IN RE NIYA B.*
(AC 46488)

Alvord, Seeley and Westbrook, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, N. Shortly after N's birth, she was placed in the care and custody of the petitioner, the Commissioner of Children and Families. N was later adjudicated neglected and the court ordered specific steps for the mother to facilitate her reunion with N. While N was in the custody of the petitioner, the mother tested positive multiple times for alcohol and illegal drugs and was arrested multiple times for operating a motor vehicle while under the influence of alcohol or drugs. The petitioner filed a termination petition that alleged that, pursuant to statute (§ 17a-112 (j) (3) (B) (i)), N had been adjudicated neglected and that the mother had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, given the age and needs of N, she could assume a responsible position in N's life. At the termination trial, the mother presented expert testimony from F, a clinical psychologist, who had previously written a report recommending reunification with N. *Held* that the trial court correctly concluded, by clear and convincing evidence, that the respondent mother had failed to achieve a sufficient degree of rehabilitation, as required by § 17a-112 (j) (3) (B) (i): the record contained sufficient evidence to support the court's determination, including that, although the mother had used and completed some services offered to her by the Department of Children and Families, including for substance use, relapse prevention

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

and mental health counseling, multiple urine tests and drug screens presented clear and convincing evidence that she continued to have substance use issues, that she demonstrated a lack of insight or outright refusal to acknowledge her substance use, including by her claims that every drug test over a three year period had produced a false positive, by her denial that any of her arrests for operating a motor vehicle under the influence was her fault, despite evidence in each instance that she had glassy or bloodshot eyes and impaired speech or behavior and she smelled of alcohol, and by her testimony at trial that these arrests were merely evidence of "slipping," not relapse, and she refused to engage in most of the recommended treatments; moreover, the mother could not prevail on her claim that the court misinterpreted F's testimony regarding, inter alia, whether she had gained adequate insight into her substance use issues and whether her instances of substance use throughout the history of the case suggested a failure to rehabilitate, as the court did not and was not required to rely on F's expert testimony, F's report recommending reunification was prepared sixteen months before the trial and F was unaware of the mother's more recent positive test results for drugs and alcohol, F ultimately testified that, at the time of the trial, he was not sure of his position as to reunification, and he had stated in his report that the mother minimized her substance use and its impact on her parenting and the lack of stability in her life.

Argued November 13, 2023—officially released January 22, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, and tried to the court, *Hon. John Turner*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

John E. Tucker, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

** January 22, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

SEELEY, J. The respondent mother,[1] Erin R., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families (commissioner), terminating her parental rights with respect to her minor child, Niya B. On appeal, the respondent claims that the court improperly determined that she had failed to achieve a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i).[2] We disagree and, accordingly, affirm the judgment of the court.

The following relevant facts, which the court found by clear and convincing evidence, and procedural history, are relevant to this appeal. On March 13, 2020, the Department of Children and Families (department) invoked a ninety-six hour hold and placed Niya in the care and custody of the commissioner. On March 17, 2020, the commissioner sought an order of temporary custody, which the court granted, and filed a neglect petition. Also on March 17, 2020, the court ordered preliminary specific steps for the respondent to facilitate her reunion with Niya.[3]

[1] John Doe, the father of the minor child, is not involved in this appeal. The trial court found that John Doe had abandoned Niya "in the sense that he has failed to maintain a reasonable degree of interest, concern, or responsibility as to [her] welfare . . . ." and that there was "no ongoing parent-child relationship . . . such as ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child." Accordingly, the court terminated his parental rights. Our references in this opinion to the respondent are to the mother.

[2] The attorney for the minor child filed a statement adopting the brief filed by the commissioner.

[3] The preliminary specific steps required the respondent, inter alia, to take part in counseling and make progress toward both parenting and individual treatment goals; accept in-home support services referred by the department and cooperate with them; submit to a substance use evaluation and follow the recommendations about treatment, including inpatient treatment if necessary, aftercare and relapse prevention; submit to random drug testing; not use illegal drugs or abuse alcohol or medicine; cooperate with service providers recommended for counseling, in-home support services, and sub-

On January 15, 2021, the court approved a concurrent permanency plan of reunification for Niya with the respondent or termination of parental rights and adoption. On December 7, 2021, the court again approved a concurrent permanency plan of reunification with the respondent or termination of parental rights and adoption. On the same date, the respondent entered a plea of nolo contendere to an allegation of neglect, specifically that Niya was being permitted to live under circumstances injurious to her well-being. The court adjudicated Niya neglected and committed her to the care and custody of the commissioner. The court ordered final specific steps for the respondent on the same day.[4]

On January 10, 2022, the respondent filed a motion to revoke the commitment, arguing that she was "ready, willing, and able to immediately assume full-time guardianship and care of the minor child . . . [that] the cause for commitment no longer exist[ed]," and that she was engaging in services and had substantially complied with all of the specific steps ordered by the court. On January 19, 2022, the commissioner filed an objection to the respondent's motion to revoke commitment, asserting that the respondent had not been compliant with urine screens, that she had tested positive for cocaine on October 4 and 20, 2021, that she had been driving without a license to her visits with Niya, that she was unemployed, and that "[a] cause for commitment still exist[ed] and it still [was] in the best interest of the child." On March 9, 2022, the commissioner filed

stance use assessment and treatment; cooperate with court-ordered evaluations or testing; get and/or maintain adequate housing and a legal income; and not get involved with the criminal justice system.

[4] The final specific steps were similar to the preliminary specific steps; see footnote 3 of this opinion; with a few relevant additions, namely, that the respondent must make progress toward her treatment goal, which was "[t]o gain insight into . . . her substance use and behaviors and how that impacts her ability to parent," and that she must not drive without a valid driver's license.

a petition to terminate the respondent's parental rights. The termination petition alleged, pursuant to § 17a-112 (j) (3) (B) (i), that Niya previously had been adjudicated neglected and the respondent had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, given the age and needs of Niya, she could assume a responsible position in Niya's life.

The termination of parental rights trial was held on June 20, August 29 and 31, and November 7, 29 and 30, 2022. The court consolidated the respondent's motion to revoke commitment and the commissioner's objection thereto with the termination of parental rights trial. During the trial, the commissioner presented testimony from the following witnesses: "Kevin Zaloski, a special investigations detective with the Danbury . . . Police Department; Brian Durling, a lieutenant with the Ridgefield . . . Police Department; Terrance Howaux, a patrolman with the Brookfield . . . Police Department; Ryan Howley, a patrolman with the Danbury . . . Police Department; Ebony Davidson, a team leader at Connecticut Counseling Center; Kelsey Dlugozima, a licensed clinical social worker for Central Naugatuck Valley Health Services; Dr. Kevin Berry, a [department] social worker supervisor; and Angel Santiago, a [department] social worker." The respondent testified and presented additional testimony from the following witnesses: "Eliezer Ortiz, program manager for the Safe Family Recovery Program; Altagracia Trinidad, a licensed professional counselor; Sharone Williams, a recovery support specialist; and Dr. Bruce Freedman, a licensed psychologist who [was] qualified as an expert in clinical and child psychology. The child's attorney called no witness[es] . . . ."

On January 20, 2023, the court issued a memorandum of decision in which it terminated the respondent's parental rights. After setting out the procedural history

and making the relevant jurisdictional findings, the court stated that it had "thoroughly reviewed the verified petition [and] all the exhibits, and ha[d] heard and carefully considered the testimony of all the witnesses. In addition, the court ha[d], with notice to the parties and without their objection, taken judicial notice of the chronology of the proceedings, the filings and submissions of pleadings, petition, court hearings' memoranda, and the dates and contents of the court's findings, orders, rulings, and judgments." The court concluded that "[t]he credible and relevant evidence offered at trial, and [its] review of the judicially noticed court records, support[ed]" its findings of facts "by clear and convincing evidence."

Relevant to the adjudicatory phase[5] of the termination proceeding, the court concluded, by clear and convincing evidence, that the department had made reasonable efforts to reunify the respondent and Niya and that the respondent had "failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of [Niya], she could assume a responsible position in the life of [Niya]." In support of that conclusion, the court made the following relevant factual findings.

The respondent "has a significant history of trauma and issues related to substance use[6] dating back to her

[5] "Proceedings to terminate parental rights are governed by . . . § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Internal quotation marks omitted.) *In re Anthony S.*, 218 Conn. App. 127, 133 n.7, 290 A.3d 901 (2023).

[6] Throughout its memorandum of decision, the court primarily used the phrase "substance use" rather than "substance abuse" in accordance with

childhood." (Footnote added.) She is the mother to two other children, A and K, who were removed from her care by New York's Child Protective Service (NYCPS) and "placed in the care of their maternal grandmother due to concerns of substance use by [the respondent]. A and K have continuously been in the care of their maternal grandmother since 2010." Furthermore, "[a]ccording to NYCPS records, [the respondent] has a history of minimizing her substance use and attempting to alter/mask her urine drug screens. Her history includes several drug charges in the state of [New York], a referral to drug court, and not completing drug court successfully which resulted in jail time."

In March, 2020, the respondent, who was nine months pregnant with Niya, was arrested in Danbury on multiple counts of possession of a controlled substance, multiple counts of possession of a controlled substance with intent to distribute, and possession of drug paraphernalia. Specifically, the police found "[a] large zip lock bag containing [two] smaller bags of cocaine and [one] small bag of heroin and/or fentanyl, drug paraphernalia, packaging material, and a scale . . . in the bedroom she occupied within the house where she resided with [two] other people. There was also $2240 found in her purse. She denied using or selling drugs."

Four days later, on March 8, 2020, the respondent checked into Danbury Hospital to deliver Niya and tested positive for cocaine. She left the hospital against medical advice. The respondent then went to Phelps

the most recent version of the Diagnostic and Statistical Manual of Mental Disorders, the DSM-5-TR, and as recommended by the National Institutes of Health. See National Institute on Drug Abuse, Words Matter: Preferred Language for Talking about Addiction (June 23, 2021), available at https://nida.nih.gov/research-topics/addiction-science/words-matter-preferred-language-talking-about-addiction (last visited January 17, 2024). We do as well, and our references to the term "substance use" throughout this opinion are to the use of both drugs and/or alcohol by the respondent.

Memorial Hospital in New York. On learning that she would be tested for substances at that hospital as well, the respondent left on March 9, 2020, and went to Westchester Medical Center in New York. On March 10, 2020, the respondent gave birth to Niya at Westchester Medical Center, at which time the department became involved with the respondent "when [this information] was reported to [the department's] Careline."[7] Both Niya and the respondent tested negative for illegal substances at that time.

The respondent "denied any illicit drug use" to the department and claimed that "the positive test result for cocaine on March 8, 2020, at Danbury Hospital, was a false positive." On March 23, 2020, the respondent completed a substance use screening at Help, Inc., through the Travisano Network.[8] The results of her urine screen, which were reported on May 4, 2020,[9] showed that she tested positive for alcohol, cocaine and fentanyl. It was recommended that the respondent participate in intensive outpatient treatment (IOP), which she began on May 4, 2020. "Upon admission into the IOP program, [the respondent's] clinician at Help, Inc., identified her as being at the precontemplation

[7] "'Careline is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect.' *In re Katherine H.*, 183 Conn. App. 320, 322 n.4, 192 A.3d 537, cert. denied, 330 Conn. 906, 192 A.3d 426 (2018)." *In re Anthony S.*, 218 Conn. App. 127, 136 n.9, 290 A.3d 901 (2023).

[8] The Travisano Network, as well as Help, Inc., both of which programs the respondent took part in, are affiliated with Central Naugatuck Valley Health Services.

[9] After the March 23, 2020 substance use screening, but before the results had been reported, Help, Inc., recommended that the respondent engage in substance use treatment. The respondent declined treatment and instead "sought a second substance use evaluation at the Wheeler Clinic to determine whether she was an active user. Wheeler Clinic reported that her instant urine screen at its clinic on April 21, 2020, was negative for all substances and, thus, did not recommend substance treatment for her. The recommendation from Wheeler Clinic was based on the April 21, 2020 instant urine screen and [the respondent's] self-report of no substance use issues."

stage of change.[10] Her counselors reported that she was either unaware or unwilling to see how substance use affected her life and that change was needed." (Footnote added.) On May 6, 2020, the respondent tested positive for alcohol, cocaine and fentanyl. On June 8, 2020, the respondent tested positive again for fentanyl.

On July 13, 2020, the respondent received a certificate from Help, Inc., "certifying that she had 'successfully' completed its IOP program. Successful completion of the IOP program required negative drug screens, regular attendance, and active participation in groups. Although [the respondent] was deemed to have successfully completed the IOP program, she struggled with relapsing while in the program, as was evidenced by her recurring positive drug screens. In July, 2020, Help, Inc., recommended [that] she participate in its relapse prevention program. [The respondent] agreed and complied. She commenced the relapse prevention program in July, 2020. On August 27, 2020, she tested positive for cocaine. She denied and disputed the results of the positive test." (Footnote omitted.) The court further noted that "[e]ach time [the respondent] had a positive drug or alcohol test result she would say it was a mistake."

"On August 28, 2020, [the respondent] informed her counselor at Help, Inc., [that] she would seek services elsewhere. She contemporaneously discontinued participating in treatment at Help, Inc. On October 13, 2020, she was formally discharged unsuccessfully. Her discharge issued with the recommendation that, after

[10] Dlugozima, a clinical social worker with Central Naugatuck Valley Health Services, which was providing services to the respondent, testified that the "precontemplation stage of change regarding substance use is that an individual either is not aware that substance use is causing problems in other areas of their lives, or that they are not really willing to see how the substance use has impacted [their lives]. They're not at a point where they're able to see that some change needs to happen."

a thirty day period of sobriety, she reengage in IOP services to begin again to address the underlying motivations for her substance use and to adopt healthier coping skills." At trial, Dlugozima "credibly testified . . . that, at the time of [the respondent's] discharge on October 13, 2020, there had been no change in [the respondent] from the date of her admission; she had not begun to make strides in understanding the problem behaviors involved with her substance use, how substance use affected her life, that changes in her life were needed, the underlying motivations for her substance use, and to adopt healthier coping skills." Upon discharge, "Travisano/Help, Inc., also reported that [the respondent's] . . . prognosis was poor and recommended [that] a higher level of care [was needed] than it provided, either 'in-patient if necessary' or residential."

The respondent "continued to deny she was having issues with substances and refused to engage in inpatient treatment." Instead, the respondent sought and began outpatient treatment at Connecticut Counseling Center in October, 2020. On November 9 and 25, 2020, the respondent's urine screens were marked as suspicious due to her low creatine levels.[11] On December 29, 2020, the respondent submitted to a hair test at the department's request, which showed that she was negative for all substances[12] retroactive for ninety days.[13]

[11] Low creatine levels may indicate that urine has been diluted. At various times throughout her treatment, the respondent's test results were marked as suspicious due to low creatine. However, the court determined that it was never "established that the urine specimens provided by [the respondent] were not from her, had been diluted, contaminated, tampered with, or were otherwise untrustworthy."

[12] The hair test performed on the respondent tested for cocaine, opioids, fentanyl, phencyclidine, amphetamines, and marijuana. The hair test performed on the respondent does not test for alcohol use.

[13] Davidson testified at trial that hair test results "go back ninety days." We also note that the respondent had a urine test on March 5, 2021, that was positive for alcohol and cocaine, which was then followed by a hair test on March 18, 2021, that was negative for all substances. As the trial court noted in its memorandum of decision, "[t]he court accepts the . . .

However, on April 5, 2021, the respondent's urine test again was deemed suspicious.

On March 1, 2021, the respondent was arrested in Bedford, New York, for operating a motor vehicle while under the influence of alcohol.[14] On March 5, 2021, she tested positive for alcohol and later admitted that she had consumed alcohol. The respondent "was scheduled to complete substance treatment on July 26, [2021] with the recommendation she continue meeting with her individual therapist for management of her stress, anxiety and depression. However, [the respondent] did not make it to July 26. She inexplicably disengaged from the program. [Connecticut Counseling Center] discharged her unsuccessfully on July 7, 2021. Her discharge summary stated she was discharged with no goals met."[15] (Footnote omitted.)

On September 3, 2021, the police arrested the respondent in Ridgefield and charged her with operating a motor vehicle while under the influence of alcohol. A police officer observed a vehicle that was swerving all over the road and traveling at only eighteen miles per hour in a forty miles per hour zone. The respondent was the operator and sole occupant of the vehicle. "After

hair test results as the more accurate and reliable test for the presence of drugs than the urine screens administered . . . ." Accordingly, the court did not appear to rest its decision on the March 5 urine test, and we do not consider it relevant to our conclusion.

[14] At trial, the police report for this incident was admitted as a full exhibit. The officer indicated that he had observed a vehicle stopped on the shoulder of a road. When he approached the vehicle, the respondent was the operator. The officer wrote that he "was able to detect a strong odor of an alcoholic beverage [emanating] from her breath along with blood shot glassy eyes." At the police department, the respondent provided a breath sample, "which yielded a [blood alcohol content] of 0.17."

[15] The evidence reflects that the treatment goals included that the respondent would learn healthy coping skills to utilize when her mental health symptoms increased, she would be able to identify triggers that increase her mental health symptoms, and she would be required to provide urine drug screens and submit to Breathalyzer tests on request.

she was stopped, the officer observed an open empty beer can and an open empty nip bottle in the center console. . . . Several more nip bottles were found in her purse. She was mumbling and her speech was slurred. An odor of alcohol was detected emanating from her and the passenger compartment. The officer had to repeat himself several times as [the respondent] had difficulty focusing on what he was saying and [on what] was going on."

On September 17, 2021, the respondent was arrested in Brookfield and charged with operating a motor vehicle while under the influence of alcohol or drugs and operating a motor vehicle with a suspended license. A police officer observed that the respondent had failed to stop at a stop sign and then crossed "over a double yellow line, nearly striking the police officer's cruiser, and forcing him off the road to prevent a head-on collision. She continued to drive erratically . . . ." The officer further observed that she again had crossed over the double yellow line and that she had "failed to stop at two more stop signs before she was stopped." He also noted that "her speech was slurred, her eyes were glassy and bloodshot" and there was an odor of alcohol emanating from her mouth. She was administered a Breathalyzer test, which showed readings of 0.195 and 0.191, well over the legal limit of 0.08.

At the end of September, 2021, the respondent recommenced IOP substance use treatment at Connecticut Counseling Center. On September 27, 2021, the respondent had a urine screening through Connecticut Counseling Center, which once again showed suspiciously low creatine levels, an indication that "her urine had been diluted." On October 4, 2021, the respondent tested positive for cocaine. The respondent later denied using cocaine and disputed the validity of the test. She "denied having substance issues," however, she did state "to her social worker . . . Santiago that she was

drinking alcohol more because of Covid, her depression, and seeing an empty nursery every day. She admitted to getting a bigger and bigger bottle every time she went back to the liquor store. [The respondent] stated further she understood she'd 'messed up and that she should not have been drinking that way . . . .' " On October 20, 2021, the respondent again tested positive for cocaine, although she later denied any use of the drug.

As discussed previously in this opinion, the respondent's driver's license had been suspended after her first September, 2021 arrest for the charge of operating a motor vehicle while under the influence of alcohol or drugs. "Thereafter, in October, 2021 . . . Santiago and other [department] personnel observed her continuing to drive to and from the [department's] office and [to] visits with [Niya]. [The department] provided her with a bus pass, which she admittedly did not use."

In December, 2021, Connecticut Counseling Center successfully discharged the respondent "with the recommendation she attend mental health treatment, relapse prevention, and [Narcotics Anonymous] meetings. [The department's] Regional Resource Group[16] substance use clinician recommended that [the respondent] enter an inpatient program at the Midwestern Connecticut Council on Alcoholism (MCCA). MCCA reported that it had no beds available at that time. MCCA recommended [that] [the respondent] connect with the Sobering Center for inpatient treatment. [The respondent] said no to inpatient treatment, did not follow through with the recommendation, and did not participate in residential treatment. Instead, she attended mental health treatment and engaged in

[16] The department's Regional Resource Group consists of "[a] group [of] clinicians in . . . mental health or substance use" who help to "figure out what services are available" to those families or individuals with whom the department is involved.

relapse prevention at [Connecticut Counseling Center] as had been recommended . . . .'' (Footnote added.).

On February 15, 2022, a social worker for the department spoke with the respondent over the phone and observed that the respondent was slurring her speech, rambling, and incoherent.[17] He was concerned and went to her home, where he ''observed a nip bottle of vodka . . . in a white bag outside of her door.'' On February 17, 2022, the respondent was found lying in the street by a Danbury police officer. Officer Howley, the responding officer, testified that the woman was the respondent and that she was hysterical and covered in blood. He observed that she appeared to be under the influence, as ''[s]he was mumbling, her speech was slurred, rambling, and hard to understand. She was staggering and unable to stand on her feet by herself. She was uncooperative and belligerent. She smelled like alcohol and appeared to be under the influence of alcohol.''

On March 24, 2022, the respondent had positive urine and Breathalyzer tests for alcohol. As a result of the positive tests, the respondent was ''discharged unsuccessfully from Relapse Prevention'' on March 30, 2022. Connecticut Counseling Center determined that the respondent needed a ''higher level of care'' and recommended that she return to intensive outpatient treatment. On May 23, 2022, the respondent tested positive for codeine, which, as Davidson from Connecticut Counseling Center testified, is an opiate. On June 9, 2022, the respondent had another urine test that was inconclusive or suspicious due to its low creatine levels. On August 9, 2022, the respondent tested positive for marijuana. She later acquired a medical marijuana card to use to treat her stress and anxiety.

[17] The court specifically noted in its memorandum of decision that it found the social worker's testimony about this incident credible.

In its memorandum of decision, with respect to the statutory ground for termination, the court determined, by clear and convincing evidence, that the respondent had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, given the age and needs of Niya, she could assume a responsible position in Niya's life. The court found that, at the time of adjudication, the respondent was "presenting problems [that] included substance use, lack of insight into her substance use, unemployment, and possible incarceration due to pending criminal charges and three charges of [operating a motor vehicle while] under the influence." The court noted the respondent's "history of abusing drugs. Multiple urine tests and drug screens through October 12, 2022, present clear and convincing evidence of alcohol abuse and continued drug use." The court also noted that Dr. Freedman, who conducted a psychological evaluation of the respondent, wrote that " '[the respondent] minimizes her substance [use], the impact on her parenting, and the lack of stability in her life.' "

The court addressed the respondent's claim that every positive drug test result was a false positive, stating: "The court discounts her claim that every positive drug result for her was a false positive and finds her multiple claims of false positive tests by different providers and testers throughout a period of three years to be far less likely and not credible." Rather, the court determined that the hair tests, which provided a three month look back period, showed that she was abstinent in using illicit drugs "for only a period of months." The court observed that "[the department] recommended and urged [the respondent] to get into inpatient treatment. She refused." Further, the court determined that, on the basis of "the evidence presented during the trial, it is clear and convincing to the court that she has not rehabilitated, nor has she made significant, substantial,

and sustained progress with her substance use and mental health issues since December 7, 2021, particularly when she's feeling stressed or anxious.

"Since December 7, 2021, [the respondent] has continued to slip and relapse, even though she completed programs and was stepped down from the [IOP] to Relapse Prevention and Women's Groups. She has continued to deny and minimize having substance use issues. Moreover, she has failed to gain substantial insight into her substance use. Although she has used and completed some services and has taken some positive steps in preparing for reunification, she has taken limited responsibility for her own problems and for having repeated positive drug test results. Her problems continue to be substance use and lack of insight into her substance use, and she faces possible incarceration due to her pending criminal charges and three charges of [operating a motor vehicle while] under the influence. . . . The court cannot find reason to be encouraged that within a reasonable time, considering [Niya's] age and needs, [the respondent] will be able to assume a responsible [role] in her life. The level of rehabilitation [the respondent] has achieved falls short of that which would reasonably encourage a belief that at some future date she can assume a responsible position in [Niya's] life, considering [Niya's] age and needs." In the dispositional phase of the termination of parental rights trial; see footnote 5 of this opinion; the court considered and made the requisite factual findings pursuant to § 17a-112 (k)[18] and concluded that the commissioner had

[18] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the [d]epartment . . . has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent,

proven by clear and convincing evidence that terminating the respondent's parental rights was in Niya's best interest. Accordingly, the court granted the petition and rendered judgment terminating the respondent's parental rights. This appeal followed. Additional facts will be set forth as necessary.

The respondent's sole claim on appeal is that there was insufficient evidence to support the court's determination that she had failed to rehabilitate in accordance with § 17a-112 (j) (3) (B) (i), meaning that she had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of Niya, she could assume a responsible role in her life. We disagree.

We begin by setting forth the following relevant legal principles and standard of review. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Anthony S.*, 218

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

Conn. App. 127, 138, 290 A.3d 901 (2023). Section 17a-112 (j) provides in relevant part that "[t]he Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [d]epartment . . . has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is on the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [he or she] will be able to assume a responsible position in [his or her] child's life. Nor does it require [him or her] to prove that [he or she] will be able to assume full responsibility for [his or her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he or she]

has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life. . . . Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue. . . . [The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Citations omitted; internal quotation marks omitted.) *In re Phoenix A.*, 202 Conn. App. 827, 841–42, 246 A.3d 1096, cert. denied, 336 Conn. 932, 248 A.3d 1 (2021)

"During the adjudicatory phase of a termination proceeding, a court generally is limited to considering only evidence that occurred before the date of the filing of the petition or the latest amendment to the petition, often referred to as the adjudicatory date. . . . Nevertheless, it may rely on events occurring after the [adjudicatory] date . . . [in] considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Nevaeh G.-M.*, 217 Conn. App. 854, 877–78, 290 A.3d 867, cert. denied, 346 Conn. 925, 295 A.3d 418 (2023).

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in

§ 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency,[19] that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citation omitted; emphasis omitted; footnote added; internal quotation marks omitted.) *In re Brian P.*, 195 Conn. App. 558, 569, 226 A.3d 159, cert. denied, 335 Conn. 907, 226 A.3d 151 (2020). Thus, "[i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 362–63, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

[19] Although the respondent claims that evidentiary sufficiency is an improper standard of review in child protection cases and should be replaced with the clear error standard, she also concedes that, as an intermediary appellate court, we are bound by our Supreme Court's decision in *In re Shane M.*, 318 Conn. 569, 588, 122 A.3d 1247 (2015), in which the court held that "the appropriate standard of review is one of evidentiary sufficiency . . . ." See, e.g., *In re Angelina S.*, 223 Conn. App. 52, 64 n.12, A.3d (2023).

"Construing the record before us in the manner most favorable to sustaining the judgment of the trial court, as we are obligated to do"; *In re Anthony S.*, supra, 218 Conn. App. 148; we conclude that there is sufficient evidence in the record to support the court's finding that the respondent had failed to achieve a sufficient degree of personal rehabilitation, considering the age and needs of Niya, as would encourage the belief that, within a reasonable time, she could assume a responsible position in Niya's life. The court detailed in its memorandum of decision how the respondent's ongoing substance use and refusal to acknowledge her substance use issues supported its determination that the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (B) (i). Specifically, the court noted that "[m]ultiple urine tests and drug screens through October 12, 2022, present[ed] clear and convincing evidence of alcohol abuse and continued drug use. She minimizes her substance abuse, its impact on her parenting, and the lack of stability in her life. She claims every positive drug test result for her was a false positive. The court discounts her claim that every positive drug test result for her was a false positive and finds her multiple claims of false positive tests by different providers and testers throughout a period of three years to be far less likely and not credible." (Footnote omitted; internal quotation marks omitted.)

It is well established that a "respondent's failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation. See *In re Kamora W.*, 132 Conn. App. 179, 190, 31 A.3d 398 (2011) (respondent refused to acknowledge drug or alcohol problem); *In re Jocquyce C.*, 124 Conn. App. 619, 626–27, 5 A.3d 575 (2010) (respondent failed to acknowledge habitual involvement with domestic violence); *In re Christopher B.*, 117 Conn. App. 773,

784, 980 A.2d 961 (2009) (respondent blamed others for problems); *In re Jermaine S.*, 86 Conn. App. 819, 834, 863 A.2d 720 (respondent's inability to admit she had substance abuse problem thwarted her ability to achieve rehabilitation), cert. denied, 273 Conn. 938, 875 A.2d 43 (2005); *In re Sheila J.*, 62 Conn. App. 470, 481, 771 A.2d 244 (2001) (respondent failed to recognize her need for recommended counseling)." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 589–90, 122 A.3d 1247 (2015). "[A]s a general proposition, the failure to acknowledge and make progress in addressing the issues that led to a child's removal may be one of many contributing factors to a court's determination that a parent has failed to achieve a sufficient degree of personal rehabilitation." *In re Mariana A.*, 181 Conn. App. 415, 432, 186 A.3d 83 (2018).

Although the respondent made repeated representations to the department and service providers that she did not have a substance use problem, the overwhelming evidence before the court established otherwise. The court found and the record reflects that the respondent frequently denied her substance use and its impact on her ability to assume a responsible role in Niya's life and refuted the validity of almost every test result, both in her interactions with the department and her service providers. During the trial, Berry testified that, every time he "tried to engage [the respondent], she denied that she [had] engaged in any substance use." He further testified that, after he received the test results in June, 2020, in which she tested positive for fentanyl, he attempted to engage the respondent, but "[s]he denied using any substances. She reported that she thinks that she tested positive because her nail came into contact with fentanyl." Santiago testified that, after the respondent called him on February 15, 2022, during which conversation "her words were slurred . . . [and she] didn't seem to be stable," he went to her home

and observed a vodka bottle, the size of a nip, outside the respondent's house. Despite this incident, when he attempted to address these concerning events with the respondent, she denied any use of alcohol.

One example of the respondent's minimization of her substance use occurred at a meeting with the department in October, 2021, after the respondent had been arrested and charged with operating a motor vehicle while under the influence as a result of three separate incidents on March 1, and September 3 and 17, 2021. During the meeting with the department, she stated that "none of the [charges for driving while under the influence] were her fault and that she was just in a bad situation and was [unjustly] blamed for alcohol being in the car." We note that the record belies the respondent's assertions. The arresting officers in each incident observed that the respondent was operating a motor vehicle in a manner that caused them to investigate further.[20] Each officer observed that the respondent had bloodshot and glassy eyes and impaired speech or behavior. The officers also indicated that they smelled an odor of alcohol emanating from her.[21] Her statement that the charges were not her fault, in effect, places the

[20] With respect to her March, 2021 arrest, the officer approached the respondent's vehicle because it was stopped on the right shoulder of the road. The respondent was the operator and she claimed that "they had run out of gas and were waiting [for] a tow," although the key was in the ignition and the vehicle was running.

As to her September 3, 2021 arrest, the officer observed that the respondent's vehicle "swerved repeatedly over the yellow line, its speed was inconsistent, and the [respondent] was having trouble navigating minor curves in the roadway."

With respect to the respondent's September 17, 2021 arrest, the officer observed that the respondent's vehicle failed to stop at several stop signs, crossed over the yellow line numerous times, made an improper turn and then crossed over the double yellow line, which required the officer to pull off to the far side of the road "to prevent a head-on collision."

[21] As to the respondent's September 3, 2021 arrest, the officer observed an open beer can "in the center console cup, as well as an open 'nip' bottle of liquor."

blame on others for her own conduct and, thus, further supports the court's determination that she lacked insight into her alcohol and substance use issues. The respondent continued to minimize her drug and alcohol use during her testimony at trial by referring to her multiple arrests for operating a motor vehicle while under the influence of alcohol as "slipping"[22] and said that "it wasn't a long-term ongoing thing. It was about a two week situation . . . ." However, when the court asked the respondent when her last drink was, she stated that it was in March of 2022. She further testified, multiple times, that she had not used any drugs since Niya was born, despite the multiple positive drug tests for cocaine, fentanyl, and codeine. The court did not find credible the respondent's testimony that every positive drug test was a false positive.

In addition to denying her continued substance use, the respondent refused to engage in the treatment that was recommended by the department or its service providers. In October, 2020, the respondent was unsuccessfully discharged from outpatient treatment provided through Help, Inc., after she discontinued treatment. The respondent "discontinued treatment after denying the results of a positive drug screen . . . ."[23]

[22] The respondent attempts to differentiate between "slips" in her sobriety and relapsing. She argues that "[t]he various instances in which [she] tested positive for an illegal substance or alcohol . . . were deemed slips by her treatment providers." The respondent relies on the testimony of Williams, who defined "relapse" as "when an individual who is maintaining sobriety picks up a substance and uses that substance for a period of time." However, the respondent cites to no authority or precedent to establish a distinction between "slipping" or relapsing in terms of its implications for the respondent's ability to rehabilitate within the meaning of § 17a-112 (j) (3) (B) (i). Furthermore, given the multiple positive drug tests and alcohol related infractions throughout the course of the department's involvement in Niya's life, the respondent's attempt to minimize these incidents by categorizing them as "slips" in her sobriety is unavailing.

[23] While receiving services at Help, Inc., she tested positive for alcohol, cocaine and norfentanyl on May 6, 2020; for fentanyl on June 8, 2020; and for cocaine on August 20, 2020.

The discharge summary "recommended that [the respondent] be moved to a higher level of care, including inpatient/residential services" and, after at least thirty days of sobriety, then the respondent could return to IOP "and begin again to address the underlying motivations for substance use and the adoption of healthier coping skills." Despite the recommended higher level of care, the respondent "refused to attend inpatient treatment and denied having issues with substances." Similarly, in October, 2021, after the respondent's third arrest for operating a motor vehicle while under the influence, the department consulted with its substance use clinician regarding this case, and "it was recommended for [the respondent] to get into residential treatment." The respondent, however, chose to disregard the department's recommendation and subsequently tested positive for cocaine use in October, 2021.

Several months before the trial began in this case, the respondent was unsuccessfully discharged from her relapse prevention group counseling after she tested positive for alcohol on March 24, 2022, and due to her "lack of regular attendance." On May 23, 2023, the respondent tested positive for codeine. Thus, the fact that she was discharged unsuccessfully from therapy several times and continued to test positive for alcohol and illicit substances after she had engaged in services addressing her substance use issues for more than three years, supports the court's finding that the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (B) (i).

The evidence shows that the respondent's struggles with alcohol and substance use, her denial and minimization of her use and her lack of insight in understanding how her continued use of alcohol and substances was negatively impacting her life were the primary concerns of the department throughout its involvement with the respondent. "[I]n determining whether a parent has

achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Internal quotation marks omitted.) *In re Nevaeh G.-M.*, supra, 217 Conn. App. 877. The totality of the evidence establishes that the factors that led to Niya's initial commitment—the respondent's substance use, her denial and minimization of her use and her lack of insight—have not been corrected.

The respondent bases much of her challenge to the court's finding of the statutory ground of failure to rehabilitate on the assertion that the court misinterpreted the testimony of Dr. Freedman. Specifically, the respondent argues that "[t]he trial court's decision is mistaken as to the testimony given by [the court-appointed evaluator], Dr. Freedman, who recommended reunification, and the nature of recovery." The respondent asserts that the court's decision relied on "a mistaken interpretation of Dr. Freedman's testimony," particularly regarding whether the respondent had gained adequate insight into her substance use issues, the reliability of the respondent's urine screens, and whether her various incidents of substance use throughout the history of the case suggest a failure to rehabilitate within the meaning of the statute. We disagree.

First, the court did not rest its decision on the testimony of Dr. Freedman. The majority of the support for the court's determination comes from the respondent's multiple infractions for operating a motor vehicle while under the influence, her multiple positive drug tests throughout the case, and her frequent denials of substance use despite overwhelming evidence to the contrary. Second, " '[a]lthough expert testimony may be accorded great weight when it is offered, there is no requirement for expert testimony in termination of

parental rights cases.' *In re Jeisean M.*, 270 Conn. 382, 400, 852 A.2d 643 (2004); see also *In re Angela C.*, 11 Conn. App. 497, 498–99, 528 A.2d 402 (1987) (trial court was not required to accept expert's opinion on issue of whether to terminate parental rights nor was testimony of another expert required to support court's judgment); *In re Teshea D.*, 9 Conn. App. 490, 493, 519 A.2d 1232 (1987) (finding no merit to respondent's claim that expert testimony was required to support court's finding that termination was in child's best interest because, '[a]lthough both our Supreme Court and this court have often, in this regard, looked to the testimony of mental health experts . . . such expert testimony is not a precondition of the court's own factual judgment as to the child's best interest' . . .)." *In re Kasmaesha C.*, 148 Conn. App. 666, 682–83, 84 A.3d 1279, cert. denied, 311 Conn. 937, 88 A.3d 549 (2014). As there is no requirement that the parties present, nor that the court rely on, expert testimony in a termination of parental rights case, the court was free to accept, reject, or only partially rely on the expert testimony of Dr. Freedman.

Finally, although portions of Dr. Freedman's testimony were positive for the respondent, he frequently contradicted himself, particularly after being asked about the impact of new evidence of the respondent's ongoing substance use issues. In its memorandum of decision, the court stated that, "[a]ccording to Dr. Freedman, [the respondent] should have eight months to a year of demonstrated sobriety to qualify for reunification or caring for [Niya]. She has not achieved a sustained period of sobriety of at least eight months to a year. . . . When asked how he would classify [the respondent's] substance use, Dr. Freedman described her as 'somebody who has episodic slips or relapses of some kind, and then gets back on track and abstains for a period of time. . . . She is still a client who is in

recovery, has been in recovery, and has had episodic slips and relapses—but is still in recovery.' "

At trial, Dr. Freedman was called as a witness by the respondent. During direct examination, Dr. Freedman testified that his opinion, "which is from sixteen months ago,[24] was that I thought [the respondent] showed good potential for reunification. So, that opinion is from sixteen months ago . . . all the documents that I reviewed suggested that that wasn't acted upon. My recommendations weren't acted upon so, a number of things have happened since then, but do I think that that indicates that she's not a candidate for reunification? No, it doesn't indicate that." (Footnote added.) At that point, the court asked Dr. Freedman to clarify his testimony, at which time he stated that his understanding was that the last positive test for any substances by the respondent was in March, 2022, and that, on that basis, the respondent was "getting close" to having " a year of demonstrated sobriety after substance abuse problems . . . to qualify for caring for a child . . . ." Dr. Freedman's positive opinion on rehabilitation was based on his understanding that the respondent had last used substances in March, 2022, when, in fact, she had tested positive for codeine in May, 2022, had a suspicious urine test in June, 2022, and had tested positive for marijuana in August, 2022.

On cross-examination, when asked what it would mean for the respondent if there was substance use in May and August, Dr. Freedman testified that "that certainly argues against her . . . and it shows that . . . that's only been . . . three months . . . that's not very

[24] We note that Dr. Freedman's evaluation was conducted in July, 2021. In the time between when the evaluation was conducted and when the trial began, the respondent was arrested twice for operating a motor vehicle while under the influence, had multiple positive drug tests for cocaine, had a positive urine test and Breathalyzer test for alcohol, and tested positive for codeine.

long and so if there's a slip then . . . it's harder to support reunification." He ultimately testified that he was "not sure" of his position as to reunification. Dr. Freedman also testified that it could be "potentially a problem" for a person with a substance use problem to use marijuana "even if they used it for medicinal purposes," as experiencing a high could cause other drug problems for that person.[25]

Furthermore, Dr. Freedman wrote in his psychological evaluation that the respondent "minimizes her substance [use], its impact on her parenting, and the lack of stability in her life." This report was admitted as a full exhibit for the court's consideration. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Internal quotation marks omitted.) *In re G. H.*, 216 Conn. App. 671, 688, 286 A.3d 944 (2022). The court was entitled to rely on and to credit Dr. Freedman's previous statement in his report that the respondent "minimizes her

[25] Although the respondent correctly notes in her appellate brief that the court's memorandum of decision omitted the word "potentially" while quoting from this portion of Dr. Freedman's testimony, we believe that the court accurately conveyed the intended meaning of his testimony about the risks posed for a hypothetical drug user, given that he testified, just a few moments later, that, "if they've had a drug problem in the past, that's risky for them to be using it in that way because it's experiencing a high of any kind [and] could set off other drug problems."

substance [use], its impact on her parenting, and the lack of stability in her life."

Moreover, given the overwhelming evidence of the respondent's multiple instances of substance use during the three year period of the department's involvement, her unwillingness to acknowledge her continued substance use issues, and her minimization of her substance use issues, we conclude the record contains sufficient evidence to support the court's determination that the respondent failed to achieve the requisite degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i), regardless of whether and to what extent the court credited any portion of Dr. Freedman's testimony.[26]

In sum, we conclude that, when construing the evidence in the manner most favorable to sustaining the court's judgment, as our standard of review requires, there is sufficient evidence to support the court's determination that the respondent failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, she could assume a responsible position in Niya's life.

The judgment is affirmed.

In this opinion the other judges concurred.

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[26] We also note that the respondent's argument asks us, essentially, to focus on only the positive portions of Dr. Freedman's testimony and to disregard the trial court's credibility determinations and weighing of evidence, which is not the role of an appellate court in a termination of parental rights case. See, e.g., *In re Caiden B.*, supra, 220 Conn. App. 372 ("[a]lthough the respondent encourages us to focus on the positive aspects of his behavior and to ignore the negatives, we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court" (internal quotation marks omitted).

JEAN-MARC JACQUES *v.* MURIEL JACQUES
(AC 45239)

Bright, C. J., and Clark and Prescott, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court awarding attorney's fees to the defendant, his former wife, in connection with a breach of contract action. The plaintiff claimed that the defendant had breached their separation agreement by failing to disclose that she had liquidated two annuities prior to the commencement of the dissolution proceedings. The trial court, *Hon. Gerard I. Adelman*, judge trial referee, rendered judgment for the defendant, finding that the plaintiff's action was barred by the applicable statute of limitations, that there was insufficient evidence to prove that the defendant had breached the agreement, and that neither party had failed to disclose assets. The plaintiff appealed to this court, which dismissed the appeal as moot. The defendant filed a motion for attorney's fees, seeking to recover the costs she had incurred in defending against the breach of contract action and the subsequent appeal. The trial court, *Hon. Constance L. Epstein*, judge trial referee, granted the motion, concluding that the defendant was entitled to recover attorney's fees under the bad faith exception to the American rule, and awarded attorney's fees to the defendant. On the plaintiff's appeal to this court, *held* that the trial court abused its discretion in awarding the defendant attorney's fees: the trial court's memorandum of decision made clear that, in determining that the plaintiff had acted in bad faith and did not have a colorable claim, the court relied exclusively on certain findings in Judge Adelman's memorandum of decision in the underlying breach of contract action rather than reviewing the record and making its own factual findings with the requisite degree of specificity as to the relevant issues; moreover, Judge Adelman's decision did not include sufficiently specific factual findings to support an award of attorney's fees under the bad faith exception to the American rule because it did not include any express findings that the plaintiff's contract claim lacked color or that the plaintiff knew that there was no factual basis for his claim or otherwise acted in bad faith, the court observed that the contract language was ambiguous, which suggested that the plaintiff's claim had some color, the court's findings that the defendant did not own the annuity contracts in question when she filed her financial affidavit because she had liquidated them to fund her new home and that the home was constructed with the knowledge of the plaintiff who provided significant funds for the project, including the two annuity contracts, did not equate to a finding that the plaintiff's claims were without color and that he knew there was no factual basis for his claim or otherwise acted in bad faith, and the decision was silent

with respect to whether and when the plaintiff knew that the defendant had properly disclosed the amount of the liquidated annuities by including them in the value of the real estate that she disclosed on her financial affidavit; furthermore, because the defendant's motion for attorney's fees included references to specific evidence in the record and the trial court failed to review that evidence, the defendant was deprived of a full and fair opportunity to present and have the court consider evidence of the plaintiff's bad faith; accordingly, this court reversed the judgment of the trial court and remanded the case for a new hearing on the defendant's motion for attorney's fees.

Argued November 6, 2023—officially released January 30, 2024

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Gerard I. Adelman*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court, *DiPentima*, *C. J.*, and *Moll* and *Bishop*, *Js.*, which dismissed the appeal; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendant's motion for attorney's fees, from which the plaintiff appealed to this court; subsequently, the court, *Hon. Constance L. Epstein*, judge trial referee, awarded attorney's fees to the defendant, and the plaintiff filed an amended appeal. *Reversed*; *further proceedings*.

Keith Yagaloff, for the appellant (plaintiff).

C. Michael Budlong, with whom, on the brief, was *Joseph R. Brennan-Reilly*, for the appellee (defendant).

Opinion

CLARK, J. The plaintiff, Jean-Marc Jacques, appeals from the judgment of the trial court awarding attorney's fees to his former wife, the defendant, Muriel Jacques. On appeal, the plaintiff claims that the court erred in awarding the defendant $51,641 in attorney's fees under

the bad faith exception to the American rule[1] by concluding that the underlying breach of contract action he brought against the defendant was entirely without color and brought in bad faith.[2] In particular, he claims that the court's award was not supported by the requisite factual findings that are required under the bad faith exception. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court and remand the case for a new hearing on the defendant's motion for attorney's fees.

The record reveals the following facts and procedural history. On March 26, 2009, the court, *Dyer*, *J.*, dissolved the parties' marriage and incorporated their separation agreement (agreement) into its judgment of dissolution. Paragraph 10 (h) of the agreement provided in relevant part: "[A]ny assets over ten thousand and 00/100 ($10,000.00) dollars in fair market value that the [defendant] owns or has an equitable interest in at the time of the dissolution which are not shown by the [defendant] on her financial affidavit, shall, upon discovery by the other party, become [the plaintiff's] property without any defense interposed by the [defendant] whatsoever as to such claims of the other party."

On May 16, 2016, the plaintiff brought the underlying breach of contract action against the defendant, alleging

[1] "Pursuant to the American rule, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 332 Conn. 837, 839 n.2, 213 A.3d 481 (2019). Our Supreme Court, however, has "recognized a 'bad faith' exception to the American rule, which permits a court to award attorney's fees to the prevailing party on the basis of bad faith conduct of the other party or the other party's attorney." *Broadnax* v. *New Haven*, 270 Conn. 133, 178, 851 A.2d 1113 (2004).

[2] The plaintiff also claims that the court erred in determining the amount of attorney's fees to award in the absence of sufficient evidence to support that amount. Because we determine that the court did not make the necessary findings to satisfy the bad faith exception in order to make an award of attorney's fees in the first instance, we do not address this additional claim.

that she had breached the agreement by failing to disclose certain assets in accordance with paragraph 10 (h) of the agreement. Specifically, the plaintiff alleged that the defendant liquidated two annuities prior to the divorce and that those proceeds, totaling $1,153,444.78, were undisclosed assets under paragraph 10 (h) of the separation agreement. The defendant countered that "[b]ecause those liquidated annuities were used to purchase land and build the defendant's home, and that real estate was properly disclosed by the defendant, the [annuity] proceeds were not undisclosed and the defendant did not breach the parties' separation agreement." The defendant also asserted five special defenses, including that (1) the plaintiff's action "was filed beyond the six year limitation period for actions on written contracts set forth by General Statutes § 52-576"; (2) paragraph 10 (h) of the agreement "is contrary to law and/or public policy"; (3) paragraph 10 (h) of the agreement "is predicated on a provision that is unconscionable"; (4) "[t]he plaintiff's claims are barred by the equitable doctrine of unclean hands, based on the plaintiff's own bad faith conduct and/or nondisclosure of assets prior to and at the time of dissolution"; and (5) "[t]he plaintiff's cause of action is predicated on a provision that is unenforceable on the ground of unilateral mistake."

On June 5, 2018, following a bench trial, the court, *Hon. Gerard I. Adelman*, judge trial referee, rendered judgment in favor of the defendant, finding that the plaintiff's action was barred by the six year statute of limitations for contract actions set forth in § 52-576 (a), there was insufficient evidence that the defendant had breached the agreement, and there had been no failure to disclose assets by either party. Judge Adelman's memorandum of decision stated in relevant part: "[T]he court makes the following findings of fact . . .

* * *

"F. The provisions of [the] agreement are, in parts, contradictory and ambiguous . . .

"H. The defendant did not own the two annuity contracts in question as of the date of her financial affidavit filed at the final hearing in that said contracts had been previously liquidated by the defendant to fund, in part, her new home . . .

"I. The funding and construction of said home was done with the knowledge of the plaintiff and he provided significant funds to the defendant for that project including, but not limited to, the two annuity contracts in question;

"J. There was no failure to disclose any assets by either party;

"K. There is insufficient evidence to make a finding as to the breach of the contract on the part of the defendant . . . ."

Additionally, the court found that, "[a]s to [the defendant's] special defenses two through five . . . the defendant did not brief them in her posttrial brief. Accordingly, the court considers them abandoned."

The plaintiff appealed, claiming, inter alia, that the trial court erred in concluding that his action was barred by the statute of limitations. *Jacques* v. *Jacques*, 195 Conn. App. 59, 60, 223 A.3d 90 (2019). On December 24, 2019, this court dismissed that appeal as moot, concluding that the plaintiff had failed to challenge an independent ground for the trial court's judgment, namely, the court's determination that the plaintiff's breach of contract claim failed on the merits due to insufficient evidence that the defendant had breached the agreement. Id., 62.

On January 22, 2020, the defendant filed a motion for attorney's fees, seeking to recover fees incurred by her in defending against the plaintiff's breach of contract action and subsequent appeal. The defendant's request for attorney's fees was made pursuant to (1) General Statutes § 46b-62,[3] (2) the agreement, (3) Practice Book § 1-25, and (4) the court's inherent authority. In her motion, the defendant alleged that the plaintiff "was aware of the circumstances surrounding the [defendant's] disclosures [on her financial affidavit in regard to the liquidated annuities] and knew or should have known that no impropriety existed." She further alleged that "[t]he [plaintiff's] actions throughout this case have been acted upon in bad faith and [are] entirely without color . . . [which] warrants counsel fees to the [defendant] . . . ." On March 17, 2020, the plaintiff filed an objection to the motion for attorney's fees.

On November 5, 2021, following a hearing, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendant's motion for attorney's fees on the basis that the defendant was entitled to recover attorney's fees under the bad faith exception to the American rule. Specifically, the court found: "In the civil court's decision on the underlying matter, Judge Adelman made specific findings. The trial court held that the two annuity contracts at issue had been liquidated prior to the divorce in order to fund the construction of [the defendant's] new home and the amounts of that liquidation were reflected in the assets reported on her financial affidavit. The trial court further found: 'The funding and construction of said home was done with the knowledge of the plaintiff . . . and he provided significant funds to the defendant for that project including, but not limited to, the two annuity contracts in question.' . . .

[3] Although § 46b-62 has been amended since the filing of the motion for attorney's fees; see Public Acts 2021, No. 21-15, § 115; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

"As to [the defendant's] reliance on this court's 'inherent authority' to award attorney's fees, Connecticut adheres to the so-called 'American' rule, which prohibits the award of such fees to the prevailing party unless such award is premised on statutory directives or is pursuant to contract. An exception to this doctrine may be successfully invoked if the losing party has acted in bad faith and/or vexatiously or wantonly acted for oppressive reasons. *Maris* v. *McGrath*, 269 Conn. 834, 845–46 [850 A.2d 133] (2004).

"[The defendant] argues that [the plaintiff] initiated the civil action, rather than a postjudgment action on the dissolution, because [the plaintiff] could thereby avoid paying attorney's fees to his counsel, premising this argument on the belief that the civil action was brought by [the plaintiff's] counsel on a contingency fee basis. [The defendant] asserts that this substantiates her assertion that [the plaintiff] simply wanted to harass her, with no financial loss to himself. However, this court has not been presented with any evidence of the fee agreement between [the plaintiff] and his counsel in the civil matter and this contention has not been considered by this court on the issue before it.

"The 'bad faith' exception to an award of attorney's fees takes into account the necessity that courts must avoid deterring the filing of lawsuits by persons who honestly believe they have a colorable claim. *CFM of Connecticut, Inc.* v. [*Chowdhury*, 239 Conn. 375, 394–95, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 735 A.2d 333 (1999)]. Under this directive, however, the Connecticut Supreme Court has held that the 'bad faith' exception [to] the American rule can be applied if there is a finding that the losing party's actions were baseless. Id. The frivolity of a litigant's action is evident in situations in which there is no good faith argument that can be made on the merits of the underlying action. *Schoonmaker*

v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 255 [828 A.2d 64] (2003).

"[The plaintiff] had no colorable claim on which to premise his civil lawsuit, and the trial court so found. Indeed, the trial court pointedly decided that [the plaintiff] knew that there was no basis for his claim. Not only did [the plaintiff] not challenge the court's finding that he had no claim and that he knew it, but also, thereafter, [the plaintiff] nevertheless filed an appeal. In that appeal [the plaintiff] did not seek review of the trial court's decision on the merits. Instead, [the plaintiff] required [the defendant] to defend an action in which [the plaintiff] sought a declaratory ruling from the Appellate Court as to the interpretation of a statute—an interpretation that would not have changed anything that affected him or [the defendant], and the Appellate Court so ruled in dismissing the appeal.

"The judiciary is entrusted with the responsibility of assisting those who invoke its authority to resolve actual disputes. The dignity and solemnity of the process, essential elements thereof, should not be eroded by the use of the process to harass others, as has occurred in this case. The court grants the motion for counsel fees." (Citation omitted.)

On November 26, 2021, the plaintiff filed a motion to reconsider, arguing, inter alia, that there was no evidence in the record to support the trial court's finding that Judge Adelman concluded that the plaintiff knew there was no basis for his claim or that he had no colorable claim. The plaintiff also argued that the award was unjustified because Judge Adelman dismissed the defendant's special defense of unclean hands and made no finding of bad faith litigation. On December 28, 2021, Judge Epstein denied the motion. This appeal followed.

On March 15, 2022, the plaintiff filed a motion for articulation, requesting the court to articulate "the specific text from Judge Adelman's decision where he

found that [the plaintiff] had no colorable claim on which to premise his civil lawsuit, and where he pointedly decided that [the plaintiff] knew there was no basis for his claim." The plaintiff also requested "the specific text from Judge Adelman's decision that [the] court relied on in finding the plaintiff engaged in bad faith litigation." On March 25, 2022, the court denied the motion for articulation, stating: "This court does not find the [plaintiff's] motion for articulation to be a request for articulation at all, but instead an attempt at an argument, or perhaps reargument. . . . [T]he decision rendered by this court quite clearly recites the provisions of Judge Adelman's decision on which this court relied. . . . The motion is denied."

On September 22, 2022, following a hearing, Judge Epstein issued a memorandum of decision awarding the defendant $51,641 in attorney's fees. Subsequently, on October 5, 2022, the plaintiff amended his appeal pursuant to Practice Book § 61-9 to include the court's September 22, 2022 decision.[4]

On appeal, the plaintiff claims that the court erred in awarding the defendant attorney's fees under the bad

[4] The plaintiff filed his original appeal on January 18, 2022, challenging the court's November 5, 2021 decision granting the defendant's postjudgment motion for attorney's fees. At the time the original appeal was filed, the court had not yet determined the amount of attorney's fees. On May 4, 2022, this court issued an order requiring the parties to submit memoranda on why the plaintiff's appeal should not be dismissed for lack of a final judgment because the trial court had yet to determine the amount of attorney's fees. On May 26, 2022, this court issued another order indicating "that resolution of the jurisdictional issue raised in the court's motion to dismiss [would be] deferred to the panel considering the merits of the appeal and without prejudice to this court considering any subsequent developments in the trial court or the filing of an amended appeal." Because the plaintiff amended the appeal after the trial court rendered judgment on the amount of attorney's fees, the amended appeal is taken from a final judgment and is therefore jurisdictionally proper. See *Paranteau* v. *DeVita*, 208 Conn. 515, 524 n.11, 544 A.2d 634 (1988); see also Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed").

faith exception to the American rule by concluding that the underlying breach of contract action was entirely without color and brought in bad faith. The plaintiff argues that Judge Epstein failed to make factual findings with the high degree of specificity required in order to award attorney's fees under the bad faith exception. Specifically, he argues that the court relied solely on the text of Judge Adelman's memorandum of decision, which "lacks any facts or finding[s] that could serve as the basis for [the] award of attorney's fees." We agree with the plaintiff.

We begin by setting forth the standard of review and legal principles relevant to this claim. "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Rinfret* v. *Porter*, 173 Conn. App. 498, 507–508, 164 A.3d 812 (2017).

Connecticut "follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for

oppressive reasons." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 332 Conn. 837, 843–44, 213 A.3d 481 (2019).

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the [bad faith] exception absent *both clear evidence* that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . *and a high degree of specificity in the factual findings* of [the] lower courts." (Emphasis in original; internal quotation marks omitted.) *Cokic* v. *Fiore Powersports, LLC*, 222 Conn. App. 216, 227, 304 A.3d 179 (2023). The burden is on the moving party to prove a lack of color and bad faith. See id., 229.

"Although this exception . . . is often referred to in shorthand as the bad faith exception, the label is somewhat of a misnomer as it encompasses both of the required findings . . . that the litigant's claims were entirely without color and that the litigant acted in bad faith." (Emphasis omitted; internal quotation marks omitted.) Id., 227. Thus, "in order to impose sanctions under the bad faith exception, the trial court must find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith. . . . *The court must make these findings with a high degree of specificity* . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Lederle* v. *Spivey*, supra, 332 Conn. 844. Although the court need not separately indicate which factual findings relate to colorability or bad faith, the court must still make both findings with a high degree of specificity. See id., 848 n.8.

"Colorability is measured by an objective standard, whereas bad faith is measured by a subjective one.

Colorability focuses on the merits of the claim. A colorable claim is defined as one that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law). Black's Law Dictionary (9th Ed. 2009) p. 282. Put another way, a claim is colorable if, given the facts presented and the current law (or a reasonable extension thereof), the claim arguably has merit. . . .

"A determination of bad faith, by contrast, rather than focusing on the objective, reasonable beliefs of the person against whom sanctions are sought, focuses on subjective intent. We have emphasized that, in determining whether a party has engaged in bad faith, [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation. . . . From that conduct, the court may infer the subjective intent of the person against whom sanctions are sought. Some examples of evidence that would support a finding of bad faith include a party's use of oppressive tactics or its wilful violations of court orders . . . or a finding that the challenged actions [are taken] for reasons of harassment or delay or for other improper purposes . . . . When . . . the claim that an individual has brought or maintained an action in bad faith is predicated on the individual's personal knowledge that there is no factual support for the claim or claims at issue, in order to infer that the individual acted in bad faith, the court must make a finding that the individual knew of the absence of that factual basis." (Citations omitted; internal quotation marks omitted.) *Lederle* v. *Spivey*, supra, 332 Conn. 845–46.

In the present case, a review of the trial court's memorandum of decision awarding the defendant attorney's fees shows that the court relied exclusively on certain findings that Judge Adelman made in his memorandum of decision rendering judgment for the defendant in

the plaintiff's underlying breach of contract action. The court explained that, "[i]n the civil court's decision on the underlying matter, Judge Adelman made specific findings. The trial court held that the two annuity contracts at issue had been liquidated prior to the divorce in order to fund the construction of [the defendant's] new home and the amounts of that liquidation were reflected in the assets reported on her financial affidavit. The trial court further found: 'The funding and construction of said home was done with the knowledge of the plaintiff . . . and he provided significant funds to the defendant for that project including, but not limited to, the two annuity contracts in question.' " On the basis of these findings, the court concluded that "[the plaintiff] had no colorable claim on which to premise his civil lawsuit and [Judge Adelman] so found."

We must therefore determine whether Judge Adelman's findings in the underlying breach of contract action were sufficient to justify the award of attorney's fees in this case.

Judge Adelman's memorandum of decision stated in relevant part: "[T]he court makes the following findings of fact . . .

* * *

"F. The provisions of [the] agreement are, in parts, contradictory and ambiguous . . .

"H. The defendant did not own the two annuity contracts in question as of the date of her financial affidavit filed at the final hearing in that said contracts had been previously liquidated by the defendant to fund, in part, her new home . . .

"I. The funding and construction of said home was done with the knowledge of the plaintiff and he provided significant funds to the defendant for that project

including, but not limited to, the two annuity contracts in question;

"J. There was no failure to disclose any assets by either party;

"K. There is insufficient evidence to make a finding as to the breach of the contract on the part of the defendant;

"L. The defendant's special defenses number[ed] two through five were abandoned by the defendant and the court makes no further findings as to those special defenses . . . ."

We conclude that Judge Adelman's memorandum of decision did not include sufficiently specific factual findings to support an award of attorney's fees under the bad faith exception to the American rule. First, Judge Adelman made no express findings that the plaintiff's contract claim lacked color or that the plaintiff knew that there was no factual basis for his claim or otherwise acted in bad faith. Judge Adelman observed that the relevant provisions of the agreement were "in parts, contradictory and ambiguous," stating that "[t]he fact that there are two provisions that might lead to two separate interpretations of the contract is sufficient proof that there is an ambiguity in the contract." In the absence of any specific finding that the plaintiff's claims lacked color and that the plaintiff acted in bad faith, Judge Adelman's observation that the contract language was ambiguous (and therefore had more than one possible interpretation) suggests that the plaintiff's claim had at least some color, rather than a complete lack of color. See *Lederle* v. *Spivey*, supra, 332 Conn. 845 ("a claim is colorable if, given the facts presented and the current law (or a reasonable extension thereof), the claim arguably has merit").

Second, although Judge Adelman found that the defendant did not own the two annuity contracts in

question when she filed her final financial affidavit because she had liquidated them to fund, in part, her new home and further found that "[t]he funding and construction of said home was done with the knowledge of the plaintiff and he provided significant funds to the defendant for that project including, but not limited to, the two annuity contracts in question," those findings alone do not equate to a finding that the plaintiff's claims were without color and that he knew there was no factual basis for his claim or otherwise acted in bad faith. In particular, the finding that the home was funded and constructed with the plaintiff's knowledge is ambiguous with respect to whether or when the plaintiff became aware that the annuities had been liquidated and used to fund the construction of the home. Moreover, Judge Adelman's decision is silent with respect to whether and when the plaintiff knew that the defendant had properly disclosed the amounts of the liquidated annuities by including those amounts in the value of the real estate she disclosed in her financial affidavit.[5]

Because Judge Adelman's memorandum of decision in the underlying breach of contract action did not include the requisite factual findings for an award of attorney's fees under the bad faith exception, Judge Epstein was required at least to review the record from those proceedings and make her own factual findings, with the requisite degree of specificity, as to the relevant issues.[6] In doing so, the court also was required to point to clear evidence in the record to support its findings that the plaintiff lacked a colorable claim and acted

[5] It is not surprising, of course, that Judge Adelman's decision lacks the requisite findings because the issue of attorney's fees was not before him when he rendered judgment in favor of the defendant.

[6] Of course, the burden is on the moving party to provide the court with a sufficient record and to point to the areas in the record that would support a finding of lack of color and bad faith. See *Cokic* v. *Fiore Powersports, LLC*, supra, 222 Conn. App. 229. A court in such a situation also may conclude that an evidentiary hearing is required. See id., 229–31.

in bad faith, explaining the connection between the evidence and its conclusions. See *Cokic* v. *Fiore Powersports, LLC*, supra, 222 Conn. App. 227 ("we have declined to uphold awards under the [bad faith] exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes" (emphasis omitted; internal quotation marks omitted)). Conclusory statements that the plaintiff lacked a colorable claim or acted in bad faith are not sufficient to meet the high threshold required under our law. Because the court instead relied exclusively on Judge Adelman's findings, which were insufficient to support an award under the bad faith exception, we conclude that the court abused its discretion in awarding the defendant attorney's fees.

Having determined that the court abused its discretion, we must now decide whether the case should be remanded for a new hearing or with direction that the motion for attorney's fees be denied. "Our resolution of this question turns on whether the defendant, having been given an opportunity to do so, presented sufficient evidence of the plaintiff's lack of a colorable claim and . . . bad faith to support the required findings." Id., 231. On the basis of our review of the record, we conclude that the defendant's motion for attorney's fees included references to specific evidence in the record, including the plaintiff's testimony, in support of her claim that the plaintiff's breach of contract claim lacked color and was brought in bad faith. The court, however, failed to review that evidence and instead relied exclusively on Judge Adelman's findings in the underlying breach of contract action. As a result, and unlike the defendant in *Cokic*, the defendant, through no fault of her own, was deprived of a full and fair opportunity to present and have the court consider evidence of the plaintiff's bad faith. We therefore remand this case for

a new hearing. Compare *Puff* v. *Puff*, 334 Conn. 341, 372–73, 222 A.3d 493 (2020) (new hearing on motion for sanctions was required because defendant alleged facts in support of findings of bad faith and lack of colorability, but court failed to make specific findings), with *Cokic* v. *Fiore Powersports, LLC*, supra, 222 Conn. App. 231–32 ("Having reviewed the record, we conclude that the defendant failed to present any evidence that the plaintiff lacked a colorable claim against it and that his pursuit of his claims was undertaken in bad faith. Therefore, a new hearing on the defendant's motion for attorney's fees is not warranted in the present case.").

The judgment is reversed and the case is remanded for a new hearing on the defendant's motion for attorney's fees.

In this opinion the other judges concurred.

HOMEBRIDGE FINANCIAL SERVICES, INC. *v.* THOMAS M. JAKUBIEC (AC 45453)

Suarez, Seeley and Norcott, Js.

Syllabus

The original plaintiff, H Co., sought to foreclose a mortgage on certain real property owned by the defendant T. Just before the commencement of the present action, H Co. recorded a lis pendens on the land records regarding the property. T died two days after he had been served with process commencing the present action. The court subsequently granted H Co.'s motion to cite in as defendants, inter alia, T's widow, heirs, beneficiaries, representatives or creditors, and H Co. filed an amended complaint to include these parties. Thereafter, H Co. moved for a judgment of strict foreclosure, and T's widow, R, filed an objection, claiming that she had notified H Co.'s counsel of her contact information but had not received any papers or notice in connection with the foreclosure action. R subsequently filed a motion to dismiss, alleging a lack of personal jurisdiction due to ineffective service of process, and the trial court granted the motion to dismiss with respect to T's estate but noted that the case remained pending as to the other parties cited in by H Co. Several months later, H Co. filed a motion for summary judgment as to

liability, contending that the note and mortgage were in default by virtue of nonpayment. R objected to H Co.'s motion for summary judgment and filed an answer and special defenses, including, inter alia, unclean hands. Thereafter, the court granted a motion to substitute F Co. for H Co., as F Co. had acquired the right to collect the debt due on the loan. The court granted F Co.'s motion for summary judgment with respect to liability, determining that F Co. had demonstrated that it was the holder of the note and therefore was entitled to pursue this foreclosure action, that F Co. had established a prima facie case, that the note had been in default for nonpayment for more than three years, and that R failed to present evidence to support her special defenses. Two months later, the court rendered a judgment of strict foreclosure. F Co. subsequently moved to open the judgment and extend the law days to allow for additional time to review a loss mitigation package, which the court granted. More than two years later, during which time a series of motions to open had been granted and R had produced a Probate Court order showing that she had acquired a 100 percent interest in the property pursuant to the laws of intestate succession, R filed a motion stating that she had complied with a court order to provide F Co. with certain documents and sought the enforcement of a new mortgage agreement. Specifically, she contended that she had submitted a completed assumption package, including the required documentation, executed a mortgage in her name, and made a series of scheduled trial payments, which F Co. had failed to apply. F Co. objected, claiming that there was no settlement to enforce. It explained that, at the time R executed the loan modification agreement, she lacked legal title to the property, and F Co. rejected any settlement agreement on that basis. F Co. also asserted that after R had acquired the property, it had offered her a trial period plan, which required three payments. After R failed to make these required payments, F Co. denied R a permanent modification. The court sustained F Co.'s objection with respect to the motion to enforce the settlement and assigned the case to the foreclosure mediation program. More than one year later, R filed a motion for nonsuit, claiming that F Co. failed to abide by the terms of the parties' settlement agreement, to comply with a standing court order by filing a federal mortgage foreclosure moratorium affidavit within fourteen days, and to comply with a subsequent court order requiring the filing of that affidavit by a specific date. R also stated that F Co. had repeatedly returned her payments by issuing checks to T, rather than to R. One day later, F Co. filed the federal mortgage foreclosure moratorium affidavit. F Co. subsequently filed an objection to the motion for nonsuit, arguing that a nonsuit was not warranted because its delay in filing the federal mortgage foreclosure moratorium affidavit was not the result of any bad faith. The court subsequently denied R's motion for nonsuit. Thereafter, following several sessions, a premediation report was issued by a foreclosure mediator, terminating the mediation as a result of R's failure to

submit certain documents. Several months later, F Co. filed a motion for a judgment of strict foreclosure. R filed an objection, contending that the notice required pursuant to the state's Emergency Mortgage Assistance Program (EMAP) (§§ 8-265cc through 8-265kk) had not been provided to T prior to the commencement of this foreclosure action, and, as a result, the court lacked subject matter jurisdiction. R also iterated her claims that F Co. had returned payments she made via a check issued to T and that F Co.'s actions demonstrated an attempt to walk away from the settlement it had offered. R further maintained that F Co.'s conduct constituted unclean hands, and, therefore, it should be barred from seeking foreclosure, an equitable action. F Co. filed a reply to R's objection, in which it provided documents establishing that, although the trial period plan for the loan modification required payments of $1750.36, R had made payments of only $943.35, argued that it was not required to accept insufficient payments, and claimed that, because R had failed to submit documents to the foreclosure mediator as requested, she had failed to provide any proof of compliance with the payment obligations to reinstate the loan. With respect to R's claim regarding the EMAP notice, F Co. indicated that proper notice had been sent to T prior to the commencement of this action, as demonstrated by the inclusion of this information in the materials attached to the motion for summary judgment. Finally, the plaintiff countered that R failed to substantiate her claims related to her unclean hands special defense or plead it properly, and it noted that, under Connecticut law, a lender has no duty to engage in settlement negotiations with a borrower. Following a remote hearing, the court granted F Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon. On R's appeal to this court, *held*:

1. R could not prevail on her claim that the trial court improperly denied her motion to dismiss for lack of personal jurisdiction as a result of improper service; pursuant to statute (§ 52-325 (a)) and the relevant Connecticut Standards of Title (13.7 (B) and 19.1), once H Co. recorded the lis pendens on the land records with respect to the property and properly commenced this action against T by way of abode service prior to his death, R, as the party who acquired T's interest in the property pursuant to the laws of intestate succession, was bound in this foreclosure action to the same extent as if she had been made a party to the action, and F Co., while free to do so, was not required to serve R.
2. R could not prevail on her claim that the trial court improperly denied her motion for nonsuit: the factual predicate underlying R's argument that the nonsuit should have been granted because F Co. breached the parties' modification agreement did not exist, as, contrary to R's insistence, the record did not show that the parties had, in fact, reached a binding settlement and/or loan modification; moreover, with respect to the claims regarding F Co.'s failure to timely submit the federal mortgage foreclosure moratorium affidavit, R failed to demonstrate how

she was harmed by F Co.'s conduct or why the court's refusal to enter a nonsuit and dismiss the case, a remedy of last resort, amounted to an abuse of its discretion with respect to the delayed filing of that affidavit.

3. R could not prevail on her claim that the trial court improperly rejected her special defense of unclean hands and rendered a judgment of strict foreclosure for F Co.; although R made bald allegations that F Co.'s conduct warranted the application of the unclean hands doctrine, she failed to provide evidentiary material to support her claim, including any evidence demonstrating that H Co.'s asserted lack of knowledge of her whereabouts when the foreclosure action was commenced was anything more than a mistake or that F Co. participated in wilful misconduct that rose to the level of unclean hands with respect to, inter alia, the return of R's partial payments during the loan modification trial period, its issuance of checks and correspondence to T after his death, and its purportedly improper refusal to process loan modification paperwork.

4. This court declined to address R's claims that the trial court improperly denied her motion to enforce a loan modification agreement, improperly granted F Co.'s motion for summary judgment, and improperly failed to dismiss the foreclosure action as a result of H Co.'s failure to comply with the EMAP notice requirement, R having failed to adequately brief these claims.

Argued October 5, 2023—officially released January 30, 2024

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Cosgrove*, *J.*, granted the plaintiff's motion to cite in the state of Connecticut et al. as party defendants; thereafter, the plaintiff filed an amended complaint; subsequently, the court, *Cosgrove*, *J.*, granted the motion to dismiss filed by the defendant Robyn Jakubiec only as to the estate of Thomas M. Jakubiec; thereafter, Freedom Mortgage Corporation was substituted as the plaintiff; subsequently, the court, *Cosgrove*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; thereafter, the court, *Calmar*, *J.*, denied the defendant Robyn Jakubiec's motion for nonsuit; subsequently, the court, *Hon. Emmet L. Cosgrove*, judge trial referee, granted the substitute plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which

the defendant Robyn Jakubiec appealed to this court. *Affirmed.*

Edward Bona, for the appellant (defendant Robyn Jakubiec).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

NORCOTT, J. In this foreclosure appeal, the defendant Robyn Jakubiec, the widow of the defendant Thomas M. Jakubiec (decedent), presents a myriad of challenges in an effort to overturn the judgment of strict foreclosure rendered following the granting of a motion for summary judgment as to liability in favor of the substitute plaintiff, Freedom Mortgage Corporation.[1] We conclude that several of the defendant's claims are inadequately briefed, and the remainder are without merit. Accordingly, we affirm the judgment of the trial court and remand the case for the sole purpose of setting new law days.

The following facts and extensive procedural history are relevant to this appeal. Homebridge Financial Services, Inc. (Homebridge), commenced this action against the decedent on April 16, 2015, via abode service. In its complaint, Homebridge alleged that the decedent owed Equity Source Home Loans, LLC, $212,000, as evidenced by a promissory note dated June 28, 2010, and that he had executed a mortgage for property located at 28 Nelkin Road in Colchester to secure this note. On February 7, 2014, the mortgage was assigned

[1] On June 2, 2016, the original plaintiff, Homebridge Financial Services, Inc., filed a motion to substitute Freedom Mortgage Corporation as the plaintiff, as that entity had acquired the right to collect the debt due on the loan in foreclosure. The court granted this motion on June 21, 2016. We therefore refer to Freedom Mortgage Corporation as the plaintiff in this opinion. Additionally, our references in this opinion to the defendant are to Robyn Jakubiec.

to Real Estate Mortgage Network, Inc., which subsequently changed its name to Homebridge. The note was in default as a result of nonpayment of the required monthly installments since July 1, 2013, and the unpaid balance totaled $201,575.15, plus interest, late charges and collection costs. Near the time of the commencement of this action, Homebridge recorded a lis pendens on the land records regarding the property.[2]

The decedent died two days after he had been served with process commencing the present action. On June 3, 2015, the court granted Homebridge's motion to cite in "the State of Connecticut, Department of Revenue Services and The Widow, Heirs, Beneficiaries, Representatives or Creditors of [the decedent] . . . ." On June 26, 2015, Homebridge filed an amended complaint and included these parties.

On September 4, 2015, Homebridge moved for a judgment of strict foreclosure. Three weeks later, the defendant filed an objection, claiming that she had "received no papers or notice in connection with this matter" and asserting that she had notified the plaintiff's counsel of her contact information. On October 9, 2015, the defendant filed a motion to dismiss alleging a lack of personal jurisdiction due to ineffective service of process. On November 23, 2015, the court granted the defendant's motion to dismiss with respect to the estate of the decedent and noted that the case remained pending as to the other parties cited in by Homebridge. Various filings ensued.

[2] "Generally, a notice of lis pendens is simply a notice that, when properly recorded, warns third parties, such as prospective purchasers, that the title to the property is in litigation; [t]he doctrine underlying lis pendens is that a person who deals with property while it is in litigation does so at his peril . . . . An encumbrance is a burden on the title and, as such, impedes its transfer. Ballentine's Law Dictionary (3d Ed. 1969)." (Citation omitted; internal quotation marks omitted.) *Ghent* v. *Meadowhaven Condominium, Inc.*, 77 Conn. App. 276, 284, 823 A.2d 355 (2003); see also *Williams* v. *Bartlett*, 189 Conn. 471, 480, 457 A.2d 290, appeal dismissed, 464 U.S. 801, 104 S. Ct. 46, 78 L. Ed. 2d 67 (1983).

On April 21, 2016, Homebridge filed a motion for summary judgment as to liability pursuant to Practice Book § 17-44. Specifically, it contended: "Said note and mortgage are now in default by virtue of nonpayment of the monthly installments of principal and interest due on July 1, 2013, and each and every month thereafter, and the plaintiff has exercised its option to declare the entire balance of said note due and payable." On May 12, 2016, the defendant objected to Homebridge's motion for summary judgment and filed an answer and special defenses, including unclean hands, lack of authority to assign the mortgage, destruction of the original note, anticipatory repudiation, and lack of standing. On June 21, 2016, the court granted a motion to substitute the plaintiff for Homebridge, as the plaintiff had acquired the right to collect the debt due on the loan in foreclosure.

On September 29, 2016, the court denied the motion for summary judgment, but, after granting the plaintiff's motion for reconsideration, the court subsequently granted the motion for summary judgment with respect to liability on December 21, 2016.[3] The court determined that the plaintiff had demonstrated that it was the holder of the note and therefore was entitled to pursue this foreclosure action. The court also determined that the plaintiff had established a prima facie case and that the note had been in default for nonpayment since July 1,

[3] "In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014); see also *JPMorgan Chase Bank, National Assn.* v. *Syed*, 197 Conn. App. 129, 134, 231 A.3d 286 (2020).

2013. It further concluded that the defendant failed to present evidence to support her special defenses. On February 14, 2017, the court rendered a judgment of strict foreclosure, finding that the property's fair market value was $260,000 and the total debt was $274,083.08.

On April 26, 2017, the plaintiff moved to open the judgment and extend the law days to allow for additional time "to review a loss mitigation package." The court granted this motion on May 8, 2017. Additional motions to open were granted and new law days were set. On March 22, 2018, the defendant moved to open and vacate the judgment, claiming that she successfully had entered into a modification agreement and made the three trial payments, as well as the first installment of the new loan agreement offered by the plaintiff, which required a monthly payment of $943.35.[4] The defendant further contended that the plaintiff had sent her a loan modification agreement, which she had executed and returned. The plaintiff objected, arguing that the defendant was neither a borrower on the loan nor a titled owner, and, therefore, the modification was null and void and not a proper ground for opening and vacating the judgment. The court granted the defendant's motion to open and extended the law days. On May 25, 2018, the defendant filed a motion to open the judgment and extend the law days. The defendant claimed that the Probate Court had issued an order granting her a 100 percent interest in the property.[5] The court granted this motion and set new law days.

The plaintiff moved to open the judgment on July 16, 2018, for the purpose of allowing additional time for

[4] In a subsequent pleading, the plaintiff provided the court with a letter dated April 23, 2019, addressed to the decedent, which provided that a trial period plan requiring three monthly payments of $1750.36 was necessary before a permanent modification of the loan would take effect.

[5] Specifically, the defendant attached a May 22, 2018 order from the Probate Court awarding her a 100 percent interest in the property pursuant to the laws of intestate succession.

the completion of a trial modification of the loan agreement,[6] which the court granted, setting new law days. Additional motions to open and the setting of new law days ensued.

On November 18, 2019, the defendant filed a motion stating that she had complied with a court order to provide the plaintiff with certain documents and sought the enforcement of the new mortgage agreement, pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811, 626 A.2d 729 (1993) (*Audubon*). Specifically, she contended that she had submitted a completed assumption package, including the required documentation, executed a mortgage in her name, and made a series of scheduled trial payments, which the plaintiff had failed to apply. The plaintiff objected on November 27, 2019, claiming that there was no settlement to enforce and no grounds to vacate the judgment. It explained that, at the time the defendant executed the loan modification agreement, the defendant lacked legal title to the property, and it rejected any settlement agreement on that basis. It also argued that this modification lacked consideration. More recently, in April, 2019, the plaintiff offered a trial period plan to the defendant, which required three payments of $1750.36. After the defendant failed to make these required payments, the plaintiff denied the defendant a permanent modification.

On December 2, 2019, the court sustained the plaintiff's objection with respect to the motion to enforce the settlement and overruled it with respect to the motion to open. It also assigned the case to the foreclosure mediation program. On September 10, 2021, following several sessions, a premediation report was issued by

[6] In her October 17, 2018 motion to open the judgment and extend the law day for cause, the defendant claimed that she successfully had entered into a modification agreement after making three trial payments and the parties' execution of a new loan agreement.

a foreclosure mediator, terminating the mediation as a result of the defendant's failure to submit certain documents.

On June 28, 2021, the defendant filed a motion for nonsuit pursuant to Practice Book § 14-3,[7] claiming that the plaintiff failed (1) to abide by the terms of the parties' settlement agreement, (2) to comply with a September 24, 2020 standing order by filing a federal mortgage foreclosure moratorium affidavit within fourteen days, and (3) to comply with the June 10, 2021 order requiring the filing of the federal mortgage foreclosure moratorium affidavit by June 25, 2021. In this motion, the defendant further stated that the plaintiff repeatedly had returned payments the defendant made to the plaintiff via checks made out to the decedent, rather than to the defendant. In addition to an order of nonsuit, the defendant requested reasonable attorney's fees. One day later, the plaintiff filed the federal mortgage foreclosure moratorium affidavit.

On July 9, 2021, the plaintiff filed an objection to the motion for nonsuit. After summarizing the lengthy procedural history of this case, the plaintiff argued that a nonsuit was not warranted because its delay in filing the federal mortgage foreclosure moratorium affidavit was not the result of any bad faith.[8] On August 2, 2021, the court denied the defendant's motion for nonsuit.

On March 21, 2022, the plaintiff filed a motion for a judgment of strict foreclosure.[9] Ten days later, the

[7] Practice Book § 14-3 provides in relevant part: "(a) If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. . . ."

[8] Specifically, the plaintiff asserted that it had requested a two week extension of time to file the federal mortgage foreclosure moratorium affidavit on June 25, 2021, and once that request was denied, it immediately filed said affidavit.

[9] "In a foreclosure proceeding the authority of the trial court to order either a strict foreclosure or a foreclosure by sale is clear. [See General

defendant filed an objection to the plaintiff's motion for a judgment of strict foreclosure. In her objection, the defendant contended that the required notice, pursuant to the Emergency Mortgage Assistance Program (EMAP), General Statutes §§ 8-265cc through 8-265kk,[10] was not provided to the decedent prior to the commencement of this foreclosure action, and, as a result, the court lacked subject matter jurisdiction.[11] Additionally, the defendant iterated her claims that the plaintiff

Statutes § 49-24.] . . . In interpreting this statute, we have stated that [i]n Connecticut, the law is well settled that whether a mortgage is to be foreclosed by sale or by strict foreclosure is a matter within the sound discretion of the trial court. . . . The foreclosure of a mortgage by sale is not a matter of right, but rests in the discretion of the court before which the foreclosure proceedings are pending." (Internal quotation marks omitted.) *Caliber Home Loans, Inc.* v. *Zeller*, 205 Conn. App. 642, 658, 259 A.3d 1, cert. denied, 338 Conn. 914, 259 A.3d 1179 (2021).

General Statutes § 49-24 provides in relevant part: "All liens and mortgages affecting real property may, on the written motion of any party to any suit relating thereto, be foreclosed (1) by a decree of sale instead of a strict foreclosure at the discretion of the court before which the foreclosure proceedings are pending . . . ."

[10] General Statutes § 8-265ee (a) provides: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, *shall give notice to each homeowner who is a mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice.* Such notice shall advise the homeowner of his delinquency or other default under the mortgage and shall state that the homeowner has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the authority with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the homeowner and mortgagee are unable to resolve the delinquency or default." (Emphasis added.) See also *Pennymac Corp.* v. *Tarzia*, 215 Conn. App. 190, 201, 281 A.3d 469 (2022).

[11] On August 1, 2023, our Supreme Court released its decision in *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 297 A.3d 968 (2023), which stated: "[W]e conclude that *the EMAP notice requirement is not jurisdictional.* Rather, it is a mandatory condition precedent to the commencement of a foreclosure

had returned payments she made via a check issued to the decedent and that the plaintiff's actions demonstrated an attempt "to walk away from the settlement it had offered . . . ." The defendant further maintained that the plaintiff's conduct constituted unclean hands and, therefore, it should be barred from seeking foreclosure, an equitable action. Specifically, the defendant contended that the "record is replete with numerous actions taken by the plaintiff requiring that it be denied foreclosure. Among these included submitting a false affidavit as to the lack of knowledge as to the defendant's residence and whereabout[s]. These acts have included refusal of trial payments, confusion of amounts due, repeated notices directed to the [decedent], checks written out to the [decedent], and material failure to comply with EMAP." Finally, she stated that the plaintiff "offered and agreed to functional reformation of the mortgage to place the loan in the defendant's name instead of [the decedent's] name. The plaintiff has repeatedly acted contrary to what it agreed to."

On April 1, 2022, the plaintiff filed a reply to the defendant's objection. Therein, it provided documents establishing that the trial period plan in 2019 for the loan modification required payments of $1750.36, and the defendant had made payments of only $943.35. The plaintiff further argued that it was not required to accept insufficient payments. Next, the plaintiff claimed that in August and September, 2021, the defendant failed to submit documents to the foreclosure mediator as requested. She failed, therefore, to provide "any proof" of compliance with the payment obligations to reinstate the loan. With respect to the defendant's claim regarding the EMAP notice, the plaintiff indicated that proper

action." (Emphasis added.) Id., 396; see also *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 483, 302 A.3d 339, cert. denied, 348 Conn. 923, 304 A.3d 445 (2023); *Bank of New York Mellon* v. *Croce*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6072015-S (September 11, 2023).

notice had been sent to the decedent on January 13, 2015, prior to the commencement of this action, as demonstrated by the inclusion of this information in the materials attached to the motion for summary judgment. Turning to the defendant's special defense of unclean hands, the plaintiff countered that she had failed to substantiate her claims or plead the defense properly. Finally, it noted that, under Connecticut law, a lender has no duty to engage in settlement negotiations with a borrower.

On April 21, 2022, following a remote hearing, the court granted the plaintiff's motion for a judgment of strict foreclosure. As of March 30, 2022, it found that the debt totaled $416,641.77 and the fair market value of the property was $275,000. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the complaint should have been dismissed as a result of improper service. Specifically, she argues that the plaintiff engaged in a pattern of conduct to evade the requirement to provide her with actual notice in accordance with General Statutes § 52-57 and that, as a result, the court lacked personal jurisdiction over the defendant. The plaintiff counters that the decedent was served properly and that, pursuant to General Statutes § 52-325 (a), following the recording of a lis pendens, any person acquiring an interest in the property shall be bound by all proceedings to the same extent as if she were made a party to the action; therefore, it was not required to serve the defendant in this case. We agree with the plaintiff.

As previously stated in this opinion, Homebridge, the original plaintiff, commenced this action against the decedent by abode service on April 16, 2015, two days before he died. On May 14, 2015, Homebridge filed a

motion for order of notice stating that all reasonable efforts to ascertain information regarding the widow, heirs, beneficiaries, representatives, or creditors of the decedent had failed, and therefore it sought an order directing that notice of the foreclosure action to these entities be made by publication in the Norwich Bulletin newspaper. On June 3, 2015, the court issued an order directing that the complaint be amended on or before July 9, 2015, to add the widow, heirs, beneficiaries, representatives or creditors of the decedent, and, on June 11, 2015, the court granted the motion for an order of notice by publication.

On September 25, 2015, the defendant filed an objection to Homebridge's then pending motion for a judgment of strict foreclosure.[12] On October 9, 2015, the defendant filed a motion to dismiss pursuant to Practice Book § 10-30. Therein, she claimed that Homebridge "misrepresented or failed to accurately report to the court that [she] had contacted [Homebridge's counsel] several times after [the decedent] had passed . . . to relay this information and her contact information as executor of the estate on May 4, 2015. . . . [Homebridge] was required to effectuate abode service on [the defendant], which it did not and actively chose not to do, instead opting for a method least likely to provide any substantial notice. . . . The complaint should be dismissed for lack of personal jurisdiction."[13] The court

[12] Specifically, the defendant's motion stated: "The undersigned and widow of the [decedent], having received no papers or notice in connection with this matter, represents to the court that she would not have had any awareness of this case proceeding had she not checked the court's website online. The undersigned also represents that she has called [Homebridge's counsel] and informed them of her contact information, the [decedent's] untimely passing in April and the fact that the [decedent's] affairs are being presently resolved in Probate Court."

[13] In its objection to the defendant's motion to dismiss, Homebridge argued that the service by publication pursuant to General Statutes § 52-68 was sufficient under the facts and circumstances of this case.

granted the motion to dismiss only as to the estate of the decedent.

On December 28, 2015, the defendant moved to dismiss the action as to herself and the decedent. She claimed that, as a result of the dismissal of the action against the estate, the foreclosure should be dismissed in its entirety. On January 6, 2016, Homebridge filed an objection, arguing that "this action is saved by Connecticut's lis pendens statute [§ 52-325 (a)]." It stated that on or about April 13, 2015, Homebridge caused a lis pendens to be recorded on the land records. Relying upon § 52-325 (a) and standards 13.7 and 19.1 of the Connecticut Standards of Title,[14] the plaintiff asserted

[14] Standard 19.1 of the Connecticut Standards of Title provides in relevant part: "[*A*]*fter the recording . . . of a notice of lis pendens, any party who thereafter acquires an interest in the property being foreclosed, by way* of a conveyance, encumbrance (including mechanics' and all other inchoate liens, certificates of which are recorded subsequently to the notice of lis pendens), or by way *of descent or otherwise, or whose conveyance or encumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken after such recording to the same extent as if that person were a party defendant in the foreclosure. Any such party may move the court to be made a party defendant. . . .*" (Emphasis added.) Connecticut Bar Association, Connecticut Standards of Title (Cum. Supp. 2014), standard 19.1.

Standard 13.7 (B) of the Connecticut Standards of Title provides in relevant part: "Although the mortgagor, upon granting the mortgage, is divested of all legal title in the mortgaged property, retaining only an equity of redemption which is considered personal property, nevertheless, upon the mortgagor's death, this personal property is converted into real property (again by the operation of the doctrine of equitable conversion), the title to which descends to the mortgagor's heirs or devisees. This results in the following . . . (c) *if the mortgagor dies subsequent to or during the pendency of a foreclosure action, the mortgagor's heirs or devisees, may be substituted for the deceased mortgagor, but the plaintiff is not obliged to move for their substitution as parties defendant, provided the plaintiff recorded a lis pendens at any time prior to the mortgagor's death.*" (Emphasis added.) Connecticut Bar Association, Connecticut Standards of Title, supra, standard 13.7 (B).

We note that, "[a]lthough the standards of title are not controlling authority, they nevertheless are persuasive to the extent that they establish the custom in the legal community . . . and this court previously has found the standards and comments helpful in resolving issues on appeal." (Citation

that, because the lis pendens had been recorded on the land records and the decedent had been served prior to his death, it was not required to do anything further in order to proceed with the foreclosure action. In its March 4, 2016 memorandum of decision, the court agreed with Homebridge with respect to its argument pertaining to the lis pendens statute and denied the motion to dismiss.

We begin by setting forth the legal principles relevant to a motion to dismiss alleging improper service and the resulting lack of personal jurisdiction. "[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction." (Internal quotation marks omitted.) *People's United Bank, National Assn.* v. *Purcell*, 187 Conn. App. 523, 526, 202 A.3d 1112 (2019). Stated differently, the "[f]ailure to comply with the statutory requirements of service renders a complaint subject to a motion to dismiss on the ground of lack of personal jurisdiction." *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011), overruled in part on other grounds by *Carpenter* v. *Daar*, 346 Conn. 80, 87, 287 A.3d 1027 (2023). Furthermore, "[b]ecause a challenge to the personal jurisdiction of the trial court is a question of law, our review is plenary." (Internal quotation marks omitted.) *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 15, 6 A.3d 163 (2010).

The record establishes that Homebridge filed a lis pendens on the land records with respect to the property and that it properly commenced this action against the decedent by way of abode service, prior to his

omitted.) *Hannaford* v. *Mann*, 134 Conn. App. 265, 276, 38 A.3d 1239, cert. denied, 304 Conn. 929, 42 A.3d 391 (2012).

death.[15] In such circumstances, the plaintiff, while free to do so, was not required to serve the defendant. See *Santander Bank, N.A.* v. *Clark*, Superior Court, judicial district of Hartford, Docket No. CV-19-6120472-S (September 29, 2022) (if mortgagor dies subsequent to or during pendency of foreclosure action, heirs or devisees may be substituted but plaintiff is not required to do so provided lis pendens was recorded prior to death); see also *HSBC Bank USA, N.A.* v. *Pitts Chapel UFW Baptist Church, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-19-6097142-S (October 11, 2022) (same); *Nationstar Mortgage, LLC* v. *Wigfield*, Superior Court, judicial district of New London, Docket No. CV-15-6024104-S (April 5, 2017) (same). We agree with the reasoning, based on § 52-325 (a) and the Connecticut Standards of Title,[16] set forth in these decisions from the Superior Court.

Section 52-325 (a) provides in relevant part that, "[i]n any action in a court of this state . . . the plaintiff or his attorney, at the time the action is commenced or afterwards . . . may cause to be recorded in the office of the town clerk of each town in which the property is situated a notice of lis pendens . . . . *Such notice shall, from the time of the recording only, be notice to any person thereafter acquiring any interest in such property of the pendency of the action; and each person whose . . . interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action. . . .*" (Emphasis added.) See also Connecticut

[15] In its March 4, 2016 memorandum of decision, the court stated that "[a]s a part of the process served, a lis pendens was recorded in the land records" and that "the service commencing this litigation was accomplished on April 16, 2015."

[16] See footnote 14 of this opinion.

Bar Association, Connecticut Standards of Title (Cum. Supp. 2014), standards 13.7 (B) and 19.1.

In the present case, Homebridge recorded the lis pendens on the land records and commenced the foreclosure action by serving the decedent. Following the decedent's death, the defendant acquired her interest in the property and, pursuant to § 52-325 (a) and the relevant Connecticut Standards of Title, was bound in this foreclosure action to the same extent as if she had been made a party to the action. Homebridge was not required to serve the defendant under these facts and circumstances. Accordingly, we conclude that the court properly denied the defendant's motion to dismiss for lack of personal jurisdiction.

II

The defendant next claims that the court improperly denied her motion for nonsuit. Specifically, she argues that the plaintiff failed (1) to abide by a settlement agreement reached by the parties, (2) to comply with the standing order, dated September 24, 2020, requiring that a federal mortgage foreclosure moratorium affidavit be filed within fourteen days, and (3) to comply with the subsequent June 10, 2021 court order requiring that the federal mortgage foreclosure moratorium affidavit be filed by June 25, 2021. The plaintiff responds that, despite the defendant's contentions, the parties never entered into a settlement or modification agreement and that its actions, consisting of minor filing errors or delays, were not done in bad faith and were not egregious or sufficient to warrant a nonsuit. We agree with the plaintiff.

On June 10, 2021, the court issued the following order: "Pursuant to the [September 24, 2020] standing order by Judge Abrams, an AFFIDAVIT—FEDERAL MORTGAGE FORECLOSURE MORATORIUM (JD-CV-172) is

required to be filed within [fourteen] days of the issuance of the standing order. Please file the affidavit by June 25, 2021, or the case may be dismissed." On June 25, 2021, the plaintiff requested a two week extension of time to comply with the court's June 10, 2021 order. On June 28, 2021, while the plaintiff's request was pending, the defendant filed a motion for nonsuit. The next day, the court denied the plaintiff's request for an extension, and the plaintiff filed the federal mortgage foreclosure moratorium affidavit. The court denied the defendant's motion for nonsuit on August 2, 2021.

"Practice Book § 17-19 provides in relevant part that [i]f a party fails to comply with an order of a judicial authority . . . the party may be nonsuited or defaulted by the judicial authority." (Internal quotation marks omitted.) *Burton* v. *Dimyan*, 68 Conn. App. 844, 846, 793 A.2d 1157, cert. denied, 260 Conn. 925, 797 A.2d 520 (2002); see generally *Jaconski* v. *AMF, Inc.*, 208 Conn. 230, 232, 543 A.2d 728 (1988) (rules of practice plainly authorize trial court to enter nonsuit for noncompliance with its orders). The ultimate decision of whether to order a nonsuit is reviewed under the abuse of discretion standard. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 70–71, 176 A.3d 1167 (2018); see also *West Haven Lumber Co.* v. *Sentry Construction Corp.*, 117 Conn. App. 465, 476, 979 A.2d 591 (denial of motion for nonsuit was not abuse of discretion), cert. denied, 294 Conn. 919, 984 A.2d 70 (2009). Furthermore, our Supreme Court has noted that "the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 71.

Applying these principles, we conclude that the court did not abuse its discretion in denying the defendant's

motion for nonsuit. First, the factual predicate underlying the defendant's argument that the nonsuit should have been granted because the plaintiff breached the parties' modification agreement does not exist. Contrary to her insistence, the record does not show that the parties had, in fact, reached a binding settlement and/or loan modification with which the plaintiff subsequently failed to abide.[17] Second, with respect to the claims regarding the plaintiff's failure to timely submit the federal mortgage foreclosure moratorium affidavit, the defendant has failed to demonstrate why the denial of the motion for nonsuit constitutes an abuse of discretion. Instead, she asserts generally that the plaintiff's conduct during the litigation amounted to a violation of the rules and lack of candor and, as a direct consequence, "dragged out [the litigation] far beyond any need or good faith reason." The defendant has failed to demonstrate how she was harmed by the plaintiff's conduct or why the court's refusal to enter a nonsuit and dismiss the case, a remedy of last resort, amounted to an abuse of its discretion with respect to the delayed filing of the federal mortgage foreclosure moratorium affidavit. See, e.g., *Vaccaro* v. *Loscalzo*, 201 Conn. App. 606, 622–23, 243 A.3d 786 (2020) (our Supreme Court has refused to uphold sanction of nonsuit when other alternatives to dismissal would have permitted case to be heard on merits while ensuring future compliance with court orders), cert. denied, 336 Conn. 908, 244

[17] In the plaintiff's November 27, 2019 objection to the defendant's motion to enforce the settlement, it set forth the following summary of the loss mitigation options: "On or about October 12, 2017, the plaintiff offered a modification . . . to the defendant, and she executed it. However, at the time, she was not lawfully siesed of the property. As a result, that modification was not accepted by the plaintiff. The Probate Court did not give her title to the property until April 17, 2018. Most recently on April 23, 2019, the plaintiff offered a trial period plan. . . . The trial plan required three payments of $1750.36. On July 12, 2019, after the defendant refused to comply with the trial period plan, the plaintiff denied the defendant for a permanent modification." (Citation omitted.)

A.3d 147 (2021); see generally *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 71 (dismissal of action is remedy of last resort); *Usowski* v. *Jacobson*, 267 Conn. 73, 96, 836 A.2d 1167 (2003) (same). Accordingly, we conclude that this claim must fail.

III

The defendant next claims that the court improperly rejected her special defense of unclean hands. Specifically, she argues that the plaintiff's conduct throughout the litigation warranted the application of this doctrine. The plaintiff, citing *Thompson* v. *Orcutt*, 257 Conn. 301, 313–14, 777 A.2d 670 (2001), counters that this doctrine "is used for fraud or misrepresentation in instances such that there is significant and purposeful fraud or perjury, or 'only when a plaintiff's improper conduct relates in some significant way to the claim he or she now asserts.' " Furthermore, it again argues that it had no duty to take any further steps to notify the defendant of this action following the recording of the lis pendens on the land records and the abode service of the decedent prior to his death, that the defendant was responsible for tendering insufficient monthly payments with respect to the 2019 loan modification, and that it had not failed to comply with the court's orders. We conclude that the defendant's unclean hands defense is without merit.

The following additional facts and procedural history will facilitate our discussion. Homebridge moved for summary judgment as to liability on April 21, 2016. The defendant filed her answer and special defenses on May 12, 2016. In her first special defense, she raised the doctrine of unclean hands.[18] On December 21, 2016,

[18] Specifically, the defendant alleged the following: "1. The plaintiff misrepresented to the court that there were no pending probate cases for the [decedent].

"2. The plaintiff misrepresented to the court that it was unable to verify, contact or locate anyone residing in the property subject to this action when in fact the [defendant] had actively contact[ed] the plaintiff and its agents

the court granted the plaintiff's motion for summary judgment.[19] In its memorandum of decision, the court explained, inter alia,[20] that the defendant had failed to provide evidentiary material to support her claim of unclean hands.

to alert them to the circumstances of [the decedent's] passing and her occupancy of the property.

"3. The purpose of the plaintiff's misrepresentations were to blindside and ambush the defendant with a judgment of foreclosure prior to her even having notice of any pleading or filing made with the court.

"4. Knowing that newspaper notice was wilfully and deliberately insufficient, the plaintiff then reiterated, unethically and dishonestly to the court, that it was sufficient in its objection to the [defendant's] motion to dismiss, which was granted, going so far as to opine its sufficiency 'where it is not reasonably possible or practicable to give more adequate warning' even though the undersigned had gone above and beyond alerting the plaintiff . . . as to her occupancy of the property.

"5. The defendant incorporates each and every allegation of every subsequent special defense as if set forth here.

"6. The above conduct is so morally reprehensible and inequitable that it would shock the conscience of the average person, and the plaintiff ought to be denied the equitable relief of foreclosure because it has failed to speak with candor before the tribunal and has wilfully engaged in the same unethical, unjust conduct."

[19] "[I]t is appropriate for a court to render summary judgment in favor of a plaintiff when the special defenses asserted by a defendant are either not legally viable or do not present a genuine issue of a material fact." *Kazlon Communications, LLC* v. *American Golfer, Inc.*, 82 Conn. App. 593, 596, 847 A.2d 1012 (2004).

[20] In its December 21, 2016 memorandum of decision, the trial court also reasoned that, with respect to the unclean hands special defense, "the conduct complained of in the pleadings does not relate to the validity, making or enforcement of the note and mortgage between [the decedent] and the lender. It would not be a legally sufficient defense." This specific reasoning is no longer proper. In 2019, our Supreme Court stated that "appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action [including unclean hands and laches]." *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 672–73, 212 A.3d 226 (2019). It further explained that "equitable and practical considerations inexorably lead to the conclusion that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and insepa-

At the outset, we note that "[i]t is well settled that a trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 378, 143 A.3d 638 (2016). "Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands may be applicable. It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked. . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied

rably connected . . . to enforcement of the note and mortgage." (Citation omitted; internal quotation marks omitted.) Id., 675.

from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 746–47, 196 A.3d 328 (2018); see also *U.S. Bank, National Assn.* v. *Moncho*, 203 Conn. App. 28, 53, 247 A.3d 161 (application of unclean hands doctrine rests within sound discretion of trial court and is subject to limited review on appeal), cert. denied, 336 Conn. 935, 248 A.3d 708 (2021); *Bank of America, N.A.* v. *Aubut*, supra, 380 (trial court enjoys broad discretion in determining whether clean hands doctrine applies).

On appeal, the defendant reasserts her bald allegations of the plaintiff's unclean hands. She has failed, however, to direct us to evidence of the plaintiff's "deplorable conduct" that would warrant the application of this doctrine. Although the defendant contends that Homebridge "lied" about its lack of knowledge of her whereabouts when the foreclosure action was commenced, she has not presented any evidence demonstrating that this was anything more than a mistake. Furthermore, the defendant failed to present evidence of the plaintiff's wilful misconduct that rose to the level of unclean hands with respect to, inter alia, the return of the defendant's partial payments during the modification trial period in 2019, issuing checks and correspondence to the decedent after his death, and the purportedly improper refusal to process modification paperwork. "[T]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a

special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 745; see also *Bank of New York Mellon* v. *Mangiafico*, 198 Conn. App. 722, 727, 234 A.3d 1115 (2020); see generally *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014) (it is incumbent on party opposing summary judgment to establish factual predicate from which it can be determined, as matter of law, that genuine issue of material fact exists).

The party raising a special defense has the burden of producing evidence supporting its special defense. *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 745; *Ocwen Loan Servicing, LLC* v. *Sheldon*, 208 Conn. App. 132, 137, 264 A.3d 106 (2021). Given the evidentiary lacunae with respect to the special defense of unclean hands, coupled with our deferential standard of review, we conclude that this claim is doomed on appeal. "Simply put, the defendant's allegations and evidentiary submission were insufficient to fall within our Supreme Court's clarification of the making, validity, or enforcement test, as set forth in *U.S. Bank National Assn.* v. *Blowers*, [332 Conn. 656, 675, 212 A.3d 226 (2019)], namely, that allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement of the note and mortgage. . . . Therefore, because the defendant did not . . . meet his burden of proving the facts alleged in his special defense . . . his claim fails." (Citation omitted; internal quotation

marks omitted.) *Bank of New York Mellon* v. *Mangiafico*, supra, 198 Conn. App. 731–32. Accordingly, we conclude that the court properly rejected the defendant's claim of unclean hands and rendered a judgment of strict foreclosure in favor of the plaintiff.

IV

Finally, the defendant raises additional claims, all of which we decline to address on their merits due to inadequate briefing. See *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App. 800, 813–14, 201 A.3d 511 (2019). Specifically, the defendant contends that the court should have (1) granted her motion to enforce a settlement, filed pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 804,[21] (2) denied the plaintiff's motion for summary judgment, and (3) dismissed the foreclosure action as a result of the plaintiff's failure to comply with the EMAP notice requirement. After a careful review, we conclude that the defendant failed to brief these issues adequately and therefore we decline to review their merits.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on

[21] "In *Audubon*, our Supreme Court shaped a procedure by which a trial court could summarily enforce a settlement agreement to settle litigation." *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 815, 277 A.3d 200 (2022); see also *Matos* v. *Ortiz*, 166 Conn. App. 775, 796–97, 144 A.3d 425 (2016).

appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized." (Internal quotation marks omitted.) *Wells Fargo Bank, National Assn.* v. *Doreus*, 218 Conn. App. 77, 79 n.1, 290 A.3d 921, cert. denied, 347 Conn. 904, 297 A.3d 198 (2023); see also *Carmichael* v. *Stonkus*, 133 Conn. App. 302, 307, 34 A.3d 1026, cert. denied, 304 Conn. 911, 39 A.3d 1121 (2012).

The defendant's *Audubon* claim consists of a single paragraph in her appellate brief and a single citation. She has failed to clearly and fully set forth an argument as to why the court committed reversible error with respect to this issue.[22] Her claim regarding the granting of the plaintiff's motion for summary judgment fares no better. It consists of three paragraphs and three case citations that primarily address general legal principles related to summary judgment.[23] The brief baldly asserts that the court overlooked the unclean hands defense. Finally, the defendant's EMAP claim,[24] which contains citation to two cases and consists of three paragraphs, similarly is lacking in the requisite legal analysis.[25]

[22] In its appellate brief, the plaintiff counters that the parties never entered into a settlement, as the defendant failed to provide either good title or adequate payment, and therefore the defendant's reliance on *Audubon* was misplaced. Additionally, as noted in part II of this opinion, the defendant's *Audubon* claim would necessarily fail because the record does not support the contention that the parties had reached a binding settlement and/or loan modification. See *Reiner* v. *Reiner*, 190 Conn. App. 268, 277, 210 A.3d 668 (2019) ("[g]enerally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement" (internal quotation marks omitted)).

[23] The plaintiff argues in its appellate brief that the defendant set forth conclusory statements without referring to evidence that established a genuine issue of material fact.

[24] In its brief to this court, the plaintiff counters that the EMAP notice was not required under the facts and circumstances of this case and that the defendant had raised this issue for the first time on appeal.

[25] Furthermore, the core of the defendant's argument is that the failure to comply with the EMAP notice results in lack of subject matter jurisdiction.

On the basis of inadequate briefing, we decline to address the merits of the defendant's claims regarding the denial of her *Audubon* motion, the granting of the plaintiff's motion for summary judgment, and the failure to dismiss the foreclosure action due to the lack of compliance with the EMAP notice.

The judgment is affirmed and the case is remanded for the sole purpose of setting new law days.

In this opinion the other judges concurred.

THREE DEER ASSOCIATES LIMITED PARTNERSHIP *v.* DENETTE JOHNSON ET AL.
(AC 46343)

Moll, Clark and Seeley, Js.

Syllabus

The plaintiff landlord sought, by way of a summary process action, to recover possession of certain real property that had been leased to the defendant J. The parties thereafter entered into a stipulated summary process agreement, which provided that a judgment of possession would be rendered for the plaintiff, subject to a stay of execution and a use and occupancy fee. The agreement further provided that the stay of execution was final and that J agreed not to reopen, appeal, or request any further stay of execution. The trial court rendered judgment in accordance with the agreement. J subsequently filed a motion to open the judgment, seeking an extension of the stay of execution, which the trial court denied on the grounds that, inter alia, the parties had entered into the agreement with the assistance of a housing court specialist, the parties understood the terms of the voluntary agreement, and J had affirmed that she would not seek, inter alia, further extensions of time or motions to open. J then filed a second motion to open the judgment, again seeking an extension of the stay to allow J to secure housing, which the trial court denied on the same grounds as the first motion to open. J appealed to this court, challenging, inter alia, the trial court's

Subsequent to the filing of the briefs in the present case, our Supreme Court expressly rejected this contention. See *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 398, 297 A.3d 968 (2023); see also *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 221 Conn. App. 483.

denial of her second motion to open and claiming that the stipulated summary process judgment should be vacated. *Held* that, on the basis of its review of the record and having afforded every reasonable presumption in favor of the trial court's action, this court could not conclude that the trial court acted unreasonably or in clear abuse of its discretion when it denied the second motion to open the stipulated summary process judgment; moreover, this court lacked subject matter jurisdiction over that portion of J's appeal that challenged the stipulated summary process judgment, as J did not file her appeal within five days of the underlying stipulated summary process judgment as required by statute (§ 47a-35), and, accordingly, that portion of the appeal challenging the underlying stipulated summary process judgment was dismissed.

Argued November 16, 2023—officially released January 30, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the parties entered into a stipulated agreement granting possession to the plaintiff subject to a stay of execution and payment by the defendants of a reasonable use and occupancy fee; thereafter, the court, *Esperance-Smith, J.*, rendered judgment in accordance with the stipulated agreement; subsequently, the court denied the named defendant's motion to open the stipulated summary process judgment; thereafter, the court denied the named defendant's second motion to open the stipulated summary process judgment, and the named defendant appealed to this court. *Appeal dismissed in part*; *affirmed.*

DeNette Johnson, self-represented, the appellant (named defendant).

Opinion

PER CURIAM. The self-represented named defendant, DeNette Johnson (Johnson), appeals following the trial court's denial of her second motion to open a stipulated summary process judgment, rendered after she had entered into a stipulated agreement with the plaintiff, Three Deer Associates Limited Partnership,

doing business as Deerfield Apartments,[1] in connection with a summary process action commenced by the plaintiff against Johnson and her son, the defendant Eric Johnson II.[2] On appeal, Johnson raises five claims, namely, that (1) the court improperly denied her second motion to open, (2) the court improperly failed to conduct an evidentiary hearing before acting on her second motion to open, (3) an evidentiary hearing should have been conducted to determine if she was compliant with General Statutes § 47a-39, (4) the court violated her due process rights by failing to hold an evidentiary hearing, and (5) the underlying stipulated judgment should be vacated. We affirm the judgment with respect to Johnson's first four claims relating to the denial of her motion to open and dismiss the appeal as it pertains to her fifth claim relating to the stipulated summary process judgment.

We briefly set forth the following relevant procedural history. In its summary process action, the plaintiff sought a judgment of possession of certain premises it had leased to Johnson pursuant to a one year written lease after Johnson had failed to pay the monthly rent due in September and October, 2022. The parties thereafter entered into a stipulated agreement, pursuant to which a judgment of possession would be rendered in

[1] As a result of the plaintiff's failure to file an appellee's brief on or before August 29, 2023, this court ordered "that the appeal shall be considered on the basis of [Johnson's] brief, and, if applicable, the appendix, the record, as defined by Practice Book [§] 60-4, and oral argument, if not waived by the appellant or the [c]ourt. Pursuant to Practice Book [§] 70-4, oral argument by the appellee will not be permitted."

[2] We note that, on appeal, Johnson attempts to raise claims on behalf of her son, arguing that she and her son signed the stipulated summary process agreement by mistake and under duress, and that they did not understand its terms. Because Johnson's son is not a party to this appeal, to the extent that Johnson has raised claims on behalf of her son in this appeal, they are not properly before this court. See *Collard & Roe, P.C.* v. *Klein*, 87 Conn. App. 337, 343–44 n.3, 865 A.2d 500, cert. denied, 274 Conn. 904, 876 A.2d 13 (2005).

favor of the plaintiff with a stay of execution through March 1, 2023, and Johnson would pay a fee of $1450 for reasonable use and occupancy. The stipulation further provides that the "stay of execution is a FINAL stay of execution. [Johnson] agree[s] not to reopen, appeal or request any further stay of execution. Judgment shall enter for Lapse of Time only and not due to any fault of [Johnson]." The stipulation was approved and signed by the court on February 7, 2023 (stipulated summary process judgment).

On March 1, 2023, Johnson filed a motion to open the stipulated summary process judgment, in which she asserted that she was "requesting an extension" and that she would pay $1450 on March 10, 2023, in order to be able to stay in the premises until April 1, 2023. The plaintiff objected to that request, arguing that it violated the specific terms of the stipulated judgment and that Johnson failed to satisfy the requirements of § 47a-39, which permits a court to grant a stay of execution of a judgment of possession if "the applicant cannot secure suitable premises" and "has used due diligence and reasonable effort to secure other premises . . . ." On March 6, 2023, the court denied the motion to open, explaining: "The parties entered a stipulation on February 7, 2023, with the assistance of a housing court specialist. All parties affirmed that they understood the terms of the agreement and voluntarily entered into the agreement, which called for a final stay through March 1, 2023. The agreement also affirmed that [Johnson] will not file any extensions of time, motions to open, or motions to delay or extend execution. . . . [T]he stipulation was approved by the court."

On March 8, 2023, Johnson filed a second motion to open, in which she asserted that she was "actively looking for new housing," that she is a sixty-nine year old senior with limited mobility, and that she needed more time. On March 16, 2023, the court denied the

second motion to open for the same reason it denied the first motion to open. Johnson thereafter filed this appeal on March 21, 2023, listing the March 16, 2023 denial of her second motion to open and the February 7, 2023 stipulated summary process judgment as the judgments being appealed.

We first set forth our standard of review. "It is well established that [t]he denial of a motion to open is an appealable final judgment. . . . This court does 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. . . . 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." (Citation omitted; internal quotation marks omitted.) *Pizzoferrato* v. *Community Renewal Team, Inc.*, 211 Conn. App. 458, 464–65, 272 A.3d 1145 (2022).

The first four claims on appeal concern the court's denial of Johnson's second motion to open. On the basis of our review of the record in this case and affording every reasonable presumption in favor of the court's action, we cannot conclude that the court acted unreasonably or in clear abuse of its discretion when it denied the second motion to open the stipulated summary process judgment. Accordingly, we affirm the judgment with respect to the court's denial of Johnson's second motion to open.

Johnson's fifth claim on appeal challenges the underlying stipulated summary process judgment itself and

seeks to have that judgment vacated. Pursuant to General Statutes § 47a-35, appeals from a summary process judgment must be taken within five days of the judgment. This court recently addressed this issue and stated: "Summary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed. . . . The process is intended to be summary and is designed to provide an expeditious remedy to the landlord seeking possession. . . . *HUD/Barbour-Waverly* v. *Wilson*, 235 Conn. 650, 658, 668 A.2d 1309 (1995).

"In *HUD/Barbour-Waverly*, our Supreme Court examined the plain meaning of § 47a-35 and the legislative policy surrounding the enactment of the statute. . . . In that case, the court concluded that, [i]n light of the plain language of § 47a-35, the fact that the summary process statutes are in derogation of common law and the legislative policy in favor of the swift resolution of disputes between landlords and tenants regarding rights of possession, we conclude that an appeal pursuant to § 47a-35 must be brought within five days of the rendering of a summary process judgment." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Centrix Management Co., LLC* v. *Fosberg*, 218 Conn. App. 206, 212–13, 291 A.3d 185 (2023).

In the present case, Johnson did not file her appeal within five days of the underlying stipulated summary process judgment. Accordingly, this court lacks subject matter jurisdiction over that part of her appeal that challenges the stipulated summary process judgment

itself,[3] and that portion of the appeal must be dismissed. See *HUD/Barbour-Waverly* v. *Wilson*, supra, 235 Conn. 655; see also *Ansonia Housing Authority* v. *Parks*, 211 Conn. App. 528, 529, 273 A.3d 245 (2022) (dismissing appeal from summary process judgment that was filed beyond five day period for lack of subject matter jurisdiction).

The appeal is dismissed with respect to the plaintiff's challenge to the stipulated summary process judgment; the judgment denying the motion to open is affirmed.

ROBIN TWERDAHL *v.* WILTON PUBLIC SCHOOLS (AC 45969)

Cradle, Westbrook and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendant school district for her alleged constructive discharge from employment as a teacher. The plaintiff had been employed by the defendant for approximately twenty-four years when she resigned from her position in August, 2019. On December 19, 2019, she filed an age discrimination complaint with the Commission on Human Rights and Opportunities (CHRO). Thereafter, the CHRO issued a release of jurisdiction over the complaint, and the plaintiff commenced the present action against the defendant, alleging a violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.), constructive discharge, and breach of contract. The plaintiff, who was seventy years old, claimed that she was forced to resign after the defendant created an intolerable work environment by marginalizing and unfairly criticizing her because it wanted to replace her with a younger teacher. The defendant filed a motion to strike the plaintiff's complaint on the grounds that it was untimely and failed to state a claim on which relief could be granted. The trial court granted the defendant's motion, and, thereafter, the plaintiff filed an amended complaint alleging only constructive discharge. In that complaint, the plaintiff added allegations related to a report issued by the defendant

[3] This court has subject matter jurisdiction over the remaining portion of the appeal because it was filed within the statutory appeal period following the denial of the motion to open. See *Atlantic St. Heritage Associates, LLC* v. *Bologna*, 204 Conn. App. 163, 170 and n.6, 252 A.3d 881 (2021); *Lopez* v. *Livingston*, 53 Conn. App. 622, 623 n.1, 731 A.2d 335 (1999).

on June 10, 2019, in which it acknowledged that an assistant principal had copied certain portions of the plaintiff's prior evaluations into her 2016–2017 school year evaluation and recommended a review of administrators' practices of referencing evaluations from prior years. The defendant filed a motion to strike, which the trial court granted, finding that the plaintiff's complaint to the CHRO was untimely pursuant to the 180 day limitation period set forth in the applicable statute ((Rev. to 2019) § 46a-82 (f)), because the plaintiff had failed to identify conduct relating to an intolerable working environment that had persisted to June 22, 2019, or thereafter, and her allegations were insufficient to establish that the working conditions were so intolerable that a reasonable person would feel compelled to resign. Subsequently, the trial court granted the defendant's motion for judgment, and the plaintiff appealed to this court. *Held* that the trial court did not err in granting the defendant's motion to strike because it properly determined that the plaintiff's complaint to the CHRO was untimely: the most recent alleged act of discrimination in the present case occurred in May, 2018, which was not within 180 days of the plaintiff's filing of her complaint with the CHRO, as required pursuant to (Rev. to 2019) § 46a-82 (f); moreover, contrary to the plaintiff's assertion that the 180 day limitation period did not begin to run until the date of her resignation, such an interpretation was contrary to the plain language of (Rev. to 2019) § 46a-82 (f), and the case that the plaintiff cited to support her claim, *Green* v. *Brennan* (578 U.S. 547), was inapplicable, as it was governed by a federal regulation (29 C.F.R. § 1614.105 (2010)) that did not share the same language as (Rev. to 2019) § 46a-82 (f); furthermore, the plaintiff did not allege any ongoing discrimination that continued until her resignation on August 14, 2019, as she had not been working for at least several weeks prior to that date because school was not in session during the summer months, nor did she identify how the defendant's alleged inaction between June 22 and August 14, 2019, regarding the recommendations in the defendant's report perpetuated an intolerable working environment when school was not in session.

Submitted on briefs November 15, 2023—officially released January 30, 2024

Procedural History

Action to recover damages for, inter alia, the plaintiff's alleged constructive discharge from employment, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the defendant's motion to strike the complaint; thereafter, the court, *Hon. Kenneth B. Povodator*, judge

trial referee, granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ashling M. Soares filed a brief for the appellant (plaintiff).

Peter J. Murphy and *Keegan A. Drenosky* filed a brief for the appellee (defendant).

Opinion

CRADLE, J. The plaintiff, Robin Twerdahl, appeals from the judgment of the trial court, rendered following the court's decision striking her complaint against the defendant, Wilton Public Schools, in which she claimed that she was constructively discharged from her employment with the defendant. The plaintiff claims that the court erred in granting the motion to strike filed by the defendant on the grounds that the filing of her complaint alleging age discrimination to the Commission on Human Rights and Opportunities (CHRO) was untimely and she failed to state a claim on which relief could be granted. We agree that the plaintiff's complaint to the CHRO was untimely and, accordingly, affirm the judgment of the trial court.[1]

The following facts and procedural history are relevant to our resolution of the plaintiff's claim on appeal. The plaintiff started her employment with the defendant school district in 1995. She resigned from that employment on August 14, 2019. On December 19, 2019, she filed an age discrimination complaint with the CHRO, and, on March 31, 2020, the CHRO issued a release of

[1] Because we agree with the court's conclusion that the plaintiff's complaint to the CHRO was untimely, we need not address her challenge to the court's conclusion that she failed to state a claim on which relief could be granted.

jurisdiction.[2] In June, 2020, the plaintiff commenced this action, and, on January 7, 2021, she filed a three count amended complaint alleging a violation of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., constructive discharge and breach of contract. All three of the plaintiff's claims were based on the same core allegation—that she was seventy years old and still qualified for her position as a school teacher at the time that she was forced to resign and that the defendant was motivated to create an intolerable work environment by the plaintiff's "advanced age and [a desire] to replace her with a younger teacher . . . ." Specifically, the plaintiff alleged that, in 2010, the defendant's staff began to "marginalize" her and "unfairly criticiz[e] her performance" with "harassment [that] progressively worsened over time." In support of these allegations, she referred to negative performance evaluations that she had received. With respect to her 2016–2017 school year evaluation, the plaintiff alleged that the newly hired assistant principal failed to follow proper procedures, plagiarized portions of prior evaluations that had been written by the former assistant principal, and "inappropriately inserted the number of sick days that [the plaintiff] had used . . . in a punitive statement . . . downgrad[ing] her evaluation accordingly." The plaintiff challenged the criticism, and, after the defendant failed to respond, the plaintiff initiated the union grievance process. The plaintiff alleged that, when it became apparent that the defendant had no intention of remedying the "discriminatory

[2] General Statutes § 46a-100 provides in relevant part: "Any person who has filed a complaint with the commission in accordance with section 46a-82 and who has obtained a release of jurisdiction in accordance with section 46a-83a or 46a-101, may bring an action in the superior court for the judicial district in which the discriminatory practice is alleged to have occurred, the judicial district in which the respondent transacts business or the judicial district in which the complainant resides . . . ." Pursuant to General Statutes § 46a-101 (e), such action must be brought within ninety days of the receipt of the release of jurisdiction.

treatment," she had "no choice but to resign from her position . . . ."

On February 10, 2021, the defendant filed a motion to strike the plaintiff's amended complaint on the grounds that her complaint to the CHRO was untimely in that it was not filed within the statutorily prescribed 180 days and she had failed to set forth a claim on which relief could be granted. The court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the defendant's motion, striking all three counts of the plaintiff's amended complaint. The court reasoned, inter alia: "[T]he plaintiff claims that she was forced to resign by the intolerable workplace conditions on August 14, 2019. The most recent antecedent events by or attributable to the defendant is that in May, 2018, Dr. Kevin Smith (status with the defendant, unknown—a Dr. Charles Smith [was] previously identified as an assistant superintendent) is alleged to have stated he would take action but no action was taken, being the latest conduct alleged by time frame. This, in turn, related to a work evaluation for an earlier academic year. There is no other conduct alleged that was attributable to, explicitly or impliedly, the defendant, much less conduct that might reasonably be construed as creating a hostile work environment and/or justifying constructive discharge. Based on the factual allegations of the complaint, the complaint to the CHRO was not timely, and the allegations of conduct do not rise to the level supporting a claim of hostile work environment and/or constructive discharge."

On March 16, 2022, the plaintiff filed a one count second amended complaint alleging constructive discharge.[3] In her second amended complaint, the plaintiff

[3] Although the plaintiff failed to replead within fifteen days following the court's decision striking her amended complaint pursuant to Practice Book § 10-44, the court permitted her to file a request to amend her complaint, which it granted.

added allegations related to a report issued by the defendant on June 10, 2019. The plaintiff alleged that, in that report, the defendant acknowledged that the assistant principal had improperly copied portions of the plaintiff's prior evaluations and recommended a review of " 'administrators' practices regarding referencing evaluations from prior years . . . .' " The plaintiff alleged that, "between June 10 . . . and August 14, 2019, the defendant failed to take a vital remedial action that it had promised to take" in the June 10, 2019 report, "in that it failed to make any changes to the administrators' practices regarding referencing evaluations from prior years or to provide the plaintiff with an explanation . . . that no changes were appropriate . . . ." The plaintiff alleged that, "[a]s a result of the defendant's discriminatory treatment of [her], she was in constant fear of being ridiculed or even terminated. As a result, she suffered from anxiety and depression. Ultimately, when it became apparent that the defendant had no intention of adequately remedying the discrimination, she was forced to resign from her position, which she did on August 14, 2019."

On April 13, 2022, the defendant filed a motion to strike the plaintiff's second amended complaint on the grounds that her complaint to the CHRO was untimely and her complaint failed to state a claim on which relief could be granted. The court granted that motion in a memorandum of decision dated September 9, 2022, and struck the complaint on the grounds that the plaintiff's complaint to the CHRO was untimely under the 180 day deadline in General Statutes (Rev. to 2019) § 46a-82 (f),[4] as "the plaintiff has [not] identified conduct

[4] General Statutes (Rev. to 2019) § 46a-82 (f) provides: "Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination, except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination."

All references to § 46a-82 in this opinion are to the 2019 revision of the statute.

relating to an intolerable working environment that had persisted to June 22, 2019, and thereafter, sufficient to make the actual date of the filing of her CHRO complaint [on December 19, 2019] timely" and the plaintiff's allegations were insufficient to "establish [that the] working conditions [were] so intolerable that a reasonable person would feel compelled to resign . . . ."

In addressing the timeliness of the plaintiff's complaint to the CHRO, the court first summarized the pertinent allegations of her complaint. Specifically, as to the allegations that were most recent in time, the court recounted: "Paragraph 29 [of the second amended complaint] jumps to June 10, 2019, reporting the issuance of an investigative report relating to the plaintiff. The report was critical of the manner in which the 2017 evaluation had been prepared (largely copying from the previous year's evaluation), including improper comments about and treatment of perceived excessive sick time. The report did not find malice on the part of the preparer of that evaluation but rather concluded that inexperience and a misunderstanding of guidance she had received were involved. The report generally distinguished between identified improper conduct and the absence of improper motives." The court noted that "[p]aragraph 29 [of the second amended complaint] also recites the investigative report's recommendations, including upgraded ratings for the plaintiff in the year-end review, and proposed monitoring and corrective action to be taken."

After setting forth the additional allegations pertaining to the time period between June 10 and August 14, 2019, as referenced herein, the court explained, inter alia: "The foregoing summarizes the complaint insofar as it identifies predicate conduct of the defendant that is claimed to be the basis of her constructive discharge. . . . The plaintiff having filed her CHRO complaint on December 19, 2019, the complaint can only encompass

events occurring on or after June 22, 2019. There is no affirmative conduct alleged in the period starting on June 22, 2019. Inferentially, the plaintiff is relying on inaction between June 10, 2019, and her resignation on August 14, 2019. Accepting that in some circumstances inaction might constitute actionable conduct for purposes of discrimination in general and constructive discharge in particular, the plaintiff has not described such a situation.

"The inaction identified could not have been part of an intolerable environment, because it did not impact any environment, especially for the time frame in question. The failure to act in that period was a failure 'to make any changes to administrators' practices regarding referencing evaluations from prior years, or to provide the plaintiff with an explanation of any determination that no changes were appropriate, if such a determination had been made.' This failure relates only to the manner in which annual evaluations are made by administrators, and more narrowly, the procedures/practice of 'referencing evaluations from prior years.' Putting aside the question of how the plaintiff would learn of changes made in that interval ([between] June 10 and August 14, 2019) and whether she implicitly is claiming that there was a duty to notify her of any changes in procedures or decisions not to make changes—mostly summer recess for schools—how was inaction or delayed action relating to protocols for preparing annual reviews related to the existence (continued existence) of an intolerable condition during the identified interval? The plaintiff has not alleged any agreed or otherwise identified deadline for action, and to the extent that end of year evaluations occur toward the end of a school year, why was August 14, 2019, of any (much less special) significance? This assumes that even June 10, 2019, has special significance in terms of an intolerable environment. On that date, a generally

favorable report had been released—while perhaps not as critical of individuals as the plaintiff may have wanted, it did criticize the manner in which the 'plagiarized' report had been prepared and was critical of the person who had prepared it (if attributing it to inexperience, etc.). It also indicated that the plaintiff's review would be upgraded in a substantial manner. And . . . it contained the never challenged assertion that '[the plaintiff] acknowledged that no current administrator ever has suggested that [the plaintiff's] job is in jeopardy or that the district is considering terminating her employment.'

"The court is required to give the nonmoving party the benefit of all reasonable favorable inferences but there is no way to read the complaint as asserting any conduct that reasonably can be construed as part of an intolerable environment within 180 days of filing of the CHRO complaint—and this does not include any additional weight [given] to the fact that 180 days prior to the date of filing may already have been during school summer vacation such that there was no workplace environment being encountered on June 22 and thereafter.

"Assuming the factual accuracy of [the allegation that the defendant failed to take remedial action during the time period between June 10 and August 14, 2019], and further assuming that there was a deadline for action on or after June 22, 2019, and further assuming that there had been a duty to report to the plaintiff on the status of the remedial action anticipated, the court cannot conclude that the plaintiff has identified conduct relating to an intolerable working environment that had persisted to June 22, 2019, and thereafter, sufficient to make the actual date of filing of her CHRO complaint timely." (Citation omitted; emphasis omitted.) The court rendered judgment on October 11, 2022, and this appeal followed.

On appeal, the plaintiff claims that the court erred in striking her complaint on the ground that her claim to the CHRO was not untimely because the 180 day period prescribed by § 46a-82 (f) did not begin to run until her August 14, 2019 resignation.[5] We are not persuaded.

To resolve the plaintiff's claim on appeal, we must interpret the statutory language set forth in § 46a-82 (f). Issues of statutory interpretation present questions of law over which we exercise plenary review. See *L. L.* v. *M. B.*, 216 Conn. App. 731, 739, 286 A.3d 489 (2022). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute." (Internal quotation marks omitted.) Id.,

[5] The plaintiff also claims that the court erred in concluding that her CHRO complaint was untimely because the "[d]efendant's inactions were part of an ongoing discriminatory practice, rendering the CHRO complaint timely under the continuing violation theory." See *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 77 n.14, 171 A.3d 409 (2017) ("The continuing violations doctrine is an equitable exception to a strict application of a statute of limitations where the conduct complained of consists of a pattern that has only become cognizable as illegal over time. . . . [W]hen a defendant's conduct is part of a continuing practice, an action is timely [as] long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." (Internal quotation marks omitted.)). Because the plaintiff did not argue to the trial court that her complaint to the CHRO was timely on the basis of the continuing violation theory and is raising it for the first time on appeal, that argument is not properly before us. See *Lowthert* v. *Freedom of Information Commission*, 220 Conn. App. 48, 56, 297 A.3d 218 (2023).

740. Our review of a court's ruling on a motion to strike also is plenary. *Tremont Public Advisors, LLC* v. *Materials Innovation & Recycling Authority*, 216 Conn. App. 775, 778, 286 A.3d 485 (2022), cert. denied, 346 Conn. 906, 287 A.3d 1089 (2023).

Pursuant to § 46a-82 (f), complaints filed with the CHRO must be "filed within one hundred and eighty days after *the alleged act of discrimination* . . . ." (Emphasis added.) The plain language of the statute focuses on the allegedly discriminatory conduct of the defendant and makes no mention of the date of a complainant's resignation. See General Statutes (Rev. to 2019) § 46a-82 (f).

In support of her argument that the 180 day period did not begin to run until the date of her resignation, the plaintiff cites to *Green* v. *Brennan*, 578 U.S. 547, 136 S. Ct. 1769, 195 L. Ed. 2d 44 (2016), wherein the United States Supreme Court held that the forty-five day limitation period within which to file a claim under 29 C.F.R. § 1614.105 (2010) began to run on the date that the employee, Marvin Green, resigned. Id., 550. As the trial court aptly concluded, *Green* is inapposite to the present case. Green's claim was not governed by § 46a-82 (f) or any other Connecticut statute. Because Green was a federal employee who worked in Colorado, his constructive discharge claim was governed by 29 C.F.R. § 1614.105; see id., 550, 553; which is not applicable to the present case. Moreover, the plaintiff's reliance on *Green* is further belied by the difference in the statutory language at issue. The regulation at issue in *Green* requires an aggrieved person to initiate his or her claim "within 45 days of the date of the matter alleged to be discriminatory . . . ." 29 C.F.R. § 1614.105 (a) (1) (2010). Although the court in Green held that the " 'matter alleged to be discriminatory' " was not limited to the conduct of the defendant; *Green* v. *Brennan*, supra, 553–54; that is not the same language used in § 46a-82

(f), which specifically applies to the employer's discriminatory *act*.

Additionally, as the trial court explained, the plaintiff in the present case, unlike Green, failed to allege any ongoing discrimination that continued until the date of her resignation in that she did not, in fact, work for at least several weeks prior to that date because school was not in session for the summer. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. . . . In order for the time period to commence with the discharge, [the plaintiff] should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of [her] employment. . . . [She] could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory." (Citations omitted; internal quotation marks omitted.) *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 112–13, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

Here, the plaintiff has not identified how the defendant's alleged inaction perpetuated an intolerable working environment when school was not in session for at least thirty days preceding the date of her resignation. We therefore agree with the court's conclusion that "there is no way to read the [plaintiff's] complaint as asserting any conduct that reasonably can be construed as part of an intolerable environment within 180 days of filing of the CHRO complaint . . . ." Accordingly, the court properly determined that the plaintiff's complaint to the CHRO was untimely.

The judgment is affirmed.

In this opinion the other judges concurred.

RODNEY S. HANKERSON *v.* COMMISSIONER OF CORRECTION (AC 45736)

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

Syllabus

The petitioner, who had been convicted of felony murder and robbery in the first degree, appealed to this court from the judgment of the habeas court, which dismissed his third petition for a writ of habeas corpus after he failed to establish good cause for its late filing. The petitioner filed his third petition in 2017 after having withdrawn a second habeas petition that he had filed in 2012 and nearly three years after judgment on his first habeas petition became final in October, 2014. Because the third petition was filed outside of the two year time limit for successive petitions set forth by statute (§ 52-470 (d)), the habeas court conducted an evidentiary hearing pursuant to § 52-470 (d) and (e) on a motion filed by the respondent, the Commissioner of Correction, for an order to show cause as to why the third petition should not be dismissed as untimely. At a hearing on the respondent's motion, the petitioner testified that good cause existed because, inter alia, his counsel at the time the second habeas petition was withdrawn had rendered ineffective assistance by misadvising or failing to advise him of the time limit to file a new habeas petition if he withdrew the pending second petition. Relying on *Kelsey* v. *Commissioner of Correction* (343 Conn. 424), which identified factors relevant to a habeas court's determination of whether good cause exists to excuse the untimely filing of a habeas petition, the habeas court concluded that a failure by counsel to advise a petitioner of the time limit in § 52-470 (d) was not an external factor that constituted good cause to excuse the untimely filing. *Held* that the habeas court did not apply the correct legal standard under § 52-470 (d) and (e) in deciding that the petitioner had not established good cause to excuse the late filing of his third habeas petition: the state of the law as to whether ineffective assistance of counsel is a factor that may constitute good cause to excuse a delay in filing was clarified by our Supreme Court in *Rose* v. *Commissioner of Correction* (348 Conn. 333), which was decided during the pendency of this appeal and which concluded that ineffective assistance of counsel cannot be imputed to the petitioner and is an external, objective factor under *Kelsey* that may constitute good cause to excuse a late filing under § 52-470 (d) and (e); moreover, although the court in *Rose* did not state that counsel's failure to advise a petitioner of the deadline necessarily constitutes ineffective assistance, it decided that such a determination is a fact specific inquiry that is left to the habeas court's discretion, taking into consideration all relevant *Kelsey* factors in light of the totality of the circumstances

presented; accordingly, this court reversed the judgment and remanded the case to the habeas court for a new hearing and good cause determination under § 52-470 (d) and (e).

Argued January 2—officially released January 30, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, overruled the petitioner's objection to the respondent's motion to show cause and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

David B. Bachman, assigned counsel, for the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom were *Rebecca R. Zeuschner* and *Nicholas L. Scarlett*, certified legal interns, and, on the brief, *Donna Marie Fusco*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Rodney S. Hankerson, appeals from the habeas court's dismissal of his petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (d) and (e). On appeal, the petitioner claims that the court erred in concluding that he failed to establish good cause for his late-filed petition. In particular, the petitioner argues that his prior habeas counsel's failure to advise him of the statutory deadline for filing a new petition following the withdrawal of his then pending petition constituted ineffective assistance of counsel, which constituted good cause for the delay in filing. In light of our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), we conclude that the judgment of

the habeas court must be reversed, and we remand the case for a new good cause hearing.

The following procedural history is relevant to our analysis. In 2007, a jury found the petitioner guilty of felony murder and two counts of robbery in the first degree. Thereafter, the trial court imposed a total effective sentence of sixty years of incarceration. This court affirmed the petitioner's conviction, and our Supreme Court denied the petitioner's petition for certification to appeal from this court's decision. See *State* v. *Hankerson*, 118 Conn. App. 380, 381, 983 A.2d 898 (2009), cert. denied, 298 Conn. 932, 10 A.3d 518 (2010).

In 2007, the petitioner filed his first habeas petition, alleging that his trial counsel, Attorney Jeffrey Kestenband and Attorney William Paetzold, provided ineffective assistance during his criminal trial. The habeas court denied the petition, and the petitioner appealed to this court, which dismissed the appeal, concluding that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal. See *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 363, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014). In 2012, the petitioner filed his second habeas petition, alleging ineffective assistance of both his appellate counsel, Attorney Jennifer Vickery, and his first habeas counsel, Attorney Arthur Ledford. On September 12, 2016, the petitioner withdrew that petition.

Thereafter, on June 2, 2017, the petitioner filed the underlying third habeas petition, which he amended on May 19, 2021. In his amended petition, the petitioner alleged that (1) the state presented false testimony at his criminal trial and failed to disclose exculpatory evidence, (2) the jury returned an inconsistent verdict, and (3) his trial counsel and prior habeas counsel were

ineffective. On April 8, 2021, the respondent, the Commissioner of Correction, filed a motion pursuant to § 52-470 (d) and (e)[1] for an order to show cause as to why the petition should not be dismissed as untimely because it was filed more than two years after the date the judgment on the petitioner's first habeas petition became final, October 8, 2014.[2] In response, the petitioner claimed that "good cause" existed for the delay because, inter alia, (1) his second habeas counsel, Attorney Thomas J. Piscatelli, "misadvised and/or failed to advise the petitioner that his withdrawal" of his second habeas petition "would necessarily render future habeas claims outside the allowable time limits set forth

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2014 . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. . . .

"(e) . . . If . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

[2] Given the well documented legislative history demonstrating "that § 52-470 was intended to grant habeas courts 'a lot of discretion' in weeding out nonmeritorious habeas claims"; *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 434, 274 A.3d 85 (2022); we question whether filing a motion to show cause almost four years after the original habeas petition was filed serves that purpose. See id. ("[I]n 2012, the legislature amended § 52-470 with the goal of enacting comprehensive habeas reform. . . . The amendments were intended to supplement that statute's efficacy in averting frivolous habeas petitions and appeals. . . . [Moreover] the reforms were the product of collaboration and compromise by representatives from the various stakeholders in the habeas process, including the Division of Criminal Justice, the Office of the Chief Public Defender, the criminal defense bar, and the Judicial Branch." (Citation omitted; internal quotation marks omitted.)). Although the petitioner does not argue that a court can or should consider the respondent's delay in filing such a motion when conducting its good cause analysis, we simply note that such delay does little to assist the court in weeding out frivolous claims so that it can turn its attention to potentially meritorious petitions.

by . . . § 52-470 without good cause," and (2) "the lack of access to sufficient legal resources . . . while incarcerated left the petitioner unable to remain abreast of the latest legal developments and, specifically, the law with respect to . . . § 52-470."

On April 29, 2022, the court held an evidentiary hearing, at which the petitioner presented four witnesses: himself; Piscatelli, his counsel when the second habeas petition was withdrawn; and Warden Daniel Dougherty and Deputy Warden Damian Doran, both from the MacDougall-Walker Correctional Institution, where the petitioner was in custody at all relevant times. The petitioner presented his testimony and that of Piscatelli to support his claim that Piscatelli provided ineffective assistance of counsel by failing to advise him of the deadline to file a new habeas petition if he withdrew his then pending second petition. The petitioner presented the testimony of Dougherty and Doran to support his claim that he did not have adequate access to legal materials at the MacDougall-Walker Correctional Institution to discover on his own the applicable filing deadline.

On June 22, 2022, the court issued an order overruling the petitioner's objection to the respondent's motion to show cause and dismissed the habeas petition. The entirety of the court's order read: "After hearing and oral argument, and having considered the written filings of the parties in support of their respective positions, the court finds the petitioner has failed to establish good cause to excuse his delay in filing the instant petition.

"Among other evidence adduced at the hearing, the petitioner had some access to legal resources in correctional institutions during his period of incarceration, as testified to by both the petitioner and the other two

witnesses at the hearing, but never sought to avail himself of them.

"Assuming, arguendo, that the petitioner's testimony was accurate, this court finds that it is insufficient to overcome the rebuttable presumption of unreasonable delay in [the] filing of the instant petition, pursuant to *Kelsey* v. *Commissioner of Correction*, [343 Conn. 424, 441–42, 274 A.3d 85 (2022)], in that there was no competent evidence of external factors affecting timely filing. Accordingly, the matter is dismissed."

Thereafter, the habeas court granted the petitioner's petition for certification to appeal, and this appeal followed.

After the parties filed their briefs in this appeal, but before oral argument, our Supreme Court issued its decision in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333.[3] In *Rose*, the court addressed whether prior habeas counsel's failure to advise a petitioner of the deadline for filing a new petition following the withdrawal of a pending petition may constitute good cause to justify a late-filed petition under § 52-470 (c)[4]

[3] Prior to oral argument, we issued an order asking the parties to be prepared to address at oral argument *Rose*'s impact on this case. At oral argument, counsel for the petitioner argued that, in light of *Rose*, we should reverse the judgment of the habeas court and remand the case for a new good cause hearing. Although counsel for the respondent argued that a remand was not necessary, he conceded that this court cannot say how the habeas court would have exercised its discretion in light of our Supreme Court's holding in *Rose*.

[4] General Statutes § 52-470 (c) provides: "Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2017; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction."

and (e). See id., 346–47. In that case, the respondent, relying on our Supreme Court's decision in *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42, argued that an error by counsel, even if it rose to the level of constitutionally deficient performance, was not an " 'external factor' " that could constitute good cause. *Rose* v. *Commissioner of Correction*, supra, 347. In particular, the respondent in *Rose* relied on the Supreme Court's statement in *Kelsey* that, "to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something *outside of the control of the petitioner or habeas counsel* caused or contributed to the delay." (Emphasis added; internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 441–42.

In *Rose*, the court rejected the respondent's reliance on *Kelsey* and, instead, relying on federal precedents in the area of procedural default,[5] concluded that "[i]neffective assistance of counsel is an objective factor external to the defense because the [s]ixth [a]mendment itself requires that responsibility for the default be imputed to the [s]tate. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external

The difference between subsections (c) and (d) of § 52-470 is that the former applies to a first habeas petition and the latter applies to subsequent habeas petitions. The fact that *Rose* involved subsection (c) and this case involves subsection (d) is irrelevant to our analysis; the presumption of delay and good cause provisions in § 52-470 (e) apply to both subsections.

[5] "In essence, the procedural default doctrine holds that a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016).

factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps, regardless of whether counsel is flouting procedural rules or hedging against strategic risks, a petitioner is not bound by the ineffective assistance of his counsel. . . . Consistent with this authority, we conclude that ineffective assistance of counsel is an objective factor external to the petitioner that may constitute good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e)." (Citations omitted; internal quotation marks omitted.) *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 347–48.

As noted previously in this opinion, the habeas court in the present case expressly relied on *Kelsey* in concluding that, even if the petitioner's testimony, which indicated that he was not properly advised by Piscatelli of the deadline for filing a new habeas petition, were accurate, Piscatelli's failure to advise the petitioner would not be an external factor that constitutes good cause. In reaching this conclusion, the habeas court did not have the benefit of our Supreme Court's clarification of *Kelsey* in *Rose* regarding "the fundamental distinction between internal and external factors that cause or contribute to a petitioner's failure to comply with a procedural rule." Id., 347. The habeas court therefore did not apply the correct legal standard when deciding whether the petitioner had demonstrated good cause for the late filing of his petition. Thus, the petitioner is entitled to a new hearing at which the court applies the correct legal standard.

To be clear, although the court in *Rose* held that constitutionally deficient performance by habeas counsel may constitute good cause for a late-filed petition, it did not hold that counsel's failure to advise a petitioner of the deadline for filing a new petition necessarily constitutes ineffective assistance of counsel. See id.,

349–50. Such a determination is a fact specific inquiry that depends on a number of factors, including the relationship between the petitioner and his counsel during the pertinent time. For example, a petitioner who terminates his relationship with counsel before withdrawing his pending petition and filing a new petition stands in a very different position than does a petitioner who withdraws his petition on the advice of his counsel and is told the wrong deadline for filing a new petition by that counsel.[6]

Furthermore, although the habeas court may conclude that ineffective assistance of counsel constitutes good cause in this case, it is not required to do so. Such a determination is still left to the discretion of the habeas court taking into consideration the *Kelsey* factors. See id., 343. "No single factor is dispositive, and, in ascertaining whether good cause exists, the habeas court must consider all relevant factors in light of the totality of the facts and circumstances presented." (Internal quotation marks omitted.) Id. For example, in the context of a purported failure to advise the petitioner of the applicable filing deadline, the habeas court could conclude that counsel's failure was constitutionally deficient and still conclude that good cause does not exist because the petitioner was otherwise aware of the deadline or unreasonably delayed in filing a new petition when he had opportunities to

[6] During oral argument before this court, counsel for the respondent stated that the respondent is considering ways to ensure that all inmates are aware of the filing deadlines in § 52-470 (c) and (d). In particular, counsel noted the possibility of posting such information in the state's correctional facilities or suggesting to the habeas court that it canvass a petitioner on his awareness of any filing deadlines before accepting a withdrawal of a pending petition. In response to counsel's suggestion, we also noted the possibility that the public defender's office could encourage counsel under its supervision to provide such information to petitioners before pending petitions are withdrawn. Whatever the mechanism, we encourage the habeas bench and bar to pursue one or more remedies that would effectively eliminate this issue.

independently discover the applicable deadline. In the end, the court's conclusion as to whether the petitioner has established good cause is still reviewed under the abuse of discretion standard. See id.

The judgment is reversed and the case is remanded to the habeas court for a new hearing and good cause determination under § 52-470 (d) and (e).