HM CONSTRUCTION & PAINTING, LLC *v.*
32 WILMOT PLACE, LLC

HM CONSTRUCTION & PAINTING, LLC *v.*
203 CMO ZONE FUND, LP

HM CONSTRUCTION & PAINTING, LLC *v.*
66 BELL STREET, LLC

HM CONSTRUCTION & PAINTING, LLC *v.*
421 LOGAN STREET, LLC

HM CONSTRUCTION & PAINTING, LLC *v.*
203 CMO ZONE FUND, LP
(AC 45606)

Bright, C. J., and Prescott and Elgo, Js.*

Syllabus

In five separate actions, the plaintiff sought to recover damages from the defendants for, inter alia, breach of contract in connection with work it had performed on the defendants' respective real properties. Each of the defendants alleged, as a special defense, that the plaintiff was not a licensed home improvement contractor. Thereafter, the defendants filed motions for summary judgment, claiming that the contracts between the parties were unenforceable and that the plaintiff could not recover on its claims because it was not in compliance with the Home Improvement Act (§ 20-418 et seq.). The defendants' motions were supported by affidavits from O, an individual who was a member or agent

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

of each of the defendants, which stated that the plaintiff was not a licensed home improvement contractor when it started work on the properties or when it filed mechanic's liens on the properties related to that work. In their motions, the defendants indicated that they would be relying on the plaintiff's forthcoming answers to requests for admissions that the defendants had served on the plaintiff. These included a request for admission that the plaintiff was not a licensed home improvement contractor on certain dates. The trial court heard arguments on the motions for summary judgment, ordered the plaintiff to respond to the defendants' answers and special defenses, and indicated that it would hold a status conference after the plaintiff had done so. Thereafter, the defendants filed notices, pursuant to the applicable rule of practice (§ 13-23), indicating that, because the plaintiff had not responded to the defendants' requests for admission within thirty days, it was deemed to have admitted the facts therein. At a subsequent hearing, the trial court indicated that it was prepared to rule on the motions for summary judgment even though the pleadings had not been closed and it had not yet held a status conference. Thereafter, the plaintiff filed replies to the defendants' special defenses, in which it admitted that it was not a licensed or registered home improvement contractor but indicated that the special defense alleging the same should fail because the defendants had asserted it in bad faith. The trial court granted the defendants' motions for summary judgment on the ground that the contracts were unenforceable because the plaintiff was not a licensed or registered home improvement contractor, as required by the act. On the plaintiff's appeal to this court, *held*:

1. The plaintiff's claim that the defendants' motions for summary judgment were not supported by admissible evidence was without merit: pursuant to Practice Book § 13-23 (a), by failing to reply to the defendants' requests for admission within thirty days, the plaintiff admitted that it was not a licensed or registered home improvement contractor, and, after the thirty day period had elapsed, the defendants filed notices with the trial court indicating that their requests were deemed admitted; moreover, the plaintiff admitted that it was not a registered or licensed home improvement contractor in its responses to the defendants' special defenses; furthermore, contrary to the plaintiff's assertion, in granting the defendants' motions for summary judgment, the trial court did not indicate that it was relying on O's affidavits, which the plaintiff claimed were inadmissible hearsay, but, instead, stated that the plaintiff's failure to respond to the defendants' requests for admission that the plaintiff was not a licensed or registered home improvement contractor resulted in that fact being admitted; accordingly, the defendants provided the trial court with undisputed evidence from which it properly could conclude that there was no genuine issue of material fact that the plaintiff was not properly licensed or registered under the act, and the defendants were entitled to judgment as a matter of law.

2. The plaintiff's claim that judgment for the defendants was improper because the trial court failed to consider the plaintiff's assertion that the defendants had acted in bad faith in raising the special defense that the contracts were unenforceable due to the plaintiff's noncompliance with the act was unavailing: the record did not contain any affidavits or proof offered by the plaintiff to support its allegations that the defendants had acted in bad faith and, in its motions opposing the defendants' motions for summary judgment, the plaintiff failed to brief or support with admissible evidence its allegations of bad faith; moreover, because the plaintiff failed to present any evidence of the defendants' alleged bad faith, it failed to establish the factual predicate needed to raise a genuine issue of material fact on that issue, and the plaintiff's claim in its motion to reargue that the trial court failed to consider the defendants' bad faith avoidance of the act was insufficient to cure that evidentiary deficiency.

3. The trial court did not abuse its discretion when it ruled on the defendants' motions for summary judgment without first holding a status conference: even without a status conference, the plaintiff had adequate time to raise a genuine issue of material fact by providing the trial court with evidentiary support for its bad faith allegations, as approximately six months had passed between the filing of the defendants' special defenses and notice of the court's determination that it was prepared to render judgment on the motions, and, instead of providing such evidence, the plaintiff filed replies to the special defenses in which it admitted that it was not licensed or registered under the act; moreover, the plaintiff did not object when the trial court indicated that it intended to rule on the motions without holding a status conference nor did it file evidentiary support for its allegations of bad faith in its oppositions to the pending motions for summary judgment or file motions for extensions of time so that it could provide the trial court with supplemental briefs regarding its bad faith defense.

Argued May 16—officially released November 7, 2023

Procedural History

Actions to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where, in the second case, the court, *Stevens*, *J.*, granted the plaintiff's motion to cite in Guerre Property, Inc., as a party defendant; thereafter, in each case, the court, *Stevens*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher Parkin, with whom, on the brief, was *Andrew J. Buzzi, Jr.*, for the appellant (plaintiff).

Houston Putnam Lowry, with whom, on the brief, was *Elizabeth M. Cristofaro*, for the appellees (named defendants).

Opinion

ELGO, J. The plaintiff, HM Construction & Painting, LLC, appeals from the judgments rendered by the trial court in favor of the defendants[1] in these related actions sounding in breach of contract, quantum meruit, unjust enrichment, and foreclosure of mechanic's liens. On appeal, the plaintiff claims that (1) the court improperly rendered judgments for the defendants because the defendants' motions for summary judgment were not supported by admissible evidence, (2) the court failed to consider the defendants' alleged bad faith in asserting a special defense, and (3) the court abused its discretion

[1] This appeal involves four named defendants against whom the plaintiff commenced five separate but related actions pertaining to real property owned by the defendants. The plaintiff filed one complaint each against the defendants 32 Wilmot Place, LLC, 66 Bell Street, LLC, and 421 Logan Street, LLC. See *HM Construction & Painting, LLC* v. *32 Wilmot Place, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107431-S; *HM Construction & Painting, LLC* v. *66 Bell Street, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107433-S; *HM Construction & Painting, LLC* v. *421 Logan Street, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107434-S. The plaintiff filed two complaints against the defendant 203 CMO Zone Fund, LP, regarding two properties it owned, one of which subsequently was transferred to an entity known as Guerre Property, Inc. See *HM Construction & Painting, LLC* v. *203 CMO Zone Fund, LP*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107432-S; *HM Construction & Painting, LLC* v. *203 CMO Zone Fund, LP*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107435-S. Guerre Property, Inc., is not a party to this appeal, and, during oral argument before this court, the plaintiff conceded that it had asserted no claim against Guerre Property, Inc. In this opinion, we refer to 32 Wilmot Place, LLC, 66 Bell Street, LLC, 421 Logan Street, LLC, and 203 CMO Zone Fund, LP, collectively as the defendants. The parties agree that the primary issues presented in this appeal are common to all of the aforementioned actions.

by rendering its decision on the motions for summary judgment on April 11, 2022, despite having indicated that it intended to hold a status conference prior to ruling on the motions, which it did not do. We affirm the judgments of the trial court.

The following facts, "viewed in the light most favorable to the nonmoving plaintiff"; *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009); and procedural history are relevant to our resolution of this appeal. In June, 2021, the plaintiff commenced five related actions against the defendants, alleging similar counts of breach of contract, quantum meruit, unjust enrichment, and foreclosure of mechanic's liens. The complaints similarly allege that the plaintiff "furnished materials and rendered labor in the construction of improvements to [the various properties] under an agreement by or with the consent of the [named defendants]," that mechanic's liens were filed on the properties, and that the full amounts due for the labor and materials were not paid. Each of the defendants filed answers and, inter alia, alleged as a special defense that the plaintiff was not a licensed home improvement contractor.

On September 3, 2021, the defendants filed motions for summary judgment, arguing that the contracts were unenforceable and the plaintiff could not recover on any of the claims because the plaintiff was not in compliance with the Home Improvement Act (act), General Statutes § 20-418 et seq.[2] In connection with their

[2] The act provides in relevant part: "No person shall hold himself or herself out to be a contractor or salesperson without first obtaining a certificate of registration from the commissioner as provided in this chapter"; General Statutes § 20-420 (a); and "[n]o home improvement contract shall be valid or enforceable against an owner unless it . . . is entered into by a registered salesman or registered contractor . . . ." General Statutes § 20-429 (a) (1). Although § 20-420 was the subject of a technical amendment in 2021; see Public Acts 2021, No. 21-197, § 10; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

motions for summary judgment, the defendants provided memoranda of law that were supported by affidavits from Kyle O'Hehir.[3] Significantly, the defendants, at that time, also informed the court that they would be relying on the plaintiff's forthcoming answers to requests for admission that they previously had served on the plaintiff. On November 1, 2021, the court heard arguments from the parties on the motions for summary judgment and ordered the plaintiff to advance the pleadings by responding to the defendants' answers and special defenses by November 17, 2021. The court stated that it intended to hold a status conference after that deadline.

The plaintiff did not file its responses to the defendants' answers and special defenses by November 17, 2021. Instead, the plaintiff filed requests to revise the defendants' answers and special defenses. The defendants thereafter filed objections to the requests to revise.[4] In October and December, 2021, the defendants filed notices indicating that, because the plaintiff did not respond to the defendants' requests for admission within thirty days, it was deemed to have admitted them, including that it "was not a licensed home improvement contractor" on certain specified dates. See Practice Book § 13-23 (a); see also *JPMorgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 267, 73 A.3d 757 ("a requested admission is deemed admitted after thirty days if no response is given"), cert. denied, 310 Conn. 935, 79 A.3d 889 (2013).

When the parties next appeared before the court at a hearing on February 22, 2022, the court inquired as

[3] Although O'Hehir's affidavits do not describe his affiliation with the defendants, the plaintiff, in its principal appellate brief, describes O'Hehir as "a member and/or agent of each of the [defendants]." The defendants do not dispute this characterization in their appellate brief.

[4] The defendants filed objections to the requests to revise in all cases except *HM Construction & Painting, LLC* v. *203 CMO Zone Fund, LP*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107432-S.

to the status of the pleadings. The court at that time sustained the defendants' objections to the plaintiff's requests to revise and granted the plaintiff an additional fifteen days to file responses to the defendants' special defenses. The court also stated that, although it previously had indicated that it wanted the pleadings closed prior to ruling on the motions for summary judgment, it now was prepared to rule on them.[5] The plaintiff did not raise any objection at that time. On March 29, 2022, the plaintiff filed replies to the defendants' special defenses, in which it admitted that it was not a licensed or registered home improvement contractor. The plaintiff nonetheless argued that this special defense should fail because the defendants asserted it in "bad faith . . . ."[6] The plaintiff, however, filed no further memorandum or evidence in opposition to the summary judgment motions.

On April 11, 2022, the court granted the defendants' motions for summary judgment on the ground that the contracts at issue were unenforceable because the plaintiff was not a licensed or registered home improvement contractor, as is required by the act, which precluded not only recovery for breach of contract but also the remaining alternative theories of recovery advanced by the plaintiff. From those judgments, the plaintiff now appeals.

I

On appeal, the plaintiff claims that the court improperly rendered judgment on the defendants' motions for

[5] At the conclusion of the February 22, 2022 hearing, the court stated: "[W]e can formally, technically, for the record state that I'm taking it on the papers . . . [for] all the motions for summary judgment . . . in this file, I'm taking [them] . . . under advisement as of today."

[6] The plaintiff asserted the defense of bad faith only in its replies filed in *HM Construction & Painting, LLC* v. *66 Bell Street, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107433-S, and *HM Construction & Painting, LLC* v. *421 Logan Street, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-21-6107434-S.

summary judgment because they were not supported by admissible evidence. Although the plaintiff admitted in its replies to the defendants' special defenses and by its failure to respond to the defendants' requests for admissions that it was not a licensed or registered contractor, the plaintiff argues that it was the defendants' burden to produce other admissible evidence in their initial filings to demonstrate that no material fact was at issue. We disagree.

The following legal principles guide our review. Practice Book § 17-49 provides that "[t]he judgment sought shall be rendered forthwith if the *pleadings*, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) "Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . it [is] incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." (Citations omitted; internal quotation marks omitted.) *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 247, 618 A.2d 506 (1992).

It has long been held that "[f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . An admission in pleading dispenses with proof, and is equivalent to proof." (Internal quotation marks omitted.) *Provencher* v. *Enfield*, 284 Conn. 772, 792, 936 A.2d 625 (2007). "A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it. . . . [The] admission in a plea or answer is binding on the party making it, and may be viewed as a conclusive or judicial admission. . . . It is axiomatic that the parties are

bound by their pleadings." (Internal quotation marks omitted.) *Industrial Mold & Tool, Inc.* v. *Zaleski*, 146 Conn. App. 609, 614, 78 A.3d 218 (2013); see also *State* v. *Rodriguez*, 180 Conn. 382, 396, 429 A.2d 919 (1980) ("[t]he vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i.e. the prohibition of any further dispute of the fact by him, and any use of evidence to disprove or contradict it" (emphasis omitted; internal quotation marks omitted)). Similarly, "[a] party's response to a request for admissions is binding as a judicial admission unless the judicial authority permits withdrawal or amendment. . . . [A] failure to respond timely to a request for admissions means that the matters sought to be answered were conclusively admitted." (Citations omitted; internal quotation marks omitted.) *East Haven Builders Supply, Inc.* v. *Fanton*, 80 Conn. App. 734, 744, 837 A.2d 866 (2004); see also Practice Book § 13-24.

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Because [l]itigants have a constitutional right to have factual issues resolved by the jury . . . motion[s] for summary judgment [are] designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted; internal quotation marks omitted.) *Maltas* v. *Maltas*, 298 Conn. 354, 365–66, 2 A.3d 902 (2010). "Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Puente* v. *Progressive Northwestern Ins. Co.*, 181 Conn. App. 852, 857, 188 A.3d 773, cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

In support of their motions for summary judgment, the defendants submitted memoranda of law and affidavits from O'Hehir. In his affidavits, O'Hehir averred that the plaintiff was not a licensed home improvement contractor when it commenced the work that was the subject of the plaintiff's claims or when it filed mechanic's liens relating to that work. The defendants further apprised the court that they would rely on the plaintiff's pending answers to their requests for admission, which specifically asked the plaintiff to admit that it was not a licensed home improvement contractor. When the plaintiff did not reply to those requests, the defendants filed notices indicating that they were deemed admitted pursuant to Practice Book § 13-23 (a). After a hearing on February 22, 2022, the court ordered the plaintiff to advance the pleadings and file responses to the defendants' special defenses, which asserted, inter alia, that the plaintiff was not a licensed contractor.[7] On March 29, 2022, the plaintiff filed its answers to the amended special defenses, in which it admitted to not being a registered or licensed home improvement contractor. On the basis of the undisputed evidence that the plaintiff was neither registered nor licensed as a home improvement contractor, the court granted the defendants' motions for summary judgment.

The plaintiff argues that O'Hehir's affidavits constituted inadmissible hearsay, and, therefore, the court improperly relied on them to conclude that the plaintiff was not a registered home improvement contractor at all relevant times. We are not persuaded.

The court's memorandum of decision makes no mention of O'Hehir and merely notes that the defendants'

[7] During the February 22, 2022 hearing, the plaintiff argued that there was a distinction between being "licensed" as opposed to "regist[ered]," noting that the act specifies only a registration requirement. We fail to see the import of any such distinction in the present case given that the plaintiff conceded in the pleadings and at oral argument before this court that it was neither licensed nor registered.

motions were "accompanied by supporting memoranda and affidavits." Nowhere did the court say that it was relying on those affidavits in rendering judgment for the defendants. To the contrary, the court specifically noted the plaintiff's failure to respond to the defendants' requests for admission that the plaintiff was not a licensed home improvement contractor and noted that the plaintiff's failure to respond resulted in that fact being deemed admitted. Furthermore, the plaintiff admitted in its replies to the defendants' special defenses that it was not a registered or licensed home improvement contractor at all relevant times. Consequently, whatever the merits of the plaintiff's claim regarding O'Hehir's affidavits, it nevertheless remains that the defendants provided the court with other undisputed evidence from which it properly could conclude that there was no genuine issue of material fact that the plaintiff was not properly registered, and, thus, the defendants were entitled to judgment as a matter of law.

The plaintiff's judicial admissions that it was not a licensed or registered contractor rendered the contracts at issue unenforceable as a matter of law, as the act clearly provides in relevant part that "[n]o home improvement contract shall be valid or enforceable against an owner unless it . . . is entered into by a registered salesman or registered contractor . . . ." General Statutes § 20-429 (a) (1) (A). Furthermore, "[a]bsent proof of bad faith on the part of the homeowner . . . § 20-429 permits no recovery by a home improvement contractor under theories of quantum meruit or unjust enrichment if the home improvement contract fails to comply with the statutory requirements of the act." *Dinnis* v. *Roberts*, 35 Conn. App. 253, 257, 644 A.2d 971, cert. denied, 231 Conn. 924, 648 A.2d 162 (1994).[8] Because a judicial admission is the equivalent of

[8] "In *Barrett Builders* v. *Miller*, 215 Conn. 316, 328, 576 A.2d 455 (1990), [our Supreme Court] held that a contractor who did not comply with the written contract requirement of the act could not recover in restitution.

proof, the plaintiff's claim that the motions for summary judgment were not supported by admissible evidence is without merit.

II

The plaintiff also claims that granting the motions for summary judgment was improper because the court failed to consider the plaintiff's assertion that the defendants acted in bad faith by raising the special defense that the contracts were unenforceable as a result of the plaintiff's noncompliance with the act. The plaintiff argues that, once the plaintiff had alleged bad faith, (1) the court should have required the defendants, as movants, to show that there was no material fact at issue regarding a potential bad faith avoidance of the contract, and (2) it was incumbent on the court to request the parties to brief the impact of the bad faith allegation on the pleadings before rendering judgment. We disagree.

In responding to a motion for summary judgment, "[o]nce the moving party has presented evidence in

This result was subsequently modified by one common-law and one statutory exception. First, in *Habetz* v. *Condon*, [224 Conn. 231, 240, 618 A.2d 501 (1992)], [our Supreme Court] held that contractors may recover in restitution despite noncompliance with § 20-429 (a), when homeowners invoke the protections of the act in bad faith. Subsequently, the legislature enacted No. 93-215, § 1, of the 1993 Public Acts, codified at § 20-429 (f), which allows recovery of payment for work performed 'based on the reasonable value of services which were requested by the owner' for partial noncompliance with certain requirements of the act when 'the court determines that it would be inequitable to deny such recovery.' Thus, both *Habetz* and § 20-429 (f) provide for recovery in quantum meruit despite a contractor's noncompliance with certain statutory requirements." (Footnote omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 586–87, 57 A.3d 730 (2012).

Notably, subsection (f) of § 20-429 requires that the contractor comply with subparagraph (A) (viii) of subdivision (1) of subsection (a) of § 20-429, which requires that the contract "is entered into by a registered salesman or registered contractor . . . ." Consequently, the plaintiff cannot take advantage of the statutory exception. We discuss the bad faith exception in part II of this opinion.

support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and . . . the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict [the evidence previously presented]." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 631, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014).

As our Supreme Court has explained in the context of the act and allegations of bad faith, although "[p]roof of bad faith . . . [will] preclude the homeowner from hiding behind the protection of the act"; *Habetz* v. *Condon*, 224 Conn. 231, 237, 618 A.2d 501 (1992); it is still "the burden of the party asserting the lack of good faith to establish its existence . . . ." Id., 237 n.11. In *Habetz*, the court indicated that "bad faith" involves "actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation . . . prompted by . . . some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Citation omitted; internal quotation marks omitted.) Id., 237. At the same time, our Supreme Court also has held that "[t]here is nothing dishonest or sinister about [property owners] proceeding on the assumption that there is a valid contract, enforcing its provisions, and later, in defense to a suit by the contractor, upon learning that the contract is invalid, then exercising their right to repudiate it." *Wadia Enterprises, Inc.* v. *Hirschfeld*, supra, 224 Conn. 249.

Here, the record does not contain any affidavits or other proof offered by the plaintiff to support the allegation that the defendants acted in bad faith by raising the requirements of the act as a special defense. Notably, in opposing the defendants' motions for summary judgment, the plaintiff failed to brief, much less support with admissible evidence, its allegations of bad faith that it raised in its replies to the defendants' special defenses. "[E]ven with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact." Id., 250. Here, the plaintiff failed to present any evidence of the defendants' alleged bad faith and, therefore, failed to establish the necessary factual predicate to raise a genuine issue of material fact on that issue. Moreover, the plaintiff's motion to reargue, claiming simply that the court "failed to consider the bad faith avoidance" of the act, does not cure that evidentiary deficiency.

Contrary to the plaintiff's assertions, once sufficient evidence is put forth by a movant to show there is no genuine issue as to any material fact, it becomes the burden of the nonmoving party to submit evidence to establish the existence of a disputed material fact. "The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment." (Internal quotation marks omitted.) *Wadia Enterprises, Inc.* v. *Hirschfeld*, supra, 224 Conn. 247. For that reason, we reject the plaintiff's contention that the court failed to consider its bald assertion that the defendants acted in bad faith by raising a special defense regarding noncompliance with the act.

III

Finally, the plaintiff asserts a claim of procedural error with respect to the court's decision to rule on the motions for summary judgment despite previously

indicating that it would hold a status conference prior to doing so. The plaintiff argues that the court's inconsistency "was clearly prejudicial in that the judgment was entered against the plaintiff without giving any regard to the issues raised by the replies to the [act] defense" and denied "the parties . . . an opportunity to brief its merits." We disagree.

The plaintiff's claim implicates the trial court's case management authority. "We review case management decisions for abuse of discretion, giving [trial] courts wide latitude. . . . A party adversely affected by a [trial] court's case management decision thus bears a formidable burden in seeking reversal. . . . A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions because it is in a much better position to determine the effect that a particular procedure will have on both parties." (Citations omitted; internal quotation marks omitted.) *Krevis* v. *Bridgeport*, 262 Conn. 813, 818–19, 817 A.2d 628 (2003); see also *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 567, 898 A.2d 178 (2006) (noting "the trial court's discretion under its case management authority").

Our rules of practice permit a party to move for summary judgment "as a matter of right at any time if no scheduling order exists and the case has not been assigned for trial. . . ." Practice Book § 17-44. Our rules further provide the timing and procedure by which opposition materials are to be filed in response to a motion for summary judgment unless otherwise ordered by the court. See Practice Book §§ 10-8 and 17-44 et seq. Within that framework, the trial court shall render a judgment "forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Practice Book § 17-49.

The record reveals that the plaintiff had adequate time to present the court with evidentiary support for its bad faith allegations. Here, the defendants filed their motions for summary judgment on September 3, 2021, within days of filing their answers and special defenses as well as their first and second sets of requests for admission. Pursuant to our rules of practice, the plaintiff sought and was granted multiple extensions of time to respond to the defendants' answers and special defenses and to answer the requests for admission. After granting the plaintiff's motions for extensions of time, the court initially told the parties that it would hold a status conference after the plaintiff responded to the answers and special defenses, which the court ordered to be filed by November 17, 2021. The plaintiff filed requests to revise on that date instead. When the defendants' objections to the requests to revise were sustained and the plaintiff failed to respond substantively to the defendants' special defenses and failed to answer the requests for admission, the court advised the parties during the February 22, 2022 hearing that it intended to rule on the summary judgment motions.[9] The plaintiff at that time did not object. On March 29, 2022, the plaintiff filed its replies to the special defenses alleging bad faith but did not simultaneously file evidentiary support for the assertion in opposition to the pending motions for summary judgment. The plaintiff also failed to file motions for extension of time so that it could provide the court with supplemental briefs regarding the defense. The pleadings were closed on April 5, 2022, and the court issued its memorandum of decision granting the motions for summary judgment on April 11, 2022.

[9] During the final remarks of the February 22, 2022 hearing, the court stated: "Now, as to the motion[s] for summary judgment . . . I know I've said different things about them so let me say something else, but this is going to be definitive . . . . [U]nless you hear from me to the contrary, I'm going to proceed to rule on the pending motions for summary judgment." See also footnote 5 of this opinion.

The plaintiff filed a motion to reargue on May 2, 2022, and alleged, inter alia, that it did not have "an appropriate opportunity to plead and present evidence in support of [the defendants'] avoidance . . . ." On May 18, 2022, the court heard oral arguments from both parties on the motion to reargue. The court noted that the plaintiff was never "precluded from arguing anything . . . [it] wanted to argue" and failed to articulate the bad faith exception "on the basis of existing case law either factually or legally." In light of the foregoing, the court denied the motion to reargue.

Given this record, we cannot conclude that the court abused its discretion when it rendered its decision on the motions for summary judgment on April 11, 2022, after giving the parties notice on February 22, 2022, that it intended to do so. By February 22, 2022, the pleadings before the court demonstrated that the plaintiff had notice of the defendants' special defenses since August, 2021, and that the plaintiff's failure to respond to the defendants' requests to admit resulted in judicial admissions that it was not a licensed home improvement contractor. Moreover, between February 22 and April 11, 2022, the plaintiff failed to act on the opportunity to raise a genuine issue of material fact by providing the court with evidentiary support of its bad faith allegations. On the contrary, the plaintiff finally filed its replies to the special defenses on March 29, 2022, and formally admitted that it was not licensed or registered under the act. In light of the foregoing, we conclude the court did not abuse its discretion in deciding the motions for summary judgment on April 11, 2022.

The judgments are affirmed.

In this opinion the other judges concurred.

CHRISTOPHER BROWN *v.* COMMISSIONER OF CORRECTION (AC 45756)

Prescott, Clark and Bear, Js.*

Syllabus

The petitioner, who had been convicted of kidnapping in the second degree and conspiracy to commit kidnapping in the second degree, sought a writ of habeas corpus, claiming that his trial counsel, M, rendered ineffective assistance because he failed to call an eyewitness identification expert at the petitioner's criminal trial and that, but for M's deficient performance, there was a reasonable probability that the petitioner's trial would have had a more favorable outcome for the petitioner. The petitioner and two associates abducted the victim and brought him to the basement of an abandoned building, where they assaulted him, tied his wrists and ankles with rope and threatened him at gunpoint, demanding to know where he kept his supply of marijuana and cash. After the police found the victim and transported him to a hospital, a detective, S, visited the victim, at which time the victim informed S that the three assailants were Black Jamaican men, one of whom had a "milky-white" left eye. On the basis of the description provided by the victim and information obtained from the victim's niece, K, and a confidential informant, another detective, R, prepared a photographic array consisting of eight photographs, including one photograph of the petitioner and seven of Black men of similar age, appearance, and dress. R also blacked out the left eye of each individual in the photographic array. R and S visited the victim in the hospital, administered the standard witness identification instructions, and gave the victim a form containing the same instructions. R and S then presented the photographic array to the victim, who selected the photograph of the petitioner. The petitioner was subsequently arrested and charged. Prior to his criminal trial, the petitioner filed a motion to suppress the victim's identification of the petitioner as one of the kidnappers because the process used by the police to present the photographic array to the victim was unnecessarily suggestive and the identification was not reliable under the totality of the circumstances. After an evidentiary hearing at which the court heard the testimony of the victim and R, the court denied the petitioner's motion to suppress. During the petitioner's criminal jury trial, M's strategy was to focus on the fact that the victim was not consistent in his recollection of the details of the incident. M extensively cross-examined

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

the victim as to the inconsistencies in his testimony on direct examination as compared to his prior statements to the police while he was at the hospital and his prior testimony at the pretrial motion to suppress hearing. M elicited testimony from the victim as to how the identification progressed from his initial statement to the police at the scene of the incident that he was unable to identify his kidnappers, to his identification of his kidnappers by their nicknames while he was at the hospital, and to his subsequent identification from the photographic array of the petitioner as one of his kidnappers. M also elicited testimony from the victim that he was inebriated at the time of the incident. In his closing argument, M repeatedly highlighted that the victim directly contradicted himself with respect to the details of the incident and, thus, the victim's entire testimony, including, but not limited to, his identification of the petitioner, should be disregarded as unreliable. The habeas court denied the petitioner's ineffective assistance of counsel claim and subsequently denied the petition for certification to appeal from the habeas court's judgment. On the petitioner's appeal to this court, *held*:

1. The habeas court abused its discretion in denying the petitioner's petition for certification to appeal: because M viewed the victim's identification of the petitioner as the main issue in the criminal case, as there was no forensic evidence connecting the petitioner to the offenses, there were no other eyewitnesses, and there was no evidence that tied the petitioner to his coconspirators, our Supreme Court's decision in *State* v. *Guilbert* (306 Conn. 216) that indicated that cross-examination and closing argument are often less effective than expert testimony at identifying the weaknesses of eyewitness identification testimony supported the petitioner's position about the preference for expert testimony; accordingly, the possible application of *Guilbert* to the present case fell within the category of issues that are debatable among jurists of reason and that could have been resolved by a court in a different manner and presented an issue adequate to deserve encouragement to proceed further.

2. The petitioner could not prevail on his claim that the habeas court improperly concluded that M's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance: M's decision not to present the testimony of an eyewitness identification expert at trial was supported by a legitimate strategic basis, as M, an experienced criminal trial attorney who was aware of the benefits that an eyewitness identification expert could provide in particular cases and who previously had consulted such experts, nevertheless determined, on the basis of his investigation of the facts, that the testimony of such an expert would not have been helpful to the defense, primarily because of the compelling nature of the victim's identification of the petitioner, and, therefore, M made the sound strategic decision to instead focus on the fact that the victim was not consistent in his recollection of the details of the incident and, thus,

his entire testimony, including, but not limited to, his identification of the petitioner, was untrustworthy; moreover, the testimony of an eyewitness identification expert to challenge the identification procedures used by the police would not have supported the theory of defense that M pursued at trial, which was to focus on the alleged lack of recollection of the victim as to many of the details of the incident, not that the police, through the procedures that were used, improperly influenced the victim to identify the petitioner from the photographic array because, as the habeas court found, M had no evidence to support that contention; furthermore, although this court recognized the general viability of the language in *Guilbert* indicating that cross-examination and closing argument often are not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony, this general statement did not require a different outcome in the present appeal because *Guilbert* did not eliminate the well established principle that the decision to call an expert witness is a strategic decision by defense counsel, which will not be reversed unless it is unsupported by a legitimate reason.

Argued September 7—officially released November 7, 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, *Klatt*, *J.*; judgment denying the petition; thereafter, the court, *Klatt*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David Carlucci*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Christopher Brown, appeals following the denial of his petition for certification to appeal from the habeas court's judgment denying his petition for a writ of habeas corpus. On appeal, the

petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal, and (2) improperly concluded that his trial counsel's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance that prejudiced the petitioner. We agree with the petitioner that the habeas court abused its discretion in denying his petition for certification to appeal. We agree, however, with the respondent, the Commissioner of Correction, that the petitioner failed to establish that his trial counsel rendered ineffective assistance. Accordingly, we affirm the judgment of the habeas court.

This court's decision in the petitioner's direct appeal sets forth the following relevant facts, which the jury in the petitioner's criminal trial reasonably could have found. "In the early morning of August 4, 2012, the [petitioner] and two associates abducted the victim, Neville Bar, and brought him to an abandoned building located at 27 Glendale Avenue in Hartford. The [petitioner] and his two associates brought the victim to the basement of 27 Glendale Avenue, tied his wrists and ankles with rope, and threatened him at gunpoint, demanding to know where he kept his supply of marijuana and cash. During the incident, the [petitioner] and his associates stabbed the victim in the leg, hit him in the face with a gun several times, and tortured him by melting a plastic water bottle onto his arms. Before leaving the abandoned basement, the three men took the victim's wallet, which contained $700, tied him with a blanket and a string of Christmas lights, and left him in a bathtub.

"On the morning of August 5, 2012, Hartford police officers found the victim in the basement of 27 Glendale Avenue after a neighbor heard him screaming for help. When discovered, the victim was standing in the bathtub, covered in feces and urine, and bound by rope,

the string of Christmas lights, and the blanket. He was confused and could only provide disjointed answers to police questioning about the incident and the identity of his assailants. He was then sent to Hartford Hospital for treatment of his wounds and dehydration.

"Later that day, Hartford police Detective Richard Salkeld visited the victim at the hospital at which time the victim informed Salkeld that the three assailants were black Jamaican men, one of whom had a 'milky-white' left eye.

"Following his conversation with the victim, Salkeld spoke to the victim's wife, Margaret Bar, and his niece, Karina Reed. Reed informed Salkeld that she knew a Jamaican male who had recently been evicted from 27 Glendale Avenue, but still used that location as a place to party. She identified the Jamaican male as 'Banit' and described him as having only 'one eye.'

"On the basis of the descriptions provided by the victim and Reed, Salkeld searched the Hartford [p]olice database for black Jamaican men associated with 27 Glendale Avenue. That search revealed that the [petitioner] had recently been a resident of 27 Glendale Avenue. A physical description of the [petitioner] in the police booking system indicated that one of the [petitioner's] eyes was 'whited over.'

"In the morning of August 6, 2012, Hartford police Detective Renee LeMark-Muir received information from a registered confidential informant who, in the past, had provided the police with credible and reliable information that had led to the identification and location of suspects. The confidential informant told LeMark-Muir that on August 5, 2012, Reed had contacted the informant, asked whether the informant had information regarding the abduction of the victim, and asked whether a Jamaican male known as 'Banit' had been

involved. The informant told the detective that the informant had then spoken to the [petitioner], whom the informant knew by his street name 'Banit.' The informant stated that the [petitioner] had confessed to kidnapping, tying up, beating, and melting a plastic bottle on the victim. The informant also stated that the [petitioner] did not believe that the victim would identify him or his two associates because the victim was afraid of them.

"On the basis of the results of the police database search, the descriptions of the assailants from the victim and Reed, and the information from the confidential informant, Hartford police Detective David [Richter] prepared a photographic array consisting of eight photographs, one photograph of the [petitioner] and seven of black men of similar age, appearance, and dress. To further make uniform the appearance of the individuals and eliminate the distinct characteristic of the [petitioner's] eye, [Richter] blacked out the left eye of each individual in the photographic array.

"At approximately noon, on August 6, 2012, [Richter] and Salkeld visited the victim in the hospital. They administered the standard witness identification instructions and also gave the victim a form containing the same instructions. The victim initialed each instruction and signed the form, indicating that he understood each instruction. The detectives then presented the photographic array to the victim, who selected the photograph of the [petitioner], whom he knew as 'Banit.' He then provided the police with a signed voluntary statement stating 'this is the guy who robbed me and kidnapped me.'

"The [petitioner] was subsequently arrested pursuant to a warrant and charged in a five count long form information with: kidnapping in the second degree in violation of [General Statutes] § 53a-94 (a); assault in

the second degree in violation of General Statutes [(Rev. to 2011)] § 53a-60 (a) (2); robbery in the first degree in violation of General Statutes § 53a-134 (a) (4); conspiracy to commit kidnapping in the second degree in violation of [General Statutes] §§ 53a-48 (a) and 53a-94 (a); and conspiracy to commit assault in the second degree in violation of §§ 53a-48 (a) and 53a-60 (a) (2)." (Footnote omitted.) *State* v. *Brown*, 161 Conn. App. 483, 485–88, 128 A.3d 553 (2015). Attorney Dennis McMahon represented the petitioner in the underlying criminal proceedings.

Prior to the criminal trial, the petitioner filed a motion to suppress the victim's identification of the petitioner as one of the kidnappers because the process used by the police to present the photographic array to the victim was unnecessarily suggestive and the identification was not reliable under the totality of the circumstances. In particular, he contended that the eyewitness procedure was flawed because the photographs were not presented sequentially or in double-blind format, the victim was not told that he should not feel compelled to make an identification or that he should take as much time as he needed, and the victim could not read the instructions on the bottom corner of the photographic array. See General Statutes § 54-1p.[1] In opposition to

[1] General Statutes § 54-1p governs eyewitness identification procedures. Section 54-1p was amended by No. 12-111, § 1, of the 2012 Public Acts, to take effect on July 1, 2012, to include a mandate, inter alia, that the Police Officer Standards and Training Council and the Division of State Police within the Department of Emergency Services and Public Protection "jointly develop and promulgate uniform mandatory policies and appropriate guidelines for the conducting of eyewitness identification procedures" no later than February 1, 2013, and that each municipal police department adopt procedures in accordance with those guidelines no later than May 1, 2013.

Here, the photographic array was presented to the victim on August 6, 2012, which was approximately one month after the amendments to § 54-1p became effective but approximately nine months before the May 1, 2013 final deadline in the amendments for the adoption of statewide uniform eyewitness identification procedures. During argument on the petitioner's motion to suppress, McMahon acknowledged that it was not yet mandatory for the police to comply with the eyewitness identification procedures that

the motion, the state contended that the identification procedure was not unnecessarily suggestive because the left eyes of all the individuals in the photographs were blacked out so that the petitioner's distinctive cloudy eye was not visible; the petitioner was provided with the witness identification form and clear verbal instructions, which included the information that he was not required to select any of the photographs and that the suspect may not be in the photographic array; and the victim was intimately familiar with the petitioner's face because he spent fifteen to twenty minutes in close proximity to the petitioner during the incident. After an evidentiary hearing at which the court heard the testimony of the victim and Richter, the court denied the petitioner's motion to suppress.[2]

During the petitioner's criminal jury trial, McMahon's strategy was to focus on the fact that the victim was not consistent in his recollection of the details of the incident. Particularly, McMahon extensively cross-examined the victim as to the inconsistencies in his testimony on direct examination, as compared to his prior statements to the police while he was at the hospital and his prior testimony at the pretrial motion to suppress hearing. Some of the contradictions included the victim's shifting testimony as to which of the kidnappers burned him; whether he identified the kidnappers by name while he was at the hospital despite the fact

had not yet been developed, promulgated, and adopted as required by § 54-1p, but he said that was not an "excuse" for the police not to have complied with the double-blind format or given notice to the victim that he did not have to choose any of the photos and that a photo of the alleged perpetrator might not be included in the photos. The habeas court concluded that "any changes implemented by" Public Act 12-111 were "inapplicable" to the photographic array presented by the police to the victim, and the petitioner does not challenge that conclusion on appeal.

[2] We note that the court in the present case incorrectly stated that the victim did not testify at the pretrial hearing on the petitioner's motion to suppress the victim's identification of the petitioner.

that he did not know their names prior to the incident; why he did not initially mention the petitioner's cloudy eye to the police at the scene; and whether he was located on the grass, on the curb, or in his locked or unlocked car when he was kidnapped. With respect to the identification of the petitioner, McMahon elicited testimony from the victim as to how the identification progressed from his initial statement to the police at the scene of the incident that he was unable to identify his kidnappers, to his identification of his kidnappers by their nicknames while he was at the hospital, and to his subsequent identification from the photographic array of the petitioner as one of his kidnappers. McMahon also elicited testimony from the victim that he was inebriated at the time of the incident, as he had consumed at least eight alcoholic beverages and smoked three marijuana joints during a five hour period preceding his abduction. In his closing argument, McMahon repeatedly highlighted that the victim "directly contradict[ed] himself" with respect to the details of the incident and, thus, his entire testimony, including, but not limited to, his identification of the petitioner, should be disregarded as unreliable.

After the trial, the petitioner was convicted of kidnapping in the second degree in violation of § 53a-94 (a) and conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 (a) and 53a-94 (a). *State* v. *Brown*, supra, 161 Conn. App. 491. The court rendered judgment accordingly and sentenced the petitioner to a total effective term of forty years of incarceration, execution suspended after twenty-three years, followed by five years of conditional discharge. Id. In his direct appeal to this court, the petitioner raised a single claim that the court improperly denied his motion to compel the state to disclose the identity of a confidential informant. Id., 485. This court disagreed and affirmed the judgment of conviction. Id.

Subsequently, the petitioner filed the operative amended habeas petition on February 28, 2020.[3] The petitioner claimed, inter alia,[4] that McMahon rendered ineffective assistance of counsel because he failed to present the testimony of an eyewitness identification expert at the criminal trial. The petitioner claimed that, "[b]ut for McMahon's deficient performance, there [was] a reasonable probability that the petitioner's trial . . . would have had a more favorable outcome for the petitioner." On May 21, 2020, the respondent filed its operative amended return generally asserting a lack of sufficient information to admit or deny the petitioner's claims.

On November 19, 2021, the habeas court, *Klatt*, *J.*, held a one day trial on the habeas petition at which the petitioner presented the testimony of Robert Powers, a forensic toxicology expert; Reed;[5] Garrett Berman, a

[3] In December, 2017, the petitioner filed an amended petition for a new trial on the basis of alleged newly discovered evidence that he obtained from the subsequent June, 2015 trial of one of his coconspirators, consisting of testimony by Reed that, when she told detectives that a Jamaican man with one eye previously had resided at 27 Glendale Avenue, she was aware that assisting the police in a criminal matter would render her eligible for relief in a pending deportation case. The court denied the petition for a new trial on the ground that the newly discovered evidence was not likely to produce a different result at a new trial. This court affirmed the court's judgment in a per curiam decision. See *Brown* v. *State*, 201 Conn. App. 903, 241 A.3d 215 (2020), cert. denied, 336 Conn. 904, 242 A.3d 1009 (2021).

[4] The operative petition contained other claims, including that McMahon rendered ineffective assistance of counsel at the hearing on the motion to suppress the victim's identification, at the criminal trial, and during the proceedings on the petitioner's petition for a new trial. See footnote 3 of this opinion. The petitioner also raised a related due process claim in which he alleged that his conviction and incarceration were obtained in violation of his due process rights as a consequence of McMahon's deficient performance. On appeal, the petitioner pursues only his claim that McMahon rendered ineffective assistance of counsel because he failed to present the testimony of an eyewitness identification expert at the criminal trial.

[5] There is an ostensible conflict with respect to the spelling of the name of the victim's niece between this court's opinion in the petitioner's direct appeal (Karina Reed) and the transcript of the habeas trial (Kerina Reid-O'Meally). Although it is not entirely clear from the record, it is apparent

memory and eyewitness identification expert; McMahon; Attorney Frank Riccio, a criminal defense expert; and Attorney Robin Krawczyk, the prosecutor who tried the petitioner's criminal trial. The petitioner attempted to subpoena the victim to testify at the habeas trial, but he subsequently learned that the victim had died seven months prior to the habeas trial. The petitioner submitted thirty-three exhibits, and the respondent submitted one exhibit, all of which the court admitted into evidence and considered in rendering its decision.

On July 11, 2022, the court issued a memorandum of decision in which it denied the petitioner's ineffective assistance of counsel claim. The court began by summarizing the petitioner's claim as follows: "The petitioner also faults [McMahon] for not calling an identification expert *at trial*. [The victim] was the only witness who identified the petitioner. The petitioner argues that the identification procedures used by the police were not procedures developed to minimize the likelihood of an unduly suggestive identification. . . . The petitioner asserts that the *jury* needed expert testimony to explain the importance of the new identification procedures and how the old procedures could have impacted [the victim's] identification." (Emphasis added.) The court reasoned that "McMahon viewed [the victim's] identification of the petitioner as the main issue in the criminal case. There was no forensic evidence connecting the petitioner to the offenses, and there were no other eyewitnesses. There was no evidence that tied the petitioner to the coconspirators. [McMahon] filed a motion to suppress [the victim's] identification on the ground that it was unnecessarily suggestive and not reliable. [McMahon] also argued that the photo[graphic] array did not comply with the eyewitness task force recommendations (e.g., sequential array and double-blind

that both names refer to the same individual. For convenience, we refer to the victim's niece throughout this opinion as Reed.

lineup), which were not yet in effect, but the motion was denied. As to the photo[graphic] array procedures, [McMahon] thought the police followed the correct procedures. [McMahon] did not allege that someone might have influenced [the victim's] identification because he had no evidence to support that contention." The court further held that "McMahon's trial strategy, like his strategy at the motion to suppress hearing, was to focus repeatedly on [the victim's] inconsistencies. [The victim] did not testify in the suppression hearing[6] but did testify at [the criminal] trial. The difficulty for [McMahon] was that [the victim] testified that he was in the basement with the petitioner for about fifteen minutes and had a very clear view of him, as well as the petitioner's highly distinguishing cloudy left eye. [The victim] never wavered from his identification of the petitioner. Although [McMahon] ha[d] consulted with identification experts in previous matters, he did not in the petitioner's case because of the strong and clear identification of the petitioner by [the victim]. [McMahon] did not think that an expert would have helped the defense or undermined the [victim's] identification of the petitioner."(Footnote added.) The habeas court further held that "[t]he trial court concluded that, 'although [Richter] did not administer a double-blind, sequential photographic array, based on the totality of the circumstances the identification procedure employed in the [petitioner's] case is constitutionally sound.' . . . The trial court found that the procedure was not unnecessarily suggestive. Here, the petitioner also has not shown that the identification was unnecessarily suggestive. The evidence presented by the petitioner at the habeas trial does [not] demonstrate that [McMahon] rendered deficient performance by not using an eyewitness identification expert. The petitioner has neither shown that his motion to suppress would have been granted nor

[6] See footnote 2 of this opinion.

undermined this court's confidence in the outcome of the criminal trial. Consequently, this ground for ineffective assistance of counsel must fail because the petitioner has not proven deficient performance or how he was prejudiced."[7] (Citation omitted; emphasis omitted.)

On July 19, 2022, the petitioner filed a petition for certification to appeal from the habeas court's judgment, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion by denying his petition for certification to appeal. We agree.

[7] We acknowledge that the court's analysis of the petitioner's claim was less than precise because the court appeared to simultaneously address McMahon's failure to present the testimony of an eyewitness identification expert *both* at the motion to suppress hearing and at the criminal trial. This incongruity may have stemmed from the fact that the petitioner did not specify in his petition or in his posttrial brief whether his claim was limited to McMahon's failure to call an eyewitness identification expert at the motion to suppress hearing, at the criminal trial, or both. On appeal, however, the petitioner narrowed his claim only to challenge McMahon's failure to present the testimony of an eyewitness identification expert at the criminal trial. See footnote 4 of this opinion. Neither party in their appellate briefs took issue with the court's use of a combined analysis to resolve the petitioner's eyewitness identification claim, and neither party filed a motion for articulation.

Accordingly, to the extent that there is an ambiguity in the court's decision, resulting from its combined analysis, as to whether it explicitly concluded that McMahon did not render ineffective assistance of counsel by failing to present an eyewitness identification expert at trial, it was the duty of the petitioner as the appellant to move for an articulation seeking an independent analysis as to each aspect of that claim. See *D2E Holdings, LLC* v. *Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 712–13, 277 A.3d 261 (it is duty of appellant to seek articulation), cert. denied, 345 Conn. 904, 282 A.3d 981 (2022). In the absence of an articulation, we presume that the trial court acted properly. See *State* v. *Bruny*, 342 Conn. 169, 201 n.15, 269 A.3d 38 (2022) (" 'we read an ambiguous trial court record so as to support, rather than contradict, [the trial court's] judgment' "); *A Better Way Wholesale Autos, Inc.* v. *Better Business Bureau of Connecticut*, 221 Conn. App. 1, 15, 299 A.3d 1200 (2023) (in absence of articulation we presume trial court considered all allegations before it), petition for cert. filed (Conn. August 28, 2023) (No. 230149).

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 221 Conn. App. 294, 302–303, 301 A.3d 1136 (2023).

In the present case, "McMahon viewed [the victim's] identification of the petitioner as the main issue in the

criminal case. There was no forensic evidence connecting the petitioner to the offenses, and there were no other eyewitnesses. There was no evidence that tied the petitioner to the coconspirators." Moreover, as discussed more fully in part II of this opinion, there is language supporting the petitioner's position about the preference for expert testimony as articulated by our Supreme Court in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), as cross-examination and closing argument "often [are] not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." Id., 243. The possible application of *Guilbert* to this case falls within the category of issues that are debatable among jurists of reason and that could have been resolved by a court in a different manner and presents an issue adequate to deserve encouragement to proceed further. We thus conclude that the habeas court abused its discretion in denying the petition for certification to appeal. See, e.g., *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 272–73, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019). Accordingly, we turn to the merits of the petitioner's ineffective assistance of counsel claim.

II

The petitioner next claims that the court improperly concluded that McMahon's failure to call an eyewitness identification expert at the petitioner's criminal trial did not constitute constitutionally deficient performance. Specifically, he argues that an eyewitness identification expert "could have explained the intricacies of eyewitness identification, leading the jurors to conclude that [the victim's] identification of the petitioner was not credible," and that there was no legitimate strategic reason for McMahon not to present the testimony of

such an expert. The petitioner also argues that McMahon's attempt to undermine the victim's identification on cross-examination and closing argument was not a sufficient substitute for expert testimony. We disagree.

We first set forth our standard of review and general principles governing habeas matters and claims of ineffective assistance of counsel. "In reviewing ineffective assistance claims . . . [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 460, 298 A.3d 588 (2023).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* 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. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Godfrey-Hill* v. *Commissioner of Correction*, 221 Conn. App. 526, 535, A.3d (2023).

With respect to the first prong of *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly

deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action *might be considered sound trial strategy.*" (Emphasis in original; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 288, 267 A.3d 120 (2021). "[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

The petitioner does not dispute that "there is no per se rule that requires a trial attorney to call an expert in a criminal case." *Doan* v. *Commissioner of Correction*, supra, 193 Conn. App. 276; see also *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012) (recognizing that our Supreme Court "has never adopted a bright line rule that an expert witness

for the defense is necessary in every . . . case"); *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600 ("there is no per se rule that requires a trial attorney to seek out an expert witness" (internal quotation marks omitted)), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014).

"[F]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy." (Internal quotation marks omitted.) *Inglis* v. *Commissioner of Correction*, 213 Conn. App. 496, 518, 278 A.3d 518, cert. denied, 345 Conn. 917, 284 A.3d 300 (2022). "[T]he selection of an expert witness is a paradigmatic example of the type of strategic choic[e] that, when made after thorough investigation of [the] law and facts, is *virtually unchallengeable*." (Emphasis added; internal quotation marks omitted.) *Nicholson* v. *Commissioner of Correction*, 186 Conn. App. 398, 414, 199 A.3d 573 (2018), cert. denied, 330 Conn. 961, 199 A.3d 19 (2019), cert. denied sub nom. *Nicholson* v. *Cook*, U.S. , 140 S. Ct. 70, 205 L. Ed. 2d 76 (2019).

Our appellate courts repeatedly have rejected a petitioner's claim that his trial counsel rendered deficient performance by failing to call an expert witness at trial on the ground that trial counsel's decision was supported by a legitimate strategic reason. For instance, in *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018), this court rejected the petitioner's claim that trial counsel was deficient for his failure to retain, and present the testimony of, an expert forensic psychologist at trial to attack the credibility of the minor victim's statements made during a forensic interview. Id., 809–11, 820. This court concluded that trial counsel's decision not to retain such an expert was "based on a number of appropriate factors," including that he had "experience defending cases involving sexual assault of young children. He was aware that forensic

psychologists were available and could be helpful in certain situations. He determined, however, that such a strategy was probably not worthwhile in this case. Here, the victim appeared comfortable throughout the forensic interview and offered information freely and at times in an unsolicited manner. He viewed the interview as having been conducted properly given his general understanding of the applicable procedures for conducting such interviews. From his experience, [trial counsel] testified that these facts made the victim's statements less susceptible to impeachment by a forensic psychologist." Id., 820; see also *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 799–801, 198 A.3d 630 (2018) (defense counsel's decision not to present testimony of forensic mental health expert was "sound and strategic" because he planned on emphasizing same points expert would have made during cross-examination of state's witnesses and during closing argument), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019); *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 78–79, 174 A.3d 206 (2017) (rejecting claim that defense counsel was deficient for his decision not to consult and call extreme emotional disturbance expert because he determined it would be more prudent "to pursue the extreme emotional disturbance defense through the testimony of the petitioner and lay witnesses"); *Gregory* v. *Commissioner of Correction*, 111 Conn. App. 430, 434, 959 A.2d 633 (2008) (defense counsel's decision not to present testimony of dog handling expert was matter of trial strategy because he presented same evidence during cross-examination of police officer handling dog), cert. denied, 290 Conn. 906, 962 A.2d 794 (2009).

Applying the foregoing principles, we agree with the habeas court's conclusion that McMahon's decision not to present the testimony of an expert identification witness at trial was supported by a legitimate strategic

basis. McMahon, an experienced criminal trial attorney, was aware of the benefits that an eyewitness identification expert could provide in particular cases because he previously had consulted such experts. McMahon nevertheless determined, on the basis of his investigation of the facts, that the testimony of an eyewitness identification expert in the present case would not have been helpful at trial primarily because of the compelling nature of the victim's identification of the petitioner. Particularly, the victim testified at trial that he was within arm's length of the petitioner for approximately fifteen minutes during the incident and that he had a very clear view of the petitioner and his highly distinguishing cloudy left eye. The victim never wavered from his identification of the petitioner, and the victim identified the petitioner as one of his kidnappers in the photographic array even though the police had eliminated the petitioner's most prominent identifiable characteristic by blacking out his left eye and the left eye of each other individual in the photographic array. At the habeas trial, McMahon testified that he thought the police followed the correct procedure when presenting the victim the photographic array and that he did not think the photographic array was suggestive at all.[8] Accordingly, in light of McMahon's experience, his previous consultation with eyewitness identification experts, and his investigation of the facts of the present case, the court determined that it was a sound strategic decision for McMahon to determine that the testimony of an eyewitness identification expert would not have been helpful to the defense. See, e.g., *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 820

[8] This was the same view of the court when it denied the petitioner's pretrial motion to suppress the identification as unnecessarily suggestive and not reliable. We note, however, that the standards governing eyewitness identification procedures have evolved since the photographic array was presented to the petitioner in the present case, more than a decade ago. See footnotes 1 and 9 of this opinion.

(trial counsel had experience defending against similar charges and knew that forensic psychologist experts were available and could be helpful in some cases, but expert would not have been helpful in case at bar because victim's statements made her less susceptible to impeachment by expert).

Instead of presenting the testimony of an eyewitness identification expert, McMahon, therefore, made the strategic decision that he would focus on the fact that the victim was not consistent in his recollection of the details of the incident and, thus, his entire testimony, including but not limited to his identification of the petitioner, was untrustworthy. Specifically, McMahon testified at the habeas trial that his trial strategy was to show that the victim "was inconsistent across the board. I was trying to shake loose the fact that . . . one of his key comments was that he had a clear look at [the petitioner] for a very long time without a mask which . . . with a milky eye . . . you know, it was clear to him. But I was trying to show that the other things he got wrong, like the time, where he was picked up from, the locations, things like that, he didn't know [the kidnappers]. He knew [the kidnappers]. I was trying to show that he was so inconsistent that the [identification] had to be put into question, too." In fact, McMahon extensively cross-examined the victim at trial as to the inconsistencies arising from the victim's statements to the police, that the victim was inebriated at the time of the incident, and that he was unable clearly to observe what was happening and who was doing it. During his closing argument, McMahon repeatedly highlighted that the victim "directly contradict[ed] himself" with respect to the details of the incident. McMahon's strategic decision to undercut the victim's identification by way of cross-examination and closing argument, instead of expert testimony, was reasonable. See, e.g., *Ricardo R.* v. *Commissioner of Correction*, supra, 185

Conn. App. 799–801; *Kellman* v. *Commissioner of Correction*, supra, 178 Conn. App. 78–79; *Gregory* v. *Commissioner of Correction*, supra, 111 Conn. App. 434.

Moreover, the testimony of an eyewitness identification expert to challenge the identification procedures used by the police would not have supported the theory of defense that McMahon pursued at trial. Relying on the testimony of Berman at the habeas trial, the petitioner on appeal contends that an eyewitness identification expert would have "expose[d] to the jury via an expert witness the myriad of ways in which the identification procedures used in the present case rendered the key evidence lacking in trustworthiness . . . ." In contrast, McMahon's theory at trial was to focus on the alleged lack of recollection of the victim as to many of the details of the incident, not that the police, through the procedures that were used, improperly influenced the victim to identify the petitioner from the photographic array because, as the habeas court found, McMahon "had no evidence to support that contention." In short, McMahon believed that the reason that the victim identified the petitioner as one of his kidnappers was not due to a defect in the photographic array, or police pressure, but instead was a result of the victim spending approximately fifteen minutes within arm's length of the petitioner during the incident. Therefore, at the time of trial, McMahon reasonably believed that the manner in which the police elicited the pretrial identification from the victim was proper and that his focus should instead be on the lack of veracity of the victim because of his lack of recollection, which is a strategic decision that we cannot second-guess. See, e.g., *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 314, 298 A.3d 636 (appellate courts consistently have declined to "second guess" strategy or judgment calls made by trial counsel), cert. denied, 348 Conn. 915, A.3d (2023).

Finally, the petitioner argues that McMahon's attempt to undermine the victim's identification on cross-examination and during closing argument was not a sufficient substitute for expert testimony. To support this argument, the petitioner relies on a statement by our Supreme Court in *State* v. *Guilbert*, supra, 306 Conn. 243, that cross-examination and closing argument "often [are] not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." Although we recognize the general viability of this statement and the need to consider it when a witness' identification is at issue, we conclude that this general statement does not require a different outcome in the present appeal. *Guilbert* was not a habeas case but, instead, was a direct appeal in which our Supreme Court reversed its precedent to conclude that testimony by a qualified expert on the fallibility of eyewitness identification is admissible when that testimony would aid the jury in evaluating the state's identification evidence. Id., 221.[9] Although cross-examination and closing argument may not always be as effective as expert testimony, that does not mean that the decision not to call an expert identification witness in a particular case necessarily constitutes deficient performance. See, e.g., *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 100–101. *Guilbert* does not eliminate the well established principle that the decision of whether to

[9] Our Supreme Court released its decision in *State* v. *Guilbert*, supra, 306 Conn. 218, on September 4, 2012, which was approximately sixteen months *prior* to the petitioner's criminal trial that began on January 16, 2014. McMahon was not asked specifically at the habeas trial whether he was aware of *Guilbert*. As we previously have stated, McMahon had consulted eyewitness identification experts in prior cases, so he was aware that, at the time of the petitioner's criminal trial, they were available to be consulted. The petitioner makes no claim that McMahon's failure to present an expert identification witness was due to a mistaken belief that such an expert's testimony would not have been admissible.

call an expert witness is a strategic decision by defense counsel, which will not be reversed unless it is unsupported by a legitimate reason. See, e.g., *Inglis* v. *Commissioner of Correction*, supra, 213 Conn. App. 518. Although an eyewitness identification expert may have provided some context with respect to the manner in which the police presented the photographic array to the petitioner, McMahon's decision not to present such testimony was reasonable in light of the strength of the victim's identification of the petitioner and McMahon's strategy to undermine that identification by challenging the victim's general lack of ability to recollect details of the incident, including but not limited to his identification of the petitioner, at trial.

In sum, we conclude that the petitioner has failed to meet his burden to overcome the presumption that McMahon's decision in this case not to call an eyewitness identification expert at trial was supported by a reasonable strategic reason. See, e.g., *Jordan* v. *Commissioner of Correction*, supra, 341 Conn. 288.

The judgment is affirmed.

In this opinion the other judges concurred.

STEVEN K. STANLEY *v.* ADAM B. SCOTT ET AL.
(AC 45838)

Prescott, Clark and Lavine, Js.*

Syllabus

The self-represented, incarcerated plaintiff sought to recover damages from the defendant state's attorneys for alleged violations of his rights under the fourth and fourteenth amendments to the United States constitution. The plaintiff was convicted of various crimes, including criminal violation of a protective order, after he made approximately 1750 phone calls to a protected person. The plaintiff claimed that the defendants illegally

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

obtained his cell phone records and used them against him at his underlying criminal trial. The trial court granted the defendants' motion for summary judgment on multiple grounds, including the defendants' lack of personal involvement in the alleged conduct and their absolute prosecutorial immunity. On the plaintiff's appeal to this court, *held* that the plaintiff abandoned his claims on appeal because he failed to adequately brief them, as he did not identify any claim of error made by the trial court or analyze any of the bases for the court's judgment granting the defendants' motion for summary judgment.

Argued October 4—officially released November 7, 2023

Procedural History

Action to recover damages for the defendants' alleged violations of the plaintiff's federal constitutional rights, brought to the Superior Court in the judicial district of Tolland, where the court, *Gordon*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Steven K. Stanley, self-represented, the appellant (plaintiff).

Stephen R. Finucane, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The incarcerated and self-represented plaintiff, Steven K. Stanley, appeals from the judgment rendered by the trial court in favor of the defendants, Adam B. Scott and Anthony Spinella. Although it is difficult to discern from the plaintiff's appellate brief, the plaintiff appears to claim that the defendants, assistant state's attorneys who prosecuted the plaintiff, illegally obtained his cell phone records and used them against him in his underlying criminal prosecution. The defendants contend, inter alia, that the plaintiff has abandoned his claims on appeal because he failed to adequately brief them. For the reasons that follow, we

agree with the defendants that the plaintiff has failed to adequately brief any cognizable claim of error in relation to the court's rendering of judgment in favor of the defendants and, therefore, has abandoned any claim on appeal. We therefore affirm the judgment of the trial court.

The following procedural history is relevant to our disposition of the plaintiff's appeal. On December 12, 2012, the plaintiff was convicted, after a jury trial, of 100 counts of criminal violation of a protective order in violation of General Statutes § 53a-223, one count of stalking in the first degree in violation of General Statutes (Rev. to 2011) § 53a-181c, and one count of threatening in the second degree in violation of General Statutes (Rev. to 2011) § 53a-62. See *State* v. *Stanley*, 161 Conn. App. 10, 12, 125 A.3d 1078 (2015), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). The plaintiff's conviction stemmed from evidence that approximately 1750 phone calls were made from the plaintiff's cell phone to the victim's cell phone between February 14 and March 24, 2012. Id., 14. The plaintiff was sentenced to eighteen years of imprisonment followed by twelve years of special parole. Id.

The plaintiff appealed his conviction to this court, but his appeal was ultimately unsuccessful. Id., 33. Thereafter, our Supreme Court denied the plaintiff's petition for certification to appeal. *State* v. *Stanley*, 320 Conn. 918, 131 A.3d 1154 (2016).

In addition to his direct appeal, the plaintiff has filed a host of civil actions and appeals in connection with his conviction and incarceration.[1] A significant theme

[1] Connecticut state court dockets are publicly available. See State of Connecticut Judicial Branch, Superior Court Case Look-up, available at https://civilinquiry.jud.ct.gov/PartySearch.aspx (last visited October 31, 2023). The Appellate Court, like the trial court, "may take judicial notice of files of the Superior Court in the same or other cases." *McCarthy* v. *Commissioner of Correction*, 217 Conn. 568, 580 n.15, 587 A.2d 116 (1991).

throughout many of these actions is the plaintiff's repeated insistence that the state and its agents illegally obtained and used his cell phone records against him at his criminal trial. See, e.g., *Stanley* v. *Leclerc*, Superior Court, judicial district of Tolland, Docket No. CV-21-5015269-S (August 12, 2022), aff'd, 218 Conn. App. 906, 291 A.3d 1086, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023); *Stanley* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-15-4007330-S (May 18, 2017), aff'd sub nom. *Stanley* v. *Commissioner of Correction*, 194 Conn. App. 903, 220 A.3d 244 (2019), cert. denied, 336 Conn. 901, 242 A.3d 712 (2020), cert. denied sub nom. *Stanley* v. *Quiros*, U.S. , 142 S. Ct. 92, 211 L. Ed. 2d 22 (2021); *Stanley* v. *State's Attorney*, Superior Court, judicial district of Hartford, Docket No. CV-15-5040022-S (June 21, 2016), aff'd, 179 Conn. App. 901, 175 A.3d 85, cert. denied, 328 Conn. 926, 182 A.3d 637 (2018).

On May 17, 2018, the plaintiff commenced the present action. He alleged in his complaint, inter alia, that the defendants violated his rights under the fourth amendment to the United States constitution when Robert Vanacore, an East Hartford police officer, acquired his cell phone records without proper notification of the search warrant, used the improperly acquired phone records to obtain a warrant for his arrest, and illegally searched his home.[2] The plaintiff also alleged that the defendants violated his rights under the fourteenth amendment to the United States constitution when they used the phone records to obtain a conviction against him, in contravention of the court order precluding use of the records at trial, and that his privacy rights were violated. The plaintiff sought money damages pursuant to 42 U.S.C. § 1983.[3]

[2] Officer Vanacore was not named as a defendant.

[3] Although the complaint made reference to numerous other statutes, the plaintiff clarified at the January 8, 2020 hearing before the trial court, *Gordon*, *J.*, that his claims were being brought pursuant to § 1983 for alleged violations of his rights under the fourth and fourteenth amendments.

On August 15, 2019, the defendants filed their answer and special defenses. Thereafter, on January 14, 2022, the defendants filed a motion for summary judgment, advancing numerous bases for why they were entitled to judgment as a matter of law.

On August 2, 2022, the court granted the defendants' motion for summary judgment as to all claims. The court concluded that the defendants were entitled to summary judgment on the plaintiff's fourth amendment claims due to their lack of personal involvement in the alleged conduct and on the basis of qualified immunity. As to the plaintiff's fourteenth amendment claims, the court determined that the defendants were entitled to summary judgment on the basis of absolute prosecutorial immunity and in accordance with *Heck* v. *Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).[4] The plaintiff timely appealed.

In the present case, the plaintiff appears to claim that the defendants illegally obtained his cell phone records and used them against him in his underlying criminal prosecution. The plaintiff's appellate brief, however, is

[4] In *Heck*, the United States Supreme Court held "that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (Emphasis altered; footnotes omitted.) *Heck* v. *Humphrey*, supra, 512 U.S. 486–87.

nearly incomprehensible. See *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)). Although the plaintiff sets forth a jumble of legal citations and allegations, his brief fails to identify any claim of error made by the trial court or analyze any of the bases for the court's judgment granting the defendants' motion for summary judgment. See *Traylor* v. *State*, 332 Conn. 789, 805, 213 A.3d 467 (2019) ("when an appellant entirely fails to challenge the trial court's conclusions with respect to the merits of the case, thus leaving them intact despite the briefing of other issues, the appeal is, in essence, rendered moot"). The omissions in the plaintiff's brief lead us to conclude that the plaintiff has abandoned his claims. See, e.g., id. ("the plaintiff's complete failure to challenge what the trial court actually decided in its memoranda of decision operates as an abandonment of his claims"); *State* v. *Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007) ("[a]n unmentioned claim is, by definition, inadequately briefed, and one that is generally . . . considered abandoned" (internal quotation marks omitted)). Although our courts are solicitous of self-represented parties, the "solicitous treatment we afford a self-represented party does not allow us to address a claim on his behalf when he has failed to brief that claim." *Traylor* v. *State*, supra, 807. Because the plaintiff's omissions "[operate] as an abandonment of any challenge" to the court's judgment in the present case, "we are required to affirm the judgment of the trial court." Id., 809–10.

The judgment is affirmed.