525, 539, 128 A.3d 579 (2015) ("Connecticut appellate courts generally will not address issues not decided by the trial court" (internal quotation marks omitted)), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016). Because we conclude that collateral estoppel has no application here, and because the court made no findings as to the issue of probable cause, we make no determination as to whether the defendants had probable cause to bring the trespass action.