LENDINGHOME FUNDING CORPORATION *v.* REI HOLDINGS, LLC, ET AL.
(AC 46292)

Elgo, Moll and Seeley, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant R Co. The defendant H Co. was a junior lienholder. The trial court rendered a judgment of strict foreclosure. Before the judgment of strict foreclosure was recorded in the trial court file and notice issued to counsel, H Co. filed a motion for judgment of foreclosure by sale, on which the trial court never ruled. Thereafter, the law days passed, and the plaintiff recorded the passing of title. More than two years later, H Co. reclaimed the motion for judgment of foreclosure by sale, which was eventually marked off short calendar. H Co. also filed a motion to open the judgment, which the trial court denied. On H Co.'s appeal to this court, *held*:

1. H Co. could not prevail on its claim that the trial court, in denying its motion to open, improperly concluded that it was not entitled to relief pursuant to statute (§ 49-15) because absolute title to the property had vested in the plaintiff: no appellate stay was in effect when the law days passed, such that the law days were legally effective, and, without redemption, absolute title to the property vested in the plaintiff, thereby precluding the defendant from obtaining relief pursuant to § 49-15; moreover, the filing of the motion for judgment of foreclosure by sale did not operate to extend the appellate stay vis-à-vis the judgment of strict foreclosure, which expired well before the law days passed, as the motion did not satisfy the requirements of the relevant rule of practice (§ 63-1 (c) (1)).
2. H Co. could not prevail on its claim that the trial court, in denying its motion to open, failed to consider that, even if absolute title to the property had vested in the plaintiff, the court had inherent, continuing jurisdiction to open the judgment as a result of the plaintiff's failure to comply with the court's Uniform Foreclosure Standing Orders; although H Co.'s claim for equitable relief in the motion to open was colorable, H Co. failed to demonstrate the existence of rare and exceptional circumstances warranting the extraordinary equitable relief that it sought in the motion to open.

Argued April 16—officially released September 10, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief,

brought to the Superior Court in the judicial district of Hartford, where the named defendant et al. were defaulted for failure to appear; thereafter, the court, *Dubay*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure; subsequently, the defendant Homeowners Finance Co. filed a motion for judgment of foreclosure by sale; thereafter, the court, *Dubay*, *J.*, rendered judgment of strict foreclosure; subsequently, the court, *S. Connors*, *J.*, denied the motion to open and vacate the judgment filed by the defendant Homeowners Finance Co.; thereafter, the court, *S. Connors*, *J.*, denied the motion to reconsider filed by the defendant Homeowners Finance Co., and the defendant Homeowners Finance Co. appealed to this court. *Affirmed.*

John A. Sodipo, for the appellant (defendant Homeowners Finance Co.).

Opinion

MOLL, J. The defendant Homeowners Finance Co.[1] appeals from the judgment of the trial court denying its motion to open the judgment of strict foreclosure rendered in favor of the plaintiff, LendingHome Funding Corporation, and denying its motion to reconsider. On appeal, the defendant claims that the court (1) improperly concluded, on the basis that title to the property at issue had become absolute in the plaintiff, that the defendant was not entitled to relief pursuant to General Statutes § 49-15 because, according to the defendant, an appellate stay was in effect when the law days passed, thereby rendering them ineffective, and (2) failed to consider that, even if absolute title had vested in the plaintiff, it had inherent, continuing jurisdiction to open

[1] The complaint also named REI Holdings, LLC, and Wayne Francis as defendants, but those parties were defaulted for failure to appear and are not participating in this appeal. For purposes of clarity, we refer to Homeowners Finance Co. as the defendant.

the judgment of strict foreclosure under the circumstances of the present action. We conclude that (1) no appellate stay was in effect when the law days passed, such that the law days were legally effective and, without redemption, absolute title to the property vested in the plaintiff, thereby precluding the defendant from obtaining relief pursuant to § 49-15, and (2) the circumstances of the present action did not justify the exercise of the court's inherent, continuing jurisdiction to afford the defendant equitable relief. Accordingly, we affirm the judgment of the trial court.[2]

The following procedural history is relevant to our resolution of this appeal. On April 27, 2018, the plaintiff commenced the present action. In its complaint, the plaintiff alleged in relevant part as follows. By way of a commercial promissory note, dated August 4, 2016 (note), REI Holdings, LLC, promised to pay the principal sum of $112,500 payable with interest to the plaintiff. To secure the note, REI Holdings, LLC, executed a mortgage on real property that it owned at 93 Jefferson Lane in East Hartford (property). The mortgage deed, which is conditioned on the payment of the note and the performance of certain covenants and other conditions, was recorded on August 29, 2016, in the East Hartford land records. The defendant is a junior lienholder by virtue of a mortgage in the original principal amount of $78,750, dated August 4, 2017, and recorded on August 11, 2017, in the East Hartford land records. Following a default on the note, the plaintiff exercised its option to accelerate the entire balance due on the note. Counts one and two of the complaint sought payment on the note and foreclosure on the mortgage securing the note, respectively.[3]

[2] The plaintiff did not file a brief in this court. On December 19, 2023, this court ordered that this appeal shall be considered on the basis of the defendant's brief and appendix, the record, as defined by Practice Book § 60-4, and oral argument, if not waived.

[3] The complaint set forth a third count asserting a claim of breach of guarantee against Wayne Francis.

On August 7, 2018, the defendant was defaulted for failure to disclose a defense. On October 24, 2018, the plaintiff filed a motion for judgment of strict foreclosure, to which the defendant did not file an objection. On November 5, 2018, the trial court, *Dubay*, *J.*, rendered a judgment of strict foreclosure, finding the amount of the debt on the property, exclusive of fees, to be $148,861.03 and the fair market value of the property to be $90,000. The court scheduled the law days to commence on February 25, 2019. At 5:37 p.m. on November 9, 2018, the court's order rendering the judgment of strict foreclosure was recorded in the trial court file, and later that evening, a JDNO notice[4] of the judgment of strict foreclosure was electronically issued to respective counsel for the plaintiff and the defendant at the time.[5]

At 10:48 a.m. on November 9, 2018, before the court's order rendering the judgment of strict foreclosure was recorded in the trial court file and prior to the issuance of electronic notice of the judgment of strict foreclosure, the defendant filed a motion titled "Motion for Judgment of Foreclosure by Sale" (November 9, 2018

[4] " 'The designation "JDNO" is a standard notation used to indicate that a judicial notice of a decision or order has been sent by the clerk's office to all parties of record. Such a notation raises a presumption that notice was sent and received in the absence of a finding to the contrary.' " *U.S. Bank, National Assn.* v. *Bennett*, 195 Conn. App. 96, 99 n.2, 223 A.3d 381 (2019).

[5] We may take judicial notice of the date and time of filings in the trial court file. See *State* v. *Pagan*, 75 Conn. App. 423, 431, 816 A.2d 635 ("Appellate courts . . . review the whole record and do not overlook material contained in the trial court's file . . . . We may take judicial notice of the contents of the court's file."), cert. denied, 265 Conn. 901, 829 A.2d 420 (2003). With respect to the timing of the issuance of the JDNO notice, we take judicial notice of information that we have obtained from the Superior Court Operations Division that JDNO notices are generated nightly at approximately 9 p.m. and typically delivered electronically to attorneys' e-services inboxes between 9 and 9:30 p.m. See, e.g., *Solomon* v. *Cavanaugh*, 9 Conn. App. 285, 286 n.1, 518 A.2d 663 (1986) (taking judicial notice of information obtained from trial court clerk's office).

motion). The defendant requested that the court render a judgment of foreclosure by sale, representing that it was prepared to bid at least $115,000 for the property at a foreclosure sale, which exceeded the $90,000 appraised value of the property.[6] The plaintiff did not file an objection, and the court's electronic case detail does not reflect any ruling on the motion. On December 12, 2018, the plaintiff filed a copy of a notice of judgment (December 12, 2018 notice) that it had sent, via certified and regular mail, to the defendant and to the nonappearing parties; see footnote 1 of this opinion; pursuant to the court's uniform foreclosure standing orders (standing orders),[7] which notice was dated the same day and provided in relevant part that the court had rendered a judgment of strict foreclosure on November 5, 2018, and set the law days to commence on February 25, 2019, "with title scheduled to vest in the name of the plaintiff on February 27, 2019."

There was no additional activity in the present action until March 24, 2022, when Sodipo Law Group filed an appearance on behalf of the defendant in lieu of prior trial counsel. That same day, the defendant reclaimed

[6] On November 1, 2018, the plaintiff filed an appraisal reflecting that the property had an appraised value of $90,000.

[7] Paragraph D of the Uniform Foreclosure Standing Orders, form JD-CV-104, provides: "Within [ten] days following the entry of judgment of strict foreclosure, the plaintiff must send a letter by certified mail, return receipt requested, and by regular mail, to all [nonappearing] defendant owners of the equity and a copy of the notice must be sent to the clerk's office. The letter must contain the following information: a.) the letter is being sent by order of the Superior Court; b.) the terms of the judgment of strict foreclosure; c.) [nonappearing] defendant owner(s) of equity risk the loss of the property if they fail to take steps to protect their interest in the property on or before the defendant owners' law day; d.) [nonappearing] defendant owner(s) should either file an individual appearance or have counsel file an appearance in order to protect their interest in the equity. The plaintiff must file the return receipt with the [c]ourt. THE PLAINTIFF MUST NOT FILE A CERTIFICATE OF FORECLOSURE ON THE LAND RECORDS BEFORE PROOF OF MAILING HAS BEEN FILED WITH THE COURT." (Emphasis in original.)

the November 9, 2018 motion, such that the motion was printed on the short calendar on April 11, 2022;[8] however, the record does not reflect any marking with respect to the motion. On June 21, 2022, the defendant again reclaimed the November 9, 2018 motion, such that the motion was printed on the short calendar on July 5, 2022; however, the motion was marked off.

On October 6, 2022, the defendant filed a motion to open and to vacate the judgment of strict foreclosure (motion to open),[9] accompanied by a supporting memorandum of law. The defendant asserted that, (1) pursuant to Practice Book § 63-1 (c) (1),[10] its filing of the November 9, 2018 motion, which it characterized as having sought "to essentially open the judgment [of strict foreclosure] to convert the strict foreclosure judgment to a [foreclosure by] sale," operated to extend the automatic appellate stay attendant to the judgment of strict foreclosure; see Practice Book § 61-11 (a);[11]

[8] The November 9, 2018 motion was not printed on any short calendar prior to April 11, 2022.

[9] In the alternative, the defendant requested that the court treat the motion to open as an application for a writ of audita querela and to vacate the judgment of strict foreclosure. The court did not address this alternative request, and the defendant on appeal does not claim that the court improperly failed to treat the motion to open as an application for a writ of audita querela. Accordingly, we need not consider this issue further.

[10] Practice Book § 63-1 (c) (1) provides in relevant part: "If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion . . . ."

[11] Practice Book § 61-11 (a) provides: "Automatic stay of execution.

"Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. If the case goes to judgment on appeal, any stay thereafter shall be in accordance with Section 71-6 (motions for reconsideration), Section 84-3 (petitions for certification by the Connecticut Supreme Court), and Section 71-7 (petitions for certiorari by the United States Supreme Court)."

pending a ruling on the motion, (2) the law days, scheduled to commence on February 25, 2019, were of no legal effect because they had passed while the extended appellate stay was in place, and (3) notwithstanding that the plaintiff never acquired absolute title to the property as a result of the law days being legally ineffective, the plaintiff impermissibly filed a certificate of foreclosure in the East Hartford land records and subsequently transferred the property.[12] The defendant further contended that good cause existed to open the judgment of strict foreclosure because the plaintiff engaged in inequitable conduct that infringed on its right to redemption.[13] Additionally, the defendant asserted that the December 12, 2018 notice was untimely pursuant to the standing orders. As relief, the defendant requested that the court exercise its authority pursuant to § 49-15,[14] or its inherent authority, to open

[12] The defendant represented that (1) on February 28, 2019, the plaintiff filed a certificate of foreclosure in the East Hartford land records, (2) on March 31, 2019, for no consideration, the property was transferred to an unidentified entity, (3) in June, 2019, the property again was transferred to an unidentified entity, and (4) in October, 2019, the property was sold to an unidentified entity for $190,000.

[13] The defendant argued that the plaintiff failed to provide a payoff amount to the defendant notwithstanding the defendant's various requests for said payoff amount, and that the plaintiff had a "scheme to obtain a systematically low appraisal, to then benefit from . . . prior improvements on the property, and to ultimately transfer the property for a substantially higher amount in a short span of time." The defendant further represented that (1) it "reasonably believed [on the basis of] the plaintiff's series of representations that it would have received payoff figures that would have allowed [it] to timely redeem prior to the law day," and that, "[b]ut for these representations, [it] would have sought to have [the November 9, 2018] motion heard prior to the scheduled law day," and (2) "[t]hrough mistake, [it] believed that the law day was valid and took no action in pursuing [the November 9, 2018 motion] after the expiration of the law day nor did it seek the court's intervention in believing the same."

[14] General Statutes § 49-15 (a) provides in relevant part: "(1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such

and to vacate the judgment of strict foreclosure and to conduct additional proceedings to "allow the defendant to interpose a defense in a manner consistent as equity requires." The plaintiff did not file an objection.

On November 4, 2022, the court, *S. Connors*, *J.*, denied the motion to open. The court reasoned that "[t]he four month rule in General Statutes § 52-212a[15] operate[d] as a constraint on the court's substantive authority to grant relief"; (footnote added); and that none of the recognized exceptions to § 52-212a applied in the present action.

On November 14, 2022, the defendant filed a motion to reconsider the court's November 4, 2022 decision, arguing that the court improperly relied on § 52-212a

judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection.

"(2) Any judgment foreclosing the title to real estate by strict foreclosure may be opened after title has become absolute in any encumbrancer upon agreement of each party to the foreclosure action who filed an appearance in the action and any person who acquired an interest in the real estate after title became absolute in any encumbrancer, provided (A) such judgment may not be opened more than four months after the date such judgment was entered or more than thirty days after title became absolute in any encumbrancer, whichever is later, and (B) the rights and interests of each party, regardless of whether the party filed an appearance in the action, and any person who acquired an interest in the real estate after title became absolute in any encumbrancer, are restored to the status that existed on the date the judgment was entered."

[15] General Statutes § 52-212a provides: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. The continuing jurisdiction conferred on the court in preadoptive proceedings pursuant to subsection (o) of section 17a-112 does not confer continuing jurisdiction on the court for purposes of reopening a judgment terminating parental rights. The parties may waive the provisions of this section or otherwise submit to the jurisdiction of the court, provided the filing of an amended petition for termination of parental rights does not constitute a waiver of the provisions of this section or a submission to the jurisdiction of the court to reopen a judgment terminating parental rights."

in denying the motion to open. The plaintiff did not file an objection. On November 28, 2022, the court granted this motion to reconsider and scheduled a hearing on the motion to open, which the court held on December 19, 2022.[16]

On January 3, 2023, the court upheld its denial of the motion to open. The court stated that, in its November 4, 2022 decision denying the motion to open, it mistakenly relied on § 52-212a when, instead, it "should have . . . considered that possession of the property . . . no longer lies with the plaintiff, but a separate third party, as stated in the [motion to open]. Under [§] 49-15, the [motion to open] may be denied if title to the property . . . has become absolute in another encumbrancer."

On January 19, 2023, the defendant filed a motion to reconsider the court's January 3, 2023 decision, which it later supplemented with a corrected memorandum of law. The defendant contended that the court incorrectly determined that title to the property had become absolute in the plaintiff because an extended appellate stay vis-à-vis the judgment of strict foreclosure remained in effect when the law days were scheduled to commence, thereby rendering the law days without legal effect. In addition, the defendant asserted that the plaintiff improperly filed the certificate of foreclosure in the East Hartford land records given that the December 12, 2018 notice was not timely filed in accordance with the standing orders, which constituted an "independent

[16] Counsel for the plaintiff appeared at the December 19, 2022 hearing. The plaintiff's counsel acknowledged that the plaintiff did not file an objection to the motion to open and, in setting forth the plaintiff's position, stated that "really the [plaintiff] is more concerned about being paid than trying to obtain title to the property . . . so it's really more to [counsel] about what [the defendant is] hoping to accomplish on this property." The plaintiff's counsel also refuted the defendant's argument that the defendant had been waiting for a payoff amount from the plaintiff, arguing that the judgment of strict foreclosure set forth the judgment amount for purposes of redemption.

basis for the court to open the judgment [of strict foreclosure]." The plaintiff did not file an objection. On February 9, 2023, the court summarily denied this motion to reconsider. This appeal followed. Additional procedural history will be set forth as necessary.

Before turning to the defendant's claims, we set forth the following general legal principles that apply when we review a court's decision on a motion to open a judgment. "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion. . . . When considering whether the court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citation omitted; footnote omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Booker*, 220 Conn. App. 783, 798, 299 A.3d 1215, cert. denied, 348 Conn. 927, 304 A.3d 860 (2023). Moreover, "[t]he law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature." (Internal quotation marks omitted.) Id., 798–99.

I

The defendant's first claim is that the trial court, in denying the motion to open, improperly concluded that it was not entitled to relief pursuant to § 49-15 because absolute title to the property had vested in the plaintiff. The defendant maintains that an appellate stay remained in effect when the law days were scheduled

to commence, thereby rendering the law days legally ineffective and preventing absolute title from vesting in the plaintiff. We disagree.

We begin by setting forth the following applicable standard of review and legal principles. Whether the court correctly concluded that the defendant could not obtain relief pursuant to § 49-15 on the basis that title to the property had become absolute in the plaintiff presents us with a question of law subject to plenary review. See *Lending Home Funding Corp.* v. *REI Holdings, LLC*, 214 Conn. App. 703, 707, 710, 281 A.3d 1 (2022) (applying plenary review in analyzing trial court's conclusion that it lacked subject matter jurisdiction to consider motion to open and to vacate judgment of strict foreclosure filed pursuant to § 49-15 on basis of determination that absolute title had vested in plaintiff). Moreover, our examination of the defendant's claim requires us (1) to analyze the appellate stay provisions in the rules of practice and (2) to interpret the November 9, 2018 motion, both of which require the exercise of plenary review. See id. (applying plenary review when examining scope of appellate stay provisions in rules of practice); *Swain* v. *Swain*, 213 Conn. App. 411, 418, 277 A.3d 895 (2022) (applying plenary review when interpreting motion).

"Motions to open judgments of strict foreclosure are governed by . . . § 49-15 (a) (1)." *U.S. Bank National Assn.* v. *Booker*, supra, 220 Conn. App. 793. Section 49-15 (a) (1) provides in relevant part: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified . . . provided no such judgment shall be opened after the title has become absolute in any encumbrancer . . . ." "[Section] 49-15 prescribes . . . four conditions for opening a judgment of strict

foreclosure: (1) that the motion be in writing; (2) that the movant be a person having an interest in the property; (3) that the motion be acted upon before an encumbrancer has acquired title; and (4) that cause, obviously good cause, be shown for opening the judgment." (Internal quotation marks omitted.) *Connecticut Housing Finance Authority* v. *McCarthy*, 204 Conn. App. 330, 339, 253 A.3d 494 (2021).

"In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the payment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. . . . Thus, once the law day passes and title vests in the [plaintiff], no practical relief is available [p]rovided that this vesting has occurred pursuant to an authorized exercise of jurisdiction by the trial court . . . .

"On the other hand, it is well established that law days that are set forth in a judgment of strict foreclosure can have no legal effect if an appellate stay is in effect because to give them legal effect would result in an extinguishment of the right of redemption pending appeal." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Lending Home Funding Corp.* v. *REI Holdings, LLC*, supra, 214 Conn. App.

711–12; see also *Wachovia Mortgage, FSB* v. *Toczek*, 189 Conn. App. 812, 824, 209 A.3d 725 ("[O]ur Supreme Court repeatedly has held that the law days set in a judgment of strict foreclosure cannot be given any legal effect while the appellate stay is in effect. See, e.g., *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 347–48, 579 A.2d 1054 (1990), and cases cited therein."), cert. denied, 333 Conn. 914, 216 A.3d 650 (2019).

In light of the foregoing legal principles, in order to resolve whether absolute title to the property vested in the plaintiff, we must determine whether an appellate stay was in place that rendered the law days legally ineffective. To analyze this issue, we turn to our rules of practice.

Practice Book § 63-1 (a) provides in relevant part: "Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. . . . If a motion is filed within the appeal period that might give rise to a new appeal period as provided in subsection (c) of this rule, the appeal may be filed either in the original appeal period, which continues to run, or in the new appeal period. . . ."

Practice Book § 63-1 (b) provides in relevant part: "If notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice is given only by mail or by electronic delivery, the appeal period shall begin on the day that notice was sent to counsel of record by the clerk of the trial court. . . ."

Practice Book § 63-1 (c) (1) provides in relevant part: "If a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the

ruling is given on the last such outstanding motion . . . . Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment. Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous [sentence]. . . ."

In order to invoke the operation of Practice Book § 63-1 (c) (1), a motion must (1) be filed within the appeal period of the underlying judgment and (2) if granted, render the judgment ineffective. Our case law establishes that a motion that satisfies the requirements of Practice Book § 63-1 (c) (1) functions to extend the appellate stay attendant to the underlying judgment until the motion is decided. As this court recently summarized, when a motion is filed that is in compliance with Practice Book § 63-1 (c) (1), "the filing of the motion extends the stay period until that motion is decided, even when a law day is scheduled to run before the court has an opportunity to resolve the motion. [*Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 216 Conn. 346–47, 349–50]; see also *Continental Capital Corp.* v. *Lazarte*, [57 Conn. App. 271, 273, 749 A.2d 646 (2000)] ('[l]aw days in a strict foreclosure cannot run if a motion to open is filed during the appeal period but is yet to be ruled on'). Stated otherwise, the timely filing of a motion to open [or other applicable motion] pursuant to Practice Book § 63-1, 'activate[s] the automatic stay under [Practice Book § 61-11]' until

that motion is decided . . . *Farmers & Mechanics Savings Bank* v. *Sullivan*, supra, 346 . . . ." *Lending Home Funding Corp.* v. *REI Holdings, LLC*, supra, 214 Conn. App. 714. Practice Book § 63-1 "can have profound effects on a foreclosure decree, since [Practice Book § 61-11] stays proceedings to enforce or carry out the judgment . . . until the time to take an appeal has expired. Thus, law days in a strict foreclosure cannot run . . . if a motion to reopen [or other applicable motion] was filed during the appeal period but has yet to be ruled upon; any redemption . . . under such circumstances would be violative of the automatic stay, and any title derived through such stayed proceedings would be subject to defeasance." (Internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 684 n.10, 899 A.2d 586 (2006).

We focus our attention on the portion of Practice Book § 63-1 (c) (1) providing that, to satisfy the rule, a motion must, "if granted . . . render the judgment, decision or acceptance of the verdict ineffective . . . ." Section 63-1 (c) (1) enumerates a nonexhaustive list of motions that meet this criterion, including motions seeking "the opening or setting aside of the judgment . . . or any alteration of the terms of the judgment." The defendant maintains that the November 9, 2018 motion satisfied this requirement. We do not agree.

In determining whether the November 9, 2018 motion, if granted, would have rendered the judgment of strict foreclosure ineffective, "we look to the substance of the relief sought by the motion rather than the form." (Internal quotation marks omitted.) *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 682, 240 A.3d 249 (2020). In the November 9, 2018 motion, the substance of which comprised five sentences on a single page, the defendant "[moved] the court to enter [a] judgment of foreclosure by sale in the [present] action" on the ground that it was willing to bid at least $25,000 more than the

appraised value of the property. The defendant cited no legal authority and made no cognizable request to open or to alter the judgment of strict foreclosure. In fact, the defendant made no reference to the judgment of strict foreclosure at all.

Additionally, the November 9, 2018 motion did not comply with the technical requirements of Practice Book § 11-11, which provides in relevant part: "Any motions which would, pursuant to Section 63-1, delay the commencement of the appeal period, and any motions which, pursuant to Section 63-1, would toll the appeal period and cause it to begin again, shall be filed simultaneously insofar as such filing is possible, and shall be considered by the judge who rendered the underlying judgment or decision. *The party filing any such motion shall set forth the judgment or decision which is the subject of the motion, the name of the judge who rendered it, the specific grounds upon which the party relies, and shall indicate on the bottom of the first page of the motion that such motion is a Section 11-11 motion. . . .*" (Emphasis added.) The November 9, 2018 motion did not identify any judgment or decision as the "subject" of the motion, or the name of the judge who rendered any such judgment or decision, and did not include a notation that it was a Practice Book § 11-11 motion. Although noncompliance with the technical requirements of Practice Book § 11-11, alone, is an insufficient ground on which to conclude that a motion fails to trigger the provisions of Practice Book § 63-1 (c) (1); see *Finance of America Reverse, LLC* v. *Henry*, 222 Conn. App. 810, 826–27, 307 A.3d 300 (2023) ("failure to comply with the technical requirements of Practice Book § 11-11 . . . is not a sufficient basis to render ineffective for the purpose of creating a new appeal period a motion that otherwise adheres to the substance of Practice Book § 63-1 (c) (1)"); the defendant's failure to include in the November 9, 2018 motion

all of the information prescribed in Practice Book § 11-11 informs our analysis of the substance of the motion and factors against interpreting the motion to fall within the ambit of Practice Book § 63-1 (c) (1).

Furthermore, the record reflects that the defendant filed the November 9, 2018 motion on the morning of November 9, 2018, whereas the court's order rendering the judgment of strict foreclosure and electronic notice thereof were not recorded in the trial court file and issued, respectively, until later that day. This begs the question of how the defendant could have intended to move to open or to alter a judgment of which it had not yet received notice.[17]

Under these unique circumstances, we cannot reasonably construe the November 9, 2018 motion as requesting, as relief, to open or to alter the judgment of strict foreclosure, and, ergo, we cannot reasonably conclude that, if granted, the motion would have functioned to render the judgment ineffective as required pursuant to Practice Book § 63-1 (c) (1).

In sum, we conclude that the November 9, 2018 motion was not a Practice Book § 63-1 (c) (1) motion. Thus, contrary to the defendant's position, the filing of the November 9, 2018 motion did not operate to extend the appellate stay vis-à-vis the judgment of strict foreclosure rendered on November 5, 2018, which expired well before the law days passed in February, 2019. As the law days were legally effective and no redemption occurred, absolute title to the property vested in the

[17] The defendant does not claim to have received notice of the judgment of strict foreclosure in open court, and it has not provided us with a transcript of the hearing on the plaintiff's motion for judgment of strict foreclosure. See Practice Book § 61-10 (a) ("It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal.").

plaintiff following the passing of the law days. Accordingly, in denying the motion to open, the court properly concluded that the defendant was not entitled to relief pursuant to § 49-15.

II

The defendant next claims that, in denying the motion to open, the trial court failed to consider that, even if absolute title to the property vested in the plaintiff following the passing of the law days, the court had inherent, continuing jurisdiction to open the judgment of strict foreclosure as a result of the plaintiff's failure to comply with the standing orders. The defendant maintains that, (1) pursuant to the standing orders, (a) notice of a judgment of strict foreclosure must be mailed to all nonappearing defendants within ten days following the entry of the judgment and (b) a plaintiff is prohibited from filing a certificate of foreclosure in the land records without first filing proof of the mailing of notice with the court, (2) the December 12, 2018 notice was untimely, and (3) because the December 12, 2018 notice did not comply with the standing orders, the plaintiff improperly filed a certificate of foreclosure in the East Hartford land records. In light of these circumstances, the defendant asserts that, notwithstanding § 49-15, the court had equitable jurisdiction to "grant relief from the operation of the judgment [of strict foreclosure] when to enforce it [was] against conscience"; (internal quotation marks omitted); and when the plaintiff interfered with the defendant's ability to exercise its right to redeem. This claim is unavailing.

"Our Supreme Court in [*U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 260 A.3d 1187 (2021)] concluded that there is a limited exercise of jurisdiction over a narrow class of equitable claims raised in post-vesting motions to open, despite the general prohibition of such jurisdiction by . . . § 49-15 (a) (1). Id., 373. The

category of claims that fall within this class of cases sound in [f]raud, accident, mistake, and surprise . . . . Id., 379; see, e.g., id., 370–71 (finding continuing equitable jurisdiction where movant relied on misrepresentations by loan servicer that caused her to fail to file motion to open before passage of law day); *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 260, 708 A.2d 1378 (1998) (concluding that there was continuing jurisdiction where motion to open filed after running of law days sought to correct an inadvertent omission in a foreclosure complaint); *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 3–4, 85 A.3d 1 (2014) (concluding there was continuing equitable authority where plaintiff misrepresented to court that it had sent notice of judgment to movant prior to law day but, in fact, did not actually provide notice until law day). These are rare exceptions, applicable only in unusual circumstances." (Footnote omitted; internal quotation marks omitted.) *DXR Finance Parent, LLC* v. *Theraplant, LLC*, 223 Conn. App. 362, 374–75, 309 A.3d 347, cert. denied, 348 Conn. 957, 310 A.3d 380 (2024); see also *U.S. Bank National Assn.* v. *Rothermel*, supra, 376–77 ("trial courts possess inherent powers that support certain limited forms of continuing equitable authority . . . and . . . these powers can, in certain rare and exceptional cases, be exercised in a manner consistent with § 49-15 after the passage of the law days" (citation omitted)). As our Supreme Court further clarified in *Rothermel*, "[e]xceptions to the general rule against postvesting motions to open judgments of strict foreclosure are, in fact, rare and exceptional. A bare assertion that equity requires such relief is insufficient . . . . [T]he party seeking to invoke the trial court's continuing jurisdiction must base their motion to open on particularized factual allegations that could support a claim cognizable in equity. Trial courts may, under existing case law, grant motions to dismiss pursuant to § 49-15 in cases

in which a claim raised in a postvesting motion to open fails to present colorable grounds for equitable relief under these limited exceptions, and appellate courts may continue to summarily dismiss appeals taken from those rulings." *U.S. Bank National Assn.* v. *Rothermel*, supra, 379–80 n.11.

We conclude that, although the defendant's claim for equitable relief in the motion to open was colorable,[18] the defendant failed to allege sufficient facts in support of the motion to open implicating the type of rare and exceptional circumstances necessary to justify the exercise of the court's continuing jurisdiction to open the judgment of strict foreclosure after absolute title had vested in the plaintiff. The sole basis of the defendant's claim that the plaintiff violated the standing orders was that the December 12, 2018 notice was untimely. As an initial matter, we observe that paragraph D of the standing orders requires notice to be mailed to all *non-appearing* defendants, which excludes the defendant. See footnote 7 of this opinion. In any event, the December 12, 2018 notice included the defendant as an addressee, and the defendant did not allege that it failed to receive the notice. In addition, the defendant did not allege that the plaintiff failed either to mail notice of the judgment of strict foreclosure or to file such notice with the court. Moreover, the record establishes that, although untimely, the December 12, 2018 notice was mailed more than ten weeks prior to the scheduled law days. In this situation, we cannot perceive how enforcing the judgment of strict foreclosure against the defendant would be "against conscience"; (internal quotation marks omitted); or how the plaintiff's conduct in this instance prevented the defendant from exercising its right to redeem.

[18] "This court has defined a colorable claim as one that is superficially well founded but that may ultimately be deemed invalid . . . ." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Booker*, supra, 220 Conn. App. 793.

In sum, we conclude that the defendant has failed to demonstrate the existence of rare and exceptional circumstances warranting the extraordinary equitable relief that it sought in the motion to open. Thus, we reject the defendant's claim that the court's denial of the motion to open constituted error on this ground.[19]

The judgment is affirmed.

In this opinion the other judges concurred.

QUICKEN LOANS, INC. *v.* JOSE RODRIGUEZ ET AL.
(AC 46309)

Suarez, Clark and Westbrook, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendants M and J. After defaulting the defendants for failure to plead, the trial court rendered a judgment of foreclosure by sale. The property was then sold to the plaintiff, and the trial court approved the sale. M timely filed a motion to set aside the court's approval of the sale. The defendants, however, never marked the motion as ready for adjudication, and, accordingly, the court did not act on it. Thereafter, the case was administratively closed. Approximately three months later, the defendants filed a motion to open, requesting that the trial court vacate the administrative closure and open and vacate the judgment of foreclosure by sale. The trial court denied the defendants' motion to open and sustained the plaintiff's objection thereto, and the defendants appealed to this court. *Held*:

1. This court concluded that any error by the trial court in its misinterpretation or misapplication of the applicable rule of practice (§ 63-1 (c) (1)) regarding the existence of an appellate stay following M's filing of the motion to set aside the approval of the sale was harmless and did not provide a reasonable basis for reversing the trial court's judgment on the defendants' motion to open: although, pursuant to Practice Book § 63-1 (c) (1), M's filing of the motion to set aside the approval of the

[19] The defendant also claims that the court abused its discretion in denying the defendant's January 19, 2023 motion to reconsider because the court, according to the defendant, overlooked legal principles that warranted the granting of the motion to open. In light of our conclusions in parts I and II of this opinion, we reject this claim.

sale extended the appellate stay that was in effect as a result of the court's approval of the sale until there was a ruling on that motion and any resulting new appeal period expired, the court's decision to enter the administrative closure of the file either acted as an implicit denial of M's motion or served as notice to the parties that the court was declining to rule on that motion, which the defendants reasonably should have construed as an effective denial of the motion pursuant to *Ahneman* v. *Ahneman* (243 Conn. 471); moreover, to the extent that M's filing of the motion to set aside the approval of the sale created the potential for a new appeal period, it began to run with the entry of the administrative closure and, thus, terminated approximately two months prior to the defendants' filing of the motion to open; furthermore, M's motion to set aside the approval of the sale did not assert fraud, mistake, surprise or any other issue with regard to the judicial sale but, instead, asserted claims directed at the judgment of foreclosure, which the defendants had waived when they failed to timely appeal from the judgment of foreclosure by sale.

2. Contrary to the defendants' assertions, the trial court did not abuse its discretion by deciding the motion to open on the papers without a hearing: a motion seeking to open or set aside a judgment is not a motion for which oral argument is as of right; moreover, although the defendants requested oral argument, they did not identify in their motion or their supporting memorandum the existence of any disputed factual issues that required the taking of evidence; furthermore, although the defendants claimed that the lack of a hearing deprived them of the opportunity to contest one of the factual predicates underlying the court's rationale for denying the motion, namely, whether they diligently pursued M's motion to set aside the approval of the sale, that issue had no legal bearing on the existence of an appellate stay.

3. The trial court did not abuse its discretion in denying the defendants' motion to open to the extent that it sought to set aside the administrative closure and properly determined that the defendants' request to open the judgment of foreclosure was untimely and, thus, that it lacked the authority to grant that aspect of the motion: the motion to open was filed nearly nine months after the court rendered the judgment of foreclosure by sale and, as such, was clearly outside of the applicable statutory limit (§ 52-212a); moreover, at the time the motion was filed, title to the property had vested in the plaintiff as the purchaser of the property because the time to appeal from the approval of the sale had long passed; furthermore, the motion did not raise a colorable claim that the foreclosure judgment was the product of fraud, duress or mutual mistake.

Argued April 22—officially released September 10, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other

relief, brought to the Superior Court in the judicial district of New Britain, where the defendant Capital One Bank (USA), N.A., was defaulted for failure to appear; thereafter, Rocket Mortgage, LLC, was substituted as the plaintiff; subsequently, the named defendant et al. were defaulted for failure to plead; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the substitute plaintiff's motion for a judgment of foreclosure by sale and rendered judgment thereon; subsequently, the defendant Michelle Rodriguez filed a motion to set aside the court's approval of the sale of the real property; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, issued a notice of administrative closure; subsequently, the court, *Hon. Joseph M. Shortall*, judge trial referee, denied the motion to vacate the administrative closure and to open and vacate the judgment of foreclosure by sale filed by the named defendant et al. and sustained the plaintiff's objection thereto, and the named defendant et al. appealed to this court. *Affirmed.*

John A. Sodipo, for the appellants (named defendant et al.).

Geoffrey K. Milne, for the appellee (substitute plaintiff).

Opinion

WESTBROOK, J. In this residential mortgage foreclosure action, the defendants Jose Rodriguez and Michelle Rodriguez[1] appeal from the judgment of the trial court denying their motion to open, which sought to set aside the court's administrative closure of the file following

[1] Capital One Bank (USA), N.A., is named as an additional defendant in the complaint by virtue of its interest in a judgment lien on the property. The trial court defaulted Capital One Bank (USA), N.A., for failure to appear, and it has not participated in the current appeal. Accordingly, all references in this opinion to the defendants collectively are to Jose Rodriguez and Michelle Rodriguez only.

the approval of a committee sale and to open the judgment of foreclosure by sale rendered in favor of the plaintiff, Rocket Mortgage, LLC.[2] The defendants claim that the court improperly (1) misinterpreted and misapplied Practice Book § 63-1 when it concluded that no appellate stay was in effect that barred the transfer of title to the plaintiff following the approval of the sale, (2) found that the defendants had not diligently pursued a motion to set aside the approval of the sale, (3) failed to conduct an evidentiary hearing on the defendants' motion to open, and (4) determined that the motion to open was untimely as to the judgment of foreclosure by sale and, thus, that it lacked the authority to open that judgment. For the reasons that follow, we affirm the judgment of the court.

The record reveals the following relevant undisputed facts and procedural history. On October 30, 2019, the plaintiff commenced this action to foreclose a mortgage on property owned by the defendants at 267 Culver Street in Newington. Following unsuccessful court-sponsored mediation, the court defaulted the defendants for failure to plead. On November 24, 2021, the plaintiff filed a motion for a judgment of strict foreclosure. The plaintiff also filed a foreclosure worksheet and other documents, including an affidavit of compliance with the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq.[3] The defendants took no action to set aside the default or to oppose the motion for a judgment of foreclosure.

[2] After commencing the action, Quicken Loans, Inc., changed its name to Rocket Mortgage, LLC, and the court granted a motion to substitute Rocket Mortgage, LLC, as the plaintiff in this action.

[3] Attached as an exhibit to the affidavit is a copy of the letter that the plaintiff averred it had sent to the defendants via certified mail on July 23, 2019, prior to the commencement of the foreclosure action. The letter contained proper notice of EMAP and, inter alia, advised the defendants of their rights under General Statutes § 8-265ee. Although the defendants assert that they never received the letter, proof of actual receipt of an EMAP notice is not relevant to the issue of whether a mortgagee properly has complied with EMAP notice requirements. See *Wells Fargo Bank, N.A.* v. *Melahn*, 222

On March 28, 2022, the court, *Hon. Joseph M. Shortall*, judge trial referee, rendered a judgment of foreclosure by sale.[4] It found, inter alia, that the amount of the outstanding debt owed by the defendants was $194,535.31 and that the fair market value of the property was $225,000. The court set a sale date of June 4, 2022. The defendants did not file an appeal challenging the judgment of foreclosure, including any claim of noncompliance with the EMAP notice requirements.

On April 28, 2022, the court, *Morgan, J.*, issued notice that, due to the length of time that the action had been pending on the docket, the court was placing the matter on the court's docket management calendar.[5] On May 24, 2022, the plaintiff filed a form request for exemption from dismissal under the docket management program, noting that the court had set a foreclosure sale date of June 4, 2022. The court granted the plaintiff's request for exemption but also provided notice "that if a motion for supplemental judgment is not filed within [ninety] days of the foreclosure sale date, an administrative closure shall enter in this case without further notice, unless for good cause shown the court extends this deadline."[6]

Conn. App. 828, 844–45, 307 A.3d 911 (2023), cert. denied, 348 Conn. 951, 308 A.3d 1038 (2024).

[4] "In Connecticut, strict foreclosure is the rule, foreclosure by sale the exception." *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 793, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). "The decision whether to order a strict foreclosure or a sale lies within the discretion of the court." Id., 794.

[5] The notice provided in relevant part: "The above case, with a return date prior to April 28, 2020, has not been disposed of (a judgment of foreclosure by sale is not a final disposition). The court shall dispose of or dismiss this case unless appropriate paperwork, such as a withdrawal or affidavit of bankruptcy, is filed prior to June 1, 2022. If counsel obtains judgment prior to June 1, 2022, then the case will be marked off of the docket management calendar." (Emphasis omitted.)

[6] "[T]he supplemental judgment [in a foreclosure action] performs a variety of functions. Not only does it ratify and confirm the sale, but it also determines the priorities of the encumbrancers and finds the debt due to each, as well as orders disbursement of the expenses of the sale and possession

The foreclosure sale went forward as ordered, and the property was sold at auction to the plaintiff for $213,800. On June 6, 2022, the committee filed a motion for approval of the sale and deed and for acceptance of the committee's report. The defendants did not oppose the motion for approval of the sale. On June 20, 2022, Judge Shortall granted the committee's motion and approved the sale and deed. The court further ordered that "[t]he plaintiff's counsel must file a motion for supplemental judgment within thirty days of this notice, or *a final disposition of the case will be ordered by the court*." (Emphasis added.)

On July 11, 2022—the final day on which to timely file an appeal from the court's approval of the sale—Michelle Rodriguez filed a motion asking the court to set aside its approval of the sale. The motion provided in relevant part that "[Michelle Rodriguez] would like to inform the court that at no time did she receive an EMAP letter from [the plaintiff] as required. [Michelle Rodriguez] disputes receiving notice of default [on the note and mortgage] as claimed at paragraph six of the complaint. Additionally, COVID and the lack of response from [the plaintiff] hindered [Michelle Rodriguez'] ability to pursue meaningful loss mitigation. [Michelle Rodriguez] would also need additional time to consult with and hire an attorney to pursue these issues further."[7] The motion did not contain an indication on the bottom of the first page that it was intended as a Practice Book § 11-11 motion or identify the judge

to the successful bidder." (Internal quotation marks omitted.) *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 163, 75 A.3d 651 (2013); see also *City National Bank* v. *Stoeckel*, 103 Conn. 732, 744, 132 A. 20 (1926) ("[t]he decree of foreclosure by sale should not adjudicate the rights of the parties to the fund or funds realized, but such rights should be determined by way of supplementary judgment").

[7] At the time she filed the motion, Michelle Rodriguez was a self-represented party. Attorney John A. Sodipo, who represents the defendants in this appeal, filed an appearance for the defendants on September 23, 2022.

that had approved the sale.[8] Neither the committee nor the plaintiff filed an opposition to the motion to set aside the approval of the sale. The trial court file indicates that the motion first appeared on a July 25, 2022 nonarguable short calendar but that the defendants never marked the motion "ready" for adjudication. Accordingly, it was not acted on by the court.[9]

On August 15, 2022, the committee filed a motion for advice. In that motion, the committee represented to the court that, despite making proper demand, the plaintiff had not paid it the fees and expenses ordered by the court. The committee asked the court for an order of payment and also requested an additional $300 in fees related to its filing of the motion for advice. On August 29, 2022, the court issued an order directing the plaintiff's counsel "to file a motion for supplemental judgment by no later than September 13, 2022, and to pay the committee $300 in addition to the fee already approved by the court."

On September 26, 2022, Judge Shortall issued the following order: "The plaintiff having failed to comply with the order of the court (*Morgan, J.*) that a motion for supplemental judgment be filed within ninety days of the sale date ([docket entry] #120.01), this file is

[8] Practice Book § 11-11 provides in relevant part that a party filing a motion that, pursuant to Practice Book § 63-1 (c) (1), could effect the timing of the appeal period, "shall set forth the judgment or decision which is the subject of the motion, the name of the judge who rendered it, the specific grounds upon which the party relies, and shall indicate on the bottom of the first page of the motion that such motion is a [Practice Book §] 11-11 motion. . . ."

[9] The defendants attached as an exhibit to a subsequent motion a copy of a short calendar reclaim form that purports to show that they later reclaimed the motion to set aside for adjudication. Our review of the trial court's file, however, shows that, although the motion appeared again on an October 11, 2022 calendar, the defendants, who by then were represented by counsel, again failed to mark the motion "ready." It is axiomatic that it is not the responsibility of the court to decide a motion in the absence of a party marking the motion ready for adjudication. See *Curry* v. *Allan S. Goodman, Inc.*, 95 Conn. App. 147, 153, 895 A.2d 266 (2006).

administratively closed." Notice of the court's administrative closure of the file was issued to all parties, including the defendants. The defendants did not file an appeal challenging the administrative closure, let alone raise the ground that the court's closure of the file arguably was in violation of an automatic appellate stay in place as a result of the filing of the motion to set aside the approval of the sale, nor did they move the court within the appeal period to open or set aside the administrative closure and restore the case to the docket for the purpose of adjudicating the motion to set aside approval of the sale. The plaintiff recorded the committee deed on October 11, 2022.

Rather, on December 16, 2022, nearly three months after the court issued notice of the administrative closure, the defendants filed what they captioned a "motion for order," in which they argued that the plaintiff had prematurely recorded the court-approved deed. According to the defendants, the plaintiff never acquired title to the foreclosed property due to the appellate stay of execution that remained in effect as a result of the unadjudicated motion to set aside the approval of the sale. Judge Morgan rejected the motion for order, stating: "This case has been administratively closed. Consequently, a motion to reopen must be filed and granted, and the required filing fee paid, before this motion may be considered by the court."

On December 21, 2022, the defendants then filed the motion to open that is the subject of the present appeal. In that motion, the defendants moved the court to vacate the administrative closure "pursuant to its inherent supervisory authority and [Practice Book §] 10-10"[10]

[10] Practice Book § 10-10 provides in relevant part: "Supplemental pleadings showing matters arising since the original pleading may be filed in actions for equitable relief by either party. . . ." A postjudgment motion to open is not a pleading. See Practice Book § 10-6. Thus, it is unclear how Practice Book § 10-10 is applicable.

and also to open and vacate the judgment of foreclosure by sale. The defendants argued that the court "has continuous jurisdiction under [General Statutes §] 52-212 to grant the relief as requested by the defendants" and that, "while the appellate stay [was] in effect pursuant to Practice Book [§] 63-1, the plaintiff or . . . its agents interfered with the defendants' right to redeem by locking the defendants out of their property and removed thousands of dollars worth of personal belongings." That same day, the court issued an order directing the plaintiff to file a response to the defendants' motion to open by December 30, 2022, and further ordered that "the property in question not be sold or otherwise alienated (e.g., leased) until this motion is acted upon."

The plaintiff filed an objection to the motion to open on December 27, 2022. It argued that the defendants had failed to establish good cause to open the judgment, the motion was untimely, and, because title to the property had already transferred to the plaintiff, the motion was not properly before the court.

On January 19, 2023, the court sustained the plaintiff's objection and denied the defendants' motion to open. The court explained: "As far as the judgment of foreclosure by sale is concerned, the motion is untimely, and the court lacks authority to open the judgment. . . . As far as the order for administrative closure is concerned, assuming the defendants have standing to address an order entered because of the plaintiff's failure to comply with a court order, their motion is not verified by an appropriate oath, as required by [§] 52-212 (c), and fails to state any reasonable cause for opening that order. [Michelle Rodriguez'] motion for order [docket entry #125] did not purport to be a [Practice Book §] 63-1 motion nor comply with Practice Book [§] 11-11's requirements for a [Practice Book §] 63-1 motion. Therefore, there was no extended appeal period and no appellate stay in effect when the court-approved deed was

recorded in the Newington land records. Even considered as such a motion, the defendant[s] never pursued resolution of the motion so that a new twenty day appeal period could begin. . . . The defendants' remedies for an alleged[ly] illegal entry upon the premises and disposition of their property lie elsewhere, and it appears from their memorandum in support of this motion to open that they are pursuing those remedies."[11] (Citations omitted; internal quotation marks omitted.) The court also vacated its prior order restraining disposition of the property. The defendants filed a motion to reconsider, which the court granted, but it "decline[d] to depart from its earlier order." This appeal followed.

We begin our discussion with general principles of law that guide our review of the court's denial of the defendants' motion to open, including our standard of review. "It is well established that [a] foreclosure action is an equitable proceeding . . . [and that] [t]he determination of what equity requires is a matter for the discretion of the trial court. . . . Similarly, the determination of whether to grant a motion to open a judgment rests in the trial court's sound discretion." (Citation omitted; internal quotation marks omitted.) *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 166, 75 A.3d 651 (2013). "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . .

[11] In an affidavit filed in support of the motion to open, the defendants' counsel averred that he was representing the defendants as plaintiffs in separate entry and detainer actions. See *Rodriguez* v. *DeCaro*, Superior Court, judicial district of New Britain, Housing Session, Docket No. CV-22-5004001-S; *Rodriguez* v. *DeCaro*, Superior Court, judicial district of New Britain, Housing Session, Docket No. CV-22-5004002-S. Those actions remain pending as of the date of the official release of this opinion.

In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *McGovern* v. *McGovern*, 217 Conn. App. 636, 646, 289 A.3d 1255, cert. denied, 346 Conn. 1018, 295 A.3d 111 (2023). With these principles in mind, we turn to the defendants' claims.

I

The defendants first claim that the court misinterpreted or misapplied Practice Book § 63-1 in rejecting the defendants' argument in their motion to open that an appellate stay existed at the time the plaintiff recorded the court-approved deed of sale. According to the defendants, because a motion to set aside the approval of the sale was filed before the appeal period for challenging the approval of the sale expired, an appellate stay existed with respect to the approval of the sale and, thus, absolute title to the property could not have passed to the plaintiff while that motion remained unresolved. Second, and relatedly, the defendants claim that the court erroneously concluded that the motion to set aside the sale had no impact on the issue of the appellate stay because the defendants had failed to diligently pursue adjudication of that motion. Because our resolution of the defendants' first and second claims is somewhat intertwined, we address them together. As we set forth in detail subsequently in this opinion, although we agree in part with some of the defendants' arguments regarding the appellate stay, we nonetheless conclude that, under the particular procedural posture of the present case, any error by the court in its reasoning regarding the existence of an appellate stay was harmless and does not provide a reasonable basis for reversing the court's judgment on the defendants' motion to open.

Whether the court properly construed our rules of practice in determining that no appellate stay was in effect as a result of the filing of the motion to set aside the approval of the sale in this case raises a question of law over which we exercise plenary review. See *Ion Bank* v. *J.C.C. Custom Homes, LLC*, 189 Conn. App. 30, 38, 206 A.3d 208 (2019); see also *Wells Fargo Bank, N.A.* v. *Treglia*, 156 Conn. App. 1, 10, 111 A.3d 524 (2015) ("principles of statutory interpretation also apply to our review of rules of practice" and "our rules of practice should be construed harmoniously and not in a way that would render one provision superfluous as a result of the existence of another" (internal quotation marks omitted)). In deciding whether an appellate stay exists in noncriminal cases, such as foreclosure actions; see *Alberta* v. *Alberta*, 58 Conn. App. 89, 93, 754 A.2d 165 (2000); we look to both Practice Book §§ 61-11 and 63-1.

Practice Book § 61-11 (a) provides in relevant part that, "[e]xcept where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed *until the time to file an appeal has expired.* . . ." (Emphasis added.) In other words, "an appellate stay of execution arises from the time [an appealable] judgment is rendered until the time to file an appeal has expired. . . . If an appeal is [timely] filed, any appellate stay of execution in place during the pendency of the appeal period continues until there is a final disposition of the appeal or the stay is terminated. . . . If no appeal is filed, the stay automatically terminates with the expiration of the appeal period." (Citations omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 99, 172 A.3d 1263 (2017). The temporary stay that exists during the pendency of the appeal period is necessary "to protect the full and unhampered exercise of the right to appellate review." (Internal quotation marks omitted.) *Ruiz* v. *Victory*

Properties, *LLC*, 180 Conn. App. 818, 833, 184 A.3d 1254 (2018).

Relatedly, Practice Book § 63-1 governs when the appeal period begins and how the appeal period may be expanded. Unless a different statutory appeal period applies, which is not the case here, an appeal ordinarily must be filed within twenty days from the date that notice of the appealable judgment is given. See Practice Book § 63-1 (a). If, however, "a motion is filed within the appeal period that, if granted, would render the judgment . . . ineffective . . . a new twenty day period . . . for filing the appeal shall begin on the day that notice of the ruling [on the motion] is given . . . ." Practice Book § 63-1 (c) (1). It follows, therefore, that the practical effect of the filing of a Practice Book § 63-1 (c) (1) motion on the automatic appellate stay is that any existing stay remains in effect until the Practice Book § 63-1 (c) (1) motion is decided and through the pendency of the resulting new appeal period.[12]

In addition to Practice Book §§ 61-11 and 63-1, we note that Practice Book § 11-11 contains several filing requirements applicable to motions that, pursuant to Practice Book § 63-1, would "cause [the appeal period] to begin again . . . ." Practice Book § 11-11. Specifically, the rule provides in relevant part that "[t]he party

[12] To be clear, the plain language of Practice Book § 63-1 provides that the filing of a *timely* Practice Book § 63-1 (c) (1) motion does not *extend* or *toll* the original appeal period but, rather, creates a *new* appeal period that commences upon disposition of the motion. The rule further provides in relevant part that an "appeal may be filed either in the original appeal period, *which continues to run*, or in the new appeal period. . . ." (Emphasis added.) Practice Book § 63-1 (a). Thus, it is possible that the initial appeal period may lapse prior to the creation of a new appeal period. Nevertheless, in order to fully protect a party's right to effective appellate review, the appellate stay of execution, which by rule persists "until the time to file an appeal has expired"; Practice Book § 61-11 (a); does not lapse along with the original appeal period if no appeal is filed therein but, instead, remains in effect, at the least, through the pendency of any new appeal period.

filing any such motion shall set forth the judgment or decision which is the subject of the motion, the name of the judge who rendered it, the specific grounds upon which the party relies, and shall indicate on the bottom of the first page of the motion that such motion is a [Practice Book §] 11-11 motion. . . .'' Practice Book § 11-11. As this court recently clarified, ''[a]lthough failure to comply with the technical requirements of Practice Book § 11-11 may provide a proper ground for denying the motion, such failure is not a sufficient basis to render ineffective for the purpose of creating a new appeal period a motion that otherwise adheres to the substance of Practice Book § 63-1 (c) (1). . . . It is the content of the motion . . . that is determinative of whether the motion creates a new appeal period *and extends the automatic appellate stay*.'' (Citation omitted; emphasis added.) *Finance of America Reverse, LLC* v. *Henry*, 222 Conn. App. 810, 826–27, 307 A.3d 300 (2023). With this understanding of the relevant rules in mind, we turn to their application in the present case.

''[T]here [generally] are three appealable determinations in a case involving a foreclosure by sale: [1] the judgment ordering a foreclosure by sale, [2] the approval of the sale by the court and [3] the supplemental judgment [in which proceeds from the sale are distributed].'' (Internal quotation marks omitted.) *Toro Credit Co.* v. *Zeytoonjian*, 341 Conn. 316, 322, 267 A.3d 71 (2021). ''A judicial sale is one made as a result of judicial proceedings by a [committee of sale] legally appointed by the court for [that] purpose. . . . The court is the vendor, and the [committee] appointed to make the sale is the mere agent of the court. . . . Only after a sale has been confirmed and ratified by the court does it become complete. . . . Following confirmation of the sale, a judicial sale generally will not be set aside in the absence of fraud, mistake or surprise.'' (Citations omitted; internal quotation marks omitted.) *Citicorp*

Mortgage, Inc. v. *Burgos*, 227 Conn. 116, 120, 629 A.2d 410 (1993). "[T]he court's approval of a sale extinguishes the rights of redemption of other parties [but] . . . does not automatically vest title with the purchaser." *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 795, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). Instead, as set forth in General Statutes § 49-26, after a sale has been ratified or confirmed by the court, "a conveyance of the property sold shall be executed by the person appointed to make the sale, which conveyance shall vest in the purchaser the same estate that would have vested in the mortgagee or lienholder if the mortgage or lien had been foreclosed by strict foreclosure . . . ."

The court's June 20, 2022 approval of the sale and deed was an appealable judgment. Accordingly, an appellate stay of execution was in effect, at the least, through the end of the appeal period in which to challenge the approval of the sale, which, in the present case, expired on July 11, 2022. On the final day of the appeal period, Michelle Rodriguez filed a motion that asked the court to set aside its approval of the sale. If the court had granted that motion, it would have rendered the approval of the sale ineffective, and, therefore, pursuant to Practice Book § 63-1 (c) (1), its filing acted to extend the appellate stay until there was a ruling on the motion and any resulting new appeal period expired.

In its ruling on the defendants' motion to open, the trial court nevertheless advanced two reasons why it believed no appellate stay was in effect following its approval of the sale.

First, the court opined that it did not view the motion to set aside approval of the sale as a proper Practice Book § 63-1 (c) (1) motion because it did not contain a notation on the bottom of the front page of the motion

that it was filed pursuant to Practice Book § 11-11. As we have previously held, however, such a defect does not impact the relief sought and, thus, did not render the motion ineffective for purposes of extending the existing appellate stay. See *Finance of America Reverse, LLC* v. *Henry*, supra, 222 Conn. App. 826–27.

Second, the court indicated that, even if the motion was a proper Practice Book § 63-1 (c) (1) motion, the defendants failed adequately to pursue its adjudication, a finding that the defendants challenge on appeal. Under the plain language of our rules of practice, however, it is the *filing* of a Practice Book § 63-1 (c) (1) motion that, in the first instance, effectuates an extension of any existing appellate stay. That extension continues until a disposition of the motion. Moreover, after a motion has gone off a short calendar without adjudication, as happened in the present case, "*any party* may claim the motion for adjudication." (Emphasis added.) Practice Book § 11-13 (c). Accordingly, the failure to seek timely adjudication of the motion to set aside approval of the sale was also attributable to the plaintiff and the committee.

In short, contrary to the conclusions of the court, the defendants are correct that the filing of the motion to set aside the approval of the sale did extend the appellate stay that already was in place as a result of the court's approval of the sale. A new twenty day appeal period would have commenced following the court's disposition of the motion.[13]

It is at this juncture, however, that we part ways with the defendants' analysis regarding the appellate stay, which the defendants contend continued even through the time of the court's ruling on their motion to open

[13] The defendants also claim that the court erroneously found that the defendants had failed to pursue the motion to set aside the approval of the sale. We disagree.

because the court never expressly resolved the pending motion to set aside the approval of the sale. We conclude otherwise.

In our view, the court's decision to enter the administrative closure of the file on September 26, 2022, either acted as an implicit denial of the defendants' pending motion to set aside the approval of the sale or served as notice to the parties that the court was declining to rule on that motion, which the defendants reasonably should have construed as an effective denial of the motion under our Supreme Court's holding in *Ahneman* v. *Ahneman*, 243 Conn. 471, 480, 706 A.2d 960 (1998). In *Ahneman*, our Supreme Court recognized that a "trial court's decision not to consider [a party's] motions was the functional equivalent of a denial of those motions. Like a formal denial, the effect of the court's decision refusing to consider the defendant's motions . . . was to foreclose the possibility of relief from the court on those issues . . . ." Id. Under either scenario, the defendants undoubtedly were aggrieved by the administrative closure of the file, which they had been notified would constitute a final disposition of the case. Consequently, the defendants could have filed an appeal challenging the administrative closure but did not do so. Moreover, to the extent that the filing of the motion to set aside the sale created the potential for a new twenty day appeal period in which to challenge the approval of the foreclosure sale and, by implication, an extension of the existing appellate stay, that new appeal period began to run with the entry of the administrative closure and, thus, terminated on October 16, 2022. The defendants did not file their motion to open or take any other action before that appeal period expired, and, therefore, any appellate stay in this case effectively terminated as of October 17, 2022, well before the filing of the motion to open. Even assuming arguendo that the recording of the committee deed on October 11, 2022, was an act

that effectuated the approval of the sale,[14] we are not convinced that the plaintiff's recording of the deed six days prior to the expiration of the appellate stay provided a reasonable basis for granting the defendants' motion to open where the defendants never appealed from the court's approval of the sale, either in the initial appeal period or the subsequent one.

Finally, the motion to set aside the approval of the sale had not asserted fraud, mistake, surprise or any other issue with regard to the judicial sale. Instead, it asserted claims directed at the judgment of foreclosure, claims that the defendants waived when they failed to timely appeal from the judgment of foreclosure by sale. Accordingly, to the extent that the motion to open was directed at the administrative closure of the file and, by implication, the approval of the sale, we cannot conclude that the court abused its considerable discretion in denying the motion.

II

The defendants next claim that the court improperly failed to conduct an evidentiary hearing with respect to their motion to open. In particular, they argue that the court's denial of the motion to open without an evidentiary hearing deprived them of an opportunity to

[14] "[I]n a foreclosure by sale, although the right of redemption is extinguished upon the court's approval of the foreclosure sale, a motion to open a judgment approving that sale, properly filed within the appeal period, acts as a stay of the proceedings to enforce or carry out the judgment." *Wells Fargo Bank of Minnesota, N.A.* v. *Morgan*, 98 Conn. App. 72, 81, 909 A.2d 526 (2006). The passing of title following the approval of a foreclosure sale occurs as a matter of law when the deed of sale is transferred to the successful bidder, not by the recording of the deed, which simply provides notice to the public of the transfer. See *National City Mortgage Co.* v. *Stoecker*, supra, 92 Conn. App. 795 ("muniment of title is the conveyance or the delivery of the deed to the purchaser"); see also *Saunders* v. *KDFBS, LLC*, 206 Conn. App. 92, 106, 259 A.3d 691 ("the land records are constructive notice to all the world of any instruments there recorded" (internal quotation marks omitted)), cert. denied, 338 Conn. 915, 259 A.3d 1180 (2021).

contest one of the factual predicates underlying the court's rationale for denying the motion to open; namely, that the defendants had failed to pursue the motion to set aside the approval of the sale. We disagree.

A motion seeking to open or set aside a judgment is not a motion for which oral argument is as of right. See Practice Book § 11-18;[15] *Valenzisi* v. *Connecticut Education Assn.*, 150 Conn. App. 47, 50 n.2, 90 A.3d 324 (2014). Although the defendants indicated on the front page of their motion that oral argument was requested and that "testimony may be required," they did not identify in either their motion or in their supporting memorandum the existence of any disputed factual issues that necessarily required the taking of evidence. See, e.g., *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 684, 690, 828 A.2d 681 ("[b]ecause the [trial] court's exercise of discretion in ruling on the motion to open [the judgment] was dependent on the disputed factual issue of fraud, due process required that the [trial] court hold an evidentiary hearing on that issue"), cert. denied, 266 Conn. 917, 833 A.2d 468 (2003). The parties each submitted a thorough memorandum of law to the court with exhibits. The court had access to the court's file, which included all relevant markings of pleadings by the parties. Finally, as we explained in part I of this opinion, whether the defendants diligently pursued the motion to set aside the approval of the sale had no legal bearing on the existence of an appellate stay, which

[15] Practice Book § 11-18 provides in relevant part: "(a) Oral argument is at the discretion of the judicial authority except as to motions to dismiss, motions to strike, motions for summary judgment, motions for judgment of foreclosure, and motions for judgment on the report of an attorney trial referee and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right . . . .

* * *

"(f) For those motions for which oral argument is not a matter of right, oral argument may be requested in accordance with the procedure that is printed on the short calendar on which the motion appears."

turned on the filing of the motion. Under the circumstances, we disagree that the court abused its discretion by deciding the motion on the papers without a hearing.

III

Finally, the defendants claim that the court incorrectly determined that it lacked the authority to open the judgment of foreclosure by sale because the defendants' motion was untimely as to that judgment. We disagree.

As we have previously indicated, "[o]ur courts have the inherent authority to open, correct or modify judgments, but this authority is restricted by statute and the rules of practice. . . . [A] civil judgment may not be opened unless a motion to open is filed within four months following the date on which it was rendered. . . . [If] a motion to open is untimely, the trial court lacks authority to open the judgment." (Citations omitted; internal quotation marks omitted.) *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 541, 37 A.3d 766 (2012). Whether a court properly determines that it lacks the authority to open a judgment of foreclosure raises a question of law over which our review is de novo. Id. "A motion to open a judgment of foreclosure by sale is typically subject to two restrictions. . . . First, a motion to open a judgment of foreclosure by sale must be filed within the four month restriction of General Statutes § 52-212a. . . . [T]he second restriction on a motion to open a judgment of foreclosure by sale is that it must be filed before absolute title left the property owner, which [in the case in which the motion is filed by the holder of the equity of redemption] means before the committee sale was approved." (Internal quotation marks omitted.) Id., 544.

Here, the court rendered the judgment of foreclosure by sale on March 28, 2022, setting a sale date of June

4, 2022. The defendants never appealed from the foreclosure judgment nor, as discussed in part I of this opinion, did they appeal following the approval of the sale. The defendants' motion to open was filed on December 21, 2022, which was nearly nine months after the court rendered the judgment of foreclosure by sale and, thus, clearly outside the statutory limit of § 52-212a.[16] Moreover, at the time the motion was filed, title to the property had vested in the plaintiff as the successful purchaser of the property because the time to appeal from the approval of the sale had long passed. The motion also raised no colorable claim that the foreclosure judgment was the product of fraud, duress or mutual mistake.

In summary, the court has considerable discretion in deciding whether to grant a motion to open or set aside a judgment. Having reviewed the file in the present matter as well as the briefs and arguments of the parties, we disagree that the court abused its considerable discretion by denying the defendants' motion to open to the extent it sought to set aside the administrative closure and, with respect to the request to open the judgment of foreclosure, we conclude that the court properly determined that the motion was untimely and, accordingly, that it lacked authority to grant that aspect of the motion.

The judgment is affirmed.

In this opinion the other judges concurred.

[16] Even if we were to conclude that the court had authority to act on the motion to open with respect to the judgment of foreclosure, we nevertheless would affirm the court's denial of the motion to open on the ground that the defendants failed to advance any reasonable basis for opening the judgment, including explaining why the defendants had failed to defend against or appeal from the judgment of foreclosure. Thus, the only proper exercise of the court's discretion would have resulted in a denial of that motion.

AMMAR I. *v.* EVELYN W.*
(AC 46544)

Alvord, Elgo and Seeley, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court dismissing his petition for third-party visitation with three minor children, with respect to whom his parental rights previously had been terminated. *Held*:

1. The trial court properly determined that it lacked subject matter jurisdiction over the petition; it was not disputed that Connecticut was not the home state of the children pursuant to the applicable statutes (§§ 46b-115a and 46b-115k) when the plaintiff commenced this child custody proceeding, as the children had lived with the defendant in North Carolina for more than six months before this proceeding commenced, and, because North Carolina possessed home state jurisdiction over visitation petitions involving the children, the trial court did not have jurisdiction pursuant to § 46b-115k (a) (3).
2. The plaintiff could not prevail on his alternative claim that the trial court improperly concluded that the accidental failure of suit statute (§ 52-592) did not apply in the present case; because § 52-592 operates to toll a statute of limitations, a necessary prerequisite to its application is the existence of a statute of limitations that would otherwise bar the cause of action at issue, and, here, the plaintiff did not identify any statute of limitations pertaining to petitions for third-party visitation and the defendant did not raise a statute of limitations defense.

Submitted on briefs March 5—officially released September 10, 2024

Procedural History

Petition for third-party visitation with three minor children, brought to the Superior Court in the judicial district of Waterbury and transferred to the judicial district of New Britain, where the court, *Armata*, *J.*, rendered judgment dismissing the petition, from which the plaintiff appealed to this court. *Affirmed.*

Ammar I., self-represented, the appellant (plaintiff).

* In accordance with our policy of protecting the privacy interests of minor children, we decline to identify the children or others through whom the children's identities may be ascertained.

Opinion

ELGO, J. The self-represented plaintiff, Ammar I., appeals from the judgment of the trial court dismissing his petition for third-party visitation with O, S, and M (children), his biological children with respect to whom his parental rights were terminated in 2019. Although the plaintiff raises various claims on appeal, the dispositive ones are whether the court properly determined that (1) it lacked subject matter jurisdiction over the petition pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (act), which has been adopted by Connecticut and codified at General Statutes § 46b-115 et seq., and (2) General Statutes § 52-592 does not apply in the present case. We affirm the judgment of the trial court.

The facts underlying this appeal are largely undisputed. On July 26, 2019, the plaintiff's parental rights were terminated with respect to the children. See *In re Omar I.*, 197 Conn. App. 499, 506, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). In 2021, a final decree of adoption was issued, at which time the defendant, Evelyn W., became the adoptive parent of the children. See General Statutes § 45a-731. The trial court thereafter dismissed the plaintiff's motion to open and set aside that decree and denied his posttermination motion for visitation with the children. See *In re Omar I.*, 214 Conn. App. 1, 3–4, 279 A.3d 320, cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); *In re Omar I.*, Docket Nos. CP-20013333-A, CP-20013334A, CP-20013335A, 2021 WL 3727802, *1, 8–9 (Conn. Super. July 27, 2021).

In October, 2021, the defendant and the children moved to North Carolina. On November 9, 2022, the

plaintiff commenced the present action by filing a verified petition for visitation in the Superior Court in the judicial district of Waterbury. He did so by completing form JD-FM-221, provided by the Judicial Branch, titled "Verified Petition for Visitation—Grandparents & Third Parties," "which a nonparent may choose to use to seek visitation with a child." *Hunter* v. *Shrestha*, 195 Conn. App. 393, 395 n.5, 225 A.3d 285 (2020). In the section pertaining to jurisdiction over the petition, the plaintiff selected a box that states in relevant part that Connecticut has the authority to decide this case because "[t]he [children] lived in Connecticut for at least [six] months but . . . were taken from Connecticut less than [six] months ago . . . by a person claiming custody, and a parent or guardian continues to live here."[1] Because no party to the action resided in the judicial district of Waterbury, the case was administratively transferred to the Superior Court in the judicial district of New Britain.

The defendant filed a self-represented appearance on December 5, 2022, and a hearing on the petition was scheduled. On February 7, 2023, the defendant filed a caseflow request seeking a virtual hearing, in which she averred: "I am no longer a resident of Connecticut. I relocate[d] to North Carolina in 2021. I am unable to appear in person due to my circumstances here at home with my children [because] some of them cannot be left unattended." The court granted that request, and a remote hearing was held on February 10, 2023.

At that hearing, the defendant "credibly testified that she and the children relocated to North Carolina in October of 2021," as the court found in its memorandum of decision. The court subsequently ordered the plaintiff to file a supplemental brief addressing several jurisdictional issues raised at that hearing, including "[h]ow

[1] The plaintiff at that time was not a parent or guardian of the children due to the termination of his parental rights three years earlier.

this court currently has jurisdiction over [the] children pursuant to the [act], in light of the fact that the minor children have not resided within the state of Connecticut since October, 2021."

On March 3, 2023, the plaintiff filed his supplemental brief, in which he claimed that the court "has jurisdiction over [the] children pursuant to the [act] *despite* the fact that [the] children have not resided within the state of Connecticut since October, 2021." (Emphasis in original.) The plaintiff argued that Connecticut courts retain "concurrent jurisdiction over a child custody proceeding" pursuant to the act. The defendant did not file a responsive pleading.

In its April 27, 2023 memorandum of decision, the court concluded, inter alia, that Connecticut was not the home state of the children, as they had resided in North Carolina with the defendant for more than six consecutive months prior to the commencement of this action. The court thus concluded that it lacked subject matter jurisdiction and dismissed the petition for third-party visitation. The plaintiff filed a motion to reargue, which the court denied, and this appeal followed.[2]

I

On appeal, the plaintiff claims that the court improperly concluded that it lacked subject matter jurisdiction over his petition for third-party visitation pursuant to the act. We do not agree.

"When reviewing an issue of subject matter jurisdiction on appeal, [our Supreme Court has] long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review

[2] The self-represented defendant appeared, but has not participated, in this appeal. Because she did not file an appellate brief, we ordered that the appeal be considered on the basis of the plaintiff's brief, oral argument, and the record. On February 29, 2024, the plaintiff filed a request to waive oral argument, which this court granted.

is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016).

As this court has noted, "[t]he purposes of the [act] are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; promote cooperation with the courts of other states; discourage continuing controversies over child custody; deter abductions; avoid re-litigation of custody decisions; and to facilitate the enforcement of custody decrees of other states. . . . The [act] addresses interjurisdictional issues related to child custody and visitation." (Internal quotation marks omitted.) *In re Iliana M.*, 134 Conn. App. 382, 390, 38 A.3d 130 (2012). Importantly, the act serves as "the enabling legislation for the court's jurisdiction" over child custody and visitation matters. Id.

The jurisdiction of a Connecticut court to make an initial child custody determination originates in General Statutes § 46b-115k (a).[3] "Section 46b-115k (a) (1) through (4) establishes a hierarchy of four bases that

[3] General Statutes § 46b-115k (a) provides in relevant part: "Except as otherwise provided in section 46b-115n, a court of this state has jurisdiction to make an initial child custody determination if:

"(1) This state is the home state of the child on the date of the commencement of the child custody proceeding;

"(2) This state was the home state of the child within six months of the commencement of the child custody proceeding, the child is absent from the state, and a parent or a person acting as a parent continues to reside in this state;

"(3) A court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships;

grant a state jurisdiction to make an initial custody determination: home state jurisdiction, significant connection jurisdiction, and more appropriate forum jurisdiction."[4] *Parisi* v. *Niblett*, 199 Conn. App. 761, 780–81, 238 A.3d 740 (2020). The question in the present case is whether any of those four bases authorized the trial court to act on the plaintiff's petition for third-party visitation.

The record indicates, and the plaintiff does not dispute, that Connecticut was not the home state of the children on November 9, 2022, the date that he commenced this child custody proceeding.[5] General Statutes § 46b-115a (7) defines "home state" in relevant part as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a

"(4) A court of another state which is the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision substantially similar to section 46b-115q or section 46b-115r, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships . . . ."

[4] As this court has observed, subdivisions (1) and (2) of § 46b-115k (a) set forth two distinct bases by which home state jurisdiction may be established. See *Parisi* v. *Niblett*, 199 Conn. App. 761, 782, 238 A.3d 740 (2020); see also 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 40:5, p. 441 ("[the] first ground for jurisdiction for an initial custody determination set forth in [§] 46b-115k (a) (1) and (2) is commonly referred to as 'home-state' jurisdiction").

[5] "[W]hen a statutory definition applies to a statutory term, the courts must apply that definition." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 536, 46 A.3d 102 (2012). For purposes of the act, a "child custody proceeding" is defined in relevant part as "a proceeding in which legal custody, physical custody or *visitation* with respect to a child is an issue. . . ." (Emphasis added.) General Statutes § 46b-115a (4). The "commencement" of such a proceeding, in turn, is defined as "the filing of the first pleading in a proceeding . . . ." General Statutes § 46b-115a (5). The official case detail indicates that the first pleading in the present case was filed on November 9, 2022.

child custody proceeding. . . .'' Pursuant to § 46b-115k (a) (1) and (2), home state jurisdiction exists when Connecticut is either (1) ''the home state of the child on the date of the commencement of the child custody proceeding'' or (2) ''the home state of the child within six months of the commencement of the child custody proceeding'' and other conditions are met. Because it is undisputed that the children lived with the defendant in North Carolina more than six months prior to the commencement of this child custody proceeding, the court properly determined that it did not have jurisdiction under the first two bases set forth in § 46b-115k (a).[6]

The plaintiff nonetheless argues that the court possessed jurisdiction over his petition pursuant to the third basis set forth in that statute. Section 46b-115k (a) (3) confers jurisdiction on the courts of this state when ''[a] court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships.'' By its plain language, that third basis for jurisdiction ''exists when a court of another state does not have home state jurisdiction . . . .'' *Parisi* v. *Niblett*, supra, 199 Conn. App. 784. Because it is undisputed that the children lived with the defendant in North Carolina since October, 2021—approximately thirteen months

[6] In light of the plaintiff's concession that the children had resided in North Carolina with the defendant for more than six months prior to November 9, 2022, the date on which he commenced this proceeding, the court was not required to hold an evidentiary hearing on the issue of whether Connecticut was the children's home state pursuant to the act. See *Pinchbeck* v. *Dept. of Public Health*, 65 Conn. App. 201, 209, 782 A.2d 242 (''[i]n the absence of any disputed facts pertaining to jurisdiction, a court is not obligated to hold an evidentiary hearing before dismissing an action for lack of jurisdiction''), cert. denied, 258 Conn. 928, 783 A.2d 1029 (2001).

prior to the commencement of this child custody proceeding—the state of North Carolina possessed home state jurisdiction over visitation petitions involving them. See N.C. Gen. Stat. §§ 50A-102 (7) and 50A-201 (a) (1) (2023).[7] Accordingly, § 46b-115k (a) (3) does not authorize the courts of this state to act on the plaintiff's petition for third-party visitation. We therefore concur with the observation of the trial court in its memorandum of decision "that Connecticut is not the home state of the children and that North Carolina . . . is the appropriate forum to decide such a [petition]."[8]

[7] Like § 46b-115a (7), § 50A-102 (7) of the North Carolina General Statutes defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period."

Like § 46b-115k (a) (1) and (2), § 50A-201 (a) (1) of the North Carolina General Statutes confers jurisdiction on the courts of that state "to make an initial child-custody determination" if North Carolina "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State . . . ."

[8] In light of the court's determination that North Carolina was the home state of both the children and the defendant at the time that this petition for third-party visitation was commenced, the plaintiff's ancillary invocation of General Statutes § 46b-115*l* (a) also is unavailing. That statute provides in relevant part that "a court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until: (1) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state . . . ." General Statutes § 46b-115*l* (a); see *Parisi* v. *Niblett*, supra, 199 Conn. App. 779 ("[p]ursuant to the [act], exclusive continuing jurisdiction ends . . . when either the original decree state or another state determines that neither parent nor the child continues to reside in the original decree state"). We reiterate that the court found—and the plaintiff does not dispute—that the children and the defendant did not reside in Connecticut when this action was commenced or at any time thereafter. Moreover, due to the termination of the plaintiff's parental rights in 2019 and the adoption of the children by the defendant in 2021, the plaintiff was not a "parent" or a "person acting as a parent," as those terms are used in § 46b-115*l* (a). As the plaintiff acknowledges in his appellate

We further note that the plaintiff has not argued that the fourth and final basis for jurisdiction under § 46b-115k (a) applies, and for good reason: there is no allegation or evidence that a court of another state that is the home state of the children has declined to exercise jurisdiction on the ground that Connecticut is the more appropriate forum. See General Statutes § 46b-115k (a) (4). On our plenary review, we therefore conclude that the court properly determined that it lacked subject matter jurisdiction over the plaintiff's petition under the act.

II

The plaintiff alternatively argues that the court improperly concluded that the accidental failure of suit statute, § 52-592, does not apply in this case. We disagree.

The following additional facts are relevant to this claim. The plaintiff commenced a separate proceeding seeking third-party visitation with the children on March 21,2022.[9] The trial court dismissed that petition due to improper service of process. The plaintiff then commenced the present proceeding by filing a new petition for third-party visitation on November 9, 2022. Although he utilized the "Verified Petition for Visitation—Grandparents & Third Parties" form provided by the Judicial Branch, his submission differs from the official JD-FM-221 form in one notable respect. In the upper left corner of the form, underneath the preprinted

brief, the defendant was "the sole custodial parent of the children" at all times relevant to this appeal. The plaintiff's contention that the trial court possessed continuing jurisdiction pursuant to § 46b-115*l* (a) is thus untenable.

[9] It is well established that an appellate court may "take judicial notice of the court files in another suit between the parties . . . ." *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990).

recitation of applicable statutes and Practice Book provisions, the plaintiff added: "Filed pursuant to C.G.S. § 52-592."

Although we appreciate the fact that the plaintiff is a self-represented individual, he misunderstands the inherent nature of § 52-592. As its plain language indicates, § 52-592 pertains to causes of action whose commencement is "time limited by law . . . ." Our Supreme Court has emphasized that § 52-592 "applies only to actions barred by an otherwise applicable *statute of limitations* . . . ." (Emphasis in original.) *Bocchino* v. *Nationwide Mutual Fire Ins. Co.*, 246 Conn. 378, 382, 716 A.2d 883 (1998); see also *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 93, 10 A.3d 498 (2010) (explaining, as part of statutory construction of § 52-592, that phrase "within the time limited by law" is used "to refer to a statute of limitations"); *Peabody N.E., Inc.* v. *Dept. of Transportation*, 250 Conn. 105, 119, 735 A.2d 782 (1999) ("[t]he plaintiff . . . brought a second action beyond the applicable statute of limitations period, relying on § 52-592"); *Bocchino* v. *Nationwide Mutual Fire Ins. Co.*, supra, 382 ("on several occasions . . . this court and the Appellate Court [have] reaffirmed the limited application" of § 52-592); *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 150, 160, 464 A.2d 18 (1983) (§ 52-592 is instance where "the legislature has specifically delineated . . . [that] the statute of limitations will be tolled"); *Pepitone* v. *Serman*, 69 Conn. App. 614, 619, 794 A.2d 1136 (2002) ("§ 52-592 enables plaintiffs to bring anew causes of actions despite the expiration of the applicable statute of limitations"); *Gillum* v. *Yale University*, 62 Conn. App. 775, 781, 773 A.2d 986 (§ 52-592 "permits plaintiffs to commence those causes of action to which it applies after the tolling of the applicable statute of limitation[s]"), cert. denied, 256 Conn. 929, 776 A.2d 1146 (2001). Because § 52-592 operates to toll a statute of

limitations, a necessary prerequisite to its application is the existence of a statute of limitations that would otherwise bar the cause of action at issue.

In the present case, the plaintiff has not identified any statute of limitations that pertains to petitions for third-party visitation. This case thus resembles *GMAT Legal Title Trust 2014-1, U.S. Bank, National Assn.* v. *Catale*, 221 Conn. App. 90, 300 A.3d 1218, cert. denied, 348 Conn. 928, 305 A.3d 265 (2023), in which we observed: "It is well known that [t]he accidental failure of suit statute applies only to actions barred by an otherwise applicable statute of limitations. . . . Because there is no applicable statute of limitations for a mortgage foreclosure, the accidental failure of suit statute is inapplicable." (Citation omitted; internal quotation marks omitted.) Id., 112 n.11; see also *McKeever* v. *Fiore*, 78 Conn. App. 783, 795, 829 A.2d 846 (2003) ("[Section] 52-592 enables parties to institute actions despite the expiration of the applicable statute of limitations. . . . In this case, § 52-592 was not at issue. The defendants raised no statute of limitations defense in their initial answer, and the court denied their request for leave to amend, which sought to add a statute of limitations defense. . . . The accidental failure of suit statute applies only to actions barred by an otherwise applicable statute of limitations." (Citations omitted; footnote omitted.)).

That logic applies equally here. The defendant has not raised a statute of limitations defense and the plaintiff has failed to identify any statute of limitations that precludes the filing of petitions for third-party visitation after a certain period of time.[10] Accordingly, the court

[10] We note that the plaintiff has not argued that § 46b-115k contains a statute of limitations. To be clear, § 46b-115k is not a statute of limitations that places a time limitation on the filing of petitions for visitation. It is a statute that circumscribes the parameters of the jurisdiction of Connecticut courts over such petitions, in accordance with a legislative scheme adopted in all fifty states to address "inter-jurisdictional issues related to child custody and visitation." (Internal quotation marks omitted.) *In re Iliana M.*,

properly concluded that § 52-592 does not apply in the present case.

The judgment is affirmed.

In this opinion the other judges concurred.

RASHAD MOON *v.* COMMISSIONER OF CORRECTION (AC 46198)

Elgo, Suarez and Keller, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that he was actually innocent of the crimes of which he had been convicted. The petitioner had planned to steal property from the victim with two other individuals, M and T, although T ultimately did not participate in the robbery. During the commission of the robbery by the petitioner and M, M shot and killed the victim. After a jury trial, the petitioner was convicted of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree. In a subsequent trial, M was found not guilty by reason of mental disease or defect of the crimes with which he was charged stemming from the robbery. In his habeas petition, the petitioner claimed that, as a matter of law, he could not have conspired with M or formed an agreement with him to participate in a robbery of the victim because M lacked the mental capacity to engage in the charged crimes. The habeas court denied the petition for a writ of habeas corpus and subsequently denied the petition for certification to appeal. On the petitioner's appeal to this court, *held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal; the petitioner's actual innocence claim involved issues that were debatable among jurists of reason, that could have been resolved by a court in a different manner, and that raised a question that was adequate to deserve encouragement to proceed further.
2. Even assuming, as this court did, that the fact of M's incapacity was newly discovered evidence, which was essential for the petitioner's claim regarding actual innocence, the petitioner could not prevail on his claim that the habeas court improperly concluded that he failed to prove that he was actually innocent of the crimes of which he was convicted:

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supra, 134 Conn. App. 390. In simple terms, § 46b-115k does not specify *when* a petition for visitation can be filed; it specifies *where* such petitions can be filed.

a. The petitioner failed to meet his burden of proving his actual innocence with regard to his conviction of conspiracy to commit robbery in the first degree: although there was no question that M was unable to form any intent to conspire with the petitioner to rob the victim and that, therefore, no crime of conspiracy could have been committed with M, the aggregate evidence at the petitioner's criminal trial and his habeas trial, all of which was required to be considered by the habeas court, would not prevent a reasonable jury from finding, beyond a reasonable doubt, that the petitioner was guilty of conspiring with T to commit the robbery, and, as such, even if evidence of M's incapacity had been presented at the petitioner's criminal trial, there was still sufficient evidence from which the jury could have found the petitioner guilty of conspiracy to commit robbery.

b. The petitioner could not prevail on his claim that he was actually innocent of robbery in the first degree and felony murder because M's mental state prevented him from forming any intent to participate in the robbery, which was the predicate felony for the felony murder charge: because the plain language of the statute governing first degree robbery (§ 53a-134 (a) (2)) provides that an individual may be guilty of first degree robbery if he or another participant in the crime uses or threatens the use of a deadly weapon, there was sufficient evidence for the jury to find that, during the commission of the robbery, the petitioner acted in concert with M; moreover, because the petitioner never disputed that M shot and killed the victim, the petitioner's criminal liability as an accessory for acts perpetrated by M was inherent in § 53a-134 (a) (2), and the fact that M lacked the ability to form any criminal intent due to his mental disease or defect did not excuse the petitioner from liability; furthermore, the felony murder statute (§ 53a-54c) does not require proof of intent and, because the petitioner was criminally liable as a participant in the robbery and the homicide was committed by the other participant, M, in the execution of that robbery, he was also guilty of felony murder pursuant to § 53a-54c.

Argued February 7—officially released September 10, 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, *Newson*, *J.*; judgment denying the petition; thereafter, the court, *Newson*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Rashad Moon, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly (1) denied his petition for certification to appeal, and (2) rejected his actual innocence claim. We conclude that the habeas court abused its discretion in denying the petition for certification to appeal, but we agree with its determination that the petitioner failed to meet his burden of proving actual innocence. Accordingly, we affirm the judgment of the habeas court denying the petitioner's habeas petition.

The following facts, as set forth by this court in the petitioner's direct appeal from his conviction, and further supplemented by the record and procedural history in the habeas proceeding, are relevant to the resolution of this appeal. "In May, 2013, the victim, Felix DeJesus, and his fiancée posted two T-Mobile Springboard tablets for sale on Craigslist. The Craigslist posting stated that the tablets were being sold for $300 each or $500 for both of them and included the victim's phone number. On May 8, 2013, at approximately 7 p.m., a prospective buyer of the tablets called the victim. The prospective buyer said that he did not have a car and asked the victim to meet him in Hartford so that he could purchase the tablets. The victim agreed to travel to Hartford and, shortly after 7 p.m., the victim left his home in Cromwell with the tablets.

"At approximately 7:45 p.m., a resident of the neighborhood where the crime occurred, Gloria Therrien, observed the victim park his car in front of 16 Allendale Road. From inside her home, Therrien saw two men approach the car and stand at its driver's side window. One of the men spoke to the victim through the front driver's side window while the other man stood next to him. Therrien heard a gunshot and saw the two men run away from the car, using a cut through that connected Allendale Road to Catherine Street. Therrien then went outside and walked toward the victim's car. She observed that the car windows were open and that the victim was in the driver's seat of the car 'jerking . . . and gurgling.' Therrien asked some children who were nearby to call 911 and report that someone had been shot.

"The police arrived at the scene at approximately 8 p.m. When Jeffrey Moody, an officer with the Hartford Police Department (department), arrived, he saw the victim's car and noticed that its engine was running and that the victim was inside. Moody approached the car and found the victim unresponsive. Thereafter, emergency services took the victim to Hartford Hospital, where he died of a single gunshot wound to the head at approximately 3:46 a.m.

"Chris Reeder, a detective with the department, arrived at the scene at approximately 8:30 p.m., after the victim had been taken to Hartford Hospital. Reeder searched the interior of the victim's car and found a T-Mobile Springboard Tablet and a white Samsung cell phone. The police took possession of both items.

"On May 9, 2013, the police extracted data from the cell phone, which they determined had belonged to the victim. The data extracted from the cell phone included a series of text messages and phone calls between the victim and a cell phone number that belonged to Marvin

Mathis, an individual who resided near the scene of the crime. Around the time of the murder, there were text messages between Mathis and the victim . . . which . . . instructed the victim to meet him at 16 Allendale Road.

"That same day, Reeder went to speak with Mathis at his home on Allendale Road. Mathis denied having any knowledge of the shooting and stated that he was asleep at home when the crime occurred. Mathis also stated that he was with the [petitioner] from approximately 6 to 7:30 p.m. on the night of the shooting and that while they were together, the [petitioner] borrowed his phone.

"Mathis allowed Reeder to view his cell phone and the text messages on the device. The text messages on Mathis' cell phone matched the text messages that the police had extracted from the victim's cell phone. Mathis, however, denied sending the messages and stated that the [petitioner] must have sent them. Reeder also observed that the call log on Mathis' cell phone revealed that, at approximately the time of the shooting, there were calls between Mathis and the [petitioner]. On May 8, 2013, there were calls between the [petitioner] and Mathis at 6:02, 7:51, 7:52 and 9:53 p.m.

"On May 12, 2013, Reeder spoke with the [petitioner] and the [petitioner's] girlfriend, Brittany Hegwood. Hegwood informed the police that on the night of the shooting, she witnessed Mathis and the [petitioner] walk 'down Catherine Street toward Hillside [Avenue]' together and that when the [petitioner] returned approximately five minutes later he stated '[Mathis] just shot somebody.'

"The [petitioner] also provided the police with a statement in which he admitted that he was with Mathis on the night of the shooting and that he went with Mathis to meet the victim. The [petitioner] stated that Mathis

told the [petitioner] that he was going to buy 'some stuff' from the victim. The [petitioner] further stated that he stood approximately thirty feet away from the victim's car while Mathis spoke with the victim through the driver's side window. The [petitioner] stated that he looked away from Mathis and heard a gunshot, at which point he and Mathis ran away from the car to the [petitioner's] house on Catherine Street.

"As part of their investigation, the police obtained a search warrant for the [petitioner's] cell phone records. The [petitioner's] cell phone records revealed calls between the [petitioner] and a phone number belonging to an individual by the name of Jahvon Thompson on May 10 and 14, 2013.[1]

"On May 23, 2014, approximately one year after the shooting, Thompson, who was under arrest at the time, spoke with Reeder. Thompson informed Reeder that he and the [petitioner] initially had planned to rob the victim because they 'were broke.' Thompson further stated that 'a day or two' before the crime he, the [petitioner], and Mathis were together and that the [petitioner] was texting the victim on Mathis' phone. Thompson stated that ultimately he did not participate in the robbery because 'something came up.'

"Additionally, in May of 2014, an individual by the name of Tyrell Hightower left three messages on a police tip line, in which he indicated that he had information about a homicide that had occurred on Allendale

[1] The petitioner submitted the transcripts from his four day criminal trial as exhibits at the habeas trial. Our review of Reeder's testimony in the criminal trial reveals that on Friday, May 3, 2013, Mathis' cell phone was used to call Thompson's cell phone. As this court noted in deciding the petitioner's direct appeal, and as we discuss further in part II C of this opinion, Thompson gave a statement to the police in which he indicated that he, the petitioner and Mathis were together, planning the robbery, " 'a day or two' " before the victim was killed. *State* v. *Moon*, 192 Conn. App. 68, 73–74, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

Road one year earlier. On June 2, 2014, Reeder met with Hightower at Hartford Correctional Center, where Hightower was incarcerated. During the meeting, Hightower informed Reeder that the [petitioner] had confessed to him that he and Mathis were involved in the murder of the victim. Hightower further stated that the [petitioner] had informed him that it was a 'robbery that went bad' and that Mathis had shot the victim.

"In late June of 2014, the police arrested the [petitioner]. After a jury trial, the [petitioner] was convicted of felony murder,[2] robbery in the first degree,[3] and conspiracy to commit robbery in the first degree.[4] The court sentenced the defendant to a total effective sentence of forty-nine years of incarceration." (Footnotes added.) *State* v. *Moon*, 192 Conn. App. 68, 71–74, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

The petitioner then appealed from his judgment of conviction to our Supreme Court, which transferred the appeal to this court. In his direct appeal, the petitioner claimed that the trial court improperly (1) instructed the jury on accomplice liability, (2) failed to poll the jurors on his affirmative defense, (3) admitted into evidence two spent shell casings that were unconnected

[2] General Statutes § 53a-54c provides in relevant part: "A person is guilty of [felony] murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery . . . and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants . . . ."

[3] General Statutes § 53a-134 provides in relevant part: "(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (2) is armed with a deadly weapon . . . ." See also *State* v. *Moon*, 192 Conn. App. 68, 77 and n.3, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

[4] General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ."

to the crime, and (4) instructed the jury on conspiracy to commit robbery in the first degree without instructing it on the intent required for robbery in the first degree. Id., 70–71. We affirmed the judgment of the trial court; id., 101; concluding that, in a supplemental instruction, the trial court did not introduce a new theory of liability when it added the phrase "another participant" to the instructions on the use of physical force element of robbery in the first degree. Id., 79–80. We further held that the court did not improperly (1) fail to poll the jury on the petitioner's affirmative defense to felony murder; id., 84; (2) admit into evidence two spent shell casings that were unconnected to the shooting because the casings were relevant to prove that the defendant had the means to commit the crime; id., 94; and (3) omit from its instruction on conspiracy to commit robbery in the first degree an instruction on the element of intent. Id., 101. The petitioner unsuccessfully petitioned our Supreme Court for certification to appeal. See *State* v. *Moon*, 334 Conn. 918, 222 A.3d 513 (2020).

The petitioner, as a self-represented party, filed a petition for a writ of habeas corpus on or about March 29, 2018. He subsequently was appointed counsel and, on or about October 31, 2022, filed a second amended petition, the operative petition, wherein he alleged, in two counts, that his criminal trial counsel was ineffective and that he was actually innocent of all three crimes on the basis of newly discovered evidence. The habeas court, *Newson*, *J.*, held a trial on November 7, 2022. On November 25, 2022, the habeas court issued its decision denying both counts of the petition.

During the habeas trial, the petitioner attempted to prove that he was actually innocent of conspiracy to commit robbery in the first degree and robbery in the first degree because Mathis could not form the intent to conspire to commit robbery or agree to participate in one with the petitioner. Building on that, the petitioner

argued that, because Mathis was not capable of agreeing with him to participate in a robbery, the petitioner also was actually innocent of felony murder because the underlying facts and the predicate felony necessary to support the felony murder charge were negated.

The petitioner presented the testimony of his criminal trial counsel, Attorney Kevin Smith. Smith acknowledged that he was aware at the time of the petitioner's criminal trial that Mathis, who also had been arrested in relation to these crimes and was awaiting his own trial, intended to raise a defense of "diminished capacity."[5] Smith testified, however, that he did not know that Mathis' case would end, as it did, with a verdict of not guilty by reason of mental disease or defect. See General Statutes § 53a-13.[6] The petitioner also submitted as exhibits at the habeas trial the transcripts from the Mathis trial and his own criminal trial.[7]

In denying the petitioner's claim of actual innocence, the habeas court rejected the petitioner's argument that, as a matter of law, he could not have conspired with Mathis or formed an agreement with him to participate in a robbery of the victim because Mathis had been

[5] The petitioner presented undisputed evidence that Mathis had been charged with robbery in the first degree in violation of § 53a-134, conspiracy to commit robbery in the first degree in violation of § 53a-48, and manslaughter in the first degree in violation of General Statutes § 53a-55. He was tried separately in a two day bench trial on May 24 and 25, 2017, and was found not guilty by reason of mental disease or defect.

[6] General Statutes § 53a-13 provides in relevant part: "(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. . . ."

[7] We note the absence in the record of the habeas trial of any copies of the actual exhibits introduced during the criminal trials of the petitioner and Mathis. The habeas court was provided only with the petitioner's judgment mittimus, the information and disposition from the Mathis criminal trial and the transcripts of the two trials.

diagnosed with schizophrenia prior to the homicide and, therefore, lacked the mental capacity to engage in the charged crimes. The habeas court determined that, because the petitioner and Mathis had been tried separately, "the factual findings from Mathis' case cannot simply be inserted into the petitioner's trial." After quoting from our Supreme Court's decision in *State* v. *Colon*, 257 Conn. 587, 602–603, 778 A.2d 875 (2001), which held that there is no requirement for consistency of verdicts where alleged conspirators are tried separately, the habeas court concluded that "the verdict in Mathis' case does not meet the burden that the petitioner must establish 'by clear and convincing evidence' that he '*could not* have committed the crime, that a *third party* committed the crime, or that *no* crime actually occurred.' " (Emphasis in original.) It explained that "Mathis' verdict only establishes that *if* evidence related to Mathis' mental state [was] presented during the petitioner's criminal trial, the jury *could have* come to a different result, *if* it accepted that evidence." (Emphasis in original.) Moreover, the court stated that "Mathis' verdict does not remove the [petitioner] from the scene of the crime, it does not negate the incriminating statements provided against him by several people, and it does not negate the incriminating text messages connecting him to the victim."

Following the denial of the petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal, which the habeas court denied on or about December 6, 2022. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly rejected his

actual innocence claim.[8] As to his actual innocence claim, the petitioner maintains that because his codefendant, Mathis, was found not guilty by reason of mental disease or defect in his subsequent trial, he necessarily lacked the requisite mens rea to enter into a conspiracy with the petitioner, and that his inability to form an intent to commit any crime at the time disproves each of the three crimes of which the petitioner was convicted: felony murder, conspiracy to commit robbery in the first degree and robbery in the first degree. He argues that the habeas court improperly relied on the rule in *Colon* to reject this claim.

The respondent, the Commissioner of Correction, argues that the habeas court did not abuse its discretion in denying certification to appeal and further argues that the petitioner's contention that the state could not satisfy the element of intent as to the three crimes of which the petitioner was convicted due to Mathis' subsequent acquittal ignores the substantial body of evidence adduced at the criminal and habeas trials. The respondent maintains that the petitioner's actual innocence claim is unavailing because he failed (1) to establish that no reasonable fact finder would have found him guilty based on the evidence presented at his criminal and habeas trials and the reasonable inferences drawn therefrom, and (2) to produce affirmative proof that he did not commit the crimes of which he stands convicted. Although we agree with the petitioner that the habeas court abused its discretion in denying certification to appeal, we agree with the respondent that the habeas court properly found that the petitioner failed to meet his burden of proving actual innocence.

[8] The petitioner's claim on appeal is limited to the habeas court's resolution of count two of the habeas petition in which he alleged actual innocence. The petitioner does not challenge the habeas court's rejection of his ineffective assistance of counsel claim and, thus, it is unnecessary for us to discuss or analyze the court's analysis with respect to that count of the second amended petition.

I

DENIAL OF CERTIFICATION TO APPEAL

We first address the petitioner's claim that the habeas court improperly denied the petition for certification to appeal. We agree with the petitioner.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008), quoting *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 449, 936 A.2d 611 (2007). As our discussion in part II of this opinion reflects, the petitioner's

actual innocence claim involves issues that are debatable among jurists of reason, that could have been resolved by a court in a different manner, and the question raised was adequate to deserve encouragement to proceed further. As such, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal. See *Williams* v. *Commissioner of Correction*, 221 Conn. App. 294, 303, 301 A.3d 1136 (2023); *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 272–73, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019).

II

ACTUAL INNOCENCE

Next, we address the petitioner's claim that the habeas court improperly concluded that he failed to prove that he is actually innocent of conspiracy to commit robbery in the first degree, robbery in the first degree and felony murder. We do not agree.

In support of his claim of actual innocence, the petitioner presented evidence to support his theory that the determination in a subsequent criminal proceeding that his codefendant, Mathis, was not legally capable of forming the criminal intent necessary to be held responsible for his crimes constituted newly discovered evidence of the petitioner's innocence. In its memorandum of decision, the habeas court aptly described the petitioner's claim as follows: "The petitioner did offer the theory that [he] could not, as a matter of law, have formed a criminal agreement with codefendant Mathis because Mathis did not have the mental capacity to form a criminal conspiracy. It is undisputed that Mathis, who was charged similarly to the petitioner, was found not guilty on May [25], 2017, after successfully presenting the affirmative defense commonly referred to as not guilty by reason of insanity . . . . Mathis was tried separately after the petitioner.

* * *

"More specifically, the petitioner argues that the codefendant's lack of mental capacity would have negated the element of robbery in the first degree requiring the state to prove that another participant in the crime was armed with a deadly weapon, the theory being that Mathis could not have formed the criminal intent to be a participant in the robbery. On that same basis, the petitioner argues that Mathis did not have the legal capacity to enter into a criminal conspiracy, negating an essential element of the conspiracy to commit robbery in the first degree charge. Finally, follows the petitioner, a determination that Mathis was not capable of appreciating the criminal nature of the criminal conduct he engaged in with the petitioner would effectively negate, as charged, the underlying facts and the supporting felony necessary to support the felony murder charge." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.)

At the outset, we set forth the legal principles relevant to our resolution of this claim and our standard of review. To secure habeas corpus relief in the form of a new trial based on a claim of actual innocence, the petitioner must satisfy the two criteria set forth in *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 747, 700 A.2d 1108 (1997). Specifically, "the petitioner [first] must establish by clear and convincing evidence that, *taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial*—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, *after considering all of that evidence and the inferences drawn therefrom* . . . no reasonable fact finder would find the petitioner guilty of the crime." (Emphasis added.) Id. With respect to the first criterion, "[t]he appropriate scope of [our] review is whether, after an

independent and scrupulous examination of the entire record, we are convinced that the finding of the habeas court that the petitioner is [or is not] actually innocent is supported by substantial evidence." Id., 803. With respect to the second criterion, our scope of review is plenary. Id., 805.

We also note that our Supreme Court has not yet opined on whether prevailing on a claim of actual innocence requires a petitioner to prove that the new evidence presented to the habeas court was unknown to the petitioner at the time of the underlying criminal trial. See *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 551 n.8, 22 A.3d 1196 (2011); see also *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 507, 217 A.3d 609 (2019) (court assumed without deciding issue of whether petitioner's claim of actual innocence was required to be predicated on newly discovered evidence). This court, however, has consistently and repeatedly held that habeas judges are bound by the requirement that the evidence of actual innocence be newly discovered. See *Lopez* v. *Commissioner of Correction*, 208 Conn. App. 515, 556–57, 264 A.3d 1097 (2021) (collecting cases), cert. denied, 340 Conn. 922, 268 A.3d 77, cert. denied sub nom. *Lopez* v. *Quiros*, U.S. , 142 S. Ct. 2730, 212 L. Ed. 2d 790 (2022). Under Connecticut law, as expressed by this court, evidence is new if the petitioner can prove "by a preponderance of the evidence . . . that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 687, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017).

With these principles in mind, we first consider whether the habeas court determined that the evidence presented by the petitioner in support of his actual innocence claim was newly discovered.

A

Newly Discovered Evidence

To begin our discussion, we note that the habeas court did not make an explicit finding that the fact of Mathis' incapacity was newly discovered evidence. Such a finding is essential for the petitioner's claims regarding actual innocence. See *Lopez* v. *Commissioner of Correction*, supra, 208 Conn. App. 556–57. The petitioner maintains that the habeas court "does not contest" that the evidence of Mathis' acquittal due to mental disease or defect is newly discovered. The respondent counters that the habeas court did not find that the evidence was newly discovered. The respondent argues that the habeas court merely sustained the respondent's objection regarding habeas counsel's line of questioning as to whether the petitioner's trial attorney knew that Mathis' case would end in an acquittal on the basis of mental disease or defect. After a careful review of the habeas court's memorandum of decision and the record, and despite the absence of an explicit determination that such evidence was newly discovered, we presume for the purposes of resolving this appeal that the court did make this requisite finding. See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 355, 133 A.3d 402 (2016) ("Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The construction of a judgment is a question of law for the court." (Internal quotation marks omitted.)); *Tracey* v. *Miami Beach Assn.*, 216 Conn. App. 379, 395, 288 A.3d 629 (2022) ("a judicial opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding" (internal quotation marks omitted)), cert. denied, 346 Conn. 919, 291 A.3d 1040 (2023).

The petitioner's trial counsel, Smith, testified at the habeas trial that, at the time of the petitioner's trial, he

did not know that Mathis' trial would end in a verdict of not guilty by reason of mental disease of defect, although he was aware that Mathis' attorney would make some claim of diminished capacity. He stated that he was not able to speak with Mathis, and Mathis' attorney was not sharing information with him. Smith also indicated that he believed he would not have had the ability to present evidence of Mathis' lack of intent at the petitioner's trial because it would have required the development of psychiatric evidence that was unavailable when the petitioner's criminal trial commenced, and the ability to develop that evidence was not within his control.

The parties briefly discuss the newly discovered evidence requirement in footnotes in their appellate briefs. The respondent did not argue before the habeas court, nor has he claimed on appeal as an alternative ground for affirmance, that the court did not find that the evidence proffered at the habeas trial was newly discovered. Even so, the record is not without some support for the position that the evidence of Mathis' incapacity could have been ascertained for use in the petitioner's trial. Smith knew Mathis' attorney was going to raise Mathis' competency as a defense at his trial. The petitioner told Thompson that he was aware of Mathis' diagnosis of schizophrenia, and Hightower declared, in his statement, that Mathis was "slow" and "[y]ou can tell he is not right in the head as soon as you meet him" and he was "not a guy I would commit a crime with."

Noticeably absent from the evidence at the habeas trial, however, is any indication that the petitioner's trial counsel would have been successful had he sought a psychiatric evaluation of Mathis prior to the petitioner's trial. Smith testified that he assumed this was not possible and the respondent presented no evidence or argument at the habeas trial to dispute that assumption.

Moreover, in closing argument, the respondent's counsel did not argue that the petitioner's evidence was not newly discovered.

In *United States* v. *Brodwin*, 292 F. Supp. 2d 484 (S.D.N.Y. 2003), the United States District Court for the Southern District of New York addressed the issue of newly discovered evidence in a case involving two defendants, licensed pharmacists, who moved for a new trial after they were convicted of conspiring with a codefendant physician, Ronald A. Jones, to illegally distribute the drug Dilaudid. Id., 485–86. Their claim was based on newly discovered evidence that Jones was insane at the time of the alleged conspiracy. Id., 486. The government argued that the court should deny the defendants' motion for a new trial because the evidence of Jones' insanity could have been discovered with reasonable diligence by defense counsel and was, therefore, not new. Id., 492. The government noted that in the months leading up to the defendants' trial, the parties were on notice that Jones might be suffering from some mental defect, yet defense counsel never made any application to the court requesting that Jones be evaluated for his sanity. Id.

In rejecting the government's argument, the court noted that "the evidence that is newly discovered in this case is not Jones's bizarre behavior, which the parties were aware of before trial, but rather the conclusions reached by experts for Jones and for the [g]overnment that Jones was not sane at the time of the offenses charged. Therefore, although the evidence supporting the experts' conclusions was available before trial, it was not apparent that an expert would conclude that Jones was insane at the time of the offenses charged, and, more importantly, the specific evidence, namely the expert opinions, simply did not exist until after the defendants were convicted. . . . The [g]overnment nonetheless argues that the defendants should have

requested that Jones be evaluated for his sanity at the time of the offenses, and that by neglecting to do so, the defendants failed to exercise due diligence in discovering Jones's insanity before trial. The defendants cannot be faulted, however, for not pursuing a finding of Jones's legal insanity before trial, because that course of action would have faced formidable obstacles that would have made the outcome of any such request both highly uncertain and the cause of much delay. The [g]overnment has cited no authority that would have supported the defendants' efforts to secure a psychological evaluation of a co-defendant, and alleged co-conspirator . . . . Any such request or application by the defendants would have been subject to either the consent of Jones or an order of this [c]ourt, neither of which the defendants should reasonably have expected to be forthcoming, given the fact that Jones himself had rights to a fair trial that deserved protection . . . . The uncertainty resulting from the formidable obstacles the defendants would have faced in making an application for a psychiatric evaluation of Jones, along with the substantial delays that would have resulted from simply making the application, place the request outside the ordinary diligence that could be expected of the defendants in putting on their defense." (Citation omitted.) Id., 493–94.

In the present case, the habeas court could reasonably have reached the same conclusion based on the record before us, particularly because Mathis' attorney was not sharing information with the petitioner's trial counsel and the ability to develop evidence regarding Mathis' lack of capacity was not within his control. Thus, although the habeas court's decision does not unambiguously reflect whether it considered Mathis' lack of capacity as newly discovered evidence, the record suggests that the habeas court reasonably could have believed that this was evidence unavailable at the

time of the petitioner's trial. Indeed, the habeas court stated during trial that it was "absolutely obvious [trial counsel] could not have known something that didn't happen until months in the future." See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355. We will not presume error on the part of the habeas court. Instead, we presume that the court properly considered the merits of the petitioner's claim for appropriate reasons as reflected in the record. See, e.g., *Stevenson* v. *Commissioner of Correction*, 112 Conn. App. 675, 686, 963 A.2d 1077 (court's ruling was entitled to presumption of correctness because appellate courts do not presume error on part of trial court), cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009). It therefore was the respondent's burden to demonstrate that, in failing to explicitly find that the evidence of Mathis' insanity was newly discovered, the habeas court committed reversible error. The respondent did not formally raise any such claim during the habeas trial or in this appeal. See *State* v. *James K.*, 209 Conn. App. 441, 465, 267 A.3d 858 (2021), aff'd, 347 Conn. 648, 299 A.3d 243 (2023).

Accordingly, for the purposes of our analysis, we will presume that the habeas court did consider the evidence of Mathis' acquittal as newly discovered and unavailable even with the exercise of due diligence by the petitioner and his counsel, particularly because the habeas court addressed, in full, the merits of the petitioner's actual innocence claim. Had the habeas court concluded that the evidence was not newly discovered, it would have ended its discussion there. See generally *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355.

B

Standard for Proving Actual Innocence

We next consider whether the habeas court applied the proper standard in its evaluation of the petitioner's

actual innocence claim. "The question of whether the habeas court applied the correct standard is a question of law subject to plenary review." *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 557.

In its memorandum of decision, the habeas court recited the proper "standard for a claim for habeas relief based on actual innocence" as set forth by our Supreme Court in *Miller* and ultimately concluded that "the petitioner has failed to meet his burden of proving actual innocence." To reach that conclusion, however, the court departed from the standard it recited and relied, instead, on legal authority that we find inapplicable to the analysis. Specifically, the court based its conclusion on the law pertaining to direct appeals by defendants who have sought to overturn their conspiracy convictions because a codefendant has been acquitted of conspiracy in a separate trial. The principal case on which the habeas court relied is *State* v. *Colon*, supra, 257 Conn. 587, in which our Supreme Court upheld the conviction of a defendant as a conspirator despite the acquittal of his sole alleged coconspirator in a separate trial because there was sufficient evidence introduced during the defendant's trial to prove, beyond a reasonable doubt, that the defendant was guilty of conspiracy. *Colon* and the other cases cited therein are not habeas corpus cases, however, and the reviewing courts considered and contrasted the separate, independent evidence of an agreement to commit the crime in question as presented to different juries in two separate criminal proceedings, relying on an analysis that permits the acceptance of inconsistent verdicts. Id., 599.

"In separate trials, [t]he evidence presented to the juries and the manner in which that evidence is presented may be significantly different and certainly will never be identical. . . . As a result, [d]ifferent juries may rationally come to different conclusions, especially

when differing evidence is presented." (Citation omitted; internal quotation marks omitted.) Id., 602. *Colon* overruled *State* v. *Robinson*, 213 Conn. 243, 567 A.2d 1173 (1989), in which our Supreme Court previously had concluded that an acquittal, at a separate trial, of the defendant's alleged coconspirator foreclosed prosecution of the defendant for conspiracy because the culpability of the coconspirator was "an essential element of the defendant's offense." (Internal quotation marks omitted.) *State* v. *Colon*, supra, 257 Conn. 598; see also id., 603. In deciding *Robinson*, the Supreme Court relied on its prior decision in *State* v. *Grullon*, 212 Conn. 195, 562 A.2d 481 (1989), in which it reversed the judgment of conviction of the defendant for an alleged conspiracy with a police informant because it deemed the police informant incapable of possessing the requisite criminal intent to form a conspiracy with the defendant. See *State* v. *Robinson*, supra, 250–53. The court in *Grullon* relied on a line of cases that described conspiracy in bilateral terms and held that where two coconspirators were tried together, the acquittal of one and the conviction of the other on the charge of conspiracy is not possible. See *State* v. *Grullon*, supra, 202. It stated that "[u]nder our [conspiracy] statute . . . a defendant cannot be guilty of conspiracy if the only other member of the alleged conspiracy lacks any criminal intent." Id., 199.

In *Colon*, the court specified that the ruling in *Grullon* makes obvious sense in the context of a single trial but that that ruling does not apply where the acquittal of one coconspirator occurs in a separate trial. See *State* v. *Colon*, supra, 257 Conn. 599. It explained that "[i]t has long been recognized that criminal juries in the United States are free to render not guilty verdicts resulting from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors" and concluded that "[t]he acquittal of the defendant's

coconspirator did not nullify the defendant's conviction of the same charge, where the two defendants were tried separately, and their respective juries were presented with separate, independent evidence of their agreement to commit the crime in question." (Internal quotation marks omitted.) Id., 603–604.

In reviewing a claim of actual innocence in a habeas petition, however, the habeas court is required to engage in a combined, rather than a separate and independent, review of all the evidence produced both during the petitioner's criminal trial and his habeas trial. This combination of evidence is the potential totality of the evidence that would be presented to a jury if a new trial were to be conducted. The relevant questions that must both be answered in the affirmative for the petitioner to prevail are whether the combined evidence clearly and convincingly establishes the petitioner's actual innocence and whether no reasonable fact finder could find the petitioner guilty beyond a reasonable doubt when confronted with the evidence available at the original criminal trial, together with the newly discovered evidence presented during the habeas trial. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 791–92; see also *Charlton* v. *Commissioner of Correction*, 51 Conn. App. 87, 89–91, 719 A.2d 1205 (1998), cert. denied, 247 Conn. 961, 723 A.2d 815 (1999). We therefore agree with the petitioner that the habeas court's reliance on the fact that the two separate verdicts on the conspiracy charge are inconsistent should not have formed the basis for the habeas court's resolution of this case in favor of the respondent. Although this would be true were the petitioner raising his claim in a direct appeal, the rule in *Colon* is not applicable to the claim of error raised in this habeas appeal.

The habeas court should have considered the evidence presented in both the petitioner's criminal trial and in the habeas trial as if it were a single body of

evidence that would be presented at a new trial. Stated differently, it should have determined whether the petitioner had satisfied his burden of proving his actual innocence based on all of the aggregate evidence before it. The court did not do so here. Instead, the habeas court determined that "the factual findings from Mathis' case cannot simply be inserted into the petitioner's trial" and, thus, expressly excluded a significant portion of the aggregate evidence from its analysis. This was improper. By failing to consider the transcripts from Mathis' trial, which had been submitted as exhibits at the habeas trial, the habeas court eschewed the standard it was required to apply. Even so, as we discuss in the following section, we conclude, on the basis of our "independent and scrupulous examination of the entire record" and our plenary review, that the ultimate conclusion reached by the habeas court, that the petitioner failed to meet his burden of proving his actual innocence, is correct. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 803.

C

Evidence of a Conspiracy to Commit Robbery in the First Degree

As noted previously, the petitioner claims that because his codefendant, Mathis, subsequently was found not guilty by reason of mental disease or defect, Mathis lacked the requisite mens rea to enter into a conspiracy with the petitioner or to commit robbery. Moreover, the petitioner argues that Mathis' inability to form an intent to agree to commit any crime at the time also disproves that he committed every one of the three crimes of which the petitioner was convicted—felony murder, conspiracy to commit robbery in the first degree and robbery in the first degree. The respondent maintains that the petitioner's actual innocence claim is unavailing because he failed (1) to establish that no

reasonable fact finder would have found him guilty on the basis of the evidence presented at his criminal and habeas trials and the reasonable inferences drawn therefrom, and (2) to produce affirmative proof that he did not commit the crimes of which he stands convicted. In other words, the respondent argues that the petitioner failed to meet his burden of proving his actual innocence. We agree with the respondent, although we arrive at this conclusion by way of a different path.

General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ." It is well settled that "conspiracy requires a showing that two or more coconspirators intended to engage in or cause conduct that constitutes a crime. Under our statute, therefore, a defendant cannot be guilty of conspiracy if the only other member of the alleged conspiracy lacks any criminal intent." *State* v. *Grullon*, supra, 212 Conn. 199.

As we have noted, to satisfy the *Miller* standard for habeas relief based on actual innocence, the petitioner was first required to establish by clear and convincing evidence that he was actually innocent of the crimes of which he was convicted. "[T]he clear and convincing evidence standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . [T]he clear and convincing burden [is] an extraordinarily high and truly persuasive [demonstration] of actual innocence . . . one in which the petitioner must unquestionably establish [his] innocence. . . . [T]ruly persuasive demonstrations of actual innocence after conviction in a fair trial have been, and are likely to remain, extremely rare. . . . Actual innocence, also

referred to as factual innocence . . . is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt." (Citations omitted; internal quotations marks omitted.) *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 560–61. "Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime." Id., 561. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner *could not* have committed the crime even though it is unknown who committed the crime, that a *third party* committed the crime or that *no* crime actually occurred."[9] (Emphasis in original.) Id., 563. "Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility." Id., 564.

The petitioner argues that the newly discovered evidence of Mathis' acquittal is sufficient to satisfy his burden of proving actual innocence of all three of the crimes of which he was convicted because the lack of a willing agreement between him and Mathis establishes that no crimes were actually committed. The respondent argues that the petitioner's contention that the state could not satisfy the element of intent as to the crimes of which the petitioner was convicted based on Mathis' subsequent acquittal overlooks the substantial body of evidence adduced at the petitioner's criminal and habeas trials. This argument, however, derives from the respondent's reliance on *State* v. *Colon*, supra, 257 Conn. 587, which, as we have explained, is not applicable to a claim of actual innocence raised in a habeas

[9] We note that the habeas court predicated its conclusion on its finding that the petitioner had not satisfied this prong of the *Miller* standard. Specifically, it found that "the verdict in Mathis' case does not meet the burden that the petitioner must establish 'by clear and convincing evidence' that he '*could not* have committed the crime, that a *third party* committed the crime, or that *no* crime actually occurred.' " (Emphasis in original.)

petition. As such, like the habeas court, the respondent relies on an improper standard in his review of the evidence adduced at the criminal trial and the habeas trial, viewing the evidence from each as separate and independent, rather than as an aggregate body of evidence, as required by *Miller*.

Our review of the transcripts from Mathis' criminal trial, which were admitted as evidence in the habeas trial, displays a virtually uncontested proceeding wherein the prosecutor did not dispute the fact that Mathis, a seriously ill schizophrenic at the time of the incident, was incapable of forming any intent to commit the crimes of which he was charged, including conspiracy, and was, therefore, not guilty of those crimes by reason of mental disease or defect pursuant to § 53a-13. On May 24 and 25, 2017, the case against Mathis was tried to the court in two phases. Mathis was charged with three crimes: reckless manslaughter in the first degree with a firearm, robbery in the first degree and conspiracy to commit robbery in the first degree. He had raised the § 53a-13 affirmative defense and claimed that, on the day of the homicide, he lacked the capacity to form an intent to commit the crimes with which he was charged due to mental disease or defect. The prosecutor presented evidence of Mathis' involvement in these crimes and the resulting death of the victim through a single witness, Reeder, the lead investigator in the homicide case, whom the defense did not cross-examine. Also introduced without objection were statements from Thompson, Hightower and Therrien, which had been admitted in the petitioner's criminal trial.[10]

The statement of Thompson, which Reeder read to the jury during the petitioner's criminal trial, indicated

[10] During the petitioner's criminal trial, Thompson's and Hightower's statements were admitted for substantive purposes as prior inconsistent statements under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). See also *State* v. *Moon*, supra, 192 Conn. App. 91 n.10.

that he and the petitioner were supposed to rob the victim together and that the petitioner actively involved Mathis on the day the robbery occurred because Thompson was not available. Both Mathis and Thompson had been present on one occasion before the homicide when the petitioner phoned the victim about purchasing the tablets advertised on Craigslist. On May 25, 2017, after hearing the state's evidence, the court found that the state had proven all of the elements of the three crimes with which Mathis was charged.

Thereafter, during the second phase of the trial, the defense called Peter Morgan, Chair of Psychiatry at Lawrence + Memorial Hospital, to testify. Morgan had prepared a report subsequent to his evaluation of Mathis, which began in May, 2015, and ended in January, 2017, the month after the petitioner's criminal trial concluded.[11] He testified that, in his opinion, to a reasonable degree of medical certainty, Mathis suffered from schizophrenia, paranoid type, and that around the time of the homicide he was suffering from severe symptoms of that illness, having been released from an inpatient hospitalization at the Institute of Living just six days before the date of the homicide. Morgan opined that Mathis lacked the capacity to understand the wrongfulness of his actions and could not conform his behavior to the law at the time of the incident. The state did not offer opposing expert testimony and indicated to the court that it did not contest that Mathis had established his § 53a-13 affirmative defense by way of the evidence presented through Morgan. Indeed, the state even established during its cross-examination of Morgan that the reliability of his evaluation was strengthened by the fact that there were medical records that confirmed Mathis' active symptoms at or around the

[11] Morgan's report and the date of its preparation are not part of the record, but it most likely was prepared after the petitioner's criminal trial concluded in December, 2016.

time of the homicide. The court found that Mathis had proven his affirmative defense and referred him to the Department of Mental Health and Addiction Services for an evaluation to be followed by a hearing in accordance with General Statutes §17a-582.[12]

On July 24, 2017, after reviewing the written evaluation and testimony of Rina Kapoor, Chief of Forensic Services at Whiting Forensic Division, Connecticut Valley Hospital, the court committed Mathis to the Whiting Forensic Division of Connecticut Valley Hospital, under the jurisdiction of the Psychiatric Security Review Board, for a maximum period of eighty years.

There is no question, given the cooperative manner in which the trial of Mathis was conducted, including

[12] General Statutes § 17a-582 provides in relevant part: "(a) When any person charged with an offense is found not guilty by reason of mental disease or defect pursuant to section 53a-13, the court shall order such acquittee committed to the custody of the Commissioner of Mental Health and Addiction Services who shall cause such acquittee to be confined, pending an order of the court pursuant to subsection (e) of this section, in any of the state hospitals for psychiatric disabilities or to the custody of the Commissioner of Developmental Services, for an examination to determine his mental condition.

"(b) Not later than sixty days after the order of commitment pursuant to subsection (a) of this section, the superintendent of such hospital or the Commissioner of Developmental Services shall cause the acquittee to be examined and file a report of the examination with the court, and shall send a copy thereof to the state's attorney and counsel for the acquittee, setting forth the superintendent's or said commissioner's findings and conclusions as to whether the acquittee is a person who should be discharged. . . .

"(e) At the hearing, the court shall make a finding as to the mental condition of the acquittee and, considering that its primary concerns are the protection of society and the safety and well-being of the acquittee, make one of the following orders:

(1) If the court finds that the acquittee is a person who should be confined or conditionally released, the court shall order the acquittee committed to the jurisdiction of the board and either confined in a hospital for psychiatric disabilities or placed with the Commissioner of Developmental Services, for custody, care and treatment pending a hearing before the board pursuant to section 17a-583; provided (A) the court shall fix a maximum term of commitment, not to exceed the maximum sentence that could have been imposed if the acquittee had been convicted of the offense . . . . "

the presentation of his affirmative defense, that Mathis' acquittal establishes, by clear and convincing evidence, that he was unable to form any intent to conspire with the petitioner to rob the victim. In light of the holding in *Grullon*, if this newly discovered evidence regarding Mathis' trial and his not guilty verdict were to be introduced in a new trial of the petitioner regarding his criminal charges, a properly instructed jury could reasonably reach one conclusion, namely, that the petitioner was actually innocent of conspiring with Mathis to commit robbery in the first degree. See *State* v. *Grullon*, supra, 212 Conn. 199. Stated simply, no crime of conspiracy could have been committed because Mathis was incapable of agreeing with the petitioner to commit robbery. See *State* v. *Montgomery*, 22 Conn. App. 340, 344, 578 A.2d 130 ("[t]he concept of a conspiracy of one can be likened to the sound of one hand clapping—it is an impossibility"), cert. denied, 216 Conn. 813, 580 A.2d 64 (1990). Without proof of another coconspirator besides Mathis, the defendant's conviction of conspiracy to commit robbery in the first degree could not stand.

Relying on *Ankerman* v. *Commissioner of Correction*, 122 Conn. App. 246, 999 A.2d 789, cert. denied, 298 Conn. 922, 4 A.3d 1225 (2010), in which this court held that the petitioner's claim that the state failed to prove the specific intent element "[was] essentially one of sufficiency of the evidence and not one of actual innocence"; id., 252; the respondent argues that the petitioner's reliance on evidence regarding Mathis' inability to engage with the petitioner in a conspiracy to commit robbery "fails because . . . it hinges on *legal* innocence, i.e., whether the state presented sufficient evidence to prove the essential elements of the crimes beyond a reasonable doubt, as opposed to *actual* innocence, i.e., whether the petitioner actually engaged in

the criminal conduct at issue—the planning and execution of the robbery." (Emphasis in original.) We disagree. If two persons do not both intend to conspire, no conspiracy is committed. See *State* v. *Grullon*, supra, 212 Conn. 199; see also *State* v. *Green*, 261 Conn. 653, 670–73, 804 A.2d 810 (2002) (reaffirming that conviction for conspiracy cannot be sustained in case in which same jury convicts one alleged conspirator of conspiracy to commit offense and acquits other). In other words, no crime actually occurs, which, by definition, is affirmative proof of actual innocence. See *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 560–61; see also C. Leonetti, "The Innocence Checklist," 58 Am. Crim. L. Rev. 97, 106 (2021) (explaining that actual innocence means that "the defendant did not commit the crime"). "Legal innocence," however, as the respondent recognizes, means that "there [is] insufficient evidence to prove guilt beyond a reasonable doubt."[13] Id.; see also N. Berg, "Turning a Blind Eye to Innocence: The Legacy of *Herrera* v. *Collins*," 42 Am. Crim. L. Rev. 121, 122 (2005) ("In the criminal context, legal innocence means that not enough proof of guilt was introduced at trial to establish that a defendant is guilty beyond a reasonable doubt. In contrast, actual innocence means simply that the defendant did not commit the offense in question.").

[13] The respondent predicates his argument on this definition of "legal innocence." We do note, however, that "legal innocence" can result for reasons that do not substantively address a defendant's guilt, such as where a victim refuses to testify or where evidence of guilt is suppressed for procedural or constitutional reasons. See *Shaw* v. *Dept. of Administration*, 861 P.2d 566, 570 n.3 (Alaska 1993); L. Litman, "Legal Innocence and Federal Habeas," 104 Va. L. Rev. 417, 437 (2018); 3 R. Mallen, Legal Malpractice (2024 Ed.) § 27:42. Indeed, "one can be legally innocent but not actually innocent due to a statute that is held to be unconstitutional, or due to ineffective assistance of counsel." (Footnote omitted.) R. Wilson, "From Advocate to Party—Defenses for Lawyers Who Find Themselves in Litigation," 61 S. Tex. L. Rev. 43, 73 (2020). None of these scenarios, including the one upon which the respondent relies, are implicated here.

In this case, Mathis' inability to conspire with the petitioner is newly discovered evidence that is more than sufficient to prove that the petitioner could not have committed with Mathis alone the crime of conspiracy to commit robbery. We therefore conclude that the evidence from the Mathis trial, if introduced in the context of a single trial of the petitioner, would give rise to a finding of actual innocence, not legal innocence, as defined in *Miller*. The undisputed fact that Mathis suffered from a mental illness that rendered him unable to form the intent to conspire means that no crime of conspiracy involving solely Mathis as coconspirator actually could have occurred. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 747. As such, the aggregate evidence that would be presented in the context of a single trial establishes that no conspiracy could exist between the petitioner and Mathis. See *State* v. *Montgomery*, supra, 22 Conn. App. 344.

There is, however, in the same evidentiary aggregate, proof of the petitioner's conspiring to commit the same robbery with a person other than Mathis: namely, Thompson.[14] During the petitioner's criminal trial, when

[14] Following oral argument in this appeal, this court ordered the parties to file simultaneous supplemental memoranda "addressing whether the petitioner's claim of actual innocence is negated if the record discloses that he also conspired with [Thompson] to rob the victim." The parties complied with our supplemental memoranda order, and we have considered their arguments in our resolution of the appeal. The respondent argues that because "[t]he record affirmatively shows . . . that the petitioner . . . conspired with [Thompson] to rob the victim" the petitioner's actual innocence claim must fail. The petitioner disagrees with the respondent and argues that our "inquiry is flawed from its inception" because it is "beyond [our] purview to determine whether [the petitioner] was guilty of conspiring with Thompson . . . ." Even so, he acknowledges that the "state presented evidence to support its assertion that [Thompson] and [the petitioner] conspired to perpetuate a robbery," and he recites "[t]he proper standard for evaluating a freestanding claim of actual innocence" in a habeas proceeding. (Internal quotation marks omitted.) The petitioner does not, however, reconcile his argument against our considering the evidence of his conspiring with Thompson with that proper standard and our obligation (1) to conduct an "independent and scrupulous review of the entire record" to determine

Thompson was called to the stand, he initially refused to testify and attempted to exercise his fifth amendment right against self-incrimination.[15] He claimed that the statement he had given to the police had been coerced, stating "the shooting task force told me if I didn't sign that statement they was going to charge me with conspiracy to that homicide because I had knowledge of it, that's the only reason why I signed it." After being allowed to consult with a court-appointed public defender regarding his fifth amendment claim, however, he did testify, and his testimony was inconsistent with the written statement he previously had given to the police. In other words, Thompson's testimony challenged the accuracy of his prior written statement. As such, the state moved to admit as a full exhibit Thompson's written statement. After the court found the statement reliable and allowed its admission, the state recalled Reeder, who read the statement to the jury. See footnote 10 of this opinion.

Thompson's statement reveals that the petitioner conspired with him to rob the victim.[16] It provides in relevant part:

whether the evidence from both the original criminal trial and the habeas corpus trial clearly and convincingly establishes that he is actually innocent of the crime of conspiracy to commit robbery and (2) to determine whether, on the basis of the totality of all of the evidence from both proceedings, and inferences drawn therefrom, no reasonable fact finder would find him guilty of that crime. He focuses, instead, on standards that have no bearing on our analysis of his claim of actual innocence.

[15] The record reflects that Thompson acknowledged having committed felony larceny for which he received probation and that he had been arrested in 2014 for violation of that probation, firearms charges and domestic assault. Moreover, at the time of trial, there was a pending robbery charge against him.

[16] We note that, in responding to the petitioner's actual innocence claim in both the habeas proceedings and in this appeal, the respondent focuses solely on Mathis as the petitioner's coconspirator and argues that Mathis' acquittal has no bearing on the petitioner's conviction of the crime of conspiracy to commit robbery. As stated herein, that argument fails because it is predicated on the rule in *Colon*, which is inapplicable. Even so, the scope of our review of the habeas court's conclusion as to the petitioner's actual

"I, Jahvon Thompson, and having Detective Reeder type this statement for me, I have not been threatened or promised anything for giving this statement. I am not under the influence of drugs or alcohol. I've been advised of my *Miranda* rights, and I have agreed to speak with the police. I understand that I am under arrest for the guns, weed, and domestic incident at my house this morning.

"I have information about a homicide that happened on Allendale in Hartford about a year ago. It was in May of 2013.

"I am friends with [the petitioner]. His nickname is Mook. He lives on Catherine Street, right by the cut from Allendale where the [victim] was killed. He lives on the second floor. I have known [the petitioner] for about four to five years. [The petitioner] is about twenty-two years old. . . .

"The [victim] was trying to sell two tablets on [Craigslist]. [The petitioner] and I had planned to rob this guy. A day or two before the [victim] got killed on Allendale, [the petitioner], Fetti[17] and I were together. [The petitioner] had Fetti's cell phone and was texting the guy selling the tablets. . . . He was selling two of them. [The petitioner] used Fetti's phone to talk with the guy selling the tablets. You should be able to find the text on Fetti's phone.

"Something came up and I had to go so we did not rob [the victim] that day. [The petitioner] and I were broke so that is why we wanted to rob [the victim]. . . . I think the day after [the victim] got killed, [the petitioner] called me and told me to come over. [The

innocence claim requires us to conduct an independent and scrupulous examination of *all* of the evidence produced during the petitioner's criminal and habeas trials, and this includes Thompson's statement.

[17] Evidence at the petitioner's criminal trial established that Mathis' nickname was Fetti.

petitioner] was whispering on [the] phone and I thought he was in trouble and that he was running from someone.

"I went over to . . . [the petitioner's] house on Catherine Street. . . . I picked up [the petitioner] at his house. It was just [the petitioner] and me in the car. We were driving around.

"[The petitioner] looked and sounded really scared. [The petitioner] was saying, the dumb [Mathis] killed him. He was saying this over and over again. [The petitioner] told me that Fetti had shot and killed the guy me and [the petitioner] had planned to rob. [The petitioner] said he had used Fetti's phone to get in [touch] with the guy on [Craigslist]. [The petitioner] told me he had told [the victim] to meet on Allendale by the cut so he could run back to his house after they rob him.

"[The petitioner] told me he gave Fetti his gun. I had seen [the petitioner] with this gun before. It is a revolver, a little .22 or maybe a .25. [The petitioner] told me he had grabbed one of the tablets and that Fetti went to the driver's door with the gun. [The petitioner] told me that he went to the passenger's side of the car and grabbed one tablet from [the victim]. There was supposed to be two tablets. [The petitioner] said Fetti was standing next to the driver door with the gun and just shot the [victim]." (Footnote added.)

After reading Thompson's statement into the record, Reeder confirmed that Thompson had provided him with information that he actually was going to participate in the robbery with the petitioner and testified that he never threatened Thompson with being arrested as a conspirator for the incident. Moreover, Reeder had previously testified that Mathis' phone was used to call the victim the morning of Friday, May 3, 2013. This corroborated Thompson's statement that he, the petitioner and Mathis were all present when the petitioner

first contacted the victim about his Craigslist advertisement regarding the two tablets. Later that same day, Mathis' phone was used to call Thompson's phone.

The evidence that Thompson also planned the robbery with the petitioner was not completely discounted during the criminal trial. The information in the petitioner's criminal trial charged that the petitioner had conspired with "another person" to commit robbery in the first degree. The prosecutor argued to the jury that Thompson's statement alone established all of the elements of all of the charges against the petitioner and that Thompson was the first one enlisted by the petitioner to commit the robbery.

The court instructed the jury that it could find the petitioner guilty of conspiracy to commit robbery in the first degree if it found beyond a reasonable doubt that, "one . . . the [petitioner] had the intent [that] conduct constituting the crime of robbery in the first degree be performed, and two, that, acting with that intent he agreed with one or more persons to engage in that conduct or cause that conduct to be performed, robbery in the first degree, and three, that either he or any one of the other parties to the agreement committed an overt act [to further the purpose of] the conspiracy." No exception to this instruction, which charged the jury to consider a conspiracy involving the petitioner and one *or more* persons, was taken by either the state or the petitioner.

We conclude that this aggregate evidence, if presented in a new trial, would not prevent a reasonable jury from finding, beyond a reasonable doubt, that the petitioner was guilty of a conspiracy, despite the evidence of Mathis' lack of mental capacity at the time of the homicide. There is substantial evidence within this aggregate that the petitioner conspired with Thompson

to commit the robbery.[18] See General Statutes § 53a-48. As such, even if evidence of Mathis' incapacity had been presented at the petitioner's criminal trial, there was still sufficient evidence from which the jury could find the petitioner guilty of conspiracy to commit robbery. On the basis of Thompson's *Whelan* statement and Reeder's testimony, the jury reasonably could have found that Thompson was a willing coconspirator. Indeed, the petitioner first planned to rob the victim with Thompson, and Thompson testified, and the jury could have believed, that the police, in an effort to obtain his cooperation, told him that he might be charged as a conspirator. The fact that Thompson was never charged as a coconspirator is of no significance to our analysis. "Conspirators need not all be charged in order to sustain a conviction of one of them for conspiracy." *State* v. *Shaw*, 24 Conn. App. 493, 494 n.1, 589 A.2d 880 (1991); see also *State* v. *Asberry*, 81 Conn. App. 44, 56 n.7, 837 A.2d 885, cert. denied, 268 Conn. 904, 845 A.2d 408 (2004) (same); *Crump* v. *Commissioner of Correction*, 68 Conn. App. 334, 338, 791 A.2d 628 (2002) (same).

On the basis of our independent and scrupulous review of the entire record of this case, we conclude that the habeas court correctly found that the petitioner failed to meet his burden of establishing, by clear and convincing evidence, that he could not have committed the crime of conspiracy to commit robbery, that a third party committed the crime of conspiracy to commit

[18] In fact, the evidence in the record indicates that the petitioner contacted Thompson after the homicide to enlist his assistance in driving him to Mathis' home so the petitioner could ensure that Mathis would not say anything inculpatory to the police. From that evidence, the trier of fact reasonably could infer that the petitioner did so because Thompson was already involved in the crime, and not a person with no prior involvement and nothing to lose if damaging information were to be disclosed to the police.

robbery or that no crime of conspiracy to commit robbery actually occurred.[19] The aggregate evidence simply does not unquestionably establish the petitioner's innocence of that crime. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 795 ("the clear and convincing evidence standard . . . forbids relief whenever the evidence is loose, equivocal or contradictory" (internal quotation marks omitted)). Furthermore, we conclude upon plenary review that a reasonable fact finder, if presented with the aggregate evidence, could find the petitioner guilty of conspiracy to commit robbery in the first degree. See id., 807.

D

Evidence of Robbery in the First Degree and Felony Murder

We next address the petitioner's claim that he is actually innocent of robbery in the first degree and felony murder because Mathis' mental state prevented him from forming any intent to participate in the robbery, which is the predicate felony for the felony murder charge. We disagree.

Our analysis of this claim is informed by this court's opinion in *State* v. *Moon*, supra, 192 Conn. App. 74–83. In his direct appeal, the first issue the petitioner raised was that the court improperly instructed the jurors for the first time, during deliberations in response to a question they posed, that the petitioner "could be convicted of robbery even if another person was the one to use force . . . ." Id., 74.

In addressing this issue, this court stated: "Count two of the information charging the [petitioner] [with

[19] We acknowledge that our rationale underlying this conclusion differs from that of the trial court. "[I]t is axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Tracey* v. *Miami Beach Assn.*, supra, 216 Conn. App. 396 n.18.

robbery in the first degree pursuant to § 53a-134 (a) (2)] alleged: '[O]n or about May 8, 2013 at 8:00 p.m. on Allendale Road in Hartford . . . while in the course of the commission of a robbery and in immediate flight therefrom, [the petitioner] or another participant in the crime was armed with a deadly weapon.'

"During closing argument, the state argued that the [petitioner] was one of the two participants in the robbery and that it was legally irrelevant whether he or Mathis shot the victim. . . .

"Under the heading 'conclusion,' the court [initially] provided: 'In summary, the state must prove beyond a reasonable doubt the following elements of robbery in the first degree: (1) the [petitioner] was committing a larceny; and (2) that *he* used physical force or threatened the use of physical force for the purpose of preventing or overcoming resistance to the taking of property or to the retention of property immediately after the taking or compelling the owner of the property or another person to deliver up the property or to engage in other conduct that aids in the commission of larceny; and (3) that in the course of the commission of the robbery or immediate flight from the crime, the [petitioner] or another participant in the crime was armed with a deadly weapon.' . . .

"The court provided the jurors with a paper copy of the jury instructions for their use during deliberations. During deliberations, the jury sent the court the following note: 'Does "the use or threat of use of physical force" element of robbery in the first degree require a finding that the [petitioner] personally used or threatened the use of force or is it sufficient as to the "use or threat of use of physical force" element if, in the course of the larceny, force was threatened by any party to the larceny? . . .

"Upon receiving the note from the jury, the court discussed the matter with counsel. Although the court stated that it believed that the instruction on robbery in the first degree was proper, it nonetheless proposed responding to the jury's note by adding the phrase 'another participant' to the use of force instruction . . . . The court explained that it was its belief that the addition of this language would clarify that the jury could find the [petitioner] guilty of robbery in the first degree if he *or another participant in the crime* used or threatened the use of physical force.

"Defense counsel objected, stating that the proposed clarification would serve as an 'unfair invasion of the province of the jury' and improperly introduce the concept of accomplice liability. . . . Over the [petitioner's] objection, the court decided to provide the jury with its proposed clarification." (Emphasis added.) Id., 75–78.

In concluding that the trial court properly instructed the jury regarding robbery in the first degree, this court held that "[t]he plain language of [§ 53a-134 (a)] states that an individual may be guilty of robbery in the first degree if he or another participant in the crime uses or threatens the use of a dangerous instrument. In *State* v. *Davis*, [255 Conn. 782, 791 n.8, 772 A.2d 559 (2001)], our Supreme Court concluded that § 53a-134 applies to both principals and accessories, stating: [O]ur robbery statute, § 53a-134, includes explicit accessory language within the text of the statute. . . . Because the robbery statute applies to principals *and* accessories on its face, the court did not need to explain the concept of accessorial liability to the jury as it relates to the robbery charge. . . . Our Supreme Court also noted that our law makes no practical distinction between the terms accessory and principal for the purposes of determining criminal liability." (Emphasis in original; internal quotation marks omitted.) *State* v. *Moon*, supra, 192 Conn. App. 81.

Accordingly, although the petitioner was not charged as an accomplice, the evidence was sufficient to convict the petitioner of robbery despite the lack of any instruction on accomplice liability because there was sufficient evidence for the jury to find that during the commission of the robbery, the petitioner acted in concert with Mathis. See *State* v. *Latorre*, 51 Conn. App. 541, 552, 723 A.2d 1166 (1999).

Moreover, Mathis' legal incapacity as a participant in the commission of the robbery would not afford the petitioner any defense at trial and thus does not support his actual innocence claim on this charge. The petitioner has never disputed that Mathis shot and killed the victim. He contended that, although he was present at the scene of the robbery, he was a distance away and had no intent to commit the robbery. The state, however, alleged that the petitioner worked in concert with Mathis and that both of them committed the robbery, and the jury found the petitioner guilty of that crime.

During the Mathis trial, the state took the position that Mathis shot and killed the victim and charged him with manslaughter in the first degree with a firearm under the reckless subsection of the statute. From the aggregate evidence presented during the habeas trial, the petitioner is clearly portrayed as an alleged accomplice to the principal, Mathis, who used physical force during the robbery that resulted in the victim's death.

General Statutes § 53a-9 provides in relevant part: "In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person under section 53a-8[20] it shall not be a

[20] General Statutes § 53a-8 provides in relevant part: "(a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. . . ." This statute establishes the guilt of an accused as an accessory.

defense that: (1) Such other person is not guilty of the offense in question because of lack of criminal responsibility or legal capacity or awareness of the criminal nature of the conduct in question . . . or because of other factors precluding the mental state required for the commission of the offense in question; or (2) such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has been acquitted thereof . . . .'' (Footnote added.)

In *State* v. *McCarthy*, 179 Conn. 1, 425 A.2d 924 (1979), the defendant was found guilty of murder and attempt to commit murder. Id., 2. In the indictment, information and bill of particulars, he was charged under § 53a-8. Id., 13–14. ''[T]he state alleged that the defendant 'did intentionally aid one Jean Siretz, while the latter, with intent to cause the death[s] of [Donald and] one Victoria Stuart, did shoot and cause the death of said Victoria Stuart.' Considerable testimony was adduced at the trial that Siretz was so affected by drugs that she was incapable of forming any intent. . . . In its charge, the court instructed the jury that [§ 53a-9] governed the situation and that 'the mental state or intent of [Siretz] is irrelevant.' He went on to note that: 'You may disregard that word ''intent'' as far as she is concerned. Her intent is not a necessary element. . . . It is surplusage in the indictment.' '' (Footnote omitted.) Id., 14.

Our Supreme Court held that ''[t]he purpose behind § 53a-9 is to prevent the specific type of evil presented by this precise fact situation: A Mansonesque[21] figure using a mentally incompetent individual to commit a crime and going free because the actual perpetrator

[21] The court was referring to the notorious criminal defendant, Charles Manson, in *People* v. *Manson*, 71 Cal. App. 3d 1, 139 Cal. Rptr. 275 (1977), cert. denied, 435 U.S. 953, 98 S. Ct. 1582, 55 L. Ed. 2d 803 (1978), and *People* v. *Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), cert. denied, 430 U.S. 986, 97 S. Ct. 1686, 52 L. Ed. 2d 382 (1977). See *State* v. *McCarthy*, supra, 179 Conn. 16.

is incapable of the requisite intent. A crime may be performed though the actual perpetrator lacked the requisite mental capacity. . . . It is but to quote the hornbook to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the mens rea—willfulness—may reside in a person wholly incapable of committing the forbidden act. The trial court's interpretation and application of § 53a-9 was correct. There was no error in instructing the jury that Siretz' intent was irrelevant." (Citations omitted; footnote altered; internal quotation marks omitted.) Id., 16.

In light of the holding in *State* v. *Davis*, supra, 255 Conn. 782, the prosecutor did not need to specifically charge the petitioner as an accessory in the robbery perpetrated upon the victim, as his criminal liability as an accessory for acts perpetrated by Mathis is inherent in the relevant statute, § 53a-134 (a) (2). It is of no significance that Mathis, the other participant in the robbery who used physical force by firing the gun, lacked the ability to form any criminal intent due to his mental disease or defect. This does not excuse the petitioner from liability.

With respect to the conviction of the petitioner on the charge of felony murder in violation of § 53a-54c, as with the first degree robbery conviction, the petitioner cannot avail himself of the defense that his partner in the robbery, Mathis, could not have formed an intent to kill the victim due to his mental disease or defect. A person is guilty of felony murder when, acting with one or more persons, he commits an underlying felony, such as robbery in the first degree, and in the course of and in furtherance of said underlying felony or in

the course of and in furtherance of the defendant's flight therefrom, he or another participant causes the death of a person other than one of the participants. See General Statutes § 53a-54c.

"[T]he phrase in furtherance of was intended to impose the requirement of a relationship between the underlying felony and the homicide beyond that of mere causation in fact, similar to the concept of proximate cause in the law of torts. Primarily its purpose was to limit the liability of a person whose accomplice in one of the specified felonies has performed the homicidal act to those circumstances which were within the contemplation of the confederates to the undertaking, just as the liability of a principal for the acts of his servant is similarly confined to the scope of the agency. All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them while acting in pursuance of, or in furtherance of, the common design." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Young*, 191 Conn. 636, 642, 469 A.2d 1189 (1983); see also *In re Michael B.*, 36 Conn. App. 364, 375, 650 A.2d 1251 (1994) ("[t]he phrase [in furtherance of] serves to exclude those murders that are committed during the course of an underlying felony but that are wholly unrelated . . . but does not serve to exclude killings that were not intended").

"Nowhere in the [felony murder] statute . . . is there a further requirement of a general intent to commit the homicidal act." *State* v. *Kyles*, 221 Conn. 643, 668, 607 A.2d 355 (1992). The purpose underlying the felony murder statute is "to punish those whose conduct brought about an unintended death in the commission or attempted commission of a felony. . . . The felony murder rule includes accidental, unintended deaths. Indeed, we have noted that crimes against the

person like robbery, rape and common-law arson and burglary are, in common experience, *likely to involve danger to life in the event of resistance by the victim* . . . .'' (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 667.

It is not necessary for the state to prove beyond a reasonable doubt that the petitioner, or Mathis for that matter, intended that the victim's life be taken. The felony murder statute only requires proof of all of the elements of the underlying felony, in this case, robbery in the first degree, and then proof that one of the participants in the proven robbery, in the course of and in the furtherance of that felony, or in flight from the commission of the felony, caused the death of a nonparticipant victim. Mathis' inability to form an intent to kill the victim is irrelevant. Because the petitioner is criminally liable as a participant in the robbery, and the homicide was committed by the other participant, Mathis, in the execution of that robbery, he is also guilty of felony murder under § 53a-54c. The aggregate evidence presented during the habeas trial is sufficient to prove that the victim was killed in the course of being robbed by the petitioner and Mathis and in furtherance of that crime.

In sum, we conclude that the habeas court's finding that the petitioner failed to meet his burden of proving actual innocence must stand. We have independently and scrupulously examined the entire record of this case and conclude that substantial evidence supports the conclusion that the petitioner is not actually innocent of the crimes for which he stands convicted. Moreover, on our plenary review, we conclude that a reasonable fact finder could find the petitioner guilty beyond a reasonable doubt of the crimes of which he stands convicted when confronted with the evidence available at the original criminal trial, together with the newly discovered evidence presented during the habeas trial.

The habeas court properly denied the petitioner's actual innocence claim.

The judgment is affirmed.

In this opinion the other judges concurred.

ROCCO ORLANDO *v.* ERNEST LIBURD
(AC 46295)

Alvord, Suarez and Westbrook, Js.

Syllabus

The plaintiff, O, sought to recover damages from the defendant, L, arising out of a motor vehicle accident. At the time of the accident, O was insured by N Co., and N Co. paid to repair the damage to O's vehicle that resulted from the accident. In O's action against L, O sought damages for, inter alia, the diminished value of his vehicle. L moved to implead N Co. as a third-party defendant and filed a third-party complaint against N Co., alleging that his insurer had tendered his full policy limit to N Co. O filed an amended complaint that purported to assert apportionment claims against N Co. The court granted N Co.'s motion for a judgment of nonsuit against L. Less than four months before jury selection was scheduled, O requested leave to amend his complaint, which the court denied. Subsequently, the court granted N Co.'s motion to strike counts of the operative complaint, including a count sounding in unjust enrichment. On O's appeal to this court, *held*:

1. O could not prevail on his claim that the trial court improperly denied his request for leave to amend his complaint, O having failed to demonstrate that the court abused its discretion in denying his request: the court's denial did not prevent O from curing alleged pleading deficiencies with respect to the counts initially pleaded because O had the opportunity to cure such deficiencies when he filed a third amended complaint two months later; moreover, although O could not properly assert the additional causes of action in the subsequent amended complaints he filed, the court found that he had had an opportunity to assert those causes of action in prior requests to amend the complaint and failed to do so; furthermore, the court also found that permitting the proposed amendment would considerably delay the proceedings in light of the upcoming trial date, despite the fact that the parties were still in the pleading stage of litigation.
2. O could not prevail on his claim that the trial court improperly dismissed his unjust enrichment count against N Co. for lack of subject matter jurisdiction:

a. O's unjust enrichment claim against N Co. was not ripe for adjudication as it was contingent on whether and to what extent O could recover against L as well as whether L would be able to satisfy the hypothetical judgment; moreover, because O's claim against L has yet to be adjudicated and liability, if any, for the alleged loss determined, and there was no allegation that L was insolvent, it was impossible to ascertain whether O would sustain any compensatory injury as a result of N Co.'s alleged misconduct.

b. The trial court properly decided the issue of subject matter jurisdiction on the basis of the operative complaint alone and did not improperly fail to consider evidence O presented regarding ripeness: O's proffered exhibits were copies of emails unaccompanied by any affidavit or other undisputed evidence as required by the applicable rule of practice (§ 10-31); moreover, even considering O's exhibits, they were not sufficient to render his claim against N Co. ripe for adjudication, as O's claim against N Co. was wholly contingent on O obtaining a judgment against L and L being unable to satisfy the hypothetical judgment.

Argued May 29—officially released September 10, 2024

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Cobb*, *J.*, granted the defendant's motion to implead Nationwide Mutual Insurance Company as a third-party defendant; thereafter, the named defendant filed a third-party complaint against Nationwide Mutual Insurance Company; subsequently, the plaintiff filed an amended complaint; thereafter, the court, *Rosen*, *J.*, granted the third-party defendant's motion for nonsuit against the named defendant and rendered judgment thereon; subsequently, the court, *Rosen*, *J.*, denied the plaintiff's request to file an amended complaint; thereafter, the court, *Rosen*, *J.*, granted the third-party defendant's motion to strike; subsequently, the plaintiff filed an amended complaint; thereafter, the court, *Sicilian*, *J.*, granted the third-party defendant's motion to strike and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew J. Forrest, with whom, on the brief, was *James R. Brakebill*, for the appellant (plaintiff).

Andrew P. Barsom, with whom, on the brief, was *Robert D. Laurie*, for the appellee (third-party defendant).

Opinion

WESTBROOK, J. In this action arising out of a motor vehicle accident, the plaintiff, Rocco Orlando, appeals from the judgment of the trial court rendered in favor of the third-party defendant, Nationwide Mutual Insurance Company (Nationwide),[1] on counts three and four of the operative amended complaint and from the court's denial of a motion for leave to amend an earlier complaint.[2] The plaintiff claims that the court improperly (1) denied his request to amend, which prevented him from curing alleged pleading deficiencies and (2) dismissed for lack of subject matter jurisdiction his counts directed against Nationwide because, contrary to the court's conclusion, the claims therein were ripe under the "make whole doctrine."[3] We affirm the judgment of the trial court.

[1] The named defendant and third-party plaintiff, Ernest Liburd, has not participated in this appeal.

[2] At the time the court rendered the decision underlying this appeal, counts three and four were the only unresolved counts of the operative complaint directed against Nationwide and, thus, the court's decision, at first blush, appeared to constitute an appealable final judgment in accordance with Practice Book § 61-3. After the initial appeal was filed, however, it became clear that the court had rendered a final judgment only with respect to one of the two counts at issue on appeal, and that the court also had never rendered judgment on a previously stricken count also directed against Nationwide. Prompted by an order of this court, the parties sought and obtained judgment on all stricken counts, and the plaintiff subsequently filed an amended appeal. Accordingly, although the original appeal is dismissed for lack of a final judgment, the amended appeal, which raises the same claims of error, is properly before us. See Practice Book § 61-9; *Haworth Country Club, LLC* v. *United Bank*, 226 Conn. App. 665, 668 n.1, A.3d (2024).

[3] In *Fireman's Fund Ins. Co.* v. *TD Banknorth Ins. Agency, Inc.*, 309 Conn. 449, 72 A.3d 36 (2013), our Supreme Court clarified that the make whole doctrine is "sound policy"; id., 457; and "operates as a default rule

The following undisputed facts and procedural history are relevant to our discussion of the plaintiff's amended appeal. On November 6, 2018, the plaintiff was involved in a motor vehicle accident with the defendant, Ernest Liburd. At the time of the accident, the plaintiff was insured by Nationwide, and Nationwide paid to repair the damage to the plaintiff's vehicle that resulted from the accident. On September 23, 2019, the plaintiff commenced the underlying action against Liburd alleging that Liburd negligently struck the plaintiff's vehicle and caused the plaintiff's damages, including diminished value of the plaintiff's vehicle. Liburd moved to implead Nationwide as a third-party defendant, and the court, *Cobb*, *J.*, granted the motion. On April 20, 2021, Liburd filed a third-party complaint against Nationwide alleging that his insurer had tendered his full policy limit to Nationwide and that Nationwide had misrepresented to him that the plaintiff had been made whole.

On May 13, 2021, the plaintiff filed an amended complaint that purported to assert apportionment claims against Nationwide. On September 17, 2021, the plaintiff filed a second amended complaint. Count one of the second amended complaint asserted a negligence cause of action against Liburd and counts two, three and four asserted causes of action against Nationwide based on

in Connecticut insurance contracts." Id., 458. It explained the doctrine as follows. First, it recognized the principle that an insurer's right to subrogation "promotes equity by preventing an insured from receiving more than full indemnification as a result of recovering from both the wrongdoer and the insurer for the same loss, which would unjustly enrich the insured." Id., 456. It then explained that, "[if] the amount recoverable from the responsible third party is insufficient to satisfy both the total loss sustained by the insured and the amount the insurer pays on the claim, however, this principle may lead to inequitable results. . . . The make whole doctrine addresses this concern by restricting the enforcement of an insurer's subrogation rights until after the insured has been fully compensated for her injuries, that is . . . made whole." (Citation omitted; internal quotation marks omitted.) Id., 456–57.

negligent misrepresentation, common-law indemnification and unjust enrichment.

On November 22, 2021, the court, *Rosen*, *J.*, granted Nationwide's motion for a judgment of nonsuit against Liburd for failing to comply with an unopposed request that he revise his third-party complaint. See Practice Book § 10-37 (a).[4]

On December 30, 2021, Nationwide moved to strike counts two, three, and four of the second amended complaint noting that the plaintiff's claims against Nationwide were apportionment claims that were entirely reliant on Liburd's allegations in his third-party complaint for which a judgment of nonsuit had been rendered. Nationwide argued that the counts against it should be dismissed or that they asserted only conclusory allegations that were legally insufficient to sustain the causes of action pleaded and, thus, should be stricken.

In response to the motion to strike, on January 27, 2022, less than four months before jury selection was scheduled, the plaintiff requested leave to file a third amended complaint that sought to plead additional causes of action against Nationwide sounding in wrongful subrogation, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and statutory theft in violation of General Statutes § 52-564. The court denied the plaintiff's request, stating: "The proposed third amended complaint is untimely, prejudicial and would unnecessarily delay the trial of this matter. Jury selection is scheduled for May 19, 2022. The proposed third amended

[4] Practice Book § 10-37 (a) provides in relevant part that a properly served and filed request to revise "shall be deemed to have been automatically granted by the judicial authority on the date of filing and shall be complied with by the party to whom it is directed within thirty days of the date of filing the same, unless within thirty days of such filing the party to whom it is directed shall file objection thereto."

complaint seeks to [add] numerous additional causes of action against the defendant Nationwide, which would require further pleading and discovery practice. Moreover, the new causes of action could have been asserted in prior requests to amend the complaint." On March 7, 2022, the court granted Nationwide's motion to strike, noting in its order that the plaintiff had consented at oral argument to the granting of the motion.

On March 21, 2022, the plaintiff filed a third amended complaint pursuant to Practice Book § 10-44,[5] and, on April 18, 2022, to correct certain scrivener's errors, filed the operative fourth amended complaint. The operative complaint retained count two as a placeholder, noting parenthetically that it previously had been stricken by the court.[6] Counts three and four of the operative complaint alleged the plaintiff's previously stricken causes of action against Nationwide that purported to sound in unjust enrichment and common-law indemnity, respectively. With respect to count three, the plaintiff alleged that Nationwide was unjustly enriched by its premature subrogation because the plaintiff had not yet been made whole, and that, "[*i*]*f* [Liburd] should be held liable to pay damages to the plaintiff . . . then the plaintiff is entitled to recover from Nationwide for all sums adjudged against [Liburd] in favor of the plaintiff." (Emphasis added.)

On June 2, 2022, Nationwide moved to strike counts three and four of the operative complaint. The plaintiff filed an opposition only as to count three, indicating therein that "[t]he plaintiff does not wish to object to

[5] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading . . . ."

[6] The plaintiff was not attempting to replead count two and does not challenge in the present amended appeal the court's decision to strike and render judgment on that count.

[Nationwide's] motion to strike count four alleging common-law indemnity." The court, *Sicilian*, *J.*, held oral argument on the motion to strike on September 12, 2022, with the arguments limited to count three of the complaint.

On September 29, 2022, the court sua sponte raised the issue of ripeness with respect to count three and ordered the parties to brief that issue.[7] Both parties submitted briefs, following which the court granted the motion to strike with respect to count four, noting that the plaintiff had not contested the motion to strike with respect to that count, and dismissed count three of the complaint as not ripe for adjudication. In its memorandum of decision, the court stated that, "[b]y its plain words, the plaintiff's count three asserts a claim contingent upon an event that has not and may never occur. Therefore, the claim is not ripe." This amended appeal followed. See footnote 2 of this opinion. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly denied his January, 2022 request for leave to amend his second amended complaint. In particular, the plaintiff argues that (1) the proposed amendment would not

[7] The court's order provided in relevant part: "In paragraph 14 of count three of the fourth amended complaint, the plaintiff alleges: If [Liburd] should be held liable to pay damages to the plaintiff . . . then the [p]laintiff is entitled to recover from Nationwide . . . . It therefore appears that the plaintiff's claim for damages against Nationwide may be unripe and that the court may lack subject matter jurisdiction over the claim. See *Cadle Co.* v. *D'Addario*, 111 Conn. App. 80, 82–83, 957 A.2d 536 (2008) ('in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire').

"The plaintiff and Nationwide are ordered, within forty-five days of the date of this order, to brief the question whether the court has subject matter jurisdiction over the plaintiff's claim for unjust enrichment against Nationwide."

have prejudiced Nationwide because the parties were still in the pleading stage of litigation, and (2) denying the proposed amendment prejudiced the plaintiff because it prevented him from curing alleged pleading deficiencies and asserting new causes of action against Nationwide.

"Our standard of review of the [plaintiff's] claim is well defined. A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion. . . .

"A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Rodriguez* v. *Hartford*, 224 Conn. App. 314, 325, 312 A.3d 85, cert. denied, 349 Conn. 907, 313 A.3d 512, and cert. denied, 349 Conn. 907, 313 A.3d 512 (2024); see also *Booth* v. *Park Terrace II Mutual Housing Ltd. Partnership*, 217 Conn. App. 398, 432, 289 A.3d 252 (2023).

In the present case, the plaintiff has failed to demonstrate that the court abused its discretion in denying his request to amend his second amended complaint.

The court's denial did not prevent the plaintiff from curing alleged pleading deficiencies with respect to the counts initially pleaded because the plaintiff had the opportunity to cure such deficiencies when he filed the third amended complaint in March, 2022. Moreover, although the plaintiff could not properly assert the six additional causes of action in the third and fourth amended complaints; see *Stone* v. *Pattis*, 144 Conn. App. 79, 94, 72 A.3d 1138 (2013) ("Practice Book § 10-44 grants the power to amend the portion of a complaint that has been stricken, not the power to revise a complaint entirely"); the court found that he had had an opportunity to assert those causes of action in prior requests to amend the complaint and failed to do so.

The trial court also found that permitting the proposed amendment would considerably delay the proceedings in light of the upcoming trial date, despite the fact that the parties were still in the pleading stage of litigation. See *Rodriguez* v. *Hartford*, supra, 224 Conn. App. 325 (trial court did not abuse its discretion in denying amendment that would considerably delay proceedings). We conclude that the court's ruling did not reflect an abuse of the court's discretion regarding the amendment of pleadings and, accordingly, reject the plaintiff's claim to the contrary.

II

The plaintiff also claims that the court improperly dismissed his unjust enrichment count against Nationwide for lack of subject matter jurisdiction on ripeness grounds. In particular, the plaintiff argues that, contrary to the court's conclusion, the claim was ripe for adjudication because Nationwide's premature subrogation had caused him tangible legal injury under the make whole doctrine. The plaintiff additionally argues that the court improperly failed to consider evidence that

he presented regarding ripeness. We disagree with both aspects of the plaintiff's claim.

A

First, we briefly set forth the standard of review and relevant legal principles that govern our review of the plaintiff's argument that his unjust enrichment claim was ripe for adjudication. "[J]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of the plaintiff's ripeness claim] is plenary. . . .

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86–87, 952 A.2d 1 (2008).

In *Cadle Co.* v. *D'Addario*, 111 Conn. App. 80, 81, 957 A.2d 536 (2008), the plaintiff purchased a promissory note from a creditor of a decedent and filed a notice of claim against the decedent's estate. This court, finding that the claim was not ripe for adjudication, stated the following: "[T]he existence of the plaintiff's injury is contingent on a determination of the priorities of the creditors of the decedent's estate, the final settlement of the estate and the absence of sufficient funds in the

estate to satisfy the plaintiff's claim. In other words, any injury sustained by the plaintiff stemming from the allegations of the defendants' misconduct are, at this point, hypothetical." Id., 83.

Turning to the present case, similar to the facts in *Cadle Co.*, the plaintiff's unjust enrichment claim against Nationwide is contingent on a final determination of his claims against Liburd and, if the plaintiff is awarded damages, the absence of sufficient funds from Liburd or his insurer to satisfy the plaintiff's claim. Even if, unlike in *Cadle Co.*, the plaintiff's priority rights may already be determined under the make whole doctrine,[8] the plaintiff's claim against Nationwide is still contingent upon whether and to what extent the plaintiff can recover against Liburd as well as whether Liburd will be able to satisfy the hypothetical judgment.

Additionally, this case is distinguishable from cases in which only the *amount* of damages was in question. See *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 87–88 (although exact amount of plaintiff's damages was uncertain, because it was clear there was no way plaintiff could recover entirety of its debt as sought in complaint, plaintiff had sustained some damages); *Cumberland Farms, Inc.* v. *Groton*, 247 Conn. 196, 211–14, 719 A.2d 465 (1998) (plaintiff's inverse condemnation action was ripe despite potential of success of administrative appeal from taking of its land because it would still be entitled to some compensation for temporary taking it had suffered during pendency of that appeal); *Mayer* v. *Biafore, Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998) (judicial determination that action was barred by statute of limitations was not necessary to justiciability of legal malpractice

[8] The parties dispute whether the plaintiff has priority rights to Liburd's insurance policy under the make whole doctrine. Because we find that the plaintiff's claim against Nationwide is not ripe for adjudication, we do not reach the merits of this dispute.

claim because injury already occurred); *Weiner* v. *Clinton*, 100 Conn. App. 753, 759–60, 919 A.2d 1038 (malpractice matter was ripe despite pending appeal because injury of default judgment allegedly caused by legal negligence already occurred), cert. denied, 282 Conn. 928, 926 A.2d 669 (2007). Here, because the plaintiff's claim against Liburd has yet to be adjudicated and liability for the alleged loss determined, and there is no allegation that Liburd is insolvent, it is impossible to ascertain whether the plaintiff will sustain any compensatory injury as a result of Nationwide's alleged misconduct.

Furthermore, the plaintiff's reliance on *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 239 A.3d 1162 (2020), as authority for his argument that Nationwide's infringement on his priority rights to Liburd's insurance policy is sufficient injury to make his claim ripe, is misplaced. In *Saunders*, our Supreme Court addressed "whether a determination of the priority of mortgages can be challenged in an appeal from the judgment of foreclosure by sale, before the foreclosure sale has taken place, when the priority of the foreclosing plaintiff's mortgage is in dispute." Id., 588. The court held that the priority determination could be appealed because the trial court had conclusively established the parties' priority rights, and the order of priority is essential to foreclosure because bidders at a foreclosure sale need to know the order of the encumbrances to which the property is subject. Id., 603–606.

Here, unlike the foreclosure action in *Saunders*, the court did not conclusively decide which party has priority rights to Liburd's insurance policy. Nor is the dispute over priority rights essential to the determination of the plaintiff's negligence claim against Liburd. To the contrary, determination of the plaintiff's claim against Liburd is necessary before the court can ascertain

whether Nationwide has been unjustly enriched by subrogation. The rationale supporting the decision in *Saunders* does not apply here. In short, we reject the plaintiff's claim that count three of his complaint was ripe for adjudication because Nationwide's premature subrogation had caused him tangible legal injury under the make whole doctrine.

B

The plaintiff also argues that the court improperly concluded that his unjust enrichment claim was not ripe because it failed to consider certain evidence presented by the plaintiff. We disagree.

"[L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . [I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009).

Here, the plaintiff's argument concerns copies of two emails from Liburd's counsel that the plaintiff attached to his brief. The first email contains a copy of a check for twenty-five thousand dollars and states, "[p]lease see the attached release and settlement check for the PD limits of 25,000.00 following the intracompany arbitration process." The second email states: "I know

Nationwide is fighting everything tooth and nail on this one but have you had any discussions with them about resolving this case. I think the last time we spoke you indicated that your plan was to get Nationwide and make a claim for a portion of the benefits State Farm paid to Nationwide. As you know we paid the policy limit on this one." The plaintiff points to the following portion of the court's memorandum of decision as support for his argument that the court failed to consider the emails that he submitted: "The plaintiff's complaint here does not allege the amount of his claimed damages, the amount subrogated by his insurer, or the limits of Liburd's coverage. . . . [T]hose omissions are fatal." The plaintiff's exhibits, however, are copies of emails that are unaccompanied by any affidavit or other undisputed evidence. See Practice Book § 10-31 (opposition to motion to dismiss should, if appropriate, include "supporting affidavits as to facts not apparent on the record"). Accordingly, the court properly decided the issue of subject matter jurisdiction on the basis of the operative complaint alone.

More importantly, even considering the plaintiff's exhibits, they were not sufficient to render his claims against Nationwide ripe for adjudication. Regardless of the amount of Liburd's insurance policy and the amount Liburd's insurer paid to Nationwide, as we concluded in part II A of this opinion, the plaintiff's claim against Nationwide is wholly contingent upon the plaintiff obtaining a judgment against Liburd and Liburd being unable to satisfy the hypothetical judgment. Thus, even if the exhibits were erroneously ignored by the trial court, the plaintiff's exhibits do not persuade us that the claim is ripe for adjudication.[9]

[9] To the extent that the parties raise the issue of whether the plaintiff has standing to assert an unjust enrichment claim against Nationwide, we do not reach this issue because we conclude that the claim is not ripe for adjudication.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE CHRISTIAN G.
(AC 47902)

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

Syllabus

The petitioner appealed to the Superior Court from the orders of the Probate Court denying his petitions for the voluntary appointment of a guardian and for the designation of a minor child as having special immigrant juvenile status. The trial court rendered judgment denying the petitions, from which the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the trial court made clearly erroneous findings of fact and misapplied the law, this court having concluded that the trial court's findings were not clearly erroneous and that its decision was correct in law.

Considered August 22—officially released August 22, 2024*

Procedural History

Appeal from the decision of the Probate Court for the district of Bridgeport denying the petitioner's petitions for the voluntary appointment of a guardian and for the designation of a minor child as having special immigrant juvenile status, brought to the Superior Court in the judicial district of Bridgeport, Juvenile Matters, and tried to the court, *Skyers*, *J.*; judgment denying the petitions, from which the petitioner appealed to this court. *Affirmed.*

Virginia M. Gillette and *Trent A. LaLima* submitted a brief for the appellant (petitioner).

Opinion

PER CURIAM. The petitioner, Christian G., appealed to the Superior Court challenging the orders of the

* August 22, 2024, the date that this decision was released as an order of this court on a motion for summary disposition, is the operative date for all substantive and procedural purposes.

Probate Court denying his petitions for the voluntary appointment of a guardian and for the designation of a minor child as having special immigrant juvenile status. See General Statutes §§ 45a-608n and 45a-610. Following a trial de novo, the Superior Court denied the petitions, and this appeal followed. We affirm the judgment of the Superior Court.

The petitioner filed his appeal to this court on August 12, 2024. He represented that his twenty-first birthday is August 26, 2024, and that his ability to apply for a petition to the United States Citizenship and Immigration Services for the designation of a minor child as having special immigrant juvenile status under 8 U.S.C. § 1101 (a) (27) (J) (2018) would be foreclosed after that date. See 8 C.F.R. § 204.11 (b) (1) (2023).

This court granted the petitioner's motion for an expedited appeal, and he filed his brief and appendix on August 19, 2024. We granted his request for summary disposition without oral argument.

On appeal to this court, the petitioner claims that the court made clearly erroneous findings of fact and misapplied the law. After carefully reviewing the petitioner's brief and appendix, and the record, including the trial court file and the transcripts of the trial proceedings, we conclude that the findings of the court are not clearly erroneous and that its decision is correct in law. See, e.g., *Haydusky's Appeal from Probate*, 201 Conn. App. 746, 747, 242 A.3d 531 (2020), cert. denied, 336 Conn. 915, 245 A.3d 424 (2021).

The judgment is affirmed.