JACEK SUPRONOWICZ ET AL. *v.* MICHAEL EATON ET AL.

(AC 45508)

Elgo, Cradle and Westbrook, Js.

Syllabus

The plaintiffs sought to quiet title by adverse possession to certain of the defendants' property that was adjacent to their own. The plaintiffs acquired title to their property in 2011 and claimed that they had used a portion of the defendants' property, which was located between the plaintiffs' home and a creek set inside of a shallow ravine, in various ways since that time. The plaintiffs also asserted that their predecessors in title had used the disputed area continuously from 1961 to 2011. The disputed area consisted predominantly of a grassy side yard, which the plaintiffs maintained, and included a small corner of the plaintiffs' paved driveway. Shortly after purchasing their property, the plaintiffs sought

and received permission from the defendants' predecessor in title to install drains in the disputed area to divert water from the roof and foundation of their residence into the creek. The defendants purchased their property in 2017. Approximately one year later, they had the property surveyed and determined that they were the record title holders of the disputed area. Thereafter, the defendants began to use and maintain the disputed area and asked the plaintiffs to stop entering it. The plaintiffs ignored the defendants' request and continued to use the disputed area until 2019, when the defendants erected a plastic fence along the border of their property as it was reflected in the survey. The plaintiffs commenced the underlying action, alleging that they and their predecessors in title had been in open, exclusive, hostile, adverse and actual possession under a claim of right of the disputed area for more than fifteen years, as required by the applicable statute (§ 52-575 (a)). The defendants filed a counterclaim seeking a declaratory judgment affirming their ownership of the disputed area and to quiet title. Thereafter, the defendants filed a motion for summary judgment, arguing that the plaintiffs could not demonstrate that the essential elements of adverse possession had been met. The trial court granted the defendants' motion, and the plaintiffs appealed to this court. *Held*:

1. The trial court improperly rendered summary judgment for the defendants because there was a genuine issue of material fact as to whether privity existed between the plaintiffs and their predecessors in title: the plaintiffs were required to demonstrate privity between themselves and their predecessors in title in order to tack the adverse use of their predecessors to their own use to satisfy the fifteen year period set forth in § 52-575 (a) and to acquire title to the disputed area because they purchased their property and began using the disputed area only eight years prior to the commencement of the action; moreover, although the plaintiffs' predecessors in title never expressly conveyed the disputed area to the plaintiffs, there was a genuine issue of material fact as to whether privity existed between the plaintiffs and their predecessors in title under the theory of implied conveyance; furthermore, several courts in other jurisdictions have found an implied transfer of a disputed area on the basis of the existence of a natural boundary that appeared to enclose the property, and the disputed area in the present case was bounded by a ravine and a creek, and the plaintiffs' predecessors in title believed that the creek was the boundary line of their property and that they owned the disputed area until they sold their property to the plaintiffs; accordingly, whether an implied transfer could be inferred from the evidence raised a question of fact that could not properly be resolved by the trial court on a motion for summary judgment.
2. The trial court improperly rendered summary judgment for the defendants because there was a genuine issue of material fact as to whether the plaintiffs recognized the defendants' superior title to the disputed area: although it was undisputed that the plaintiffs asked the defendants'

predecessor in title for permission to install drains in the disputed area shortly after the plaintiffs had purchased their property, there was conflicting evidence regarding whether the permission sought was for the use of the disputed area or for the resulting increase in water into the creek, which the plaintiffs believed was owned by the defendant's predecessors in title and which marked the then supposed boundary line, and that factual dispute was required to be resolved by the fact finder, not by the trial court at summary judgment.

3. The trial court improperly rendered summary judgment for the defendants because there was a genuine issue of material fact regarding the exclusivity of the plaintiffs' use of the disputed area: there was a genuine issue of material fact as to whether adverse possession had been established prior to the defendants' entry into the disputed area in 2018, as the plaintiffs presented evidence that they and/or their predecessors in title had used the disputed area continuously from 1961 until the defendants erected a fence around it in 2019; moreover, to the extent that the plaintiffs did not establish adverse possession prior to 2018, it was the role of the fact finder to determine whether the plaintiffs' use was sufficient to satisfy the exclusivity requirement needed to establish adverse possession despite the defendants' use of the disputed area beginning in 2018.

Argued November 9, 2023—officially released March 5, 2024

Procedural History

Action seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the named defendant et al. filed a counterclaim; thereafter, the court, *Hon. Irene P. Jacobs*, judge trial referee, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed*; *further proceedings*.

Ian A. Cole, for the appellants (plaintiffs).

Arthur C. Zinn, for the appellees (named defendant et al.).

Opinion

WESTBROOK, J. In this action to quiet title alleging ownership by adverse possession, the plaintiffs, Jacek Supronowicz and Iwona Supronowicz, appeal from the

summary judgment rendered by the trial court in favor of the defendants Michael Eaton and Stephanie Hawker.[1] The plaintiffs claim that the court improperly concluded that they could not establish their claim of adverse possession as a matter of law because they (1) failed to demonstrate that privity existed between themselves and their predecessors in title for purposes of tacking periods of possession, (2) acknowledged the defendants' superior title to the disputed area, and (3) failed to show that their use of the disputed area was exclusive. The plaintiffs assert that genuine issues of material fact remain as to each of these issues and that the court therefore improperly granted the defendants' motion for summary judgment. We agree with the plaintiffs as to each of their claims and, for the reasons that follow, reverse the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiffs, and procedural history are relevant to our resolution of this appeal. The parties are the owners of adjoining parcels of land on Fair Oaks Drive in Shelton. The plaintiffs are the record owners of the parcel at 16 Fair Oaks Drive. Jacek Supronowicz acquired title to this property by warranty deed from John Nangle and Melissa Nangle (collectively, Nangles) in 2011.[2] The plaintiffs claim that they have used a portion of the property located between their home and a creek set inside of a shallow ravine—the disputed area—in various ways since they purchased their property. Following the natural path of the creek, the disputed area extends perpendicular to Fair Oaks Drive for more than two hundred feet.[3] It is widest along Fair

[1] The complaint also named Village Mortgage Company as an additional defendant, but it failed to appear. Accordingly, we refer to Michael Eaton and Stephanie Hawker as the defendants.

[2] Jacek Supronowicz subsequently quitclaimed his interest in the property with right of survivorship to himself and his wife, Iwona Supronowicz.

[3] The disputed area, according to the complaint, "[c]ommenc[es] at a point where a creek crosses from land designated as Lot 4 to [l]and designated as Lot 3 on a certain map entitled, 'final Plan of Woodland Park, Section

Oaks Drive, extending, at its greatest width, about fifty feet into the defendants' titled property. Although a small corner of the plaintiffs' paved driveway lies on the disputed area, it is predominately a grassy side yard populated with trees, shrubs, and a utility pole. The plaintiffs "have used a portion of the [disputed] area as their driveway and have maintain[ed] a lawn, trees, shrubs and a utility pole on the other portions of the [disputed] area." On June 1, 2011, shortly after purchasing their property, the plaintiffs sought permission from the town of Shelton to install drains to divert water from the roof and foundation of their residence to the creek. In connection with the permit application, the plaintiffs sought and received permission from the defendants' predecessor in title to install the drains in the disputed area.[4] The plaintiffs' predecessors in title also used the disputed area in various ways from 1961 to 2011.[5]

The defendants are the record owners of the parcel at 12 Fair Oaks Drive, which is adjacent to the plaintiffs'

1,' dated April 1960, [r]evised January 1961, made by Richard J. Nowakowski and on file in the Shelton Town Clerk's office, then;

"EASTERLY: along the northerly side of the creek a distance of 245 ± feet then;

"NORTHERLY by Fair Oaks Drive 50 . . . ± feet, then 90 degrees;

"WESTERLY along the northerly boundary of land designated as Lot No. 3 on a map entitled 'final Plan of Woodland Park, Section 1,' dated April 1960, [r]evised January 1961, made by Richard J. Nowakowski and on file in the Shelton Town Clerk's office, a distance of 240 ± feet to the point of beginning."

[4] The permission read: "I hereby give permission to the present owners of 16 Fair Oaks Drive, Shelton, Connecticut, to install one (1) curtain drain and one (1) footing drain, both of which will drain into the water course channel that runs parallel to the boundary of our properties. The present owners of 16 Fair Oaks Drive shall be responsible for all costs related to the installation and maintenance of both drains. This agreement is limited to the installation of these two drains and nothing additional."

[5] The plaintiffs' predecessors in title maintained the disputed area by mowing grass, plowing snow, raking leaves, and fertilizing the lawn, as well as planting trees in the disputed area.

property. They acquired title to this property by warranty deed on May 15, 2017. Approximately one year after the conveyance, the defendants had the property surveyed, which revealed that the defendants are the record title holders of the disputed area. In the months following the survey, the defendants spoke with one or more of the plaintiffs to request that the plaintiffs not enter the disputed area and to inform the plaintiffs that the defendants were the record title holder of the disputed area. The plaintiffs, however, continued to enter the disputed area until, in August, 2019, the defendants erected an orange plastic fence along the border of the plaintiffs' property line as reflected in the defendants' survey.

The plaintiffs filed the underlying action in November, 2019, seeking to quiet title by adverse possession to the disputed area. The plaintiffs allege in their operative complaint[6] that they and their predecessors in title have been in "open, exclusive, hostile, adverse, and actual possession under a claim of right" of the disputed area for more than fifteen years, as required by General Statutes § 52-575 (a).[7] The plaintiffs allege that they and

[6] The defendants filed a request to revise on December 18, 2019. The defendants requested that the plaintiffs, in relevant part, revise their complaint to clarify what actions were taken by the plaintiffs and their predecessors in title to evidence the " 'open, exclusive, hostile, adverse, and actual possession' " of the disputed area. The court, *Tyma*, *J.*, overruled the plaintiffs' objection to the relevant requested revision, and the plaintiffs filed their revised complaint on October 27, 2020. The revised complaint is the operative complaint in this action.

[7] "[Section] 52-575 (a) establishes a fifteen year statute of repose on an action to oust an adverse possessor." (Footnote omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 578–79, 31 A.3d 1 (2011). Specifically, General Statutes § 52-575 (a) provides in relevant part that "[n]o person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period, any person or persons claiming ownership of such lands and tenements and the right of entry

their predecessors in title had used a portion of the disputed area continuously as their driveway and had maintained the lawn, trees, shrubs, and a utility pole in the disputed area for more than fifteen years before the defendants put up the fence. The defendants filed an answer denying the essential allegations of the complaint and a counterclaim seeking a declaratory judgment affirming their ownership of the disputed area and quieting title in them.

The defendants subsequently filed a motion seeking summary judgment on the complaint and on their counterclaim and a memorandum of law in support thereof in which they argued that the plaintiffs could not demonstrate that the essential elements of adverse possession were met. The plaintiffs filed an objection to the defendants' motion for summary judgment, arguing that they and their predecessors in title had continuously and openly possessed the disputed area for more than the requisite fifteen year period.

The trial court, *Hon. Irene P. Jacobs*, judge trial referee, issued a memorandum of decision on the motion for summary judgment on April 6, 2022. The court held that, although the evidence suggests that both the plaintiffs and their predecessors in title had used the disputed area, the plaintiffs were not in privity with their predecessors in title because the plaintiffs' predecessors did not expressly convey to them the disputed area

and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice. . . ."

either orally or by deed and, thus, the plaintiffs could not tack their successive periods of adverse possession for purposes of satisfying the fifteen year statutory period. The court additionally held that "[t]he plaintiffs previously offered to purchase the disputed property from the defendants and therefore have acknowledged the defendants' superior title."[8] The court further held that "the evidence shows that the plaintiffs did not exclusively possess the disputed area. Rather, both parties testified to using and maintaining the area." Regarding the defendants' counterclaim, the court held that the defendants had shown that "they solely possess the disputed area. Accordingly, no genuine issue of material fact exists with respect [to] the defendants' counterclaim." The court granted the defendants' motion for summary judgment.[9]

The plaintiffs subsequently filed a motion for reargument and reconsideration. The plaintiffs argued that

[8] In so holding, the court relied on *Allen* v. *Johnson*, 79 Conn. App. 740, 746–47, 831 A.2d 282, cert. denied, 266 Conn. 929, 837 A.2d 802 (2003). The defendants concede on appeal that the court's reliance on *Allen* and "reliance on [the plaintiffs'] offers to purchase an easement to the disputed area and/or swap land as evidence of the plaintiffs' acknowledgment of the defendants' superior rights was misplaced," but they argue that the court's legal conclusion was nevertheless correct. The defendants instead argue before this court that the plaintiffs recognized the defendants' superior title by obtaining the permission of the defendants' predecessor in title to install drains in the disputed area and, therefore, that the court's conclusion may nevertheless be affirmed.

[9] In its original memorandum of decision, the court stated that, "[f]or the foregoing reasons, the defendants' motion for summary judgment is denied." The defendants thereafter filed a motion to reconsider, arguing that there appeared to be a scrivener's error as to the court's ultimate conclusion because the substance and weight of the court's findings and legal conclusions did not align with the court's conclusion. The plaintiffs objected to the motion to reconsider, arguing that "the court's order denying the motion for summary judgment is consistent with both the factual record as well as the law." The court agreed with the defendants that a scrivener's error had occurred and granted the defendants' motion to reconsider. The court corrected the last sentence of the decision to read, "For the foregoing reasons, the defendants' motion for summary judgment is granted."

the court had "erred in concluding that, as a matter of law, the [plaintiffs] could not tack the adverse use by their predecessor[s] in title to their own adverse use to meet the fifteen year limitations period." In support of their argument, the plaintiffs asserted that the intent of their predecessor in title to convey the disputed area "may be implied from the circumstances and need not be express . . . ." (Internal quotation marks omitted.) The court denied the plaintiffs' motion on May 9, 2022. This appeal followed.

On appeal, the plaintiffs argue that the court improperly concluded as a matter of law that (1) there was no privity between the plaintiffs and their predecessors in title for purposes of tacking periods of possession, (2) no genuine issue of material fact remained regarding whether the plaintiffs admitted superior title in the defendants, and (3) no genuine issue of material fact remained regarding whether the defendants' repeated entry into the disputed area beginning in July, 2018, defeated the exclusivity of the plaintiffs' use. The defendants respond that the court properly determined that there were no genuine issues of material fact and that they were entitled to summary judgment as a matter of law. For the reasons that follow, we agree with the plaintiffs that the evidence, construed in the manner most favorable to them, supports that there is a genuine issue of material fact as to each of the three claims raised by the plaintiffs.

As a preliminary matter, we set forth our standard of review and other relevant legal principles. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the

nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198–99, 931 A.2d 916 (2007).

"When title is claimed by adverse possession, the burden of proof is on the claimant. . . . The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner. . . . The use is not exclusive if the adverse user merely shares dominion over the property with other users. . . . Such a possession is not to be made out by inference, but by clear and positive proof." (Internal quotation marks omitted.) *Dowling* v. *Heirs of Bond*, 345 Conn. 119, 143, 282 A.3d 1201 (2022).

"It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years whether by one or more persons. . . . [T]he possession [however] must be connected and continuous . . . ." (Internal quotation marks omitted.) *Har* v. *Boreiko*, 118 Conn. App. 787, 799, 986 A.2d 1072 (2010). "If one party's period of use or possession is insufficient to satisfy the fifteen year requirement, that party may tack on the period of use or possession of someone who is in privity with the party, a relationship that may be established by showing a transfer of possession rights." (Internal

quotation marks omitted.) *Caminis* v. *Troy*, 300 Conn. 297, 310 n.14, 12 A.3d 984 (2011).

"The authoritative rule of tacking successive possessions for the acquisition of title after fifteen years is found in *Smith* v. *Chapin*, 31 Conn. 530 [531–32] (1863). . . . Privity of estate is not necessary, but rather, privity of possession. It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years whether by one or more persons. This was settled in *Fanning* v. *Willcox*, 3 Day [Conn.] 258 [1808]. Doubtless the possession must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance agreement or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. . . . Privity of possession is defined as a continuity of actual possession, as between prior and present occupant, the possession of the latter succeeding the possession of the former under deed, grant, or other transfer or by operation of law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Matto* v. *Dan Beard, Inc.*, 15 Conn. App. 458, 479–80, 546 A.2d 854, cert. denied, 209 Conn. 812, 550 A.2d 1082 (1988).

"[T]he failure of a predecessor in title to convey the disputed area, either orally or by deed, destroys the connection between successive adverse claimants which is necessary to the successful acquisition of title by tacking successive adverse possessions . . . . See also 16 R. Powell, Real Property (2005) § 91.10 [2] (tacking not permitted when it is shown that the claimant's predecessor in title did not intend to convey the disputed [area])." (Internal quotation marks omitted.) *Durkin Village Plainville, LLC* v. *Cunningham*, 97 Conn. App. 640, 652, 905 A.2d 1256 (2006).

To reverse the court's grant of summary judgment, there must be a genuine issue of material fact as to each of the issues raised, as "[a] defendant's motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim . . . ." (Internal quotation marks omitted.) *Costello & McCormack, P.C.* v. *Manero*, 194 Conn. App. 417, 430, 221 A.3d 471 (2019). We accordingly address each issue in turn, first addressing the issue of privity, then turning to the issue of recognition of superior title, and, last, addressing the issue of exclusivity. We conclude that there is a genuine issue of material fact as to each issue.

I

The plaintiffs first argue that the court improperly concluded that, for purposes of satisfying the fifteen year statutory period by tacking on their predecessors in title's period of adverse possession of the disputed area, there was no genuine issue of material fact that the plaintiffs lacked the requisite privity with their predecessors in title because the predecessors never expressly conveyed the disputed area to the plaintiffs. The plaintiffs argue that the evidence, construed in the manner most favorable to them, supports that their predecessors impliedly conveyed to them the disputed area and that, therefore, there is a genuine issue of material fact as to whether privity exists. We agree that there is a genuine issue of material fact as to whether privity exists in this case.

It is undisputed that the plaintiffs have not themselves adversely held the disputed area for the fifteen years required under § 52-575 (a) to acquire title by adverse possession. They therefore must tack the adverse use of their predecessors in title to their own use to satisfy the statutory period and acquire title to the disputed area. To do so, they are required to show that there

was privity between themselves and their predecessors in title. "It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years whether by one or more persons. . . . [T]he possession [however] must be connected and continuous . . . ." (Internal quotation marks omitted.) *Har* v. *Boreiko*, supra, 118 Conn. App. 799. "If one party's period of use or possession is insufficient to satisfy the fifteen year requirement, that party may tack on the period of use or possession of someone who is in privity with the party, a relationship that may be established by showing a transfer of possession rights." (Internal quotation marks omitted.) *Caminis* v. *Troy*, supra, 300 Conn. 310 n.14.

In their brief in response to the defendants' motion for summary judgment, the plaintiffs argued that "the intent of the grantor to transfer possession of an area not specifically referenced in the deed of conveyance, but contiguous with it, may be [inferred] from all the surrounding circumstances and an express written or oral statement of intent is not necessary." Specifically, the plaintiffs argued that "the intent of the Nangles [the plaintiffs' predecessors in title] to transfer any interest that they may have had in the disputed parcel may be inferred from the surrounding circumstances. Their testimony shows that they absolutely believed that the disputed parcel was part of 16 Fair Oaks Drive, which they conveyed by deed to the plaintiffs."

The trial court granted the defendants' motion for summary judgment without addressing this argument in its memorandum of decision. Relying on *Har* v. *Boreiko*, supra, 118 Conn. App. 787, it held that there could be no privity as a matter of law because the plaintiffs' predecessors in title did not convey the disputed area either orally or by deed.[10] In reaching this conclusion,

[10] Specifically, the court stated that, "[w]hile the evidence suggests that the plaintiffs' predecessor in title did use the dispute[d] area, the evidence conclusively shows that the plaintiffs were not conveyed the disputed area, either orally or by deed, and therefore cannot claim successive adverse possession from their predecessors in title."

the court relied on the following passage from *Har*: "[T]he failure of a predecessor in title to convey the disputed area, either orally or by deed, destroys the connection between successive adverse claimants which is necessary to the successful acquisition of title by tacking successive adverse possessions . . . . See also 16 R. Powell, [supra] § 91.10 [2] (tacking not permitted when it is shown that the claimant's predecessor in title did not intend to convey the disputed parcel)." (Internal quotation marks omitted.) *Har* v. *Boreiko*, supra, 800, quoting *Durkin Village Plainville, LLC* v. *Cunningham*, supra, 97 Conn. App. 652.

The court's reliance on *Har* and related case law, however, is misplaced. The passage from *Har* quoted in the preceding paragraph comes from *Durkin Village Plainville, LLC*; see *Har* v. *Boreiko*, supra, 118 Conn. App. 800; which in turn quoted *Marquis* v. *Drost*, 155 Conn. 327, 332, 231 A.2d 527 (1967). See *Durkin Village Plainville, LLC* v. *Cunningham*, supra, 97 Conn. App. 652. These cases all involve different factual circumstances than those present here. In *Marquis*, the predecessor in title had expressly *excluded* the disputed area from the deed. *Marquis* v. *Drost*, supra, 329 ("[i]t is undisputed that each deed in the plaintiffs' chain of title to lot 16 expressly excluded and excepted [the disputed area] from the conveyance of the lot"). Our Supreme Court additionally noted that the predecessor in title in that case had not adversely used the disputed area, making the issue of tacking moot, because there was no prior period of adverse use onto which the claimant could tack their own use. Id., 331–32. Our Supreme Court nevertheless went on to say in dicta that a "connection between successive adverse claimants . . . is necessary to the successful acquisition of title by tacking successive adverse possessions under the rule noted in such cases as *Smith* v. *Chapin*, [supra] 31 Conn. 530." *Marquis* v. *Drost*, supra, 332. Although

our Supreme Court did state in *Marquis* that there was no oral conveyance of the disputed area and that the deed had expressly excluded the disputed area, it did not, as paraphrased by *Durkin Village Plainville, LLC*, expressly limit the required connectivity between successive adverse claimants to an oral or written conveyance of the disputed area. Id.; see also *Durkin Village Plainville, LLC* v. *Cunningham*, supra, 652.

The question, therefore, is what evidence is sufficient to find that a grantor intended to convey the disputed area to the grantee, thereby establishing the continuous connection between successive adverse claimants required to find privity and tack the successive adverse uses. It is clear from our case law; see *Marquis* v. *Drost*, supra, 155 Conn. 332; *Har* v. *Boreiko*, supra, 118 Conn. App. 800; *Durkin Village Plainville, LLC* v. *Cunningham*, supra, 97 Conn. App. 652; that an express conveyance of the disputed area either orally or by deed is sufficient to establish that the grantor intended to convey the disputed area. Neither this court nor our Supreme Court, however, has addressed whether a grantor's intent to convey a disputed area may be established by implication.

This issue was, however, addressed by the Superior Court in *Zhang* v. *56 Locust Road, LLC*, Docket No. CV-12-6015791-S, 2016 WL 624045 (Conn. Super. January 13, 2016), aff'd, 177 Conn. App. 420, 172 A.3d 317, cert. denied, 327 Conn. 986, 175 A.3d 44 (2017). Although not binding on this court, *Zhang* is persuasive, particularly in light of the majority rule in other jurisdictions discussed subsequently in this opinion. See annot., 17 A.L.R.2d 1160, § 8 (1951).

In *Zhang*, the adverse claimants argued that they may tack their adverse use of the disputed area to that of their predecessors in title. *Zhang* v. *56 Locust Road, LLC*, supra, 2016 WL 624045, *8. Although there was

no express conveyance of the disputed area, either orally or by deed, the court found that the facts and circumstances of the use of the disputed area leaves "no doubt that the [predecessors in title] intended to convey the disputed area along with the deed-described property, in the transactions leading to ownership of 40 Locust Road by the plaintiffs." Id., *12.

The property at issue in *Zhang* included a horse riding ring with ancillary structures that were partially on the claimant's property and partially on the disputed area. Id., *4. The court reasoned that "the discussions, marketing materials, etc., as well as the layout of the property with the riding ring and fencing all facially appearing to be part of the conveyed property, leave the court with the firm impression that there was an intent to convey the entirety of 40 Locust Road, including all ancillary or appurtenant interests . . . ." Id., *10. The court emphasized that it "believe[d] that the physical layout virtually mandates such a conclusion. The riding ring . . . is essentially indivisible in a structural sense and a usage sense. The same can be said (albeit to a lesser extent) about the fence that . . . almost completely surrounds that entire end of the property including the riding ring, providing an enclosure for horses . . . . Quite simply, it would be irrational to convey *part* of a riding ring or paddock to a buyer of the property, leaving the remainder of the enclosed oval area out of the transaction." (Citation omitted; emphasis in original; footnote omitted.) Id., *11. The court therefore found an implied intent to convey the disputed area along with the property described in the deed and found that the claimant could therefore tack their predecessor's adverse use of the disputed area to their own. Id., *11–12, 16. For the following reasons, we conclude that the approach employed in *Zhang* is best suited to resolving the issue of privity and that, applying that approach, there is a

genuine issue of material fact as to whether privity exists in this case under a theory of implied conveyance.

As outlined by the American Law Reports, which attempts to compile the decisional law of other jurisdictions, "the doctrine which appears generally to prevail is that a transfer in fact of adverse possession, or of the adverse possession and claim of an area not within the description of the deed or contract, will be effective for tacking purposes though the same appears to have occurred by implication only, by force of the circumstances and acts of the parties, and is not shown to have been evidenced by any declaration of transfer or other direct words. . . . A requirement of express delivery of possession would be not only illogical but exceedingly burdensome in view of the numerous cases in which the parties though claiming all of the land in question, and in a manner characterizing their holdings as adverse to the whole world, were not aware that any of it was not within the deed or contract. The circumstances generally are to be considered in determining whether possession of the disputed area was transferred to the grantee." Annot., 17 A.L.R.2d, supra, § 8, pp. 1160–61.

"[W]here title by adverse possession is claimed to an area contiguous to that described in the deed or contract, and the whole property, described and not described, was in use by the vendor as a unit, and the fact thereof was apparent by reason of the position of fences, hedges, buildings, etc., the instrument instead of operating to negative the element of privity, seems to possess, as conjoined with such circumstances, an evidentiary value in support of privity, and this is most noticeable in instances in which the description used was such that it might reasonably have been supposed to include the whole property." (Footnote omitted.) Id., § 1, p. 1131.

From our review of the law of other jurisdictions, it is apparent that the majority rule is that privity can be established by an implied conveyance of the disputed area.[11] Implication of a transfer of possession of the disputed area is most commonly found in two circumstances: (1) when the disputed area is enclosed within the deed described property[12] or (2) when a building or other structure stands in part on the disputed area.[13]

[11] North Carolina is firmly in the minority in expressly limiting tacking to cases of express conveyance. See N.C. Gen. Stat. Ann. § 1-40 (2021); *Ramsey* v. *Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476 (1948) ("[t]he privity necessary to warrant the tacking of the possession of successive claimants by adverse possession must be created by grant, devise, purchase, or descent").

A minority of other jurisdictions have similarly held that "a transfer sub silentio is insufficient to permit the tacking of the possessions of the undescribed area." Annot., 17 A.L.R.2d, supra, § 8, p. 1160; see also id., § 10, pp. 1171–74 (collecting cases from Michigan, New York, Tennessee, and Wisconsin, but noting they are now of "doubtful authority" in light of more recent case law in those states).

The American Law Reports concludes that, "[e]xcept for those few, sometimes uncertain, authorities . . . the doctrine which appears generally to prevail is that a transfer in fact of adverse possession, or the adverse possession and claim of an area not within the description of the deed or contract, will be effective for tacking purposes though the same appears to have occurred by implication only, by force of the circumstances and acts of the parties, and is not shown to have been evidenced by any declaration of transfer or other direct words." Id., § 8, p. 1160.

[12] "In most jurisdictions, and under the circumstances of most cases, the successive adverse possessions of vendor and purchaser of an area not within the description of the deed or contract but lying along and extending up to a fence apparently marking the boundary line between the land sold and neighboring land may be tacked upon the theory of an implied delivery of possession of such area." Annot., 17 A.L.R.2d, supra, § 10, p. 1168; see *Ringstad* v. *Grannis*, 12 Alaska 190, 197, 171 F.2d 170 (1948); *St. Louis Southwestern Railway Co.* v. *Mulkey*, 100 Ark. 71, 75, 139 S.W. 643 (1911); *Cooper* v. *Tarpley*, 112 Ind. App. 1, 10, 41 N.E.2d 640 (1942); *Howind* v. *Scheben*, 233 Ky. 139, 141, 25 S.W.2d 57 (1930); *Wishart* v. *McKnight*, 178 Mass. 356, 361–62, 59 N.E. 1028 (1901); *Davock* v. *Nealon*, 58 N.J.L. 21, 25, 32 A. 675 (1895).

[13] "Ordinarily, the fact that the vendor and purchaser were successively in adverse possession of buildings or other structures encroaching on land adjoining that described in the deed or contract is convincing evidence of a transfer to the purchaser of possession of the area so appropriated." Annot., supra, 17 A.L.R.2d § 12, p. 1176; see also *Belotti* v. *Bickhardt*, 228

There are, additionally, a few cases that find that the disputed area was impliedly conveyed because a natural boundary appeared to enclose the property. In *Freed* v. *Cloverlea Citizens Assn., Inc.*, 246 Md. 288, 291–92, 228 A.2d 421 (1967), the adverse claimants and their predecessors in title maintained an area to the south of their property that abutted a naturally formed ditch. The claimants were told by their predecessors in title that the property line went to the ditch, although the real property line was several feet to the north of it. Id., 291, 294. The claimants and their predecessors maintained the disputed area by cultivating a garden, as well as planting trees, cleaning the ditch of debris, and mowing the lawn. Id., 292–94. One of the claimants' predecessors in title said that he never erected a fence to enclose the property because the ditch acted as a natural boundary. Id., 292. After reviewing persuasive law from other jurisdictions, the court in *Freed* analogized the circumstances of the case to cases in which the disputed area had been enclosed by a fence and concluded that the claimants could tack the adverse use of their predecessors to their own use.[14] Id., 301–304.

In *Clithero* v. *Fenner*, 122 Wis. 356, 360, 99 N.W. 1027 (1904), the Supreme Court of Wisconsin similarly found privity sufficient to tack successive adverse uses when a creek enclosed the disputed area with the property transferred by deed. The court stated: "It is . . . apparent from the evidence that [the] respondent took possession of the whole, by occupying it, [enclosing] it,

N.Y. 296, 308–309, 127 N.E. 239 (1920); *Peoples* v. *Hagaman*, 31 Tenn. App. 398, 407, 215 S.W.2d 827 (1948).

[14] The court in *Freed* cited to several cases, including the New Hampshire case of *Alukonis* v. *Kashulines*, 96 N.H. 107, 109, 70 A.2d 202 (1950), which held that "there was evidence [that] the plaintiff was shown the bounds, which included the [disputed area], by her predecessor in title and that this tract had been [enclosed] and cultivated for many years by the plaintiff and her predecessors. This appears sufficient to support the plaintiff's right to tack." See *Freed* v. *Cloverlea Citizens Assn., Inc.*, supra, 246 Md. 302.

and using the part specified in the deed and this adjoining strip as an entirety. In the light of these circumstances, the presumption that the conveyance must be limited to the calls of the deed is overcome by the established facts that [the] respondent obtained possession of the tract outside of the description as a part of the premises purchased under the deed. Such a transfer establishes a successive relationship to the tract in controversy, making the parties to the transfer privies in possession; thus conferring all the legal rights of the father, as vendor, on [the] respondent, as his vendee." Id., 361.

Whether privity exists in cases of implied transference is inherently a fact dependent inquiry. In the present case, there is a genuine issue of material fact as to whether privity exists. This is based on whether the plaintiffs' predecessors in title impliedly transferred the disputed area to the plaintiffs. Although there is no fence or building on the disputed area in this case, the disputed area is bound by a ravine and a creek. Several cases have analogized natural boundaries to cases involving fences and have found an implied transfer on the basis of the existence of a natural boundary. The plaintiffs' predecessors in title, additionally, believed that the creek was the boundary line and that they owned the disputed area up until the time they sold the property to the plaintiffs.[15] Whether an implied transfer

[15] At a deposition, the plaintiffs' attorney questioned Melissa Nangle, one of the plaintiffs' predecessors in title, as follows:

"Q. You testified there's a brook line between [the defendants' predecessors in title's] house and 16 Fair Oaks Drive?

"A. Yes.

"Q. Okay. And can you tell me when—in the 1960s, do you know what—where the boundary—or did you have any conception of where the boundary lay between the [defendants' predecessors in title's] house and 16 Fair Oaks Drive?

"A. It was the brook; that one side was theirs and the other side was ours.

"Q. So, as growing up, that was your understanding?

"A. Absolutely.

"Q. Where did you get that understanding?

of the disputed area may be inferred from the evidence in the present case raises a question of fact that cannot properly be resolved by the court at summary judgment.

II

The plaintiffs next claim that the court improperly rendered summary judgment because there is a genuine issue of material fact as to whether the plaintiffs recognized the defendants' superior title[16] to the disputed area by asking the defendants' predecessor in title for permission to install drains on the disputed area three months after the plaintiffs purchased their property.[17] We agree.

Although summary judgment is certainly not precluded in adverse possession cases, adverse possession raises predominantly fact intensive issues that generally

"A. I just—it was just a natural belief. It just looked—that's how it was. I was never told otherwise.

"Q. Okay. And since 1961 to 2011, did you or your family use the area between the brook and your house and driveway at 16 Fair Oaks Drive?

"A. We always maintained all that property. My father may have used it for things that I'm not aware of or don't remember, but we always maintained that property from the brook on.

* * *

"Q. When [John Nangle] mowed the lawn—as far as the edge of the brook?

"A. Oh, yes, the whole property. That was considered our property, to my knowledge."

[16] Recognition of superior title implicates the continuous element of adverse possession. See *Allen* v. *Johnson*, 79 Conn. App. 740, 746, 831 A.2d 282, cert. denied, 266 Conn. 929, 837 A.2d 802 (2003). "An adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title. . . . [T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other. . . . Occupation must not only be hostile in its inception, but it must continue hostile, and at all times during the required period of fifteen years challenge the right of the true owner, in order to found title by adverse use upon it. . . . Such an acknowledgment of the owner's title terminates the running of the statutory period, and any subsequent adverse use starts the clock anew." (Citation omitted; internal quotation marks omitted.) Id.

[17] See footnote 8 of this opinion.

must be resolved at trial. Our Supreme Court has stated that "[i]t is the province of the jury, or court sitting as a jury, to determine from conflicting or doubtful evidence the existence of facts necessary to constitute adverse possession . . . . If there is at least some evidence, although slight, which is sufficient to be submitted to the jury, and which tends to show the existence of the essential facts alleged to constitute adverse possession, and such evidence is disputed, or, if undisputed, is of a doubtful character, the question as to the existence of such facts is one of fact for the jury and should be submitted to [it] for determination, under proper instructions from the court; or in case of a trial by the court alone, the question is one of fact for the court sitting as a jury." (Citation omitted; internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 573, 31 A.3d 1 (2011).

Here, the defendants submitted undisputed evidence that the plaintiffs had asked the defendants' predecessor in title for permission to install drains on the disputed area shortly after the plaintiffs purchased their property. According to the defendants, this evidence is an acknowledgement by the plaintiffs that the defendants hold superior title to the disputed area. The signed document provides in relevant part that the defendants' predecessors "hereby give permission to the present owners of 16 Fair Oaks Drive, Shelton, Connecticut, to install one (1) curtain drain and one (1) footing drain, both of which will drain into the water course channel that runs parallel to the boundary of our properties. The present owners of 16 Fairs Oaks Drive shall be responsible for all costs related to the installation and maintenance of both drains. This agreement is limited to the installation of these two drains and nothing additional."

The defendants argue that, by seeking this permission, the plaintiffs unequivocally have recognized the

defendants' superior title to the disputed area. According to the defendants, the language of the document was unambiguous and clearly shows that permission was sought to enter the disputed property, as the document specifically refers to the construction and maintenance of the drains. They claim that "[t]he letters specifically limited permission to the installation of the drains and imposed an affirmative obligation on the plaintiffs to maintain them at the plaintiffs' own cost, neither of which permissions would have been necessary if the plaintiffs' actions were limited to improvements conducted on their own property. This evidence alone decisively demonstrates [that] the plaintiffs were aware of the need for, and actively sought, the defendants' predecessors' consent to enter the disputed area and is fatal to the plaintiffs' claim." In so arguing, the defendants characterize the permission granted as permission to use the disputed area.

The plaintiffs, in their depositions, counter that they sought permission from their neighbors because the proposed drains would increase the flow of water into the creek they believed to be owned by the defendants' predecessor in title and which marked the boundary between their properties.[18] They believed that the city

[18] The defendants' attorney questioned Jacek Supronowicz as follows:

"Q. Okay. Why do you think these [permissions] were required?

"A. Because—I told you before [in] the beginning, we know that the brook is on their side. That's why we asking them if we can do it and dump the water in the brook.

"Q. Because presumably dumping water in the brook would have some effect on the way the water flows in the brook?

"A. Everything is possible.

"Q. And all of the individuals who said that they were all co-owners of 12 Fair Oaks Drive all gave you consent to install the drains; that's correct?

"A. Yes.

"Q. Which means they didn't object to having additional water go into the brook; is that right?

"A. I think so."

of Shelton required this document because the installation of the drains would increase the water draining into the creek owned by the defendants' predecessors.[19]

There is therefore conflicting evidence regarding whether the permission sought was for the use of the disputed area or for the increase in water to the creek along the then supposed boundary line. Consequently, we conclude that there is a genuine issue of material fact as to whether the plaintiffs ever recognized a claim of superior title to the disputed area that would defeat their adverse possession claim. This factual dispute must be resolved by the fact finder, not by the court at summary judgment.

III

Last, the plaintiffs claim that the court improperly concluded that the defendants' entry into the disputed area defeated the exclusivity of the plaintiffs' use. We conclude for the following reasons that there is a genuine issue of material fact regarding the exclusivity of the plaintiffs' use of the disputed area.

The defendants submitted evidence to the court that they began to use and maintain the disputed area in

[19] The defendants' attorney cross-examined Iwona Supronowicz as follows:

"Q. Okay. Do you know who prepared the documents?

"A. They were presented to me, and they've been already signed. And they give it to me so I can give them to the city of Shelton because I need to have that because Mr. John Cook [an individual with the city's Inland/Wetland Commission] said that I need to have a statement from 12 Fair Oaks Drive about water coming in from our drains to the watercourse, to the brook.

* * *

"Q. . . . And you just mentioned that the reason that [Cook] told you you needed these letters was because of water that was going to drain into the watercourse.

"A. Yes.

"Q. Is that correct?

"A. Yes. Because in the drain you have water, and you have to dump it someplace. So, we decided to dump it to the brook."

2018 and, thus, the plaintiffs' use of the disputed area was not exclusive as required to establish adverse possession. Specifically, the defendants rely on the deposition of Jacek Supronowicz in making this argument. In his deposition, Jacek Supronowicz said that he had observed the defendants mowing the lawn and weed whacking the disputed area.[20] Although he believed this use happened more than ten times, he could not recall how frequent this use was.[21] The defendants did not themselves testify as to this use.

There is, under the issue of privity discussed in part I of this opinion, a genuine issue of material fact as to whether adverse possession was established prior to the defendants' entry into the disputed area in 2018. The plaintiffs presented evidence that the Nangles, their predecessors in title, had used the disputed area since 2007 and that the Nangles' parents had used the disputed area since they purchased the property in 1961. In *Roche* v. *Fairfield*, 186 Conn. 490, 503, 442 A.2d 911 (1982), our Supreme Court held that, even if the title owner of a disputed area acts in a manner to try to toll the period of adverse use, if the statutory period of adverse use and all of the other elements of adverse

[20] The defendants' attorney questioned Jacek Supronowicz as follows:

"Q. In your interrogatory responses you mentioned that the defendants had been observed by you or your wife in the disputed area mowing the lawn and weed whacking.

"A. Yes."

[21] The defendants' attorney questioned Jacek Supronowicz as follows:

"Q. Okay. Could you give me a range of how many times you think you might have observed [the defendants mowing and weed whacking the disputed area]?

"A. I don't remember.

"Q. Okay. Would it be more than ten times?

"A. Yes.

* * *

"Q. All right. Would you say that the number of times you observed either of the defendants in the disputed area was more than fifty times?

"A. Maybe."

possession had previously been established by the claimant, then the claimant nevertheless has obtained title by adverse possession. Similarly, in *Boccanfuso* v. *Green*, 91 Conn. App. 296, 303–304, 880 A.2d 889 (2005), the plaintiffs had used the disputed area for more than fifteen years before the defendants purchased their property. This court held that "any claim of ownership that the defendants asserted on the basis of their use of the property was too late to affect the exclusivity of the plaintiffs' use during the period within which adverse possession was established initially." Id., 308. If privity exists between the plaintiffs and their predecessors in title, then it is possible that, if the fact finder determines that all of the requisite elements of adverse possession have been met, title by adverse possession had already been established before the alleged shared use of the disputed area.

There is additionally a factual question as to whether the plaintiffs' use of the disputed area could nevertheless be considered exclusive, even if the defendants began entering the disputed area in 2018. "In general, exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership; viz., such acts as would ordinarily be exercised by an owner in appropriating land to his own use and the exclusion of others. . . . Thus, the claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. . . . It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Roche* v. *Fairfield*, supra, 186 Conn. 502–503. "In adverse-possession doctrine, the exclusivity requirement describes the behavior of an ordinary possessor and serves to give notice to the

owner." (Internal quotation marks omitted.) *Boccanfuso* v. *Conner*, 89 Conn. App. 260, 289 n.23, 873 A.2d 208, cert. denied, 275 Conn. 905, 882 A.2d 668 (2005), and cert. denied, 275 Conn. 905, 882 A.2d 668 (2005).

Whether the plaintiffs' activities in the disputed area are consistent with open acts of ownership is a factual determination. To the extent the defendants' activities beginning in 2018 are relevant, we acknowledge that the defendants' repeated entry into the disputed area to mow and weed whack brings into doubt whether the plaintiffs' actions were acts of ownership sufficient to establish the exclusivity element of adverse possession. However, "[e]ven assuming that the plaintiff faces a difficult challenge in ultimately proving its case at trial, that assumption cannot form the basis for granting a motion for summary judgment. So extreme a remedy as summary judgment should not be used as a substitute for trial or as a device intended to impose a difficult burden on the non-moving party to save his [or her] day in court unless it is clear that no genuine issue of fact remains to be tried. . . . A judge's function when considering a summary judgment motion is not to cull out the weak cases from the herd of lawsuits waiting to be tried; rather, only if the case is dead on arrival, should the court take the drastic step of administering the last rites by granting summary judgment." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 631, 57 A.3d 391 (2012).

Because a "claimant's possession need not be absolutely exclusive" but, rather, needs to be only the "type of possession [that] would characterize an owner's use"; (internal quotation marks omitted) *Roche* v. *Fairfield*, supra, 186 Conn. 502; it is the role of the fact finder to determine whether the claimant's use, even if not absolutely exclusive, is nevertheless the type of ownership sufficient to find the exclusivity required to establish adverse possession. There is, therefore,

a genuine issue as to whether the plaintiffs' use was nevertheless sufficiently exclusive, despite the defendants also entering the area after 2018.

In summary, we conclude that the court improperly granted the defendants' motion for summary judgment. As outlined previously in this opinion, contrary to each of the defendants' three arguments, there remain genuine issues of material fact.

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

In this opinion the other judges concurred.

DONALD G. *v.* COMMISSIONER OF CORRECTION*
(AC 45422)

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

Syllabus

The petitioner, who had been convicted of several crimes in connection with two incidents in which he sexually assaulted the minor victim, C, sought a writ of habeas corpus. He claimed that K, his appellate counsel, had rendered ineffective assistance by failing to raise claims of prosecutorial impropriety and a violation of *Brady* v. *Maryland* (373 U.S. 83) that resulted from the state's failure to disclose to the defense a complete copy of notes made by a police detective, Y, who had interviewed the petitioner about C's allegations. During the petitioner's criminal trial, C testified that she, her friend, and her sister had gone to the petitioner's workplace to help him paint the interior of the building. C went upstairs to paint an office while her friend and her sister remained downstairs. The petitioner entered the office and sexually assaulted C. Y testified on direct examination that the petitioner had told him that two girls, in addition to C, helped him paint that day. Defense counsel then cross-examined Y, and, during a recess, the prosecutor provided defense

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

counsel with an incomplete copy of Y's notes. Y then admitted on cross-examination that the notes were inconsistent with his initial testimony about the number of girls present that day. Subsequent to his criminal trial, the petitioner obtained a complete copy of Y's notes through the Freedom of Information Act (§ 1-200 et seq.). The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner's claim that K rendered ineffective assistance was unavailing, as the petitioner could not establish that he was prejudiced by K's failure on direct appeal to raise claims of prosecutorial impropriety and a violation of *Brady*:

a. Notwithstanding the habeas court's erroneous determination that the petitioner's habeas petition did not allege claims of ineffective assistance concerning the *Brady* claim and the prosecutor's comment during closing argument to the jury that the petitioner had told Y "some BS" about his conduct with C, and thus it improperly failed to consider those claims, this court reviewed those claims on their merits, as a remand to the habeas court for its consideration of those claims was unnecessary, the parties having fully briefed the claims and agreed that the underlying facts were not in dispute and that the record was adequate for review by this court.

b. Although the respondent, the Commissioner of Correction, conceded that the state had failed to provide defense counsel with a complete copy of Y's notes and did not dispute that the notes were favorable to the defense, the petitioner failed to establish that the notes were material to his defense within the meaning of *Brady*: because Y admitted that the incomplete copy of his notes did not indicate that the petitioner had told him that multiple girls in addition to C were present during the painting incident, which the petitioner contended would have discredited C's testimony and corroborated other testimony that only one girl other than C was present, any additional support would have been minimal, as defense counsel achieved the same result with the incomplete copy of Y's notes as he would have with a complete copy of the notes; moreover, despite the petitioner's contention that C's testimony was central to the state's case and that his ability to cast doubt on her truthfulness was paramount to establishing reasonable doubt, even though a complete copy of Y's notes may have lent support to defense counsel's impeachment of Y and C, it could not be said that there existed a reasonable probability that further impeachment of Y using a complete copy of his notes would have altered the outcome of the criminal trial.

c. There was no merit to the petitioner's assertion that K rendered ineffective assistance by failing to claim that the prosecutor improperly commented to the jury that the petitioner had told Y "some BS" about having "wrestl[ed]" with C and slapping her on the "butt": although the prosecutor's use of "BS" was inartful and unnecessary, the remark was a fair comment on the evidence, as Y had testified that the petitioner

appeared to be very nervous when Y confronted him with C's accusations, and the prosecutor's suggestion that the petitioner had lied to Y about the painting incident constituted proper argument from which the jury was asked to infer that C's version of the events was true and that the petitioner's was not.

2. The habeas court properly concluded that K acted reasonably in deciding not to raise claims of prosecutorial impropriety regarding the prosecutor's use of the term "victim" when referring to C during trial and his remark that C's sister was in the courtroom during closing argument to the jury:

a. Although the criminal court had ordered the parties not to refer to C as the "victim" during trial, which both parties thereafter violated, the petitioner could not prevail on his claim that the prosecutor's use of that term six times gave rise to a claim of prosecutorial impropriety that K improperly failed to raise on direct appeal: this court concluded, after applying the factors set forth in *State* v. *Williams* (204 Conn. 523), that the prosecutor's sporadic use of the terms "victim" and "victimization" was not blatantly egregious or so frequent or severe as to deprive the petitioner of a fair trial, as the prosecutor properly referred to C numerous times as "the complainant," "the complaining witness" or by her initials during a trial that lasted five days and culminated in hundreds of pages of transcript; moreover, although the court did not give the jury specific curative instructions, the court repeatedly instructed the jury not to consider the statements and arguments of counsel as evidence, which the jury is presumed to have followed; furthermore, the prosecutor's acknowledgment to the jury that the state had the burden of proving the petitioner's guilt beyond a reasonable doubt, along with the jury's verdict of not guilty on one of two counts of sexual assault in the first degree with which the petitioner had been charged, made it especially unlikely that the jury was unduly influenced by the prosecutor's inappropriate references to C as the victim.

b. The petitioner failed to prove that a reasonable probability existed that he would have prevailed in his criminal appeal had K raised a claim that the prosecutor improperly remarked that C's sister was in the courtroom during closing argument to the jury: reasonably competent counsel may not have interpreted the prosecutor's ambiguous remark as giving rise to a valid claim of prosecutorial impropriety, and, even if K had argued that the prosecutor's remark was improper, that argument was unlikely to have succeeded, as it had minimal, if any, prejudicial effect in that the only new information it suggested was that C's sister, who did not testify during the trial, was a real person and was present during the trial; moreover, it was only the sister's presence during the painting incident that was disputed at trial, and the prosecutor's knowledge of her presence during trial would not corroborate C's testimony that her sister was present during the painting incident; furthermore, the lack of an objection by defense counsel suggested that counsel

believed the statement was not so severe that it risked depriving the petitioner of a fair trial, the prosecutor having made the statement only once.

Argued September 19, 2023—officially released March 5, 2024

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, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. In this certified appeal, the petitioner, Donald G., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claims that the court improperly (1) failed to consider two of his claims of ineffective assistance of appellate counsel and (2) concluded that his appellate counsel did not render ineffective assistance by failing to raise claims of prosecutorial impropriety on direct appeal from the petitioner's criminal conviction. We affirm the judgment of the habeas court.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. "The minor victim . . . is the niece of the [petitioner]. In the time period between May and October, 2003, when the victim was age ten

or eleven, she, along with her sister and her friend, went to the [petitioner's] workplace to help him paint the interior of the building. The victim went upstairs to paint the office while her sister and her friend remained downstairs. The [petitioner] entered the office," where he sexually assaulted the victim. *State* v. *Donald H. G.*, 148 Conn. App. 398, 400, 84 A.3d 1216, cert. denied, 311 Conn. 951, 111 A.3d 881 (2014). "The [petitioner] later took the victim's sister and the victim's friend home, but he returned to his workplace with the victim where he continued to sexually assault her . . . . On the basis of these facts, [hereinafter referred to as the 2003 incident] the state charged the [petitioner] with one count of sexual assault in the first degree and two counts of risk of injury to a child." Id., 401. The state also charged the petitioner with (1) one count of sexual assault in the third degree and one count of risk of injury to a child in connection with an incident involving the victim at a 2007 Christmas party hosted by her family and (2) one count of sexual assault in the first degree in connection with another incident involving the victim at a 2008 Christmas party hosted by her family. Id., 401–402.

"On July 2, 2009, the victim, while staying with a friend's family due to a deterioration in her relationship with her family, confided in her friend's mother that the [petitioner] repeatedly had sexually abused her. A few days later, the friend's mother drove the victim to the police station to report the sexual abuse. The victim made further disclosures to the police on August 27, 2009, and September 5, 2009.

"The [petitioner] was arrested and charged, by way of an amended information, with two counts of sexual assault in the first degree, one count of sexual assault in the third degree, and three counts of risk of injury to a child. The jury found the [petitioner] guilty of all charges with the exception of the count of sexual

assault in the first degree that stemmed from the 2008 Christmas party incident, for which the jury returned a verdict of not guilty. The court accepted the jury's verdict, rendered judgment of conviction on five counts, and imposed a total effective sentence of thirty years [of] incarceration, ten years of which were mandatory, followed by five years of parole with special conditions, and lifetime registration as a sexual offender." Id., 402–403.

The petitioner appealed from his conviction, claiming that "(1) the court erred in allowing the state to introduce evidence of uncharged misconduct, (2) the court erred when it refused to conduct an in camera review of the victim's psychological records, (3) the court's improper response to a question posed by the jury during its deliberations deprived him of a fair trial, and (4) the prosecutor committed prejudicial impropriety during closing and rebuttal argument."[1] Id., 400. This court rejected the petitioner's claims and affirmed the judgment of conviction. Id. The petitioner was represented in his direct appeal by Attorney W. Theodore Koch III.

Thereafter, the petitioner filed his first petition for a writ of habeas corpus, claiming that his trial counsel, Attorney Robert A. Lacobelle (defense counsel), provided ineffective assistance in that he (1) failed to call four witnesses in support of an alibi defense, (2) allegedly had a conflict of interest, (3) improperly referred to the complainant as the "victim" during trial and failed to object or request a curative instruction when the prosecutor did the same, and (4) failed to adequately investigate an alleged incident of uncharged misconduct that the state introduced at trial. After a trial on

[1] The petitioner claimed on direct appeal that the prosecutor committed two instances of impropriety that are separate from the improprieties that the petitioner challenges in the present appeal. See *State* v. *Donald H. G.*, supra, 148 Conn. App. 420.

the merits, the court, *Kwak*, *J.*, denied the petition. See *Donald G.* v. *Commissioner of Correction*, 203 Conn. App. 58, 63, 247 A.3d 182, cert. denied, 337 Conn. 907, 253 A.3d 45 (2021). The petitioner subsequently filed a petition for certification to appeal, which the habeas court granted. Id. This court affirmed the judgment, and our Supreme Court denied the petitioner's subsequent petition for certification to appeal. See *Donald G.* v. *Commissioner of Correction*, 337 Conn. 907, 253 A.3d 45 (2021).

In 2017, the self-represented petitioner initiated the present habeas action, claiming that Koch had rendered ineffective assistance. On May 24, 2021, the petitioner filed the operative petition—his second amended petition. In the operative petition, the petitioner raised ten separate "grounds" for relief, only three of which are relevant to the present appeal. First, the petitioner claimed in "ground three" that Koch rendered ineffective assistance by failing to raise on direct appeal a claim that the petitioner was prejudiced by the prosecutor's and defense counsel's references to the complainant as the "victim" during trial in violation of a court order. Second, the petitioner alleged in "ground nine" that the prosecutor had improperly identified in the trial audience the third girl whom the victim had testified was present during the 2003 incident and improperly made a comment during closing argument that implied that the petitioner had lied to Detective Steven Young when Young interviewed him about the 2003 incident. The petitioner also alleged that the state's failure to provide the defense with a complete copy of Young's notes from that interview regarding the number of girls on the scene of the 2003 incident violated his right to confrontation and constituted a violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The petitioner then alleged in "ground ten" that Koch performed deficiently by "failing

to raise the significant [and] obvious claims described in ground nine . . . [on] direct appeal over issues actually raised" and that Koch's deficient performance prejudiced him.

The respondent, the Commissioner of Correction, left the petitioner to his proof on grounds three and ten and raised several affirmative defenses to ground nine, including that the petitioner had failed to state a claim on which relief could be granted, that he had procedurally defaulted on that claim and that he was barred from raising it by the doctrine of res judicata, all of which the petitioner denied in his reply.

The habeas court, *Oliver*, *J.*, held a one day trial on July 26, 2021, during which the petitioner represented himself with the assistance of court-appointed standby counsel. The petitioner presented the testimony of Koch and the prosecutor from his criminal trial, Attorney Charles M. Stango Following trial, the petitioner filed a brief, and the respondent filed a notice that he would not file a posttrial brief because the petitioner had failed to proffer any evidence in support of his claims. On January 20, 2022, the court issued a memorandum of decision, in which it rejected the respondent's affirmative defenses but nevertheless denied the petitioner's habeas petition due to his failure to prove his claims. This certified appeal followed. Additional facts will be set forth as necessary.

On appeal, the petitioner claims that the habeas court improperly (1) failed to review his claims that Koch had rendered ineffective assistance by not raising a *Brady* claim and a claim that the prosecutor had improperly stated during closing argument to the jury that the petitioner had lied to a police detective, and (2) concluded that the petitioner's right to effective assistance of appellate counsel was not violated when Koch failed to raise two other claims of prosecutorial

impropriety on direct appeal. We address each claim in turn.

I

The petitioner first claims that the habeas court erroneously concluded that the operative petition did not allege that Koch rendered ineffective assistance by failing to raise (1) a *Brady* claim arising out of the state's suppression of a complete copy of Young's notes and (2) a prosecutorial impropriety claim relating to the prosecutor's statement during rebuttal argument to the jury that the petitioner had "told Detective Young some BS," and that the court thus improperly failed to consider those claims. We agree with the petitioner, but because we conclude that both claims would have failed on their merits had Koch raised them on direct appeal, the court's error was harmless.

A

The following additional facts, as undisputed in the record, and procedural history inform our analysis. In its memorandum of decision denying the habeas petition, the habeas court interpreted the operative petition as "[raising] a single claim of ineffective assistance of appellate counsel . . . premised on ten alleged grounds of deficient performance for failure to raise claims on appeal." The court addressed each of the ten grounds using the four groupings set forth in the petition: "First (grounds one, two, and three), allegations related to the use of the term 'victim' by both the prosecutor and defense counsel; second (grounds four, five, and six), allegations related to the state's use of the petitioner's request for counsel as consciousness of guilt evidence; third (grounds seven and eight), allegations related to collusion between the prosecutor and defense counsel to sabotage the petitioner's alibi defense and mislead the jury; and fourth (grounds nine and ten), allegations related to improprieties when [the

prosecutor] pointed to an individual in the public gallery of the courtroom to bolster the complainant's testimony and discredit the defense." The court's memorandum of decision lacks any reference to either a *Brady* claim or a claim of prosecutorial impropriety based on the prosecutor's statement to the jury that the petitioner had told Young "some BS."

On September 28, 2022, the petitioner filed a motion for articulation, requesting that the habeas court address his claims that "Koch rendered ineffective assistance . . . when he (1) failed to raise and litigate a claim that the petitioner's right to due process and a fair trial, pursuant to *Brady* and its progeny, was violated when the state failed to disclose material exculpatory evidence; and (2) that the petitioner's right to due process was violated by certain improprieties during the prosecutor's closing argument." The respondent filed an opposition to the petitioner's motion for articulation, arguing that the petitioner was "attempting to raise new claims not adequately [pleaded] in his habeas petition . . . ." The court denied the petitioner's motion for articulation on October 19, 2022.

The petitioner then filed with this court a motion for review of the habeas court's denial of his motion for articulation, requesting that this court order the habeas court to respond to the questions posed in the motion for articulation. The respondent opposed the motion for review, again arguing that the motion for articulation "improperly tried to compel the habeas court to decide claims that the petitioner had not adequately or clearly [pleaded] in his operative habeas petition." This court granted the petitioner's motion for review but denied the relief requested therein; however, we ordered, sua sponte, that the habeas court "shall articulate (1) whether it found that the petitioner pleaded in [the operative petition] that appellate counsel was ineffective for failing to raise a *Brady* claim with respect to

. . . Young's notes, and the factual and legal basis therefor; (2) whether it found that the petitioner pleaded in [the operative petition in paragraph 97 (b) through (f)] that appellate counsel was ineffective for failing to argue on direct appeal that [the prosecutor] made several improper remarks in his closing statement at the petitioner's underlying criminal trial regarding both his time and experience as a prosecutor, as well as his personal opinion concerning the testimony offered at the criminal trial, and the factual and legal basis therefor; and (3) if the court did find that the petitioner pleaded [those] claims concerning ineffective assistance of appellate counsel, the court's decision thereon."

The habeas court addressed these issues in an articulation on January 30, 2023. As to the first issue, the court explained that "[t]he focus of the petitioner's assertions was the prosecutor pointing out someone in the courtroom while arguing how many others were with . . . the victim at the garage. . . . Ground ten contains the allegation that Koch was ineffective for the reasons described in ground nine. . . . [A] fair reading of ground nine is that it alleges an instance of prosecutorial impropriety" rather than a *Brady* violation. (Citations omitted.) According to the court, the petitioner raised the *Brady* claim "for the first time" in his posttrial brief, contrary to the well established principle that a claim cannot be raised for first time in a posttrial brief. As to the second issue, the court concluded that the assertions in "paragraph 97 (b) through (f) [of the operative petition] themselves were not claims of prosecutorial improprieties" but, instead, "were examples of how the prosecutor's closing arguments tried to reconcile [the victim's] saying two other girls were there [with] Young's testimony."[2] (Emphasis omitted.)

[2] Given its conclusion as to the first and second issues, the habeas court concluded that no articulation was necessary as to the third issue.

B

On appeal, the petitioner claims that ground nine of the operative petition alleged a *Brady* claim relating to the state's suppression of Young's notes and a prosecutorial impropriety claim relating to the prosecutor's "BS" comment, and that ground ten alleged that Koch rendered ineffective assistance by failing to raise these claims on appeal. According to the respondent, the petitioner's references to *Brady* and the prosecutor's statement served as additional support for the petitioner's claim that the prosecutor had improperly identified the victim's sister in the courtroom "but did not, in themselves, constitute freestanding bases upon which to base a claim of ineffective assistance." We agree with the petitioner.

The following standard of review and legal principles guide our analysis. "[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005). "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . . This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A habeas court does

not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 624–25, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010). "[T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, supra, 560.

Mindful of these principles, we interpret the allegations set forth in grounds nine and ten of the operative petition as alleging that Koch rendered ineffective assistance by failing to raise several claims on direct appeal, including both a *Brady* claim and a claim that the prosecutor improperly argued to the jury that the petitioner "told Detective Young some BS." In ground nine of the operative petition, although the subheading for that ground focuses only on the prosecutor's identification of the sister in the courtroom, the petitioner also alleges a *Brady* violation and five other instances of prosecutorial impropriety. Following a discussion of the testimony relevant to the petitioner's claim that the prosecutor improperly identified the sister, the petition states in relevant part: "Defense counsel [asked] the court for a copy of [Young's] notes, [but] he 'never got those notes.' . . . The prosecutor made a copy of those . . . notes and gave [it] to [defense counsel]. . . . [Young checked] his notes and stated that it states her, another, and then it's cut off . . . . It wasn't photocopied properly. . . . Young testified [the] next day but could not be questioned [as] to [the] cut-off portion of his notes

due to the state's failure . . . to turn over a complete copy of them. . . . Denying the right to confrontation, and a *Brady* violation for not turning over the requested notes, as stated in the transcript." (Citations omitted.) After the discussion of the *Brady* claim, the petition also alleges: "Prosecuting authority continued impropriety serving to rehabilitate [the victim's] and . . . Young's conflicting testimony in [paragraph 97] (b) through (f) . . . (f) 'He made a mistake [the petitioner] told . . . Young some B.S.' . . . (violated fifth amendment right to remain silent, can only be confirmed or denied by petitioner, injecting personal opinion, not in evidence that petitioner was B.S.ing)." (Citations omitted.) Ground nine concludes with the statement: "There is a reasonable probability that, but for the prosecutorial improprieties as described, *individually* [*and*]*/or cumulatively*, the result of the petitioner's criminal trial would have been different and more favorable to the petitioner. In the alternative, if only the [prosecutor] did not become a key witness himself, unsworn, identifying [the sister] in the trial audience, [i]t is reasonabl[y] likely the trial outcome would have been different." (Emphasis added.) Reading the petition broadly and realistically, and considering it as a whole, we interpret these statements as raising several claims of impropriety related to the prosecutor's conduct during the petitioner's criminal trial, including both a *Brady* claim and a claim that the prosecutor improperly stated that the petitioner had "told . . . Young some BS."

In ground ten of the operative petition, the petitioner then alleges that Koch rendered ineffective assistance by "failing to raise these significant [and] obvious *claims* described in ground nine . . . [on] direct appeal over issues actually raised." (Emphasis added.) Although, in relation to this argument, the petitioner discusses in detail only the prosecutor's identification

of the sister in the courtroom, the petitioner nonetheless concludes his discussion of ground ten by stating that, "[t]here is a reasonable probability that, but for the petitioner's appellate counsel's deficient performance described, *individually and/or cumulatively*, the results of the petitioner's direct appeal would have been different and more favorable to the petitioner." (Emphasis added.) Therefore, when grounds nine and ten are read together, the operative petition is reasonably interpreted as raising a claim of ineffective assistance of appellate counsel arising from a failure to raise the multiple claims of misconduct by the prosecutor discussed in ground nine, including, inter alia, a *Brady* claim arising out of the state's suppression of a complete copy of Young's notes and a prosecutorial impropriety claim arising from the prosecutor's "BS" comment.

Our conclusion as to the *Brady* issue is bolstered by the habeas court's apparent understanding during trial that the petitioner was advancing a claim that Koch rendered ineffective assistance for not raising a *Brady* claim on appeal. During the habeas trial, as an offer of proof concerning the prosecutor's testimony, the petitioner explained: "I'd like to have [the prosecutor] testify today to two exhibits of . . . Young's handwritten notes. Both [exhibits] will support my *Brady* violation claim on page 18 of my petition. I subpoenaed [the prosecutor] to testify [as] to what his reason was for turning over the detective['s] notes, handwritten notes improperly photocopied . . . . [T]hat's pretty much what I want to talk to him about, to authenticate the notes. And the appellate counsel should've raised a *Brady* [claim] on appeal." When the court asked the petitioner where he raised that claim in the habeas petition because "there is clearly . . . no *Brady* claim" from the court's reading of the petition, the petitioner referred the court to grounds nine and ten of the petition and described the facts underlying the *Brady* claim.

Thereafter, the court confirmed its understanding that the petitioner was "asserting an ineffective assistance of appellate counsel [claim] for not bringing a *Brady* claim relating to the miscopying or incomplete copying of . . . Young's notes." Despite the respondent's objection that "there's absolutely no *Brady* claim" in the petition, the court concluded that paragraph 94 of the petition appeared to raise such a claim and subsequently allowed the petitioner to question the prosecutor regarding Young's notes, and indicated that the court would review the trial transcript for defense counsel's cross-examination of Young regarding his notes.

Moreover, the petitioner did not abandon either claim, as he questioned Koch regarding his decision not to raise either the *Brady* or prosecutorial impropriety claim on appeal and discussed both claims in his posttrial brief. In particular, the petitioner's posttrial brief states that Koch rendered ineffective assistance by failing to raise a claim on appeal that the prosecutor had identified the sister in the audience during his closing argument and "used a *Brady* violation to sway the jurors [that] she was that third person" present, along with the victim and her friend at the time of the 2003 incident. The petitioner further argued in his posttrial brief that Koch performed deficiently by failing to raise claims on appeal relating to the additional allegedly improper remarks referenced in paragraphs 89 (a) and 97 (b) through (f) of the habeas petition.

Therefore, we conclude that the habeas court erroneously determined that the operative petition did not allege that Koch rendered ineffective assistance by (1) failing to raise a *Brady* claim and (2) failing to raise a prosecutorial impropriety claim relating to the prosecutor's statement that the petitioner had "told Young some BS."

C

Our conclusion that the habeas court failed to consider claims that were properly before it typically would require that we remand the case to the habeas court for its consideration of those claims. See *Quint* v. *Commissioner of Correction*, 99 Conn. App. 395, 403, 913 A.2d 1120 (2007). "This court need not remand the case for the trial court's decision on [an] issue [however] . . . if it can be determined as a matter of law on the record before us. . . . In other words, if the evidence necessary for resolution is undisputed, then this court can decide the issue as a matter of law without need for a remand for factual findings." (Citation omitted.) *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 57, 272 A.3d 150 (2022).

As to the petitioner's *Brady* claim, the parties agreed during oral argument before this court that the facts relevant to the claim are not in dispute and that the record is therefore adequate for this court to address the merits of the claim on appeal. We agree that we can address the *Brady* claim as a matter of law because, given that the respondent's appellate counsel conceded during oral argument before this court that the evidence was suppressed and does not dispute that the evidence was favorable to the petitioner, the dispositive issue is whether the suppressed evidence was material under *Brady*. This is "a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error." *State* v. *Ortiz*, 280 Conn. 686, 720, 911 A.2d 1055 (2006). Moreover, the materiality inquiry is not about "what happened, based on the evidence presented and the permissible inferences drawn therefrom. The inquiry here is what would or would not have happened if something that did not happen had happened. We are as qualified as the [habeas] court to evaluate the record and to make that hypothetical determination." (Internal quotation marks omitted.)

Id., 720–21 n.20; see also *Williams* v. *Commissioner of Correction*, 221 Conn. App. 294, 304–305, 301 A.3d 1136 (2023) ("[t]he test for materiality is whether the suppressed evidence in the context of the entire record creates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (internal quotation marks omitted)).

Similarly, as to the petitioner's prosecutorial impropriety claim, this court and our Supreme Court regularly consider such claims in the first instance on direct appeal. See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 340 n.4, 260 A.3d 1152 (2021); *State* v. *McLaren*, 127 Conn. App. 70, 78–79, 15 A.3d 183 (2011); *State* v. *Angel T.*, 105 Conn. App. 568, 573 n.4, 939 A.2d 611 (2008), aff'd, 292 Conn. 262, 973 A.2d 1207 (2009). Indeed, "a claim of prosecutorial impropriety warrants review even if the defendant fails to preserve it at trial . . . ." (Citations omitted.) *State* v. *Schiller*, 115 Conn. App. 189, 195, 972 A.2d 272, cert. denied, 293 Conn. 910, 978 A.2d 1113 (2009).

Here, given that the parties do not dispute that the prosecutor made the "BS" comment during closing argument and that Young testified regarding his conversation with the petitioner, whether the prosecutor's comment constitutes impropriety requires only that we apply the law governing prosecutorial impropriety claims to the undisputed facts in the record. Our review of this claim is therefore plenary. See *State* v. *Jones*, 135 Conn. App. 788, 802, 44 A.3d 848 (affording plenary review to trial court's conclusion that prosecutorial impropriety occurred because it was "conclusion of law based on [the trial court's] review of the evidence and the closing arguments and was not based on any findings of fact"), cert. denied, 305 Conn. 925, 47 A.3d 885 (2012).

Because both claims require only that we apply the law to the undisputed facts in the record, and the parties have fully briefed both claims on their merits before this court, we are in as good a position to decide the petitioner's claims as the habeas court would be on remand. Accordingly, this court properly may reach the merits of the petitioner's claims on appeal despite the habeas court's failure to address them. See *Quint* v. *Commissioner of Correction*, supra, 99 Conn. App. 403 ("[b]ecause the relevant facts are not in dispute . . . and resolution of the petitioner's [claims] requires only the application of the law . . . to those undisputed facts, this court properly may reach the merits of [the petitioner's claims] on appeal"); see also *State* v. *Donald*, 325 Conn. 346, 354–55, 157 A.3d 1134 (2017) (despite trial court's denial of motion to suppress without making factual findings or elaborating on legal basis for denial, record was adequate for review because material facts were not in dispute and question of whether court properly denied motion to suppress is subject to plenary review). We thus turn to the merits of those claims.

1

First, the petitioner argues that Koch rendered ineffective assistance by failing to raise a claim on direct appeal that the state's suppression of a complete copy of Young's notes constituted a *Brady* violation. We conclude that the petitioner cannot establish that he was prejudiced by that failure and, accordingly, his ineffective assistance claim fails.

A petitioner cannot prevail on an ineffective assistance claim if the underlying claim that he argues his appellate counsel should have raised on appeal is without merit. See *Valentine* v. *Commissioner of Correction*, 219 Conn. App. 276, 285, 289–90, 295 A.3d 973

(petitioner cannot satisfy performance prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), if issues not raised by appellate counsel lack merit, and *Strickland*'s prejudice prong requires reviewing court to analyze merits of underlying claimed error in accordance with appropriate appellate standard for measuring harm), cert. denied, 348 Conn. 913, 303 A.3d 602 (2023). Accordingly, to assess whether Koch rendered ineffective assistance by failing to raise a *Brady* claim on appeal, we turn to the merits of that claim.

"[T]he respective roles of the habeas court and the reviewing court are . . . the same under *Strickland* as they are under *Brady*. As a general matter, the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous . . . . [W]hether those facts constituted a violation of the petitioner's rights under the sixth amendment [however] is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Carmon* v. *Commissioner of Correction*, 178 Conn. App. 356, 370, 175 A.3d 60 (2017), cert. denied, 328 Conn. 913, 180 A.3d 961 (2018).

"In *Brady* v. *Maryland*, supra, 373 U.S. 87, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The prosecution's duty to disclose under *Brady* applies not only to exculpatory evidence but also to impeachment evidence, which is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . To prove a *Brady* violation,

the petitioner must establish: (1) that the state suppressed evidence (2) that was favorable to the defense and (3) material either to guilt or to punishment. . . . If the petitioner fails to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, supra, 221 Conn. App. 304.

In the present case, because the respondent's appellate counsel conceded during oral argument before this court that Young's notes were suppressed and does not dispute that the notes were favorable to the defense, the dispositive issue is whether that evidence was material. "The test for materiality is whether the suppressed evidence in the context of the entire record creates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . [T]he mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial, however, does not establish materiality in the constitutional sense. . . . The question [of materiality] is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . . [W]here there is no reasonable probability that disclosure of the exculpatory evidence would have affected the outcome, there is no constitutional violation under *Brady*." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 304–305. In this respect, "[t]he test for materiality under

Brady and the test for prejudice under *Strickland*[3] are the same—with respect to both, the petitioner must demonstrate that the alleged constitutional impropriety gives rise to a loss of confidence in the original outcome . . . .'' (Footnote added.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 266–67, 112 A.3d 1 (2015).

The following additional facts, as undisputed in the record, are necessary to our resolution of this claim. At the petitioner's criminal trial, the prosecutor questioned Young on direct examination about his investigation, which included talking to the petitioner about the victim's accusations. Defense counsel then cross-examined Young, and, during a recess in the proceedings, received from the prosecutor a copy of the notes that Young had written during his conversation with the petitioner. That copy appeared to be incomplete in that the last word on it was ''gir.'' When the proceedings resumed, the court asked defense counsel if he had sufficient time during the recess to read the notes, to which defense counsel responded: ''I did. They're fairly straightforward.'' Defense counsel continued cross-examining Young, focusing on the number of girls that the petitioner told Young had accompanied the victim on the day of the 2003 incident, whether Young's notes used the singular ''another girl'' or the plural ''another girls,'' and whether the copied notes were missing relevant language.

After his criminal trial, the petitioner acquired a complete copy of Young's notes through a request pursuant

[3] Under the two part analysis for reviewing claims of ineffective assistance of appellate counsel; see *Strickland* v. *Washington*, supra, 466 U.S. 687; a court determines under the prejudice prong ''whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial.'' (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, supra, 219 Conn. App. 289–90.

to the Freedom of Information Act, General Statutes § 1-200 et seq. That copy provides in relevant part on the first line, "Remembers Girls. Her another girl," and, on the second line, "Painting Garage Doors." The respondent's appellate counsel conceded during oral argument before this court that the state had in fact failed to disclose a complete copy of Young's notes to defense counsel during the criminal trial.

On appeal, the petitioner claims that Young's notes were material under *Brady* because they contained evidence that impeached the victim's testimony, which was "the sole evidence offered in support of the petitioner's conviction . . . ." In particular, the petitioner argues that "a dispute existed as to the complainant's ability to accurately recall and testify truthfully concerning [the 2003 incident]," particularly regarding the number of girls who accompanied the victim to paint at the petitioner's workplace that day. The petitioner argues that the complete copy of Young's notes, which shows that he wrote "another girl," in the singular, would have corroborated the testimony of a defense witness that only one girl other than the victim was at the petitioner's workplace that day, and discredited the victim's testimony that two other girls—her sister and her friend—were present. According to the petitioner, given that the victim's testimony was "central" to the state's case, his "ability to adequately cast doubt on her truthfulness and recall was paramount to establish reasonable doubt." The petitioner argues that Koch "should have recognized this meritorious issue and pursued [it] on direct appeal." We are not persuaded.

Although our Supreme Court "has stated many times that when the prosecution's case hinges entirely on the testimony of certain witnesses, information affecting their credibility is material"; *State* v. *White*, 229 Conn. 125, 136–37, 640 A.2d 572 (1994); "[t]he seminal test remains whether there exists a reasonable [probability]

that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. . . . If the evidence in question would not have provided the [petitioner] with any significant impeachment material that was not already available and used by him . . . it is immaterial under *Brady*. This is true even if the [evidence's] cumulative effect may have lent some additional support to the [petitioner's] attack on [a witness]." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, supra, 221 Conn. App. 316.

Here, we recognize that, given the lack of other corroborating evidence of the petitioner's guilt, whether the complete copy of Young's notes truly was cumulative of other information available to the petitioner is an important consideration. Moreover, we acknowledge that the complete copy of Young's notes, which was inconsistent with Young's testimony that the petitioner had told him that two girls, in addition to the victim, were on the scene, may " 'have lent some additional support' " to defense counsel's impeachment of both Young and the victim. Id. Nonetheless, given defense counsel's thorough cross-examination of Young, we conclude that any additional support would have been minimal. Indeed, despite Young's initial testimony that the petitioner "told me, if I remember correctly, it was several girls [painting that day] along with [the victim]," and his uncertainty about whether he in fact wrote "another girls" or "another girl," Young admitted that his notes were not consistent with his initial testimony. The following colloquy took place between defense counsel and Young on cross-examination:

"Q. . . . With respect to that g-i-r, there's a portion that's cut off that wasn't photocopied properly, correct?

"A. I would assume so. Yes.

"Q. Okay. Do you assume that that other part missing is the letter L, another girl?

"A. I don't know. It could be . . . L, it could be l-s. Without the report—or, I'm sorry—my notes, I wouldn't know for sure.

"Q. Okay. But it can't—if you wrote her and another—you wouldn't write her and another girls?

"A. Right. But I didn't write and. I wrote her, another, and I could have wrote girls; I was trying to write fast, so.

"Q. But another girls isn't proper English?

"A. No, it's not.

"Q. Okay. So, he never told you there were three girls there, fair to say?

"A. [The petitioner] told me there were girls there, several girls, if I remember correctly.

"Q. That's not what you have in your notes, though?

"A. Correct.

"Q. Okay. That's what you may have written later on at the police station when you wanted to write up a report, but that's not what you wrote in your notes, correct?

"A. I didn't write that in my notes, no."

The fact that defense counsel achieved the same result with an incomplete copy of the notes that he would have with a complete copy—that is, an admission from Young that his notes did not indicate that the petitioner had told him that multiple girls in addition to the victim were present on the day of the 2003 incident—supports our conclusion that defense counsel effectively impeached Young's earlier testimony that the petitioner told him several girls were present. We cannot say there is a reasonable probability that further

impeachment of Young's testimony using the complete copy of the notes would have altered the outcome of the petitioner's criminal trial. Accordingly, because the suppressed evidence was not material, a *Brady* violation did not occur, and the petitioner thus cannot establish that he was prejudiced by Koch's failure to raise that claim on direct appeal. See *Robinson* v. *Commissioner of Correction*, 204 Conn. App. 560, 571 n.5, 253 A.3d 1040 ("[b]ecause the proffered evidence is not material, the habeas court correctly concluded that the petitioner did not suffer prejudice from his prior habeas counsel's failure to investigate and present the allegedly suppressed documents"), cert. denied, 337 Conn. 903, 252 A.3d 363 (2021).

2

The petitioner next claims that Koch rendered ineffective assistance by failing to raise a claim that, during rebuttal argument to the jury, the prosecutor improperly "interjected his personal opinion concerning the veracity of the petitioner" by stating that the petitioner had "made a mistake. He told Detective Young some BS about maybe he shouldn't have been wrestling." (Emphasis omitted.) Because the petitioner's prosecutorial impropriety claim fails as a matter of law, we conclude that the petitioner was not prejudiced by Koch's failure to raise that claim on direct appeal.

The following legal principles govern claims of prosecutorial impropriety. "[A] claim of prosecutorial impropriety . . . even in the absence of an objection, has constitutional implications and requires a due process analysis under *State* v. *Williams*, 204 Conn. 523, 535–40, 529 A.2d 653 (1987). . . . In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant

of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] [was harmful and thus] caused or contributed to a due process violation is a separate and distinct question. . . . The defendant bears the burden of satisfying both of these analytical steps. . . . In evaluating whether a defendant has carried that burden, we recognize that prosecutorial inquiries or comments that might be questionable when read in a vacuum often are, indeed, appropriate when review[ed] . . . in the context of the entire trial." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 523–24, 122 A.3d 555 (2015).

This court previously has recognized that prosecutorial impropriety may occur during the cross-examination of witnesses or in closing arguments. See *Valentine* v. *Commissioner of Correction*, supra, 219 Conn. App. 298 (closing arguments); *State* v. *McLaren*, supra, 127 Conn. App. 81 (cross-examination of witnesses). "[B]ecause closing arguments often have a rough and tumble quality about them, some leeway must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Citation omitted; internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, supra, 219 Conn. App. 298–99.

The following additional facts, as undisputed in the record, are relevant to our resolution of the petitioner's claim. During the petitioner's criminal trial, the following colloquy occurred between the prosecutor and Young regarding the conversation Young had with the petitioner at the petitioner's workplace:

"A. . . . [W]e identified ourselves as police officers, and we requested to speak with the foreman.

"Q. What happens then?

"A. One of the gentlemen stopped working, came up and asked if he could help us . . . . He said that the foreman was out to lunch at the time and asked if he could help us. I said, what's your name, and he identified himself as [the petitioner], and then I told him that we were actually there to speak with him.

"Q. Prior to that last statement by you that we're actually here to speak with you, sir, prior to that, describe [the petitioner's] mood and demeanor—actually, demeanor is probably better.

"A. He was pleasant. He seemed like he just wanted to help us out.

"Q. The minute that you say you're there to speak with him, what happens?

"A. Well, nothing at first. We brought him over—away from the other gentleman that was working there and then I told him that I was there to talk to him about an allegation that [the victim] had made that she had been inappropriately touched by him, and that's when his demeanor completely changed.

"Q. How did it change? Only with that information, how did it change?

"A. Okay. His hands began to shake; he began to start to say something, and he would stutter; he couldn't finish a sentence. He was very nervous.

"Q. What happens next?

"A. He started to say, well, I shouldn't have done, and then he stopped midsentence, and he started to tell me about a wrestling story with him and [the victim] where he had slapped her on the butt, is what he said.

"Q. So, you haven't asked him a question yet?

"A. No.

"Q. And he says, I shouldn't have done [that], and then starts telling you this story?

"A. That's correct."

On the basis of this testimony, the prosecutor stated during rebuttal argument to the jury: "Young goes to see [the petitioner] unannounced. Why? Because if you go see someone right away, they don't have time to prepare a story, and you get to see their face and you get to see how they react, their demeanor, when they're confronted with the fact that the only confrontation initially—we have a report that you may have inappropriately touched your niece. Boom, Mr. Jovial; can I help you guys? What brings you by? He became panic stricken. Dumbfounded, maybe. The first thing out of his mouth is not, this is outrageous; I would never have

done such a thing. It's, oh, maybe I shouldn't have done it. There was this time we were wrestling. He doesn't know what . . . Young knows. So, the classic response is to come up with a scenario that you can try and explain. He made a mistake. *He told . . . Young some BS* about maybe he shouldn't have been wrestling. Why? Because he's hoping that's all . . . Young knows. We all know now Young knew a lot more than that." (Emphasis added.)

On appeal, the petitioner argues that, because he "never testified and there was no evidence admitted that [his] statement to Young was not truthful . . . there was no evidence from which the jury could reasonably infer that the petitioner lied to Young," and, it was therefore "improper for [the prosecutor] to interject his own opinion about the petitioner's credibility." (Citation omitted.) In response, the respondent argues that "it is clear from the context in which [the prosecutor's comment] was made that the prosecutor was not proffering his personal opinion regarding the credibility of the petitioner's statements to Young or of the petitioner generally but was drawing reasonable inferences from the evidence and, specifically, Young's testimony." We agree with the respondent.

The petitioner accurately states the law that "[t]he prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses . . . [n]or . . . express his opinion, directly or indirectly, as to the guilt of the defendant." (Internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 713, 793 A.2d 226 (2002). At the same time, however, "[i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor,

on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The state's attorney should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 583–84, 849 A.2d 626 (2004).

Additionally, it "is well established that a prosecutor may argue about the credibility of witnesses, as long as [his] assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom. . . . The prosecutor may also make these arguments with respect to the credibility of statements by the defendant himself, so long as they are rooted in the evidence at trial. See, e.g. . . . *State* v. *Smalls*, 78 Conn. App. 535, 542–43, 827 A.2d 784 (prosecutor may properly comment on defendant's voluntary pretrial statements if the defendant relies on those statements for a defense and comment does not burden defendant's right not to testify), cert. denied, 266 Conn. 931, 837 A.2d 806 (2003)." (Citations omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, supra, 318 Conn. 547–48.

Here, the prosecutor's suggestion that the petitioner was lying to Young was a proper argument rooted in the evidence presented at trial. The jury heard Young testify that the petitioner appeared to be "very nervous" when Young confronted him about the victim's accusations and that the petitioner subsequently denied those accusations, and the jury also heard the victim testify as to the truth of those accusations. From this testimony, the jury reasonably could have inferred that the petitioner was nervous when he spoke with Young not because, as defense counsel implied during closing argument, it is natural to "get nervous when a police officer stops you," especially when confronted with an

allegation of sexual assault, but, instead, because the victim's accusations were true, and the petitioner's wrestling explanation was a lie, or as the prosecutor phrased it, "BS," that was intended to convince Young that nothing more had transpired between the petitioner and the victim. The prosecutor was therefore asking the jury to draw a reasonable inference in the state's favor based on the evidence at trial, namely, that the victim's version of events was true and the petitioner's was not. Although the prosecutor's use of "BS" was inartful and unnecessary, it was not improper but, instead, was a fair comment on the evidence. See *State* v. *Fauci*, 282 Conn. 23, 39, 917 A.2d 978 (2007) ("in a case that essentially reduces to which of two conflicting stories is true, it may be reasonable to infer, and thus to argue, that one of the two sides is lying").

Accordingly, because we conclude that the prosecutor's statement was not improper and that the petitioner's prosecutorial impropriety claim thus lacks merit, the petitioner cannot establish that he was prejudiced by Koch's failure to raise that claim on appeal.

II

The petitioner next claims that the court erroneously concluded that Koch did not render ineffective assistance by failing to raise on direct appeal two other claims of prosecutorial impropriety that allegedly occurred during the petitioner's criminal trial. Specifically, the petitioner claims that the prosecutor improperly (1) referred to the complainant as the "victim" throughout the trial in violation of a court order and (2) identified a member of the trial audience as the third girl on the scene of the 2003 incident in an attempt to bolster the credibility of the victim and Young.

The following legal principles regarding claims of ineffective assistance of appellate counsel inform our analysis. "The first part of the *Strickland* analysis

requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [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 [appellate] strategy. . . . The right to counsel is not the right to perfect representation. . . . [Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, supra, 219 Conn. App. 288–89. "The determination of which issues to present, and which issues not to present, on an appeal is by its nature a determination committed to the expertise of appellate counsel, and not to his client. . . . [A] habeas court will not, with the benefit of hindsight, second-guess the tactical decisions of appellate counsel." (Citation omitted; internal quotation marks omitted.) *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 496, 84 A.3d 1246, cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014). Additionally, as previously noted in this opinion, "the second prong [of *Strickland*] considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal . . . [which] requires the reviewing court to [analyze] the merits of the underlying

claimed error in accordance with the appropriate appellate standard for measuring harm." (Internal quotation marks omitted.) *Valentine* v. *Commissioner of Correction*, supra, 289–90.

A

The petitioner first claims that Koch rendered ineffective assistance by failing to raise a claim on appeal that the prosecutor's repeated use of the term "victim" during trial in violation of a court order was improper and deprived the petitioner of his right to a fair trial. We are not persuaded.

The following additional facts, as set forth by this court in the petitioner's prior habeas appeal, are relevant to our review of this claim. "Prior to the commencement of trial, the petitioner's [defense] counsel filed a motion with the court to prohibit the use of the word 'victim' by either party. The court granted the motion in limine and cautioned all parties to refrain from addressing the complainant as the 'victim.' During the course of the trial, however, both the prosecutor and the petitioner's [defense] counsel sporadically used the word 'victim' when referencing the complainant in the presence of the jury. The prosecutor referred to the complainant as the 'victim' on six occasions and [defense] counsel did so twice. [Defense] counsel did not object to the prosecutor's violation of the court order or request a curative instruction from the court." *Donald G.* v. *Commissioner of Correction*, supra, 203 Conn. App. 70. This court upheld the first habeas court's decision that defense counsel did not render ineffective assistance by referring to the complainant as the "victim" or by failing to object to or request a curative instruction following the prosecutor's similar references. Id., 72–73. This court resolved the petitioner's claim of ineffective assistance of trial counsel on the prejudice prong of *Strickland* without addressing the

performance prong, reasoning that, "although both the state and [defense] counsel inappropriately referred to the complainant as the victim, neither did so consistently. Both parties predominately identified the witness either as the complainant or by use of her initials. There is simply no support for the petitioner's assertion that, but for [defense] counsel's use of the word 'victim' on two occasions throughout the entirety of the trial proceeding, or his failure to object or to request a curative instruction after the prosecutor made similar references, it is reasonably likely that the outcome of the trial would have been different. This conclusion is buttressed by the fact that the petitioner in fact was acquitted of one of the charges against him. If the jury had been improperly influenced by these references to the victim, presumably it would not have acquitted the petitioner of one of the charges." Id.

Consistent with this court's reasoning in the petitioner's prior habeas appeal, in the present case, Koch testified that "the evidence overall was so powerful that I didn't think that people saying the word, victim, a few times was going to get us anywhere. And also because [the petitioner was] acquitted on one count of sexual assault in the first degree, which seems to show to me that the jury didn't necessarily think of the complainant as a victim to the point that they could just blindly convict [him] because somebody called her a victim inadvertently in the courtroom."

On the basis of this testimony, the habeas court found that Koch "did not view the use of the term 'victim' as a strong issue to pursue on direct appeal." The court thereafter concluded that, "[g]iven the claim raised in the prior habeas, as affirmed by the Appellate Court . . . this claim was not one that reasonably competent appellate counsel should raise. Therefore, as applied to the petitioner's allegation that appellate counsel was ineffective for failing to raise a claim on direct appeal

challenging the use of the term 'victim' during the criminal trial, the court concludes that the petitioner has failed to prove both prongs of the [*Strickland*] test. There is no evidence establishing that [appellate counsel] rendered deficient performance on this basis. Even if this court were to assume deficient performance, there is no prejudice."

On appeal, the petitioner, addressing the factors used to determine whether a prosecutorial impropriety deprived a defendant of a fair trial; see *State* v. *Williams*, supra, 204 Conn. 540;[4] argues that the prosecutor's use of the term "victim" was not invited by the defense, was severe, frequent and central to critical issues in the case because the term "victim" has intrinsic potential for prejudice where allegations of sexual assault are raised, and that the prosecutor's use of that term was not mitigated by any curative measures by the court. Last, the petitioner asserts that the state's case against him was not particularly strong because it hinged on the victim's credibility, as to which there were already significant issues.

The respondent concedes that the prosecutor "may have improperly used the term 'victim' in light of the trial court's order precluding use of that term" but nevertheless argues that "any claim that the petitioner [was] deprived of a fair trial as a result of the prosecutor's use [is] meritless." According to the respondent, under the circumstances, "it is highly unlikely that the jury even later recalled, let alone [was] swayed by,"

[4] "[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, supra, 204 Conn. 540 . . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the impropriety to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, supra, 318 Conn. 549.

the prosecutor's use of the term "victim" during the evidentiary portion of the trial, and "the jury reasonably would have interpreted the prosecutor's sporadic use of the term [during closing argument] as argument concerning what the evidence revealed and not as any improper personal opinion regarding the victim's credibility or the petitioner's guilt."

Although "a *court's* repeated use of the word victim with reference to the complaining witness is inappropriate when the issue at trial is whether a crime has been committed . . . [a] different set of circumstances exists when the person making reference to the complaining witness is the prosecutor. . . . This is so, our courts have held, for two basic reasons. First, although a prosecutor's reference to the complainant as the 'victim,' in a trial where her alleged victimization is at issue, risks communicating to the jury that the prosecutor personally believes that she in fact is a victim, and thus the defendant is guilty of victimizing her, the isolated or infrequent use of that term in a trial otherwise devoid of appeals to passion or statements of personal belief by the prosecutor will probably be understood by jurors to be consistent with the prosecutor's many proper references to the complainant as the complainant or the alleged victim, particularly where the prosecutor openly acknowledges and willingly accepts the state's burden of proving the defendant guilty beyond a reasonable doubt solely on the basis of the evidence admitted at trial. Second, when a prosecutor uses that term in argument, where his or her role is generally expected and understood to be that of an advocate, such isolated or infrequent references to the complainant as the 'victim' are likely to be understood by jurors as parts of a proper argument that the evidence has established the complainant's victimization, and thus the defendant's guilt, beyond a reasonable doubt. In either of those circumstances, the prosecutor's use of the term 'victim'

in reference to the complainant is not considered improper because such usage does not illicitly ask the jury to find the defendant guilty on the basis of the prosecutor's personal belief in the complainant's victimization or the defendant's guilt." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 434–35, 238 A.3d 797, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020).

"Notwithstanding our courts' willingness . . . to excuse a prosecutor's rare and infrequent use of the term 'victim' to describe the complainant in a criminal trial, our Supreme Court has expressly admonished prosecutors to refrain from making excessive use of that term because of its obvious potential for prejudice." *State* v. *Thompson*, 146 Conn. App. 249, 269, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013).

On the basis of our review of the record, we agree with the habeas court's conclusions that Koch acted reasonably in determining not to raise this claim on appeal and that the petitioner was not prejudiced by that decision. In the context of the entire trial, the prosecutor's use of the terms "victim" and "victimization" was neither so frequent nor so severe as to deprive the petitioner of a fair trial.

In total, over the course of a five day trial that culminated in hundreds of transcript pages, there were only six references to the term "victim" or "victimization" by the prosecutor, which were sporadically mixed in among his numerous proper references to the victim as the "complainant," the "complaining witness," or by her initials. Given this ratio and considering the contexts in which the term was used, the alleged improprieties were infrequent and not consistent. As this court similarly noted in the petitioner's prior habeas appeal,

"although both the state and [defense] counsel inappropriately referred to the complainant as the victim, neither did so consistently. Both parties predominately identified the witness either as the complainant or by use of her initials." *Donald G.* v. *Commissioner of Correction*, supra, 203 Conn. App. 72; see also *State* v. *Olivero*, 219 Conn. App. 553, 594, 295 A.3d 946 (prosecutor's fourteen uses of term " 'victim' " during evidentiary portion of trial and closing argument "was not frequent when compared to the entirety of the trial, which was six days and culminated in approximately 900 transcript pages"), cert. denied, 348 Conn. 910, 303 A.3d 10 (2023).

Moreover, the alleged improprieties were not "blatantly egregious . . . ." *State* v. *Fauci*, supra, 282 Conn. 51; id. ("[b]eyond defense counsel's failure to object, in determining the severity of prosecutorial impropriety, we look to whether the impropriety was blatantly egregious or inexcusable"). On the basis of our review of the record, the prosecutor's "words . . . were not accompanied by other expressions of opinion as to the defendant's guilt" but, instead, appear to have been "mostly ill-chosen short-form references to the complainant, whom [the prosecutor] most commonly referred to during trial as the complainant . . . or by her initials . . . ." *State* v. *Thompson*, supra, 146 Conn. App. 273. Notably, Koch testified that he believed that the parties' references to the term "victim" during trial were generally inadvertent.

Finally, although the court did not provide specific curative instructions to the jury, the court repeatedly gave the jury general instructions not to consider the statements and arguments of counsel as evidence, including prior to the evidentiary portion of trial, and both before and after closing arguments. Given that the jury is presumed to follow instructions given by the court, "[t]hese general instructions were more than adequate to counteract any harm resulting from the alleged

improprieties." *State* v. *Olivero*, supra, 219 Conn. App. 595; see id. (court repeatedly instructed jury that counsel's arguments were not evidence, jurors were sole judges of credibility, and jurors must confine themselves to evidence in record). Additionally, the prosecutor expressly acknowledged the state's burden of proof beyond a reasonable doubt numerous times throughout closing arguments, stating at the start of his closing argument, for example, that "I need to be able to show you beyond a reasonable doubt that each element [of the charge] was met. If I don't, you are to acquit him on that charge; if I do, you should convict," and stating during rebuttal argument that whether the inconsistencies between the victim's testimony and the testimony of a defense witness "give [the jury] reasonable doubt . . . [is] up to [the jury] to decide." This makes it especially unlikely that the jury was unduly swayed by the prosecutor's sporadic use of the term "victim." See also *State* v. *Olivero*, supra, 595 (prosecutor began closing argument by informing jury that it, and not prosecutor, trial counsel or judge, was fact finder).

This conclusion draws further support from the jury's verdict finding the petitioner not guilty on the count of sexual assault in the first degree that stemmed from the 2008 Christmas party incident. See *State* v. *Courtney G.*, supra, 339 Conn. 365 (jury's verdict of not guilty on some charges "clearly demonstrat[es] the jurors' ability to filter out the allegedly improper statements and make independent assessments of credibility" and "is a strong indication that the defendant was not prejudiced by prosecutorial impropriety" (internal quotation marks omitted)). As this court concluded in the petitioner's prior habeas appeal, "[i]f the jury had been improperly influenced by these references to the victim, presumably it would not have acquitted the petitioner of one of the charges." *Donald G.* v. *Commissioner of Correction*, supra, 203 Conn. App. 73.

Accordingly, we agree with the habeas court's conclusion that Koch's decision not to raise this claim of prosecutorial impropriety neither constituted deficient performance nor prejudiced the petitioner.

B

The petitioner next claims that Koch rendered ineffective assistance by failing to raise a claim on appeal that, during rebuttal argument to the jury, the prosecutor improperly proffered unsworn testimony by identifying the victim's sister, the third girl who allegedly was present during the 2003 incident, in the trial audience. We agree with the habeas court's conclusion that the petitioner failed to establish both that Koch performed deficiently by failing to raise this claim and that a reasonable probability existed that the petitioner would have prevailed on appeal but for that failure.

The following additional facts set forth in the habeas court's memorandum of decision are relevant to our resolution of this claim. "On the first day of the criminal trial . . . the victim testified that she, her sister . . . and her friend . . . went to the petitioner's garage to help him paint. . . . [The victim] at some point was painting upstairs with the petitioner while [the sister] and [the friend] were downstairs painting. [The victim] described the petitioner sexually assaulting her when she was alone with him upstairs while the other two were downstairs. [The sister] and [the friend] did not testify in the criminal trial. During the state's rebuttal arguments, the prosecutor summarized [the victim's] testimony [about] her sister and friend [being] at the garage. The prosecutor stated that [the sister] was sitting right there, presumably in the courtroom. . . .[5] The

[5] The prosecutor argued during rebuttal in relevant part: "The rest has been placed before you in painstaking detail. Hey, she said three girls on the stand. [Her friend], *her sister . . . who is sitting right there*, as well as herself; three girls. But [the defense witness], who doesn't remember what day it is, says two girls. Is that inconsistency enough? Does that give you reasonable doubt? That's up to you to decide." (Emphasis added.)

context in which the prosecutor referred to [the victim] and the two other girls was to contrast [the victim's] trial testimony with that of a defense witness . . . who testified that he only saw two girls. Thus, the prosecutor was highlighting inconsistent testimony about how many girls were present in the garage on the day [the victim] testified the one sexual assault occurred." (Citations omitted; footnote added.)

The court further found that, at the habeas trial, the prosecutor provided no explanation for his closing arguments. Additionally, the court found that Koch "could not recall if [the sister] testified and noted that transcripts do not necessarily reflect nonverbal events during a trial. The transcript of the state's rebuttal argument, while reflecting that the prosecutor referenced [the sister], is silent as to any physical indication of who [the sister] is or where she is sitting. . . . Koch also could not recall if he considered raising a claim based on these events, as well as why he did not [raise] such a claim if he had considered it and could only describe his general strategy of raising claims that had 'some traction.' "

Accordingly, the habeas court concluded that, "[g]iven this paucity of evidence . . . the petitioner has failed to affirmatively show that . . . Koch rendered deficient performance by not raising a claim on appeal regarding the prosecutor's alleged gesture. Furthermore, the petitioner has also not shown that he would have prevailed on appeal had such a claim been raised."

The petitioner argues that the court's conclusion was improper because the court's "focus on the lack of testimony from [the prosecutor] was misdirected, as such testimony would be irrelevant to the petitioner's claim. Rather, the petitioner's claim related to Koch's failure to raise this instance of impropriety on appeal upon the record available to [him] at the time that he

represented the petitioner." According to the petitioner, the record available to Koch when he represented the petitioner on appeal indicated that the prosecutor "referred to the purported identity and presence of [the victim's] younger sister . . . at trial during closing arguments, expressing to the jury his own secret knowledge of identification evidence that was not admitted during the course of the trial. . . . This conduct was improper," and Koch rendered ineffective assistance when he failed to raise that issue on appeal.

The respondent argues that it is unclear whether the prosecutor's conduct was improper. According to the respondent, in the absence of any indication in the trial transcripts that the prosecutor pointed or gestured to anyone in the trial audience, it is equally possible that the prosecutor's statement was simply an inartful argument that the defense witness' testimony was not credible because, if that witness had actually been present at the scene of the 2003 incident, he could not have missed the sister, " 'who [was] sitting right there' at the crime scene." We agree with the respondent that the prosecutor's remark was ambiguous and conclude, therefore, that reasonably competent counsel may not have interpreted it as giving rise to a valid prosecutorial impropriety claim.

Moreover, even if Koch had argued on appeal that this statement constituted prosecutorial impropriety, that argument was unlikely to have been successful. Assuming that the prosecutor pointed or gestured to the sister to indicate that the sister was " 'sitting right there,' " at the petitioner's criminal trial, the statement had minimal, if any, prejudicial effect. The only new information the statement suggested was that the sister, whom the victim claimed had accompanied her to the petitioner's workplace on the day of the 2003 incident, was a real person and that she was present at the petitioner's trial. This information was unlikely to have had

any meaningful impact on the jury because only the sister's presence during the 2003 incident, not the fact that she was a real person, was a disputed fact that was central to a critical issue in the case. Contrary to the petitioner's argument, the prosecutor's knowledge of the sister's presence at the trial would not serve to corroborate the victim's testimony that the sister was present during the 2003 incident. Additionally, defense counsel did not object to this statement, which suggests that he did not believe it was so severe that it risked depriving the petitioner of a fair trial, and the prosecutor made such a passing reference on only one discrete occasion. See *State* v. *Fauci*, supra, 282 Conn. 51.

Thus, it would not have been unreasonable for Koch to conclude that this claim lacked " 'traction,' " nor is there any likelihood that this claim would have succeeded on appeal had Koch raised it. Accordingly, we agree with the habeas court that the petitioner has failed to prove both that Koch performed deficiently by failing to raise this claim on appeal and that the petitioner was prejudiced by that failure.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] As to the petitioner's claims regarding the prosecutor's identification of the sister and use of the term "victim," the petitioner argues that the habeas court erred by deciding these issues separately because "the cumulative effect of the petitioner's claimed improprieties must be analyzed together." The petitioner is correct that, under the second part of the analysis in *State* v. *Williams*, supra, 204 Conn. 540; see part I C 2 of this opinion; the court must assess "whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 287, 973 A.2d 1207 (2009). Nonetheless, given that neither impropriety the petitioner alleged was particularly egregious, frequent, or necessarily even improper under the first part of that analysis, our conclusion remains the same even if we consider the cumulative effect of the alleged improprieties on the fairness of the petitioner's criminal trial.

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(AC 45845)

Moll, Clark and Seeley, Js.

Syllabus

The plaintiff, N Co., appealed to this court from the judgment of the trial court denying its application for a prejudgment remedy pursuant to statute (§ 52-278a et seq.). N Co.'s proposed complaint alleged common-law and statutory vexatious litigation claims that arose out of an earlier action to which N Co. was not a party. The trial court in the earlier action had rendered judgment for H Co., the plaintiff in that action, and it awarded attorney's fees to H Co. H Co. thereafter changed its name to B Co., and B Co. assigned the judgment obtained in the earlier action and all related claims arising out of such litigation to N Co. The defendants named in the present action were either defendants in the earlier action or attorneys and law firms who represented those defendants. The court in the present action thereafter denied N Co.'s application, concluding that its proposed vexatious litigation claims were barred by the doctrine of collateral estoppel and that the payment of any judgment rendered against the law firm defendants would be adequately secured by insurance. *Held* that the trial court lacked subject matter jurisdiction over N Co.'s application for a prejudgment remedy, as N Co. lacked standing to bring the application predicated on its vexatious litigation claims: N Co.'s claims fell squarely within the category of tort claims that may not be assigned, as its alleged damages included, inter alia, claims of injuries to H Co.'s business reputation and attorney's fees necessary for the defense of claims against H Co., which were personal in nature and accrued only to H Co. and not to N Co.; accordingly, this court reversed the trial court's judgment and directed the trial court to dismiss N Co.'s application.

Argued November 14, 2023—officially released March 5, 2024

Procedural History

Application for a prejudgment remedy seeking the attachment or garnishment of certain of the defendants' property, brought to the Superior Court in the judicial district of Waterbury, where the court, *Pierson*, *J.*, denied the application, and the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Bruce L. Elstein, for the appellant (plaintiff).

Kenneth A. Votre, for the appellees (named defendant et al.).

Jonathan C. Zellner, for the appellees (defendant Bruce W. Diamond et al.).

Lorey Rives Leddy, with whom, on the brief, was *David P. Friedman*, for the appellees (defendants Pullman & Comley, LLC, et al.).

Opinion

CLARK, J. The plaintiff, Northeast Building Supply, LLC, appeals from the judgment of the trial court denying the application for a prejudgment remedy that it filed in accordance with General Statutes § 52-278a et seq. against the defendants, Maureen Morrill, Clifford Jones, Pullman & Comley, LLC, Attorney Irve Goldman, Attorney Bruce Diamond, and the Law Office of Bruce W. Diamond, LLC. On appeal, the plaintiff claims that the trial court erred in denying its application for a prejudgment remedy when it concluded that (1) collateral estoppel barred the vexatious litigation claims it sought to bring against the defendants and (2) the attorney and law firm defendants—Pullman & Comley, LLC, Goldman, Diamond, and the Law Office of Bruce W. Diamond, LLC—had adequate insurance to secure any judgment that might be rendered against them.

The defendants argue that the court properly denied the plaintiff's application for a prejudgment remedy. They also, for the first time on appeal, raise a jurisdictional claim. They claim that the plaintiff lacked standing to assert the vexatious litigation claims against the defendants because those claims were assigned to the plaintiff from a different entity, Northeast Builders Supply & Home Centers, LLC (Home Centers). The defendants argue that the plaintiff's vexatious litigation claims constitute tort claims that involve alleged personal injuries unique to Home Centers. They further

contend that Connecticut law makes clear that such tort claims may not be assigned. Consequently, the defendants maintain that the plaintiff lacks standing to pursue its application for a prejudgment remedy.

For the reasons that follow, we agree with the defendants that the plaintiff lacks standing to pursue the application for a prejudgment remedy and, consequently, that the trial court was without subject matter jurisdiction. Accordingly, we reverse the judgment of the trial court and remand the case to that court with direction to render judgment dismissing the plaintiff's application.[1]

I

We begin with an overview of the relevant facts and procedural history of this case. On September 17, 2021, the plaintiff filed an application for a prejudgment remedy pursuant to General Statutes § 52-278c,[2] alleging

[1] In advancing their arguments, some of the defendants also appear to claim that this court lacks jurisdiction over the present appeal because the plaintiff lacked standing to bring the vexatious litigation claims against the defendants. We disagree. "It is well established that the subject matter jurisdiction of [our appellate courts] is governed by [General Statutes] § 52-263, which provides that an *aggrieved party* may appeal to the court having jurisdiction from the *final judgment* of the court." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *King* v. *Sultar*, 253 Conn. 429, 434, 754 A.2d 782 (2000); see also Practice Book § 63-1. The plaintiff is the entity that initiated this matter by filing an application for a prejudgment remedy. The trial court denied the application on the basis of collateral estoppel and the adequacy of insurance. The plaintiff is aggrieved because it has a specific legal interest in its application and the issues decided by the court in denying its application. The denial of an application for a prejudgment remedy following a hearing is a final judgment for purposes of an appeal. See General Statutes § 52-278*l*. Accordingly, this court has jurisdiction over the present appeal.

[2] General Statutes § 52-278c provides in relevant part: "(a) Except as provided in sections 52-278e and 52-278f, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents: (1) An application, directed to the Superior Court to which the action is made returnable, for the prejudgment remedy requested; (2) An affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is

that there was probable cause to believe that it would recover at least $600,000 on the basis of its proposed, unsigned writ of summons and complaint. The plaintiff's proposed three count complaint against the defendants alleged a common-law vexatious litigation claim, a statutory vexatious litigation claim for double damages pursuant to General Statutes § 52-568 (1), and a statutory vexatious litigation claim for treble damages pursuant to § 52-568 (2), all arising out of an earlier action to which the plaintiff was not a party. See *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-09-5021502 (February 2, 2018), aff'd, 202 Conn. App. 315, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021) (RMM litigation).

The RMM litigation to which the plaintiff was not a party was commenced by Home Centers, a building supply company, against RMM Consulting, LLC (RMM); Todd Hill Properties, LLC; Morrill; and Jones (original defendants) to recover damages for breach of contract after the original defendants purportedly failed to make payments owed for building materials sold to them pursuant to a credit agreement. See *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 321, 245 A.3d 804, cert. denied, 336 Conn. 933, 248 A.3d 709 (2021). The credit agreement

probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any known defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff; (3) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing complying with subsection (e) of this section be given to the defendant; (4) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing . . . ."

entered into between Home Centers and the original defendants was signed by Morrill, who was the sole member of both RMM and Todd Hill Properties, LLC, and by Jones, who is Morrill's husband and a building contractor, in their capacities as both buyers and personal guarantors. Id., 320. The defendant Diamond, the principal of the defendant Law Office of Bruce Diamond, LLC, represented the original defendants in the RMM litigation. The defendant Goldman, an attorney with the defendant Pullman & Comley, LLC, also represented Morrill and Jones in that action but only with respect to the fifth special defense, which claimed that the original defendants had not purchased any of the goods and materials at issue from Home Centers.

After lengthy litigation and a bench trial, the court, *Arnold*, *J.*, rendered judgment in favor of Home Centers on its claims and on the original defendants' counterclaim. The court awarded Home Centers $68,886.58, plus interest on the principal debt. See id., 328. The court further indicated that it would schedule a postverdict hearing to determine "if the court would award attorney's fees and costs to the plaintiff and, if so, what amounts may be reasonable." In its memorandum of law in support of attorney's fees, Home Centers argued that it was entitled to attorney's fees exceeding the amount its attorneys were entitled to in accordance with the contingency fee arrangement it had entered into with its attorneys because Home Centers and its counsel expended significant time and resources defending against what Home Centers argued were meritless defenses. After a hearing, the court rejected Home Centers' claim that it was entitled to attorney's fees in excess of the amount it owed under the contingency fee arrangement and awarded Home Centers a total of $35,346.87 in attorney's fees, which included $10,846.87 in accordance with the contingency fee agreement between Home Centers and its counsel to prosecute

its case-in-chief, $9500 for the defense of the original defendants' counterclaim, and $15,000 for the representation of Home Centers' interest in the United States Bankruptcy Court.[3]

The plaintiff's unsigned, proposed complaint in support of its application for a prejudgment remedy in this case alleges that, "[b]efore December 14, 2020, [Home Centers] obtained a judgment against the defendants, Morrill and Jones (among others)" and that, "[o]n or about December 14, 2020, [Home Centers] changed its name to Brilco [Capital Holdings, LLC (Brilco)]." The unsigned complaint further alleges that the plaintiff has standing because "[o]n or about August 10, 2021, Brilco, [formerly known as Home Centers], assigned the judgment obtained in the RMM litigation and all related claims that arose out of or [were] related to such litigation to [the plaintiff]."

In October, 2021, the defendants Pullman & Comley, LLC, Goldman, Diamond, and the Law Office of Bruce W. Diamond, LLC (collectively, law firm defendants), filed objections to the plaintiff's application for a prejudgment remedy arguing, inter alia, that the doctrine of collateral estoppel barred the plaintiff's vexatious litigation claims against them. They claimed that Judge Arnold in the RMM litigation already found that the original defendants "in good faith exercised their rights and available remedies in defending [that] case," and that the pursuit of the fifth special defense reflected a proper effort to use all the "tools" in the original defendants' "toolbox." They further claimed that these findings were fundamental to the trial court's determination that Home Centers' award of attorney's fees was limited to the amount due under the contingency fee

[3] A more detailed recitation of the underlying facts of the RMM litigation is set forth in this court's prior decision in *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, supra, 202 Conn. App. 321.

agreement and not based on an hourly rate. Accordingly, they argued that the doctrine of collateral estoppel barred the plaintiff's underlying vexatious litigation claims and that the plaintiff therefore could not establish that there was probable cause that it would obtain a judgment in the amount it sought in its application for a prejudgment remedy. The law firm defendants also argued that the plaintiff's application should be denied because they had ample insurance to cover any judgment against them. See General Statutes § 52-278d (a) (4).

On February 2, 2022, the court, *Pierson*, *J.*, ordered that the evidentiary hearing on the plaintiff's application for a prejudgment remedy would be bifurcated, and that the hearing would be held on two separate days. Phase I of the hearing would be limited to whether (1) the plaintiff was collaterally estopped from pursuing the application against one or all of the defendants and (2) the defendants had adequate insurance to secure a judgment in the amount of $600,000. Phase II would address all remaining factual and legal issues raised by the plaintiff's application and the defendants' opposition thereto.[4]

On September 21, 2022, the court denied the plaintiff's application for a prejudgment remedy. The court concluded that (1) the plaintiff failed to demonstrate probable cause that a judgment in the amount sought would be rendered in its favor because its proposed vexatious

[4] On January 4, 2022, before issuing its February 2 bifurcation order, the court issued an order indicating that it was considering bifurcating the hearing on the plaintiff's application and provided the parties with an opportunity to brief the issue of whether bifurcation was appropriate. Each of the parties provided the court with their respective position. Additionally, on January 25, 2022, Jones and Morrill filed an objection to the plaintiff's application for a prejudgment remedy. They claimed, inter alia, that the advice of counsel defense barred the plaintiff's vexatious litigation claims against them.

litigation claims were barred by the doctrine of collateral estoppel and (2) as to the law firm defendants, the payment of any judgment rendered against them was adequately secured by insurance. See General Statutes § 52-578d (a). The plaintiff timely appealed the court's decision.

II

For the first time on appeal, the defendants challenge the plaintiff's standing to bring its application for a prejudgment remedy against them. In the defendants' view, the underlying vexatious litigation claims that the plaintiff seeks to pursue in this case are tort claims alleging personal injuries unique to Home Centers and therefore are not assignable from Home Centers to the plaintiff under Connecticut law. As a result, the defendants claim that the plaintiff lacked standing to bring its application for a prejudgment remedy because it is predicated on claims that the plaintiff does not have standing to assert. They therefore claim the trial court lacked subject matter jurisdiction over the matter.[5]

The plaintiff argues that it has standing because the assignment at issue is valid and enforceable. Specifically, the plaintiff maintains that enforcement of the

[5] On October 5, 2022, after the plaintiff filed this appeal but before the parties briefed their claims, the defendants Pullman & Comley, LLC, and Goldman filed a motion to dismiss the present appeal on the ground that the plaintiff lacked standing to maintain the underlying prejudgment remedy application and proposed complaint. They argued that the vexatious litigation claims were tort claims not assignable under Connecticut law. They also argued that it was against public policy to allow Home Centers to assign the vexatious litigation claims to the plaintiff because the plaintiff was a shell company specifically formed as a separate legal entity for the sole purpose of pursuing the vexatious suit claims against the defendants in order to insulate the plaintiff from the risk of consequences should those vexatious suit claims turn out to lack probable cause. On December 13, 2022, this court denied the motion to dismiss "without prejudice to parties addressing their arguments concerning the plaintiff's standing in their briefs on the merits of this appeal."

assignment would not violate public policy because the assignment was part of the business reorganization of Home Centers. It contends that Home Centers was reorganized pursuant to a reorganization agreement, that Home Centers changed its name to Brilco, and that Brilco transferred, assigned, and conveyed all of the operating assets it owned to New Holdco, defined as Northeast Group Holdings, LLC. The plaintiff contends that New Holdco then transferred to the plaintiff all rights, title, and interest in Brilco. As a result, the plaintiff contends that it now owns and runs the business that was formerly known as Home Centers. The plaintiff maintains that, under such circumstances, it would not violate public policy to enforce the transfer and assignment of the vexatious litigation claims, which in its view are not unique or personal to Home Centers. In addition, the plaintiff contends that the defendants' arguments go to the validity of the assignment, not to whether it had standing to pursue the application for a prejudgment remedy.

A

We begin with the relevant legal principles relating to standing. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [it] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 488, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, 579 U.S. 903, 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

"A valid assignment transfers to the assignee exclusive ownership of all of the assignor's rights to the

subject assigned and extinguishes all of those rights in the assignor." *Mall* v. *LaBow*, 33 Conn. App. 359, 362, 635 A.2d 871 (1993), cert. denied, 229 Conn. 912, 642 A.2d 1208 (1994); see also *Bouchard* v. *People's Bank*, 219 Conn. 465, 473, 594 A.2d 1 (1991). Contrary to the plaintiff's contention on appeal, our case law makes clear that the validity or enforceability of an assignment implicates the standing of an assignee to pursue purportedly assigned claims. See *Bozelko* v. *Milici*, 139 Conn. App. 536, 539–40, 57 A.3d 762 (2012) (plaintiff who assigned interest in action to third person no longer had standing to file petition for new trial), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013). Indeed, in the absence of a lawful assignment of a claim, a purported assignee cannot stand in the shoes of the assignor and, therefore, lacks standing to proceed with that claim. See id.; see also *Riffin* v. *Consolidated Rail Corp.*, 783 Fed. Appx. 246, 250 (3d Cir. 2019) ("[T]he purported assignment to [the plaintiff] is champertous, and, therefore, it is invalid. Thus, [the plaintiff] lacked standing to bring his claims here.").

"[W]hen a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, supra, 159 Conn. App. 488; see also *Premier Capital, LLC* v. *Shaw*, 189 Conn. App. 1, 5, 206 A.3d 237 (2019) (judgment debtor's claim that plaintiff lacked standing to bring action was reviewable on appeal, even though judgment debtor raised it for first time on appeal).

B

We turn next to the law in Connecticut governing the assignability of claims. The question of whether a particular legal claim may be assigned requires an examination of the nature of the legal claim at issue. Our Supreme Court, for instance, has held that the assignment of contract claims is permissible; *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 267–68, 757 A.2d 526 (2000); but the assignment of tort claims is not. See *Dodd* v. *Middlesex Mutual Assurance Co.*, 242 Conn. 375, 382–84, 698 A.2d 859 (1997). With respect to contract claims, our Supreme Court has explained that "the modern approach to contracts rejects traditional common-law restrictions on the alienability of contract rights in favor of free assignability of contracts. . . . Common-law restrictions on assignment were abandoned when courts recognized the necessity of permitting the transfer of contract rights. The force[s] of human convenience and business practice [were] too strong for the common-law doctrine that [intangible contract rights] are not assignable." (Citations omitted; internal quotation marks omitted.) *Rumbin* v. *Utica Mutual Ins. Co.*, supra, 267–68.

Conversely, our Supreme Court has held that tort claims alleging injuries that are personal in nature are not assignable. See *Stearns & Wheeler, LLC* v. *Kowalsky Bros.*, 289 Conn. 1, 8, 955 A.2d 538 (2008) ("[w]e have prohibited . . . the assignment of tort claims"); *Gurski* v. *Rosenblum & Filan, LLC*, 276 Conn. 257, 267, 885 A.2d 163 (2005) ("[w]e have taken a contrary position . . . with respect to whether a tort claim can be assigned, at least when the claim is based on personal injury"). In *Dodd*, our Supreme Court explained that "[t]he reasons underlying the rule [prohibiting the assignment of causes of action to recover for personal injuries] have been variously stated: unscrupulous interlopers and litigious persons were to be discouraged

from purchasing claims for pain and suffering and prosecuting them in court as assignees; actions for injuries that in the absence of statute did not survive the death of the victim were deemed too personal in nature to be assignable; a tort-feasor was not to be held liable to a party unharmed by him; and excessive litigation was thought to be reduced." (Internal quotation marks omitted.) *Dodd* v. *Middlesex Mutual Assurance Co.*, supra, 242 Conn. 382–83.

It is not always clear, however, whether a particular claim is a "contract" claim or a "tort" claim for purposes of assignability. In such circumstances, our Supreme Court has undertaken an individualized and fact specific analysis to determine whether the assignment of the particular claim in question violates public policy. In *Gurski* v. *Rosenblum & Filan, LLC*, supra, 276 Conn. 267–68, for example, our Supreme Court observed that, "[b]ecause an action for legal malpractice can be pleaded either in contract or in tort . . . neither *Dodd* nor *Rumbin*, nor their labels, [was] helpful," and that "the better approach [was] to resolve the issue uniformly on the basis of public policy." (Citations omitted.) Id. The court held that "an assignment of a legal malpractice claim or the proceeds from such a claim to an adversary in the same litigation that gave rise to the alleged malpractice is against public policy and thereby unenforceable." Id., 259–60.

Similarly, in *Stearns & Wheeler, LLC* v. *Kowalsky Brothers, Inc.*, supra, 289 Conn. 9, our Supreme Court concluded that the claim in that case of a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., was not clearly a contract claim or a tort claim because "CUTPA claims, generally, are purely statutory and cannot be precisely characterized either as tort claims or as contract claims." The court again resolved the issue of assignability by undertaking an individualized public policy

analysis of the particular claim that was assigned in that case. Id., 10–11. The court concluded that the assignment of the plaintiff's CUTPA claim in that case was invalid because enforcement would violate the public policy interests of the exclusivity provision of the Workers' Compensation Act, General Statutes § 31-275 et seq.[6] Id., 11.

In the present case, the vexatious litigation claims that the plaintiff asserts do not require us to undertake an individualized and fact specific analysis to determine whether the assignment of those claims violates public policy. That is because the plaintiff's vexatious litigation claims fall squarely within the category of tort claims that may not be assigned. First, Connecticut courts have historically and routinely categorized vexatious litigation claims as tort claims. See, e.g., *Rioux* v. *Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007) ("the fact that the *tort* of vexatious litigation itself employs a [balancing test] . . . counsels strongly against a categorical or absolute immunity from a claim of vexatious litigation" (emphasis added)); *DeLaurentis* v. *New Haven*, 220 Conn. 225, 267, 597 A.2d 807 (1991) ("lack of probable cause is the gravamen of the *tort* of vexatious suit" (emphasis added)); *Blake* v. *Levy*, 191 Conn. 257, 262–63, 464 A.2d 52 (1983) ("[i]n a case like the present one, where the claimed impropriety arises out of previous

[6] In *Stearns & Wheeler, LLC*, the defendant also argued "that CUTPA claims, generally, are not assignable." *Stearns & Wheeler, LLC* v. *Kowalsky Brothers, Inc.*, supra, 289 Conn. 9 n.12. Although the court did not directly address the defendant's argument, it noted "that two state supreme courts, one in North Carolina and the other in Texas, have concluded that actions brought pursuant to their respective deceptive trade practices acts, which are similar but not identical to CUTPA, are not assignable. See *Investors Title Ins. Co.* v. *Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268 (1992); *PPG Industries, Inc.* v. *JMB/Houston Centers Partners Ltd. Partnership*, 146 S.W.3d 79, 83–87 (Tex. 2004)." *Stearns & Wheeler, LLC* v. *Kowalsky Brothers, Inc.*, supra, 9 n.12. Our Supreme Court explained that, "[i]n both cases, the courts expressed legitimate concerns about the market that would be created if deceptive trade practices claims were assignable." Id.

litigation, we may usefully look for guidance to the principles that have evolved to define the *tort* of malicious prosecution and vexatious litigation, because those kindred torts have also had to address the competing policies of deterrence of groundless litigation and protection of good faith access to the courts" (emphasis added)). Indeed, in defining the parameters of a vexatious litigation claim in Connecticut, our Supreme Court has often looked to the Restatement (Second) of Torts, which describes, among other things, torts relating to unjustifiable litigation, including the torts of malicious prosecution, wrongful use of civil proceedings,[7] and abuse of process. See 3 Restatement (Second), Torts, §§ 653 through 682, pp. 404–75 (1977); see also *DeLaurentis* v. *New Haven*, supra, 256; *Blake* v. *Levy*, supra, 264.

This is true regardless of whether the claim being asserted is the common-law tort of vexatious litigation or the statutory tort of vexatious litigation. "In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. . . . [T]o establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under . . . § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation

[7] As one Superior Court has observed, the elements of a claim of wrongful use of civil proceedings "appear to be identical to those of Connecticut's tort of vexatious litigation." *J.M. Scott Associates, Inc.* v. *Whitney*, Superior Court, judicial district of Litchfield, Docket No. CV-12-6006095 (September 6, 2012) (54 Conn. L. Rptr. 653, 655).

marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 183, 118 A.3d 158 (2015). The mere fact that the legislature has chosen to codify the common-law tort of vexatious litigation with a statutory analog that differs only insofar as it eliminates the requirement that a plaintiff prove malice while also providing for the possibility of higher damages when malice is proven does not transform the claim into a contract claim or create any ambiguity with respect to whether it is a claim sounding in tort.

Second, as with other torts that our courts have deemed unassignable, the injuries suffered by plaintiffs alleging vexatious litigation are personal in nature. See *Dodd* v. *Middlesex Mutual Assurance Co.*, supra, 242 Conn. 382 ("[a]n assignment of a claim against a third person or a bargain to assign such a claim is illegal and ineffective if the claim is for . . . damages for an injury the gist of which is to the person rather than to property, unless the claim has been reduced to judgment" (internal quotation marks omitted)). Indeed, the personal nature of the tort is elucidated by the types of economic and noneconomic damages that may be incurred as a result of vexatious litigation. For example, economic damages for a vexatious litigation claim may include, inter alia, "attorney's fees, incurred to defend against the underlying action or proceeding, any lost wages for time required to attend court proceedings in the underlying action or proceeding, any loss to business or property resulting from the commencement and prosecution of the underlying action or proceeding, and any reasonable and necessary medical expenses incurred to treat physical or mental injury caused by the commencement and prosecution of the underlying action or proceeding." Connecticut Civil Jury Instructions 3.13-5 and 3.13-6, available at https://jud.ct.gov/JI/Civil/Civil.pdf (last visited February 29, 2024). As to noneconomic damages, a plaintiff may be entitled to

damages for, inter alia, "mental anguish, humiliation, embarrassment, mortification, shame, fear and damage to reputation." Id. Simply put, actions for vexatious litigation recognize "the right of an *individual* to be free from unjustifiable litigation . . . . The purpose of the action is to compensate *a wronged individual* for damage to *his* reputation and to reimburse *him* for the expense of defending against the unwarranted action." (Emphasis added; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 553–54, 944 A.2d 329 (2008), citing 8 S. Speiser et al., American Law of Torts (1991) § 28:20, p. 113.

The plaintiff's proposed complaint in the present case further illustrates the personal nature inherent in a claim of vexatious litigation. It alleges, for instance, that "[Home Centers] suffered damages," including, inter alia, "[l]ost time managing its business affairs due to time spent attending to discovery, depositions, hearings and trial"; "[i]njuries to its business and professional reputation"; "[p]ublic disclosure of its private and highly confidential financial information"; "[d]isruption of personnel of [Home Centers] attending and responding to defending such claim(s)"; and "[a]ttorney's fees necessary for the defense of the claims . . . ."[8] As is true with vexatious litigation claims in

[8] We note that one federal District Court has held that a vexatious litigation claim may be assigned if it seeks to recover only attorney's fees. See *Zabelle* v. *Coratolo*, 816 F. Supp. 115, 121 (D. Conn. 1993). The plaintiff in this case, however, unlike the plaintiff in *Zabelle*, seeks to recover for a broad range of injuries, including but not limited to attorney's fees. In addition, Home Centers has already been compensated for the attorney's fees it incurred in the RMM litigation. See *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, supra, 202 Conn. App. 328 n.15 ("[o]n September 4, 2018, following a hearing, the court issued a decision awarding the plaintiff $35,346.87 in attorney's fees as well as postjudgment interest pursuant to General Statutes § 37-3a of 6 percent per annum"). More fundamentally, we are not convinced that a vexatious litigation claim seeking to recover only attorney's fees falls outside the class of torts that are personal in nature and are therefore not assignable. Irrespective of the relief sought, a claim

general, whether asserted by an individual or a business entity, these are claims that are personal in nature and, in this case, accrued to the original assignor, Home Centers, and not the plaintiff.

Our conclusion finds further support in the decisions of our Supreme Court and courts of last resort in other states holding that malicious prosecution claims are among the class of torts that seek redress for injuries that are personal in nature and are therefore not assignable. See *Whitaker* v. *Gavit*, 18 Conn. 522, 526 (1847) ("[i]t is certain that a right of action for a personal injury, as for an assault and battery, slander, *malicious suit* . . . is not assignable even in equity" (emphasis added)); see also *Tomkovich* v. *Mistevich*, 222 Mich. 425, 429, 192 N.W. 639 (1923) ("a right of action for malicious prosecution is personal, and cannot be assigned"); *Investors Title Ins. Co.* v. *Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268 (1992) ("[c]laims such as defamation, abuse of process, malicious prosecution or conspiracy to injure another's business are not assignable as such claims are considered personal torts"). Although the plaintiff in the present case asserts a vexatious litigation claim rather than a malicious prosecution claim, "[a] vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint." (Internal quotation marks omitted.) *Falls Church*

for vexatious litigation is personal in nature insofar as it arises from conduct that caused a particular person or entity to sustain injuries that are unique to that person or entity. This is true even with respect to vexatious litigation claims seeking to recover only attorney's fees. The damages one incurs as a result of having to expend money on legal fees due to the vexatious litigation tactics of another party are influenced by personal factors, including the very personal relationship between an attorney and a client, the personal decisions a client makes while defending against such claims, the unique legal advice a client receives from a particular attorney, and the personal decision a client makes when selecting an attorney for legal representation.

Group, Ltd. v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007), citing *Schaefer* v. *O. K. Tool Co.*, 110 Conn. 528, 148 A. 330 (1930).[9] Indeed, "[t]he elements of the torts of malicious prosecution and vexatious litigation are identical . . . ." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553 n.6.

For the foregoing reasons, we conclude that the vexatious litigation claims assigned to the plaintiff from Home Centers are tort claims that are personal in nature and, therefore, the assignment is not enforceable. As a result, the plaintiff lacks standing to pursue those claims against the defendants. See *Stearns & Wheeler, LLC* v. *Kowalsky Bros.*, supra, 289 Conn. 8; *Bozelko* v. *Milici*, supra, 139 Conn. App. 539. It inexorably follows that the plaintiff lacked standing to bring its application for a prejudgment remedy predicated on those claims, and the trial court therefore lacked subject matter jurisdiction over the application.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the plaintiff's application for a prejudgment remedy.

In this opinion the other judges concurred.

[9] We note that many states, unlike Connecticut, refer to vexatious litigation claims in the civil context as "malicious prosecution" claims. See, e.g., *Chervin* v. *Travelers Ins. Co.*, 448 Mass. 95, 102–103, 858 N.E.2d 746 (2006) ("[t]he tort [of malicious prosecution] is not confined to the wrongful initiation of criminal proceedings; it may be maintained for the unjustifiable initiation of a civil action" (internal quotation marks omitted)); *Burt* v. *Smith*, 181 N.Y. 1, 5, 73 N.E. 495 (1905) ("[a]n action for malicious prosecution is usually based upon an arrest in criminal proceedings, although it may be founded upon a civil action when commenced simply to harass and oppress the defendant"), cert. denied, 203 U.S. 129, 27 S. Ct. 37, 51 L. Ed. 121 (1906); *Ims* v. *Portsmouth*, 32 A.3d 914, 922 (R.I. 2011) (defining malicious prosecution "as a suit for damages resulting from a prior criminal or civil legal proceeding that was instituted maliciously and without probable cause, and that terminated unsuccessfully for the plaintiff therein" (internal quotation marks omitted)).

TOWN OF AVON ET AL. *v.* JOSEPH SASTRE ET AL.
(AC 45885)

Elgo, Cradle and Seeley, Js.

Syllabus

Pursuant to statute (§ 1-200 (5)), " '[p]ublic records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency . . . ."

Pursuant further to statute (§ 1-210 (b)), "[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . communications privileged by the attorney-client relationship . . . ."

The plaintiffs, the town of Avon and its town manager, B, appealed from the judgment of the trial court dismissing their administrative appeal from the final decision of the defendant Freedom of Information Commission ordering the plaintiffs to disclose certain information to the defendant S pursuant to the Freedom of Information Act (§ 1-200 et seq.). A managerial level town employee met with B to seek his guidance on how to handle certain work-related incidents and events involving the town's chief of police, R, that the employee had observed. Following that meeting, B contacted the town's attorney, who asked whether the employee had any documentation of those incidents. B subsequently contacted the employee, who confirmed that he had created a log detailing incidents occurring over the course of more than one year. The employee provided the log to B, who made a copy of the log, provided the copy to the town attorney, and returned the log to the employee. Pursuant to a memorandum from the town, R was placed on administrative leave, pending an investigation. Sometime thereafter, the town and R executed a severance agreement, and R retired from his position as chief of police. A few months later, S submitted a request that the town provide him with any and all records relating to the accusations concerning R. In response to this request, the plaintiffs provided S with a copy of the memorandum placing R on leave and the severance agreement; however, neither document included the reason behind the decision to place R on administrative leave, and the plaintiffs did not provide S with a copy of the log that had been given by the town employee to B documenting that employee's observations of R's conduct. S filed an appeal with the commission alleging that the plaintiffs had violated the act by failing to provide him with the log. During the hearing on S's complaint before a hearing officer for the commission, the plaintiffs' sole argument in opposition to S's request was that the log was exempt from disclosure due to the attorney-client privilege pursuant to § 1-210 (b). After the hearing officer issued her proposed final decision,

finding that the log was not exempt from disclosure under the attorney-client privilege, the town responded to the proposed decision and, in addition to maintaining its argument that the log was protected from disclosure under the attorney-client privilege, also argued that the log was not a public record under the act because it consisted of the personal notes of an individual. In its final decision, the commission found that the log was a public record within the meaning of the act and concluded that the log was not a document protected by the attorney-client privilege, and, thus, it was not exempt from disclosure under the act. The commission therefore ordered that the log be disclosed to S. The plaintiffs filed an administrative appeal with the trial court, which, after a hearing, issued a memorandum of decision in which it agreed with the decision of the commission and dismissed the plaintiffs' administrative appeal. On appeal to this court, the plaintiffs argued, inter alia, that the commission erred by not considering or applying the four part test for determining whether a communication between a public employee and an attorney is privileged set forth in *Shew* v. *Freedom of Information Commission* (245 Conn. 149), which provides that communications to an attorney for a public agency are protected from disclosure by privilege if the attorney is acting in a professional capacity for the agency, the communications are made to the attorney by current employees or officials of the agency, the communications relate to the legal advice sought by the agency from the attorney, and the communications are made in confidence. The commission, in turn, argued that the commission properly determined that the plaintiffs failed to demonstrate one of the three criteria set forth in *State* v. *Kosuda-Bigazzi* (335 Conn. 327) for establishing that a document is privileged, either by showing that the document is itself the record or memorialization of a communication between the client and the attorney, that the document was created with the intent to communicate the contents to an attorney and the client actually communicated the contents to the attorney, or that a preexisting document has been transformed into a communication for the purpose of seeking legal advice and that the document was communicated to or intended to be communicated to an attorney. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court erred in concluding that the log was a public record pursuant to the act:

a. Contrary to the plaintiffs' claim, this court concluded that the log included information relating to the conduct of the public's business under § 1-200 (5): there was no doubt that the public has an interest in the conduct of police, as public employees, and a log detailing concerns about the work-related conduct of the town's chief of police implicated the public's business and concern; moreover, § 1-200 must be construed in light of the overall purpose of the act, which favors disclosure of government records; furthermore, B conceded in his hearing testimony that the revelations in the log about the conduct of R were crucial to the decision to place him on leave, and the fact that the log triggered

such an action, particularly against a high-level town official whose job involved public safety, supported the conclusion that the log included information relating to the conduct of the public's business, as the contents of the log provided a basis for understanding the town's investigative process, its decision making and its overall handling of R's employment, which eventually resulted in his resignation and a subsequent severance agreement between R and the town.

b. The plaintiffs could not prevail on their claim that the log was not prepared, owned, used, received or retained by a public agency under § 1-200 (5), this court having concluded that the log was received by the town, which was dispositive of whether the log was a public record: it was undisputed that the employee, at the town attorney's request, gave the log to B, and, in light of the ordinary meaning of the word "receive," this court concluded that, when B took possession of the log, the town received the log for purposes of § 1-200 (5); moreover, the plaintiffs provided no authority for their argument that "received" under the statute means that the document must be given to a public agency for the agency's retention, and, in fact, such a reading of the statute would be redundant, as the statute includes whether a document was retained by a public agency as a separate ground for finding that it is a public record, and statutes shall be interpreted, whenever possible, to avoid redundancy; furthermore, the plaintiffs' argument that the log was not received by the town because B merely served as a conduit to deliver the log to the town attorney was unavailing, as the plaintiffs cited no authority in their appellate briefs for this assertion, the town attorney in this case was an agent of the town, and towns cannot be permitted to circumvent their statutory obligations relating to the disclosure of public records by simply delivering the records to their attorney.

2. Contrary to the plaintiffs' claim, the commission did not act unreasonably, arbitrarily, illegally or in abuse of its discretion in concluding that the log was not exempt from disclosure under the act pursuant to the attorney-client privilege: on the basis of a thorough review of the record, including an in camera review of the log, this court concluded that the record contained substantial evidence to support the commission's findings that the log contained personal observations of the employee relating to the conduct of R, the employee created the log for his own personal use, the log was not created for the purpose of seeking legal advice or with the intent to communicate its contents to an attorney, the employee met with B, who is not an attorney, to discuss the employee's concerns about R's conduct and to seek guidance on how to deal with R regarding the incidents that the employee had observed, and the log did not constitute a record of communication between a client and an attorney, as there was no evidence in the record showing that the employee who created the log ever spoke with the town attorney, and, because those findings related to the second and third parts of the test in *Shew*, the trial court, in effect, applied the test in *Shew* when it

analyzed the plaintiffs' claim of attorney-client privilege; moreover, those findings supported a conclusion that the plaintiffs failed to meet their burden of establishing that the log was exempt from disclosure under the attorney-client privilege, either under the test in *Shew* or the first two of the three ways to establish the attorney-client privilege with regard to documents as set forth in *Kosuda-Bigazzi*; furthermore, the commission's finding that the log was a preexisting document, in that it was in existence before B sought legal advice from the town attorney, was also supported by the substantial evidence in the record concerning the log, demonstrating that it was not a record of a communication and was not created for the purpose of seeking legal advice, and the commission specifically found that the employee did not later create a typed compilation and/or summary of the log for the purpose of securing counsel, and therefore there was no evidence in the record demonstrating a transformation of the log for the purpose of seeking legal counsel; additionally, although the plaintiffs argued that the log was provided to the town attorney solely for the purpose of seeking legal advice, this argument ignored the fact that the legal advice sought was for the town, not the person who created the log, and the log did not become a privileged document simply because B provided the log to the town attorney when he sought legal advice about how the town should proceed with respect to R.

Argued October 19, 2023—officially released March 5, 2024

Procedural History

Appeal from a decision by the defendant Freedom of Information Commission ordering the plaintiffs to disclose certain information to the named defendant, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Michael C. Harrington, with whom, on the brief, was *Proloy K. Das*, for the appellants (plaintiffs).

Jennifer F. Miller, commission counsel, with whom, on the brief, were *Danielle L. McGee*, commission counsel, and *Colleen M. Murphy*, general counsel, for the appellee (defendant Freedom of Information Commission).

Elana Bildner, with whom, on the brief, were *Sapana Anand* and *Dan Barrett*, for the appellee (named defendant).

Opinion

SEELEY, J. The plaintiffs, the town of Avon (town) and the town manager, Brandon Robertson, appeal from the judgment of the Superior Court dismissing their administrative appeal from the final decision of the defendant Freedom of Information Commission (commission) regarding a complaint filed by the defendant Joseph Sastre. In its final decision, the commission found that the plaintiffs had violated the Freedom of Information Act (act), General Statutes § 1-200 et seq., when they denied Sastre's request for a document (log) related to the resignation in 2019 of the town's police chief, Mark Rinaldo (Chief Rinaldo), and ordered that the town disclose the log pursuant to the act. On appeal, the plaintiffs claim that the court improperly dismissed their appeal from the commission's decision ordering disclosure of the log because (1) the log is not a public record under § 1-200 (5)[1] and, thus, is not subject to disclosure under the act, and (2) even if the log is a public record, it is exempt from disclosure under General Statutes § 1-210 (b) (10)[2] pursuant to the attorney-client privilege. We disagree with the plaintiffs and affirm the judgment of the Superior Court.

[1] General Statutes § 1-200 (5) provides: " 'Public records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method."

Although § 1-200 was amended by No. 21-2, § 147, of the 2021 Public Acts, the amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] Section 1-210 governs access to public records. Subsection (b) of General Statutes § 1-210 provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (10) Records, tax returns, reports and statements exempted by federal law or the general

The following facts, as found by the commission and which are not disputed by the parties, and procedural history are relevant to our resolution of this appeal. In November, 2019, a managerial level "town employee met with the . . . town manager to discuss [work-related] incidents and events involving Chief Rinaldo. . . . [T]he employee was seeking the . . . town manager's guidance on how to deal with [Chief Rinaldo] regarding [certain] incidents [involving Chief Rinaldo] that the employee had observed." Following that meeting, the town manager contacted the attorney for the town (town attorney) and described the incidents mentioned by the employee. During that conversation, the town attorney asked whether the employee had any documentation of those incidents. The town manager then contacted the employee, at which time he "learned that the employee had created a log[3] detailing the underlying incidents. . . . [T]he log details incidents occurring over the course of one year, four months and five days (June 20, 2018, to October 25, 2019)." (Footnote added.) As a result of that conversation, "the employee provided the log to the . . . town manager, who made a copy of the log, provided the copy to the town [attorney], and returned the log to the employee." As documented in a memorandum dated November 11, 2019, Chief Rinaldo was placed on administrative leave, pending an investigation. Sometime thereafter, the town

statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes . . . ."

[3] "The employee's log is an eleven page document with the employee's personal observations of work-related activities of Chief Rinaldo from June 20, 2018, through October 25, 2019. The hearing officer found, and it appears [to be] undisputed, that the log was prepared by the employee for the employee's own personal purposes."

and Chief Rinaldo executed a severance agreement, and Chief Rinaldo retired from his position as chief of police.

On February 10, 2020, Sastre submitted a request that the town "provide him with any and all records relating to the 'accusations' concerning . . . [Chief] Rinaldo." In response to this request, the plaintiffs provided Sastre with a copy of the November 11, 2019 memorandum and the severance agreement; however, neither document included the reason behind the decision to place Chief Rinaldo on administrative leave. The plaintiffs did not provide Sastre with a copy of the log that had been given by the town employee to the town manager documenting that employee's observations of Chief Rinaldo's conduct.

On March 13, 2020, Sastre filed an appeal with the commission, alleging that the plaintiffs violated the act by failing to provide him with the aforementioned log. On November 19, 2020, a hearing concerning Sastre's appeal was conducted before a hearing officer for the commission, at which Sastre and the plaintiffs "appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint." During the hearing, the plaintiffs' sole argument in opposition to Sastre's request was that the log was exempt from disclosure due to the attorney-client privilege. On September 22, 2021, the hearing officer issued her proposed final decision, finding that the log was not exempt from disclosure under the attorney-client privilege. On October 15, 2021, the town responded to the proposed decision. In its response, the town, in addition to maintaining its argument that the log is protected from disclosure under the attorney-client privilege, also argued that the log is not a public record because it consists of the personal notes of an individual.

On October 27, 2021, the commission held a meeting at which it reviewed the hearing officer's proposed decision. During the meeting, the town attorney reiterated the argument that the log was exempt from disclosure due to the attorney-client privilege and also argued that the log did not qualify as a public record as defined by the act. On November 17, 2021, the commission issued its final decision on the matter. The commission first found that the log is a public record within the meaning of General Statutes §§ 1-200 (5), 1-210 (a) and 1-212 (a). The commission next addressed the plaintiffs' claim that the log is exempt from disclosure under § 1-210 (b) (10), which exempts from disclosure records of "communications privileged by the attorney-client relationship . . . ." The commission concluded that the log is not a document protected by the attorney-client privilege and, thus, it is not exempt from disclosure under § 1-210 (b) (10). Therefore, the commission ordered that it be disclosed to Sastre.

After the commission issued its decision, the plaintiffs filed an administrative appeal in the Superior Court pursuant to General Statutes § 4-183. Sastre and the commission were both named as defendants in the appeal. A hearing was held on September 19, 2022. On September 20, 2022, the Superior Court issued a memorandum of decision in which it agreed with the decision of the commission that the log is a public record subject to disclosure under the act and, therefore, dismissed the plaintiffs' administrative appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

As a preliminary matter, we must first set forth the standard of review for this administrative appeal. "Our resolution of [this appeal] is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act [UAPA]; General Statutes § 4-166 et seq.; to the determinations made by an administrative

agency." (Internal quotation marks omitted.) *Rocque* v. *Freedom of Information Commission*, 255 Conn. 651, 658, 774 A.2d 957 (2001). "Under the UAPA, it is [not] the function . . . of [an appellate] court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 379, 194 A.3d 759 (2018).

"The 'substantial evidence' rule governs judicial review of administrative fact-finding under the UAPA." *Dolgner* v. *Alander*, 237 Conn. 272, 281, 676 A.2d 865 (1996). "According to our well established standards, [r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred."

(Citations omitted; internal quotation marks omitted.) *Stratford Police Dept.* v. *Board of Firearms Permit Examiners*, 343 Conn. 62, 81, 272 A.3d 639 (2022).

I

The plaintiffs first claim that the court improperly dismissed their administrative appeal from the commission's decision ordering disclosure of the log because the log is not a public record under § 1-200 (5).[4] In support of this claim, the plaintiffs argue that the log does not meet the statutory definition of a public record because it was not "prepared, owned, used, received or retained by a public agency . . . ." General Statutes § 1-200 (5).[5] We are not persuaded.

[4] On appeal to the Superior Court, the plaintiffs argued both that the log is not a public record and that, even if it were, it is exempt from disclosure under the attorney-client privilege. In its memorandum of decision, the court stated in a footnote: "The court notes that the plaintiffs did not timely challenge the status of the log as a public record in the agency proceeding below. When the log was requested by the hearing officer for in camera review, the plaintiffs' attorney voluntarily provided the log on behalf of the town. The only defense to disclosure effectively asserted [before the commission] was the attorney-client privilege." Nonetheless, the court addressed the issue of whether the log is a public record and agreed with the commission's determination that the log is a public record under § 1-200 (5). In their principal appellate brief, the plaintiffs contend that they properly raised the claim before the commission issued its decision, and neither the commission nor Sastre argues on appeal that the issue of whether the log is a public record was not preserved and should not be reviewed. Given that the plaintiffs did raise a claim before the commission that the log is not a public record, that both the commission and the Superior Court substantively addressed the issue and found the log to be a public record, and that no objection has been raised on appeal to our consideration of the issue, we will review this claim.

[5] In support of their claim that the commission erred in determining that the log is a public record, the plaintiffs also argue that "the document is not a public record, but rather private notes of an individual." Throughout their appellate briefs, the plaintiffs repeatedly refer to the personal nature of the employee's notes and observations contained in the log, arguing that notes of a personal nature are not subject to review by the public and, thus, cannot constitute a public record. The plaintiffs also cite federal case law for the proposition that " '[d]isclosure of . . . personal documents would invade the privacy of and impede the working habits of' " an employee. Both the commission and Sastre counter that the plaintiffs cannot now

The following legal principles are relevant to our evaluation of this claim. Our Supreme Court has described the act as "our right-to-know law, providing for disclosure of public information . . . . [T]he [act] expresses a strong legislative policy in favor of the open conduct of government and free public access to government records. . . . At the time of its unanimous passage by the General Assembly, the act was noted for making sweeping changes in the existing right to know law so as to mark a new era in Connecticut with respect to opening up the doors of city and state government to the people of Connecticut. . . . The general rule under the act is disclosure." (Citation omitted; internal quotation marks omitted.) *Groton Police Dept.* v. *Freedom of Information Commission*, 104

claim, for the first time on appeal, that the disclosure of the log would constitute an invasion of the public employee's privacy. Specifically, the commission and Sastre argue that any claim that the disclosure of the log would constitute an invasion of privacy under § 1-210 (b) (2) should have been made before the hearing officer and the commission and that the plaintiffs' failure to do so precludes them from objecting to the disclosure of the log for privacy reasons in this appeal. As Sastre and the commission both point out, the plaintiffs have repeatedly tried to shoehorn arguments regarding the "personal" or "private" nature of the log into their other claims, despite never having properly raised the invasion of privacy exemption under § 1-210 (b) (2). They further assert that arguments relating to the personal and private nature of the log are irrelevant to whether the log is a public record. We agree with the commission and Sastre.

Although the plaintiffs argue that the personal or private nature of the log prevents it from being a public record, any such argument is unavailing, as the definition of a public record under § 1-200 (5) centers not on whether the document contains information personal to the person who created it, but rather on whether that information "relat[es] to the conduct of the public's business . . . ." General Statutes § 1-200 (5). Additionally, because the plaintiffs did not raise an invasion of privacy claim under § 1-210 (b) (2) before the commission, they are precluded from doing so now. See *Dortenzio* v. *Freedom of Information Commission*, 42 Conn. App. 402, 409, 679 A.2d 978 (1996) (review of commission's decision is limited to issues raised before commission and findings in administrative record). Accordingly, the plaintiffs' arguments concerning the personal and private nature of the log are simply an attempt to argue a claim that was never properly raised, and, therefore, we do not take them into consideration in our determination of whether the log constitutes a public record under the act.

Conn. App. 150, 154–55, 931 A.2d 989 (2007); see also *Chairman* v. *Freedom of Information Commission*, 217 Conn. 193, 196, 585 A.2d 96 (1991) (act " 'makes disclosure of public records the statutory norm' "); *Board of Trustees* v. *Freedom of Information Commission*, 181 Conn. 544, 550, 436 A.2d 266 (1980) (noting that representative who sponsored bill that was enacted "expressly stated on the floor of the house, the intent of the act 'is to make every public record and every public meeting open to the public at all times with certain specified exclusions' "). "The [commission] has full authority to determine the existence of public records and the propriety of their disclosure." *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 454, 545 A.2d 1064 (1988). In determining whether the log is a public record under the act, we must be "mindful that the purpose of the act is to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 398.

Whether the log is a public record under § 1-200 (5) of the act involves a matter of statutory interpretation[6]

[6] We note "the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement." (Internal quotation marks omitted.) *Bridgeport* v. *Freedom of Information Commission*, 222 Conn. App. 17, 44, 304 A.3d 481 (2023), cert. denied, 348 Conn. 936, 306 A.3d 1072 (2024). Our Supreme Court recently explained that it "will defer to an agency's construction of a statute or administrative regulation if the language at issue is ambiguous and the agency's construction is time-tested, reasonable, and previously has been subject to judicial scrutiny. . . . When the statute or regulation at issue is not ambiguous, or the agency's construction of the statute or regulation is not time-tested, reasonable, or has not previously been subjected to judicial scrutiny, 'we apply a broader standard of review . . . .' " (Citation omitted.)

and "presents a question of law over which [an appellate court] exercise[s] plenary review." Id., 399. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Bridgeport* v. *Freedom of Information Commission*, 222 Conn. App. 17, 48, 304 A.3d 481 (2023), cert. denied, 348 Conn. 936, 306 A.3d 1072 (2024).

We start with the language of § 1-200 (5). Section 1-200 (5) defines a public record as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received *or* retained by a public agency . . . ." (Emphasis added.) Thus, pursuant to the statute, a document is a public record

Commissioner of Mental Health & Addiction Services v. *Freedom of Information Commission*, 347 Conn. 675, 688, 299 A.3d 197 (2023). In the present case, the language of § 1-200 (5) is not ambiguous, and the commission does not claim that its construction of the statute is entitled to deference or that it is time-tested. Moreover, the commission's final decision includes the commission's legal determination that the log is a public record within the meaning of § 1-200 (5), without any analysis or interpretation of the definition of a public record as set forth therein. Accordingly, we conclude that the issue of statutory interpretation in the present case is a question of law subject to plenary review. See, e.g., *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 382 (applying plenary review to question of statutory construction); *Williams* v. *Freedom of Information Commission*, 108 Conn. App. 471, 478, 948 A.2d 1058 (2008) (same); *Zoning Board of Appeals* v. *Freedom of Information Commission*, 66 Conn. App. 279, 283–86, 784 A.2d 383 (2001) (same).

if it (1) relates "to the conduct of the public's business" and (2) was "prepared, owned, used, received *or* retained by a public agency . . . ." (Emphasis added.) General Statutes § 1-200 (5). Because the statute is in the disjunctive, only one of the aforementioned five grounds must be shown in order to demonstrate that the log is a public record. See, e.g., *In re Annessa J.*, 343 Conn. 642, 677, 284 A.3d 562 (2022) (" 'use of the disjunctive "or" between the two parts of the statute indicates a clear legislative intent of separability' ").

A

We first note that for the log to constitute a public record, it must relate to the conduct of the public's business.[7] Section 1-200 (5) does not define what constitutes the "conduct of the public's business" under the

[7] In its appellate brief, the commission asserts that the "plaintiffs either do not dispute that the log, which consists of concerns regarding work-related conduct of [Chief Rinaldo], pertains to the public's business or, alternatively, have failed to adequately brief that issue." In their appellate briefs, the plaintiffs make a passing reference that the log does not relate to the public's business. Additionally, the plaintiffs refer to the conduct of the public's business requirement in a footnote in their principal appellate brief and then cite to two commission decisions in which the document at issue was not considered to be a public record because it did not relate to the conduct of the public's business. The facts of those decisions, however, are inapposite to the present case. Moreover, the plaintiffs' principal appellate brief is devoid of any argument or application of that law to the facts of the present case or any analysis concerning whether the log is related to the conduct of the public's business. To the extent that the plaintiffs, by referring to the personal nature of the information in the log, are asserting that it does not relate to the public's business, we are not persuaded. First, as we stated, the plaintiff's appellate brief is devoid of the necessary analysis and citation to applicable law regarding what constitutes the "public's business" to properly assert such a claim for appellate review. Additionally, the plaintiffs, by referencing the personal nature of the log, appear to be implicating, without specifically referencing, the right to privacy exemption under the act, which is not applicable to this case. See footnote 5 of this opinion.

"We repeatedly have stated that [w]e are *not required* to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . .

act. "[I]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Braasch* v. *Freedom of Information Commission*, 218 Conn. App. 488, 510, 292 A.3d 711 (2023); see also General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language"). The word "public" is defined by Merriam-Webster's Collegiate Dictionary as "of, relating to, or affecting all the people or the whole area of a nation or state . . . of or relating to government . . . [or] of, relating to, or being in the service of the community or nation . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1005; see also The American Heritage Dictionary (5th Ed. 2011) p. 1424 (defining "public" as "[o]f, concerning, or affecting the community or the people"). "Business" is defined, in part, as "[o]ne's rightful or proper concern or interest"; The American Heritage Dictionary, supra, p. 252; and "conduct" means "the

[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Emphasis added; internal quotation marks omitted.) *Buchenholz* v. *Buchenholz*, 221 Conn. App. 132, 142 n.6, 300 A.3d 1233, cert. denied, 348 Conn. 928, 304 A.3d 860 (2023). "Claims are . . . inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Rosario* v. *Rosario*, 198 Conn. App. 83, 90, 232 A.3d 1105 (2020). We agree with the commission that the claim was inadequately briefed; however, while we are not *required* to review an issue that has not been adequately briefed, in the interest of thoroughness in explaining why the log is a public record under the act and in our plenary review, we will address the relation between the log and the public's business. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 724 n.29, 138 A.3d 868 (2016) (whether to review inadequately briefed claim constitutes exercise of judicial discretion).

act, manner, or process of carrying on . . . [or] a mode or standard of personal behavior . . . .'' Merriam-Webster's Collegiate Dictionary, supra, p. 259. Construed together, the ''conduct of the public's business'' refers to an action or behavior that is of concern to the members of the community as a whole.

As we stated, the log details the concerns of a town employee regarding the work-related conduct of the chief of police. Our Supreme Court has made clear that ''when a person accepts public employment, he or she becomes a servant of and accountable to the public. . . . The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.'' *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 177, 635 A.2d 783 (1993). The conduct of the police, in particular, has been deemed a matter of public concern by our Supreme Court. See *Hartford* v. *Freedom of Information Commission*, 201 Conn. 421, 435, 518 A.2d 49 (1986) (''the public has a legitimate interest in the integrity of local police departments and in disclosure of how such departments investigate and evaluate . . . complaints of police misconduct'').

Documents do not have to be created by a public agency to relate to the conduct of the public's business. See *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 398. For example, our Supreme Court recently addressed a claim that certain documents were not public records under the act ''because they were created by a private individual and not the [Department of Emergency Services and Public Protection].'' Id., 397. In rejecting that argument, the court explained: ''[D]ocuments that are not created by an agency, but come into its possession because there was probable cause to believe that they constitute 'evidence of an offense, or . . . evidence that a particular person participated in

the commission of an offense,' relate to the conduct of the public's business." Id., 398. Similarly, in the present case, although the log was created by the employee, it came into the town's possession when the employee provided it to the town manager, who, in turn, provided it to the town attorney, and its contents were instrumental in Chief Rinaldo being placed on administrative leave.

We also find guidance on this issue from case law concerning the invasion of privacy exemption to disclosure of public records, which "precludes disclosure . . . when the information sought by a request does not pertain to legitimate matters of public concern . . . ." *Perkins* v. *Freedom of Information Commission*, supra, 228 Conn. 175. In that context, our Supreme Court has stated that "[t]he legislature has . . . determined that disclosures relating to the employees of public agencies are presumptively legitimate matters of public concern . . . [although] [t]hat presumption is not . . . conclusive." Id., 174. Moreover, as we stated, "the public has a legitimate interest in the integrity of local police departments" and how they "investigate and evaluate . . . complaints of police misconduct." *Hartford* v. *Freedom of Information Commission*, supra, 201 Conn. 435. For instance, this court previously held that a document containing the instant messages of a police officer, which were the trigger for an investigation into whether the officer was responsible for misconduct, "pertained to a legitimate matter of public concern . . . [because] [the messages] contain[ed] the information which formed the basis for and triggered the . . . investigation in this case. Therefore . . . disclosure of the instant message conversations was necessary to facilitate the public's understanding and evaluation of the [department's] investigative process, decision-making and overall handling of an important

matter involving a fellow police officer." (Internal quotation marks omitted.) *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 508–509, 46 A.3d 291 (2012).

In the present case, we conclude, following our own in camera review of the log and our review of the commission's findings, which are not disputed by the parties, that the log includes "information relating to the conduct of the public's business . . . ." General Statutes § 1-200 (5). First, there can be no doubt that the public has an interest in the conduct of police, as public employees, and a log detailing concerns about the work-related conduct of the town's chief of police certainly implicates the public's business and concern. In addition to the public's right to know whether its public servants are engaging in misconduct, we must construe the statute in light of the overall purpose of the act, which favors disclosure. See *Clerk of the Common Council* v. *Freedom of Information Commission*, 215 Conn. App. 404, 413, 283 A.3d 1 (2022) ("[t]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records" (internal quotation marks omitted)); see also *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 13, 144 A.3d 405 (2016) ("the general rule under the [act] is disclosure" (internal quotation marks omitted)).

Our determination is also supported by the hearing testimony of the town manager, who confirmed that he was given the log by the town employee and that it contains revelations about the conduct of Chief Rinaldo, the town's highest ranking police official. The employee had documented his concerns about Chief Rinaldo's conduct for more than one year and eventually sought the advice of the town manager, which prompted an investigation into the potential misconduct of Chief Rinaldo. The town manager conceded in his hearing

testimony that the revelations in the log about the conduct of Chief Rinaldo were crucial to the decision to place him on leave. The fact that the log triggered such an action, particularly against a high-level town official whose job involves public safety, supports our conclusion that the log includes information relating to the conduct of the public's business, as the contents of the log provide a basis for understanding the town's investigative process, its decision making and its overall handling of Chief Rinaldo's employment, which eventually resulted in his resignation and a subsequent severance agreement between Chief Rinaldo and the town.

B

Having determined that the contents of the log relate to the conduct of the public's business, we next address whether the log was "prepared, owned, used, received or retained by a public agency . . . ." General Statutes § 1-200 (5). Although the plaintiffs make arguments regarding all five grounds on appeal, we first address whether the log was received by the town, which, if found, will be dispositive of whether the log is a public record and obviate any need to address the other grounds. In support of their claim that the log was not received by the town, the plaintiffs assert that "received" under the statute means that the document must be "given to a public agency for the agency's retention" and that the log was not received by the town because the town manager merely served as a "conduit" to deliver the log to the town attorney. We do not agree with either of these arguments.

We first note that the act does not define the word "receive" for purposes of § 1-200 (5). As we stated previously in this opinion, "[i]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from

the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Braasch* v. *Freedom of Information Commission*, supra, 218 Conn. App. 510; see also General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language"). The word "receive" is defined as "to come into possession of: acquire . . . ." Merriam-Webster's Collegiate Dictionary, supra, p. 1038. It is also defined as "to have delivered or brought to one . . . ." The Random House Dictionary of the English Language (2d Ed. 1987) p. 1610. Applying those definitions to the statutory language, we conclude that "any recorded data or information relating to the conduct of the public's business . . . received . . . by a public agency" in § 1-200 (5) necessarily includes a document that has come into the possession of a public agency.

The commission made the following relevant findings in its decision, which support a determination that the log was received by the town for purposes of the act. After the town manager was made aware of the employee's log, the town manager told the employee that the town attorney wanted to review the log. As a result of that request, the employee gave the log directly to the town manager, who made a copy of it; the town manager then gave the copy to the town attorney and returned the original log to the employee. It is thus undisputed that the employee, at the town attorney's request, gave the log to the town manager. In light of the ordinary meaning of the word "receive," we conclude that when the town manager took possession of the log, the town "received" the log for purposes of the statute.

The plaintiffs have provided no authority for their argument that "received" under the statute means that the document must be "given to a public agency for

the agency's retention." Such a reading of the statute would be redundant, as the statute includes whether a document was "retained" by the public agency as a separate ground for finding that it is a public record. It is a principle of statutory interpretation that statutes shall be interpreted, whenever possible, to avoid redundancy. See *Yeager* v. *Alvarez*, 134 Conn. App. 112, 121–22, 38 A.3d 1224 (2012) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Citation omitted; internal quotation marks omitted.)).

The plaintiffs' argument that the log was not received by the town because the town manager merely served as a "conduit" to deliver the log to the town attorney is equally unavailing. Again, the plaintiffs cite no authority in their appellate briefs for this assertion. The town attorney in this case is an agent of the town. See, e.g., *First Selectman* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-0501055-S (November 28, 2000) (29 Conn. L. Rptr. 27, 29) (holding that transcripts prepared by stenographer and delivered directly to town's attorney, and not town, were public records because "[t]he transcripts . . . were received and used by the [t]own's attorney as the [t]own's agent"); see generally *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 201, 75 A.3d 68 (2013) (noting that "[a]n attorney is the client's agent"). Furthermore, towns cannot be permitted "to circumvent their statutory obligations relating to disclosure of 'public records' by simply delivering the records to their attorney." *First Selectman* v. *Freedom of Information Commission*, supra, 29. Accordingly, the fact that the town manager provided the log

to the town attorney does not change the fact that the town "received" the log for purposes of the act.

Therefore, because the log relates to the conduct of the public's business and was received by the town, the commission correctly determined that the log constitutes a public record under § 1-200 (5) of the act.

II

The plaintiffs next argue that, even if the log constitutes a public record for purposes of the act, it is exempt from disclosure pursuant to the attorney-client privilege under § 1-210 (b) (10) because it was given to the town attorney "for the sole purpose of providing legal advice." We do not agree.

The following legal principles guide our analysis of this claim. Section 1-210 (b) (10) exempts from disclosure "communications privileged by the attorney-client relationship . . . ." Our Supreme Court recently explained the parameters of the attorney-client privilege, stating: "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived. . . . In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice. . . . The privilege applies, however, only when necessary to achieve its purpose; it is not a blanket privilege. . . .

"The attorney-client privilege applies to oral and written communications. See, e.g., E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 5.16.1 (b), p. 262 ([c]ommunications between an attorney and a client can be written as well as oral); see also 1 Restatement (Third), The Law Governing Lawyers § 69, comment (b), p. 525 (2000) (A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words . . . .). The present case involves documents, and our analysis will focus on that form of communication. The privilege must be established for each document separately considered and must be narrowly applied and strictly construed. . . . The burden of establishing the applicability of the privilege rests with the party invoking it . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Kosuda-Bigazzi*, 335 Conn. 327, 341–43, 250 A.3d 617 (2020).

Exemptions under the act are also narrowly construed. "[T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records. . . . [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it. . . .

"When a claim of attorney-client privilege is invoked in an administrative proceeding, [appellate] review of a determination as to whether that privilege applies is governed by the [act] . . . . Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the

trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 13.

In *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 714 A.2d 664 (1998), our Supreme Court considered the issue of "whether the attorney-client privilege protects communications in circumstances where the client is a corporate or municipal entity, rather than an individual . . . ." Id., 158. In concluding that it does protect such communications, the court adopted the following test: "[C]ommunications to an attorney for a public agency are protected from disclosure by privilege if the following conditions are met: (1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence."[8] (Footnote omitted; internal quotation marks omitted.) Id., 159.

[8] The legislature subsequently codified the common-law attorney-client privilege in General Statutes § 52-146r, which, in subsection (b), provides that "[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure." See also *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 149, 794 A.2d 535 (2002). The statute defines "confidential communications" to include "all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or

In the present case, the commission did not specifically cite to *Shew* in its decision[9] but, rather, relied on our Supreme Court's recent decision in *State* v. *Kosuda-Bigazzi*, supra, 335 Conn. 327, in which the court set forth three ways to establish the attorney-client privilege with regard to documents. Specifically, in *Kosuda-Bigazzi*, the court explained: "First, a party can establish that a document is privileged by showing that the document is itself the record or memorialization of a communication between the client and the attorney. . . . [Second] [i]f the document is not a record of a communication, a party can still establish privilege by showing that (1) the document was created with the intent to communicate the contents to an attorney, and (2) the client actually communicated the contents to the attorney." (Citations omitted.) Id., 343. The third way for a party to establish that a document is protected by the attorney-client privilege is "by showing transformation of a preexisting document into a communication for the purpose of seeking legal advice and that the document was communicated to or intended to be communicated to an attorney. Preexisting documents are

employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice . . . ." General Statutes § 52-146r (a) (2). "[T]he essential elements of the attorney-client privilege under both statutory and common law are identical." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 301 n.9, 77 A.3d 121 (2013) (*Norcott, J.*, concurring). For purposes of both §§ 1-210 (b) (10) and 52-146r, the four part test set forth in *Shew* is applied to determine whether communications are privileged. See id.; *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 515–16, 14 A.3d 998 (2011).

[9] We note, however, that the commission cited to both the common-law definition of the attorney-client privilege, as set forth in *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 149, 794 A.2d 535 (2002), and the statutory definition in General Statutes § 52-146r. As we stated previously in this opinion, the essential elements under both the common-law and statutory privilege are identical and are embodied in the four part test set forth in *Shew*. See footnote 8 of this opinion.

documents that are *not* a record of a communication and were *not* created for the purpose of seeking legal advice. . . . [Preexisting] documents that are not in themselves communications . . . are treated in different ways, depending on how the attorney acquired them. . . . A preexisting document does not become privileged merely because it is transferred to or routed through an attorney. . . . However, a preexisting document could become privileged if it were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See *Angst* v. *Mack Trucks, Inc.*, Docket Nos. 90-3274, 90-4329, 1991 WL 86931, *2 (E.D. Pa. May 14, 1991) (reasoning that plaintiff's handwritten notes made for personal use, not for purpose of securing attorney, would not fall within privilege, but typed compilation and summary created for purpose of securing counsel would fall within privilege)." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Kosuda-Bigazzi*, supra, 344–45.

On appeal, the plaintiffs argue that the commission erred by not considering or applying the test set forth in *Shew* for determining whether a communication between a public employee and an attorney is privileged. Relying on *Shew*, the plaintiffs argue that "the notes in this case were given to the [town attorney] for the sole purpose of providing legal advice . . . [and] [a]s such, the notes are exempt from disclosure pursuant to the attorney-client privilege." The commission counters that *Shew*, which "specifically addresses the issue of records that memorialize communications between counsel and public employees . . . does not address the issue [in the present case]" and that the commission properly determined that the plaintiffs failed to demonstrate one of the three criteria set forth in *Kosuda-Bigazzi* for establishing that a document is privileged. Sastre makes an argument similar to that of

the commission and argues further that, even under the test set forth in *Shew*, the plaintiffs failed to meet their burden of demonstrating that the attorney-client privilege applies. We conclude that, under either test, the plaintiffs failed to meet their burden of establishing that the log is exempt from disclosure pursuant to § 1-210 (b) (10) under the attorney-client privilege.

In its final decision, the commission made the following factual findings regarding the plaintiffs' attorney-client privilege claim. The commission "found that the . . . town manager is not an attorney and that the employee was not seeking legal advice from him. Rather . . . the employee was seeking the . . . town manager's guidance on how to deal with [Chief Rinaldo] regarding the incidents that the employee had observed. . . . [F]ollowing [their] November, 2019 meeting . . . the . . . town manager contacted [the town attorney] in order to obtain legal advice regarding the incidents the town employee had described to him. . . . [T]he . . . town manager relayed to [the town attorney] the incidents that had been described to him by the employee. . . . [A]t such time, the town [attorney] asked the . . . town manager to inquire of the employee as to whether the employee had any documentation or personal notes concerning the incidents involving [Chief Rinaldo]. . . .

"[T]he . . . town manager contacted the employee and first learned that the employee had created a log detailing the underlying incidents. . . . [T]he . . . town manager informed the employee that the town [attorney] wished to review the log. . . . [T]he employee provided the log to the . . . town manager, who made a copy of the log, provided the copy to the town [attorney], and returned the log to the employee."

On the basis of those uncontested facts, as found by the commission, and following its in camera review of

the log, the commission found that the log "[does] not constitute a record of communication between the client and the attorney." The commission further found that the log was "not created with the intent to communicate the contents to an attorney." The commission also stated in its final decision: "It is found that the log is a preexisting document, in that it was in existence before the town [manager] sought legal advice from the town attorney. It is further found that the employee created the log for his own personal use and not for the purpose of seeking legal advice. It is also found that the employee did not later create a typed compilation and/or summary of the log for the purpose of securing counsel. Accordingly, it is found that the log is not a communication protected by the attorney-client privilege. Finally, it is concluded that the employee's log in the possession of the . . . town manager is not an attorney-client privileged document within the meaning of § 1-210 (b) (10) . . . ." The Superior Court agreed with the commission's determination and rendered judgment dismissing the appeal.

We conclude, on the basis of our thorough review of the record, including an in camera review of the log, that the record contains substantial evidence to support the commission's findings that (1) the log contains personal observations of the employee relating to the conduct of Chief Rinaldo, (2) the employee created the log for his own personal use, (3) the log was not created for the purpose of seeking legal advice or with the intent to communicate its contents to an attorney, (4) the employee met with the town manager, who is not an attorney, to discuss the employee's concerns about Chief Rinaldo's conduct and to seek "guidance on how to deal with [Chief Rinaldo] regarding the incidents that the employee had observed," and (5) the log does not constitute a record of communication between a client and an attorney, as there is no evidence in the record

showing that the employee who created the log ever spoke with the town attorney. We first note that those findings relate to the second and third parts of the *Shew* test; therefore, the court, in effect, applied the test in *Shew* when it analyzed the plaintiffs' claim of attorney-client privilege. Moreover, those findings support a conclusion that the plaintiffs failed to meet their burden of establishing that the log is exempt from disclosure under the attorney-client privilege, either under the *Shew* test or the first two of the three ways to establish the attorney-client privilege with regard to documents as set forth by our Supreme Court in *Kosuda-Bigazzi*. See *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 16 ("[I]t is not enough for the party invoking the privilege to show that a communication to legal counsel relayed information that might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information." (Internal quotation marks omitted.)).

Furthermore, the commission's finding "that the log is a preexisting document, in that it was in existence before the town [manager] sought legal advice from the town attorney," is also supported by the substantial evidence in the record concerning the log, demonstrating that it is not a record of a communication and was not created for the purpose of seeking legal advice. See *State* v. *Kosuda-Bigazzi*, supra, 335 Conn. 344. As our Supreme Court has stated, such documents can become privileged if the documents "were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney." Id., 345. In the present case, the commission specifically found "that the employee did not later create a typed compilation and/or summary of the log for the purpose of securing counsel." There is, therefore,

no evidence in the record demonstrating a transformation of the log for the purpose of seeking legal counsel. The log did not become a privileged document simply because the town manager provided the log to the town attorney when *he* sought legal advice about how the *town* should proceed with respect to Chief Rinaldo. See *State* v. *Kosuda-Bigazzi*, supra, 345. The plaintiffs' argument that the log was provided to the town attorney solely for the purpose of seeking legal advice ignores the fact that the legal advice sought was for the town, not the person who created the log.[10] Accordingly, we conclude that the commission did not act unreasonably, arbitrarily, illegally or in abuse of its discretion in concluding that the log was not exempt from disclosure under the act pursuant to the attorney-client privilege. See *Lewin* v. *Freedom of Information Commission*,

[10] In their principal appellate brief, the plaintiffs assert that "there was a confidential communication between a managerial employee and the [town attorney] regarding a matter pertaining to work at the town. Rather than interview the individual . . . the [town attorney] asked the individual to provide any notes . . . of [the individual's] concerns. As such, the communication between the [town attorney] and the individual took the form of a written communication that occurred for the sole purpose of receiving legal advice. Therefore, as in *Shew*, the communication between [the town attorney] and the employee was privileged and is not subject to public disclosure pursuant to § 1-210 (b) (10)." We do not agree with the plaintiffs' assertion or their characterization of the "communication" at issue. The log was created by the employee before any communication was made by the town manager to the town attorney. Therefore, even though it was subsequently provided to the town attorney, that does not change the fact that it was not created by the employee for the purpose of seeking legal advice, nor does it transform the log, a preexisting document, into a communication between the employee and the town attorney. This is not a situation in which the employee, at the town attorney's request, created the document to summarize information for which he sought legal advice. Moreover, the plaintiffs misapply *Shew* when they describe the communication between the town manager and the town attorney as "confidential," rather than the log, which is the alleged privileged communication or document. See *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159. Any confidential discussion that occurred between the town manager and the town attorney is not at issue in this case, in which the plaintiffs are asserting that the log constitutes a privileged communication.

91 Conn. App. 521, 525, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005).

In summary, we conclude that the log constitutes a public record subject to disclosure under the act and that the commission's determination that it is not exempt from disclosure under the act pursuant to the attorney-client privilege resulted from a correct application of the law to the facts found. Accordingly, the court properly rendered judgment dismissing the plaintiffs' administrative appeal.

The judgment is affirmed.

In this opinion the other judges concurred.