F. S. *v.* J. S.*
(AC 45698)

Alvord, Seeley and Westbrook, Js.

Syllabus

The defendant appealed from the judgment of the trial court awarding sole legal and physical custody of the parties' minor child, O, to the plaintiff and imposing certain restrictions on his visitation with O. After the plaintiff initiated the underlying marital dissolution action, the parties

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to use the parties' full names or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

filed numerous motions with the court, and, given the volume and nature of the motions, the court ordered that neither party could file any additional motions without first requesting leave from the court, with an exception for ex parte emergency requests approved by the guardian ad litem. The parties thereafter entered into an agreement to dissolve their marriage, which indicated that, although they agreed upon the division of their marital property and debt and the issue of alimony, they had been unable to resolve issues related to custody, access and care of O and that those issues should be resolved by the court in subsequent proceedings after completion of a custody evaluation by S, a clinical psychologist. The court subsequently rendered a judgment of dissolution of marriage that incorporated the parties' agreement. S filed her custody evaluation with the court, and the custody hearing was scheduled to commence in March, 2020, but, due to the COVID-19 pandemic, it did not go forward as scheduled. When the trial ultimately commenced, the court heard testimony from L, a social worker from the Department of Children and Families, over repeated objections by the defendant. L testified that she had investigated an anonymous call made to the department concerning the plaintiff's purported physical removal of O from a baseball game in which he was participating. During L's testimony, a redacted version of the relevant department investigation protocol was admitted into evidence as a full exhibit. L testified that her investigation included, among other things, interviews with O and conversations with G, O's former therapist, and that, as a result of her investigation, the department discovered no concerns with the plaintiff's actions during the baseball game incident or her ability to parent O, but the department did develop concerns about O's emotional well-being with respect to the defendant. L also testified that the department subsequently substantiated emotional neglect of O by the defendant, and, in response to questions from the defendant on cross-examination, that she had reviewed an affidavit sworn to by G and that G's opinion, both as expressed in the affidavit and in interviews, was relied on by the department in its investigation. L's testimony did not disclose the actual contents of G's affidavit. The defendant later attempted to have a copy of G's affidavit admitted into evidence, but the plaintiff objected on hearsay grounds, and it was marked for identification purposes only. Several days into the trial, the defendant made an oral motion for a continuance, arguing that he would not go forward upon medical advice and indicating that, inter alia, his blood pressure that morning was at unacceptable levels and that he was disabled as a result of an auto accident. The court denied the defendant's oral motion, noting that he had filed several motions for continuance within the previous few days citing other reasons, all of which were denied. Later that day, after the defendant provided the court with a letter from his medical provider that indicated that the defendant suffered from angina and asked the court to adjust the trial schedule in an attempt to reduce

the defendant's stress, the defendant indicated to the court that his stress was largely due to not having time between hearing dates to eat properly and prepare his case. The defendant did not refer to the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) or clarify that he was seeking an accommodation under the ADA. The court reconsidered the defendant's oral motion for a continuance, stating on the record that it was going to adjust the court's schedule to accommodate the defendant's health and to reduce his stress, and later issued a written order granting the defendant's motion for continuance and indicating that the remaining days of trial would continue in half day morning sessions. Approximately ten half day morning sessions were held. Thereafter, the court scheduled additional sessions for alternating full days. The defendant, with permission, filed a motion for a scheduling order in which he argued that the court previously had granted him an ADA accommodation limiting trial dates to half days and stating that the full day trial dates scheduled by the court were contrary to his medical provider's advice and contrary to the existing order of accommodation. The defendant requested that the court reschedule further sessions to half day morning sessions. The court denied the motion for a scheduling order on the record, and the next day the defendant filed a motion in which he indicated that he had filed a grievance with the ADA administrator for the Connecticut Judicial Branch. He asked the court to stay any further full day proceedings until the grievance matter was resolved, although he indicated that he was able to go forward with half day morning sessions pursuant to the original accommodation. The court denied the motion, and, at the next day's hearing, the defendant made an oral motion for a continuance that the court denied without prejudice to the defendant producing documentation from his physician regarding his health status. The defendant informed the court that he was not proceeding with his case and abruptly left the courthouse and did not return. The defendant appeared for the next scheduled court date. Before the lunch recess, the defendant informed the court on the record that he was not going to return to court for a full day trial until the court modified its order. The court informed the parties that the hearing would resume at 2 p.m. unless a written motion for a continuance was filed and granted. The defendant neither filed a motion for a continuance nor appeared for the afternoon session. Several days later, the defendant again appeared for the hearing in the morning but again failed to appear for the afternoon session and did not file a motion for a continuance. On the basis of the defendant's failure to appear, the court determined that the defendant had failed to present his testimony and evidence as set forth in the court's scheduling order, and, therefore, the court determined that the defendant's case was concluded. The court also denied all of the defendant's pending motions with prejudice for failure to present any testimony, evidence, and argument to the court. The plaintiff was permitted to provide rebuttal testimony. In the court's

memorandum of decision, it set forth detailed findings with respect to the defendant's behavior generally, his parenting skills, and his difficult relationship with O, which contrasted with the healthy relationship that the court found O had with the plaintiff. The court noted in some detail the defendant's medical diagnosis by two separate doctors of narcissistic personality disorder and his failure to make or maintain any significant progress through treatment. The court ultimately awarded full legal and physical custody of O to the plaintiff. With respect to parenting time, the court ordered that the defendant was entitled to weekly supervised access to O via a third-party therapeutic supervised visitation agency, with the cost paid by the defendant. However, the defendant's parenting access would begin only after the defendant provided proof to the plaintiff and/or her counsel that he had engaged a clinician to address his narcissistic personality disorder, and such proof was required to be updated on a quarterly basis. The court also issued orders limiting the defendant's right to seek modification or expansion of his parenting access. The court further ordered that the defendant could not participate in any of the child's extracurricular and sporting activities until he satisfied the conditions for seeking modification/expansion of the parenting access orders. *Held*:

1. The defendant's claims that the trial court violated his rights under the ADA were unavailing, this court having determined that, even assuming for purposes of argument that the defendant had a disability that entitled him to a reasonable accommodation under the ADA as a matter of procedural due process, he in fact received such accommodation and failed to demonstrate otherwise or to point to any evidence in the record from which it reasonably could be concluded that any of the trial court's adverse actions or rulings in the present matter were the product of retaliatory animus rather than a proper exercise of judicial discretion:

   a. The defendant could not prevail on his claim that the trial court improperly refused to provide him with the same medical accommodation granted to him earlier in the trial, as he did not make a formal ADA request prior to his oral motion to the court, and the letter from his medical provider did not suggest any particular accommodation but only recommended that the court adjust the hearing schedule, which at that time consisted of back-to-back full day hearings, so as to reduce the defendant's stress; moreover, nothing in the language of the court's order limiting the length of the remaining then scheduled hearing dates to half days rendered that accommodation nonmodifiable in the future, and, to the contrary, it could be reasonably inferred from the court's requirement that the defendant keep it apprised of any changes in his medical condition that the accommodation was never intended to be permanent or to bind future courts in the event of a change in relevant circumstances; furthermore, the defendant provided no authority that stands for the proposition that once a public entity has provided an accommodation it is not permitted to adjust it under appropriate circumstances or to

provide a substitute accommodation, and, in the present case, when it became clear to the court that continuing with half day sessions would be untenable and interfere with docket management and the fair administration of justice, it was well within the court's discretion to substitute the prior accommodation for one that was equally reasonable, and proceeding with full day hearings on nonconsecutive days still allowed time for the defendant to rest and recover from the prior day's proceedings and reduced the stress of preparing for the next day, which was fully in accord with the recommendation of the defendant's medical provider and was, in fact, the exact accommodation the defendant originally requested.

b. The defendant could not prevail on his claim that the trial court retaliated against him for exercising his rights under the ADA by denying motions and prematurely resting his case; the defendant failed to point to anything in the record that would support his assertion that the trial court's actions were made with discriminatory animus rather than, as reflected in the record, as a response to the defendant's failure to appear, which was a reasonable and nondiscriminatory basis for the court's actions for which the defendant failed to account.

2. The trial court properly considered the defendant's mental health diagnosis as a basis for determining custody and setting conditions regarding visitation: pursuant to the statute (§ 46b-56) governing orders regarding the custody and care of minor children in dissolution actions, one of the factors that a court may consider is the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interest of the child, and, in the present case, the court did not award the plaintiff sole custody of the parties' child solely on the basis of the defendant's mental health diagnosis but, rather, it was but one of a number of reasons provided by the court for its decision and, therefore, was not in and of itself determinative of the court's custody order; moreover, the court's focus was not on the defendant's mental health per se, but, rather, the court identified that it was concerned by the defendant's failure to make reasonable progress to address its harmful effect on his parenting of O; furthermore, the defendant failed to demonstrate that the court made any clearly erroneous factual findings regarding his mental health or to point to anything in the record that would support his assertions that the court's consideration of his mental health diagnosis amounted to retaliation or disability discrimination.

3. The trial court did not abuse its discretion by considering the custody evaluation prepared by S in determining the best interest of O: the court did not rely solely on S's custody evaluation but, rather, it had ample current evidence before it of the defendant's present ability to parent, and, although the court accepted S's evaluation into evidence, it considered and evaluated it in light of the updated testimony from S and others,

as well as evidence submitted by both parties regarding the child's and parents' current situations; moreover, although S's custody evaluation may have had some limitations due to the delay of the courts being closed due to COVID-19, this went solely to the weight the trial judge gave the report rather than to its admissibility.

4. The defendant could not prevail on his claim that the trial court improperly required the parties to request leave of the court before filing trial and pretrial motions and improperly denied multiple such requests: although the defendant relied on language from *Ahneman* v. *Ahneman* (243 Conn. 471), in which the Supreme Court held that the trial court lacked the discretion to refuse to rule on certain motions filed by the defendant in that case, there was nothing in the decision in *Ahneman* curtailing a trial court's exercise of its considerable discretion over its docket or expressly barring the type of prohibitory order issued in the present case, and, to the contrary, the court in *Ahneman* acknowledged that exceptions to the general rule that a trial court must consider and decide on a reasonably prompt basis all motions properly placed before it may exist in an extreme, compelling situation; moreover, several years after the *Ahneman* decision, this court in *Strobel* v. *Strobel* (92 Conn. App. 662) opined that a prohibitory order essentially identical to the one at issue in the present case constituted a praiseworthy attempt by the trial judge to limit the parties' barrages of repetitive and abusive motions, and this court found that the record in the present case reflected no less a compelling reason for an order attempting to curtail the flood of repetitive and oftentimes frivolous motions filed in this matter.

5. The defendant could not prevail on his claim that the trial court improperly awarded sole custody of O to the plaintiff even though the parties had always shared custody and the plaintiff made no showing of a change of circumstances; in the present case, the parties shared legal and physical custody of O until the time of the dissolution of marriage, and whether such joint custody should continue in the future was precisely the issue that the parties could not agree upon in their separation agreement and left for the court in the present action to decide, and, accordingly, the case law cited by the defendant holding that courts lack the authority to modify existing custody orders in the absence of a material change of circumstances was inapposite to the facts of this case.

6. The defendant could not prevail on his claim that the trial court erroneously found that the defendant had narcissistic personality disorder; this court was not left with a definite and firm conviction that any mistake was made with respect to the trial court's challenged findings, as the evidence in the record, including testimony from S and her custody evaluation, adequately supported the court's findings that the defendant had been diagnosed with narcissistic personality disorder and that this diagnosis constituted a long-term pattern of maladaptive behavior that was not amenable to treatment.

7. The defendant could not prevail on his evidentiary claims that the trial court improperly admitted certain testimony of L and improperly admitted and relied on an affidavit of G: on the basis of this court's thorough review of the transcripts of L's testimony and the many objections raised during her testimony by the defendant, this court concluded that the defendant failed to demonstrate how the trial court abused its broad discretion with respect to the admission of L's testimony; moreover, to the extent that the defendant attempted to raise additional objections that were not raised at trial, this court declined to review these unpreserved aspects of his claim, and, with respect to the objections he did raise at trial, this court concluded that the trial court properly ruled on them in the manner that it did for the reasons provided and that further explication by this court was unwarranted; furthermore, there was nothing in the record from which to conclude that the trial court improperly relied on G's affidavit in awarding custody to the plaintiff, as the court never stated in its memorandum of decision that it relied on G's affidavit, which was not in evidence, and the few references to G by the court in its memorandum of decision were incidental and did not reflect any error in the court's reasoning.

Argued November 13, 2023—officially released February 20, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Prestley, J.*, accepted the parties' stipulation to bifurcate the trial as to the issue of custody; thereafter, the case was tried to the court, *Prestley, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; subsequently, the case was transferred to the Regional Family Trial Docket and the issue of custody was tried to the court, *Nguyen-O'Dowd, J.*; judgment granting sole legal and physical custody of the parties' minor child to the plaintiff, from which the defendant appealed to this court. *Affirmed.*

J. S., self-represented, the appellant (defendant).

Dennis Francis O'Toole, for the appellee (plaintiff).

Opinion

WESTBROOK, J. In this marital dissolution action, the defendant, J. S., appeals from the judgment of the

trial court awarding the plaintiff, F. S., sole legal and physical custody of the parties' minor child, O. The self-represented defendant claims on appeal that he is entitled to a new custody hearing because the court improperly (1) violated the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2018),[1] by refusing to continue to provide him with a medical accommodation previously granted to him by the court; (2) terminated the defendant's presentation of evidence and denied certain motions in retaliation for his exercising his rights under the ADA; (3) relied on the defendant's mental disability as a basis for awarding custody to the plaintiff and restricting his right to visitation; (4) relied on a stale custody evaluation in determining the best interest of O; (5) required the parties to request leave of the court before filing motions and denied multiple such requests made by the defendant; (6) awarded sole custody of O to the plaintiff despite the fact that the parties previously shared custody and the plaintiff failed to demonstrate any substantial change in circumstances; (7) found that the defendant suffered from narcissistic personality disorder; and (8) committed evidentiary errors by (a) admitting the testimony of a social worker from the Department of Children and Families and (b) admitting and relying on an affidavit of O's former therapist, Damion Grasso. Having carefully reviewed the voluminous record presented,[2] we conclude that the defendant has failed to demonstrate any reversible error. Accordingly, we affirm the judgment of the court.

The record reveals the following facts, which were either found by the court or are undisputed in the

[1] The ADA provides in relevant part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2018).

[2] This case has been pending for more than seven years, and the docket sheet contains well over one thousand entries.

record, and procedural history. The plaintiff initiated the underlying marital dissolution action in September, 2016. The parties have one child together, O, who was born in May, 2011. By agreement of the parties, the court issued a number of pendente lite orders at the start of the dissolution proceedings, including appointing Attorney Margaret Bozek as guardian ad litem (GAL) for O; awarding the defendant twice weekly supervised parenting time; and ordering the defendant to pay child support to the plaintiff in the amount of $142 per week. On January 3, 2017, the parties reached a subsequent agreement regarding the defendant's parenting time. The court approved that agreement, which provided the defendant with weekly overnight parenting time and an additional five hours of parenting time on weekends.[3]

Early in the proceedings, the parties also filed numerous motions with the court, the bulk of which were disposed of by the court, *Simon*, *J.*, on March 3, 2017, following a hearing.[4] Given the volume and nature of the motions, Judge Simon also ordered that neither party could file any additional motions without first requesting leave from the court, except that the parties could file any ex parte emergency request without leave of the court provided that such request also included an affidavit from the GAL stating that she agreed with the request.

On June 29, 2017, the criminal court in the judicial district of Hartford, geographical area number twelve

[3] Originally, the defendant would have parenting time with O beginning after school on Wednesdays and return him to school on Thursdays. On April 19, 2017, the court modified the defendant's parenting time to accommodate the defendant's request that O be permitted to play Little League baseball. Pursuant to the new order, the defendant's weekly overnights would occur on whichever day that O had a game, and the weekend visit was moved from Sundays to Saturdays.

[4] The defendant filed the overwhelming majority of these motions, a practice that continued throughout the underlying proceedings.

(G.A. 12), informed the court that the defendant had been arrested and arraigned for violating a protective order involving the plaintiff and that he was being held on a $500,000 bond. That same day, the court issued an order in which it granted the plaintiff temporary sole decision-making authority over O's activities and vacated the then existing visitation order for the defendant, indicating that the defendant's access to O would revert to the court's orders of January 3, 2017.[5] Subsequently, on July 19, 2017, the court suspended the defendant's parenting time due to court-ordered competency evaluations in his pending criminal matters. The court also granted sole temporary legal custody of O to the plaintiff until further order of the court.[6]

On January 19, 2018, in response to motions filed by the defendant, the court, *Olear*, *J.*, entered an order restoring the defendant's parenting time with O to once a week for ninety minutes through a supervised visitation facility. Additionally, by agreement of the parties, the court ordered them to participate in conflict management therapy with Stephen Humphrey, a clinical psychologist, and to undergo a custody/psychological evaluation with Linda Smith, also a clinical psychologist.

On April 3, 2018, the parties entered into an agreement to dissolve their marriage. The agreement, in relevant part, provided the following: "The parties acknowledge that as of the date hereof, they have been unable to resolve the issues related to custody, access and

[5] The court indicated in its order that the defendant's most recent arrest was the seventh criminal case pending against him in G.A. 12.

[6] As stated by the court in the underlying memorandum of decision, "[i]t was not until October 21, 2020, when the court, *Connors*, *J.*, acting upon the defendant's motion for clarification (#438), vacated the prior order for temporary sole legal custody to the plaintiff (#438.10). The court . . . restored joint legal custody to the parties with the plaintiff having final decision-making for summer camp and therapy issues."

care of [O]. The issues shall be resolved by subsequent proceedings after completion of the custody evaluation being conducted by Dr. Smith." Although the parties were unable to reach a custody agreement, they agreed upon the division of their marital property and debt and that neither would pay alimony to the other. The court, *Prestley*, *J.*, rendered a judgment of dissolution of marriage that same day that incorporated the parties' agreement. The court also ordered that the current child support order of $142 per week would remain in effect.

Following a hearing on April 4, 2018, the court, *Olear*, *J.*, issued an order granting the defendant unsupervised parenting time with O on Thursdays after school. If a Little League practice or game interfered with the Thursday parenting time, the visitation would occur on Monday. The court also granted the GAL's request for permission to withdraw from this matter. The court, *Hon. Gerard I. Adelman*, judge trial referee, subsequently denied the defendant's motion, which objected to the GAL expenses and sought to remove/replace the GAL. The court ordered the defendant to pay the GAL the sum of $22,286.42.

On June 22, 2018, Judge Olear denied the defendant's request to resume overnight visits with O but granted the defendant additional parenting time on Sundays for two hours. The court also clarified that the previously ordered Thursday parenting time was for two hours.

On October 15, 2018, the defendant sought leave of the court to file several motions. Specifically, he sought to file three motions for contempt in which he alleged that the plaintiff had violated court orders regarding visitation, the nonconsumption of alcohol, and O's participation in youth soccer. The defendant also asked the court for a hearing on previously filed motions that sought orders to restore his custodial rights, to increase

visitation time, and to award costs.[7] On December 14, 2018, the defendant filed a largely duplicative motion asking again for permission to file a motion for contempt regarding visitation and a motion seeking an order requiring the parties to undergo drug and alcohol testing. He also requested a scheduling order to hear all of his then outstanding motions. Judge Olear denied both of the defendant's requests for leave to file motions but granted his request for a hearing on his motion seeking an increase in parenting time.

On March 6, 2019, the parties entered into an agreement allowing O to participate in Little League tryouts. Following a hearing on April 5, 2019, the court issued orders that the parties would take O to and from practices and/or games during their respective parenting time. The court increased the defendant's parenting time to Tuesdays and Thursdays starting after school to 5:30 p.m. and moved his Sunday parenting time to Saturdays from 1 p.m. to 4 p.m.

On May 8, 2019, the defendant filed a request for leave to file six motions for contempt and a motion for restoration of custody. The court denied the request for leave without prejudice, indicating that the defendant could "request to have the motions heard at the custody hearing." On July 23, 2019, the defendant filed a request for leave to file four motions for contempt and a motion to restore his parenting time. The next day, he filed another motion for leave to file a motion for contempt. The court, *Nastri*, *J.*, granted the defendant's motions for leave with respect to the motions for contempt but denied leave to file the motion to restore visitation.

[7] In the memorandum of decision underlying this appeal, the court stated that throughout the proceedings, rather than allowing matters to be scheduled by the court, it was customary for the defendant to inundate the court and the plaintiff with multiple, often duplicative, filings. This observation is borne out by our own review of the record.

On September 10, 2019, the court ordered the parties to go to the caseflow coordinator to obtain a hearing date for the defendant's pending motions for contempt. The court also granted the defendant permission to file several additional motions, all of which were to be heard at the custody hearing, which, at the time, was scheduled for December 9, 2019.

On December 6, 2019, Dr. Smith filed her custody evaluation with the court. The December 9, 2019 hearing date was continued by the court, and the matter was transferred to the Regional Family Trial Docket and scheduled for five consecutive hearing dates to commence in March, 2020. The March, 2020 custody hearing, however, did not go forward as scheduled.[8]

In addition to filing a variety of motions and objections directed at discovery, on October 13, 2020, the defendant filed a request asking to have all of his pending motions for contempt heard separately from the custody dispute. The court denied that request on October 26, 2020. The defendant's outstanding motions for contempt and the custody matter were then scheduled for hearing dates to begin on December 14, 2020.

[8] The defendant continued to file numerous requests and motions with the court throughout 2020. On January 21, 2020, the court, *Connors*, *J.*, denied requests by the defendant to file motions regarding the scheduling of a new hearing date to address his pending contempt motions and motions regarding O's participation in Little League that spring, a holiday visitation schedule, and increased parenting time. On July 8, 2020, the defendant filed an application for a restraining order alleging that he was in immediate physical danger and harm because the plaintiff had allowed O to participate in summer camp, increasing O's exposure to COVID-19 and, therefore, his own. That application was denied following a contested hearing on July 22 and 28, 2020. On August 24, 2020, Judge Connors granted the defendant's request for leave to file a motion for order to determine what elementary school O would attend in the fall of 2020. On August 31, 2020, the court, *M. Murphy*, *J.*, denied the motion for order. On September 9, 2020, the defendant filed a request for leave to file a motion regarding O's participation in fall Little League. The court, *Connors*, *J.*, denied that request.

The parties and the plaintiff's counsel appeared virtually on December 14, 2020, for the custody hearing. Neither party, however, had complied with the court's standing orders by filing a witness or exhibit list. Moreover, motions in limine and a motion for protective order remained outstanding, and depositions had not yet been completed. As a result, the court, *Nguyen-O'Dowd, J.*, continued the custody hearing to February, 2021, and issued a scheduling order to resolve all necessary outstanding matters prior to the February hearing.[9]

The custody hearing did not commence in February as scheduled because the court was closed due to inclement weather. On February 16, 2021, the plaintiff sought a further continuance of the custody hearing due to an emergent medical condition of her counsel and related treatment. The court granted the continuance over an objection from the defendant. The defendant then proceeded to file more than thirty separate requests and motions directed toward the plaintiff's alleged violations of court orders.

On March 10, 2021, the defendant filed a notice of intent to file a writ of error, which he filed on April 9, 2021, and later amended on April 21, 2021.[10] This court denied the defendant's motion to expedite that appeal and, on May 26, 2021, issued an order dismissing the amended writ of error for lack of jurisdiction because the defendant was a party to the underlying action; see

[9] In January, 2021, the defendant filed a request for leave to file a motion for clarification as to the court's January 19, 2018 order regarding payments to the custody evaluator. The request was granted, and the court, *Olear, J.*, clarified its orders, explaining that the parties' oral agreement was that the defendant was solely responsible for the $10,000 retainer to Dr. Smith and the $4000 owed to Dr. Humphrey.

[10] According to his appeal form, the defendant sought review of the trial court's refusal to timely schedule and hear fifty-three pending motions for contempt filed from 2017 to 2021; its denial of a motion in limine regarding the December 6, 2019 custody evaluation; and its refusal to restore his visitation rights.

Practice Book § 72-1 (b) (1); and because there was no appealable final judgment.

The contested custody trial and hearing on the defendant's motions for contempt was rescheduled to commence starting on May 24, 2021. On May 24 and 25, 2021, Judge Nguyen-O'Dowd conducted the trial remotely on Microsoft Teams.[11] The parties then appeared in person on May 26 and 27, June 2 and 3, November 29 and 30, and December 1 and 2, 2021.

On December 3, 2021, the parties were scheduled for a full day, in person hearing. That morning, the defendant filed a motion seeking reissuance of certain subpoenas and a continuance of the hearing to the afternoon due to a flat tire. The presiding judge, *Diana*, *J.*, issued an order that the matter, as requested, would resume at 2 p.m. and denied all other relief sought in the motion. The defendant later filed another motion to continue the afternoon session, which the court denied. The defendant did not appear in court at 2 p.m. for the hearing.

The parties next appeared in person for full day hearings on December 6, 7 and 8, 2021. During this time, the defendant filed multiple motions that, if granted, would have further delayed completion of the custody hearing. For example, on December 6, 2021, the defendant, who had chosen to proceed as a self-represented party, filed a motion for a continuance to "consult counsel." Judge Diana denied the motion. On December 7, 2021, the defendant filed a motion for a continuance so he could seek the advice of counsel regarding a motion that he had filed to disqualify Judge Nguyen-O'Dowd. Judge Diana denied that motion on December 8, 2021.

[11] Although no transcript of the May 25, 2021 hearing was filed with this court, it is clear from the record that there was a remote hearing on that day.

Also on December 8, 2021, the defendant made an oral motion for a continuance, arguing that he would not go forward "upon medical advice." He did not have a medical provider present or a medical letter. Nonetheless, he indicated to the court that his blood pressure that morning was "at unacceptable levels" and that he is "disabled as a result of an auto accident [and] has complications and eye pain from a current hemorrhage of a broken eye socket received as a result of domestic violence." He further argued that the custody proceedings were going "in a reckless pace and marathon session requiring the pro se defendant to burn the candle at both ends." The court denied the defendant's oral motion, noting that the defendant had filed several motions for continuance within the previous few days citing other reasons, all of which were denied. The court indicated, however, that the denial was without prejudice to the defendant producing "written documentation from his physician regarding his health status."

Later that day, the defendant provided the court with a letter from his medical provider that, as described by the court, asked the court to "please adjust this court schedule in an attempt to reduce [the defendant's] stress." The medical provider also indicated in his letter that the defendant suffered from angina. The defendant indicated to the court that his stress was largely due to not having time between hearing dates to eat properly and prepare his case. At no point did the defendant refer to the ADA or clarify that he was seeking an accommodation under the ADA. Judge Diana reconsidered the defendant's oral motion for a continuance, stating on the record that, "I'm going to adjust the court's schedule to accommodate the gentleman's health to reduce his stress." He later issued the following written order: "The court grants the defendant's

oral motion for [a] continuance and shall make accommodations as follows: the remaining days of trial shall continue in half day morning sessions."[12]

The parties appeared in person for half day morning sessions on December 9, 10, 20, 21 and 22, 2021, and January 3, 4, 5 and 6, 2022. The court held a half day remote session on February 9, 2022. Thereafter, the court scheduled additional sessions for alternating full days on February 14, 16 and 18, and March 9 and 15, 2022. The defendant, with permission, filed a motion for a scheduling order in which he argued that Judge Diana previously had granted him an ADA accommodation limiting trial dates to half days and stating that the full day trial dates scheduled by the court were "contrary to the defendant's current doctor's medical advice and contrary to the existing order of accommodation." The defendant requested that the court "reschedul[e] further sessions to half day morning sessions."

The court denied the motion for a scheduling order on the record at the February 14, 2022 hearing.[13] The next day, the defendant filed a motion in which he indicated that he had filed a grievance with the ADA administrator for the Connecticut Judicial Branch. He asked the court to stay any further full day proceedings

[12] The court had the following colloquy with the defendant:

"The Court: So how can . . . a change in the trial schedule reduce your stress? . . . Do you want half days, not full days?

"[The Defendant]: At this point in time, Your Honor, I think I need a rest.

"The Court: How long do you need a rest?

"[The Defendant]: Well, at least for the balance of the week. And I think I can continue into next week *every other day*. . . .

"The Court: [T]hat's the problem. The court's schedule is set through March where all of our schedules are already determined because people have to have notice of when they have their other trials. So, I can't just say that you can have next week, every other day. You understand?" (Emphasis added.)

[13] The defendant did not order transcripts for the proceedings on February 16, 2022.

until the grievance matter was resolved, although he indicated that he was "able to go forward with half day morning sessions as per the original accommodation." The court denied the motion on February 17, 2022.

At the February 18, 2022 hearing, the defendant made an oral motion for a continuance that Judge Nguyen-O'Dowd denied without prejudice to the defendant producing documentation from his physician regarding his health status. The defendant informed the court that he was not proceeding with his case and abruptly left the courthouse and did not return. The defendant appeared for the next scheduled court date on March 9, 2022. Before the lunch recess, the defendant informed the court on the record that he was not going to return to court for a full day trial until Judge Diana modified his December 8, 2021 order. Judge Nguyen-O'Dowd informed the parties that the hearing would resume at 2 p.m. unless a written motion for a continuance was filed and granted. The defendant neither filed a motion for a continuance nor appeared for the afternoon session. On March 15, 2022, the defendant again appeared for the hearing in the morning but, once again, failed to appear for the afternoon session and did not file a motion for a continuance.

On the basis of the defendant's failure to appear, the court determined that the defendant "failed to present his testimony and evidence as set forth in the court's scheduling order," and, therefore, the court determined that "[t]he defendant's case [was] concluded." Moreover, the court denied all of his pending motions for contempt and motions to disqualify with prejudice for failure to present any testimony, evidence, and argument to the court.[14] The plaintiff was permitted to provide rebuttal testimony. The court ordered the parties

[14] The defendant filed an appeal from the court's order, which this court later dismissed on June 21, 2022, for failure to comply with an order to file preliminary paperwork. See Practice Book § 63-4 (a) and (c).

to file proposed findings of fact by April 14, 2022.[15] The plaintiff timely complied. The court granted the defendant an extension of time to April 17, 2022, and he filed his statement of proposed findings of facts on April 18, 2022.

On July 15, 2022, the court issued its memorandum of decision regarding custody and disposing of a number of outstanding motions. The court set forth detailed findings with respect to the defendant's behavior generally, his parenting skills, and his difficult relationship with O, which contrasted with the healthy relationship that the court found O has with the plaintiff. The court noted in some detail the defendant's medical diagnosis by two separate doctors of narcissistic personality disorder and his failure to make or maintain any significant progress through treatment. The court stated, in part, that, "throughout the custody dispute, the defendant has been more concerned with proving that an injustice has been committed against him by the plaintiff and the individuals and institutions involved in this case, whether directly or indirectly, than with advocating for an outcome that is in [O's] best interest. . . . The defendant is also a high conflict individual. . . . He is unable to communicate effectively with the plaintiff and others without conflict. His response to any request for compromise is to threaten litigation and exert control over the situation. His pathology for paranoia and conspiracy theories displayed itself at trial when he was adamant in his belief that Dr. Smith accepted a bribe in this case. Aside from this bold accusation, no other evidence was provided to the court on this accusation. In sum, the defendant has displayed no change in his psychological functioning [that] negatively impacts his parenting abilities; he has gained no

[15] In the interim, the defendant filed a civil rights complaint with the United States Department of Justice and initiated a civil rights action against Judge Nguyen-O'Dowd in federal District Court, arguing that the court had violated his rights under the ADA.

insight into the obstacles that prevent him from becoming an effective parent; and [he] fails to recognize the need to engage in treatment." The court found that O displayed "significant [negative] behaviors related to his visitation with the defendant" and that, during visits, "the defendant has an inability to display appropriate boundaries."

The court found, moreover, that the defendant had poor parenting skills even when the parties were living together. The court explained: "The defendant modeled his parenting based on a puppy training book. He referred to training puppies like raising [O]. The defendant referred to himself as the alpha and dominant member in the pack as to his relationship with [O]. As a young child, [O] was afraid of the defendant, often hiding and not wanting to go to him. The defendant would tower over [O] and yell at him and threaten to spank him. Additionally, he would exhibit irrational behavior toward [O]. The defendant wanted to expose [O] to his love for golf. When the defendant went to the golf course, he tied [O] to a stake in the ground. In another incident, [O] had scratches on his skin and the defendant insisted that they were cactus spines caught under the skin and pulled them out. The defendant unnecessarily gave [O] lice treatment. He medicated [O] for pinworm even after medical and school personnel indicated that [O] did not have them. These are but a few of the examples in which the defendant displayed a lack of empathy and irrational behavior related to his interaction with [O].

"The defendant lacks the ability to play an active and positive role in [O's] life. He views [O] as an object to fulfill his needs rather than providing him with love and affection and respecting his feelings. Throughout the defendant's testimony, he described in detail the activities that he engages in with [O]. . . . There was nothing in [his] testimony that these were activities that [O]

selected or enjoyed. These activities were selected by the defendant to meet his goals to ensure that [O] obtains a level of academic superiority like the defendant and [O's] adult brother." The court credited the observation of Dr. Smith that, although "usually a parent and child spend time interacting with one another . . . this was not the case with the defendant and [O]. They functioned in parallel and not in interaction. Much of their interaction was separate. [O] would engage in his activities and the defendant in his own talk and activities. [O] made efforts to engage the defendant in an activity of his choice or to talk about a topic he initiated. However, the defendant's response was to ignore [O] or bring [up] a topic that had nothing to do with [O's] statement. This is problematic from a psychological perspective because it will result in the child having a less intimate relationship with his or her parent. In [O's] case, it will limit how much [O] will connect and feel safe with the defendant without receiving this emotional support."

The court concluded: "It would be negligent for the court to allow [O] to continue to be subjected to the defendant's maladaptive behaviors. This protracted custody case has allowed [O] to be continually exposed to the defendant's gaslighting, negative tirades about the plaintiff, oversharing of information and lack of emotional connection and support. [O's] current surroundings while in the defendant's care negatively impact his emotional well-being. The defendant is unable to recognize the real harm that his conduct is causing [O]. Rather, the defendant is more interested in proving that he is right at all costs no matter who is negatively affected, even if [O] is at the center."

With respect to custody, the court ordered as follows: "The plaintiff shall have sole legal and physical custody. The plaintiff shall have sole decision-making authority as to [O's] school, extracurricular activities, sports,

camps and medical care to include medical, dental, psychiatric and therapeutic care. The defendant shall not enroll [O] or schedule appointments for [O] in those areas in which the plaintiff has sole decision-making authority. The defendant shall not interfere with [O's] participation and engagement in the areas in which the plaintiff has sole decision-making authority. This shall include contacting, either by written, electronic or in person communication, the providers or organizations to harass them." Neither party was permitted to relocate with O out of state without prior order of the court.

With respect to parenting time, the court ordered that the defendant was entitled to weekly supervised access to O on Wednesdays after school, or at 3 p.m. if there is no school, until 7 p.m., and on alternating Saturdays from 10 a.m. to 2 p.m. A third-party therapeutic supervised visitation agency would be responsible for supervision, with the cost paid by the defendant. The defendant's parenting access was ordered to begin once the defendant provided proof to the plaintiff and/or her counsel that he had engaged a clinician to address his narcissistic personality disorder. Such proof was required to be updated on a quarterly basis. The court also issued orders limiting the defendant's right to seek modification or expansion of his parenting access until a motion for modification has been filed with the court with a request for leave and a showing that he had exercised at least 75 percent of his parenting access and has engaged in regular and consistent treatment for at least one year, including, but not limited to, engaging "a clinician who has the skills and training to address narcissistic personality disorder; consultation with a psychiatrist and neurologist; and group therapy for domestic abuse/trauma." The court further ordered that the defendant could not participate in any of O's extracurricular and sporting activities until he satisfied the conditions for seeking modification/expansion of the

parenting access orders. The court issued a number of other orders related to child support, taxes, legal fees and the resolution of certain outstanding motions.

This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the defendant's claims on appeal, we first set forth our standard of review and other applicable legal principles. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *Coleman* v. *Bembridge*, 207 Conn. App. 28, 33–34, 263 A.3d 403 (2021). "As has often been explained, the foundation for [our deferential] standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Internal quotation marks omitted.) *Buxenbaum* v. *Jones*, 189 Conn. App. 790, 794, 209 A.3d 664 (2019).

Orders regarding the custody and care of minor children in dissolution actions are governed by General

Statutes § 46b-56, which grants the court broad discretion in crafting such orders. Subsection (a) of § 46b-56 provides in relevant part that "the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . ."

"In making . . . any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. *Such orders may include . . . the award of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child* . . . ." (Emphasis added.) General Statutes § 46b-56 (b).

"[Section] 46b-56 (c) provides in relevant part that when making custody orders, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of [seventeen enumerated factors]. . . . The court is not required to assign any weight to any of the factors that it considers.[16] In reaching a decision as to what is in

[16] General Statutes § 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so, may consider, but shall not be limited to, one or more of the following factors: (1) The physical and emotional safety of the child; (2) the temperament and developmental needs of the child; (3) the capacity and the disposition of the parents to understand and meet the needs of the child; (4) any relevant and material information obtained from the child, including the informed preferences of the child; (5) the wishes of the child's parents as to custody; (6) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (7) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between

the best interests of a child, the court is vested with broad discretion and its ruling will be reversed only upon a showing that some legal principle or right has been violated or that the discretion has been abused." (Footnote added; internal quotation marks omitted.) *Morrone* v. *Morrone*, 142 Conn. App. 345, 351, 64 A.3d 803 (2013). As our Supreme Court recently reiterated, "[t]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] [the state's appellate courts], but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Zhou* v. *Zhang*, 334 Conn. 601, 632–33, 223 A.3d 775 (2020); see also *Yontef* v. *Yontef*, 185 Conn. 275, 279, 440 A.2d 899 (1981) ("[i]t

the child and the other parent as is appropriate, including compliance with any court orders; (8) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (9) the ability of each parent to be actively involved in the life of the child; (10) the child's adjustment to his or her home, school and community environments; (11) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (12) the stability of the child's existing or proposed residences, or both; (13) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (14) the child's cultural background; (15) the effect on the child of the actions of an abuser, if any domestic violence, as defined in section 46b-1, has occurred between the parents or between a parent and another individual or the child; (16) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (17) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision."

is a rare case in which a disappointed litigant will be able to demonstrate abuse of a trial court's broad discretion in [child custody] matters"). With these standards in mind, we turn to the claims on appeal.

I

The defendant's first two claims assert that the trial court violated his rights under the ADA. Specifically, the defendant claims that the court (1) refused to provide him throughout the underlying proceedings with the same medical accommodation first granted to him by Judge Diana and (2) retaliated against him for exercising his ADA rights by denying motions and prematurely resting his case. We conclude that both claims are without merit.

We begin by noting that the defendant has brought both an administrative grievance and an action in federal District Court that raise, inter alia, the same ADA claims now raised in the present appeal. The parties have not raised or briefed whether principles of comity between state and federal courts, the prior pending action doctrine, failure to exhaust administrative remedies or some other justiciability doctrine should militate against our review of the merits of the defendant's claims. The plaintiff has argued that no trial court has made any express findings regarding whether the defendant has a "disability" for purposes of the ADA,[17] and

[17] As used in the ADA, "[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual . . . ." 42 U.S.C. § 12102 (1) (A) (2018). There is undisputed evidence in the present case that the defendant had coronary artery disease and suffered related angina attacks. The court made no factual determination, however, whether his conditions *substantially* affected or limited major life activities, which the ADA states "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102 (2) (A) (2018); see also *Aucutt* v. *Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1318 (8th Cir. 1996) (affirming District Court's holding that, although it was undisputed that plaintiff suffered from "angina, high blood pressure, and coronary artery disease," plaintiff was not

the record is at best ambiguous as to whether the "accommodation" Judge Diana granted the defendant was intended by the court as an ADA accommodation or merely a pragmatic solution to issues raised by the defendant via his oral motion for a continuance. The defendant did not seek an articulation from Judge Diana regarding his order, and it is axiomatic that this court does not make findings of fact; see *Zitnay* v. *Zitnay*, 90 Conn. App. 71, 81, 875 A.2d 583, cert. denied, 276 Conn. 918, 888 A.2d 90 (2005); both of which implicate the adequacy of the record before us.

In any event, we need not resolve any reviewability concern because, even if we were to assume for purposes of argument that the defendant had a disability that entitled him to a reasonable accommodation under the ADA as a matter of procedural due process, we conclude, for the reasons that follow, that he, in fact, received just that and has failed to demonstrate otherwise. Furthermore, he has failed to direct us to any evidence in the record from which we reasonably could conclude that any of the court's adverse actions or rulings in this matter were the product of retaliatory animus rather than a proper exercise of judicial discretion.

A

The ADA defines a public entity as, inter alia, "(A) any State or local government; [or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131 (1) (2018). "For purposes of the ADA, the Connecticut Superior Court is considered to be a public entity." *State* v. *Riddick*, 61 Conn. App. 275, 283 n.5, 763 A.2d 1062, cert. denied, 255 Conn. 946, 769 A.2d

"disabled" within meaning of ADA because "he had presented no evidence suggesting that his medical problems 'substantially limit[ed]' one or more of his 'major life activities' ").

61 (2001). Accordingly, once a court identifies a litigant as having a disability, it should act to provide some reasonable accommodation to allow the litigant to participate in the court proceedings. A court has considerable discretion, however, in choosing the type of accommodation to offer. See id., 283–84; see also *McElwee* v. *Orange*, 700 F.3d 635, 641 (2d Cir. 2012) ("[a]lthough a public entity must make reasonable accommodations, it does not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice" (internal quotation marks omitted)). A party is not entitled to the precise accommodation that he or she requests but only a *reasonable* accommodation. See *Cooling* v. *Torrington*, 221 Conn. App. 567, 584–85, 302 A.3d 319 (2023). Moreover, if a party needs a specific accommodation, then he or she needs to provide enough information to demonstrate why only that accommodation is sufficient. See id., 586.

In the present case, the defendant made an oral request for a continuance in which he argued that he was under stress and needed time between hearing dates to rest and effectively present his case. The defendant did not make a formal ADA request prior to his oral motion to the court either by contacting the court's ADA coordinator or by completing a form requesting accommodations by a person with disabilities that is available on the Judicial Branch website. His medical provider submitted a letter that did not suggest any particular accommodation but only recommended that the court adjust the hearing schedule, which at that time consisted of back-to-back full day hearings, so as to reduce the defendant's stress. Judge Diana, upon review of the recommendation of the defendant's medical provider and having listened to the defendant explain the source and nature of his stress, "adjust[ed] the court's schedule to accommodate the [defendant's] health" by limiting the length of the remaining then scheduled hearing dates

to half days only. Nothing in the language that the court used rendered that accommodation nonmodifiable in the future. To the contrary, the court required the defendant to keep the court apprised of any changes in his medical condition, from which it can be reasonably inferred that the accommodation was never intended to be permanent or to bind future courts in the event of a change in relevant circumstances.

It is axiomatic that a trial court "has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . The court inherently holds reasonable control over its schedule." (Citation omitted; internal quotation marks omitted.) *M. B.* v. *S. A.*, 194 Conn. App. 727, 733–34, 222 A.3d 551 (2019). The defendant has provided no authority, nor are we aware of any, that stands for the proposition that once a public entity has provided an accommodation it is not permitted to adjust it under appropriate circumstances or to provide a substitute accommodation.

Here, when it became clear to Judge Nguyen-O'Dowd that continuing with half day sessions would be untenable and interfere with docket management and the fair administration of justice, it was well within the court's discretion to substitute Judge Diana's prior accommodation for one that was equally reasonable. Proceeding with full day hearings on nonconsecutive days still allowed time for the defendant to rest and recover from the prior day's proceedings and reduced the stress of preparing for the next day, which was fully in accord with the recommendation of the defendant's medical provider. In fact, it was the exact accommodation the

defendant originally requested from Judge Diana. See footnote 12 of this opinion.

We are unpersuaded that the court conducted the custody hearing in a manner that violated the defendant's rights under the ADA. Accordingly, he is not entitled to a new hearing on that basis.

B

We briefly turn next to the defendant's claim that the court retaliated against him for exercising his rights under the ADA. The record before this court is insufficient to establish that the court took any action against the defendant in retaliation for his exercising his rights under the ADA.

The ADA prohibits retaliation against "any individual because such individual has opposed any act or practice made unlawful by [the ADA] . . . ." 42 U.S.C. § 12203 (a) (2018). To ultimately succeed on a claim of retaliation under the ADA, however, a plaintiff must establish that the alleged retaliatory actions of the defendant would not have occurred "but for" the plaintiff having exercised his ADA rights. See *Natofsky* v. *City of New York*, 921 F.3d 337, 346–50 (2d Cir. 2019). In other words, if the defendant has even one legitimate, nonretaliatory reason for its actions, the plaintiff's claim of retaliation will fail unless the plaintiff produces evidence to rebut the proffered nondiscriminatory reason. See *Ring* v. *Boca Ciega Yacht Club Inc.*, 4 F.4th 1149, 1163 (11th Cir. 2021) (defendant was entitled to summary judgment on plaintiff's ADA retaliation claim because plaintiff failed to rebut nondiscriminatory reason proffered by defendant).

In the present case, the defendant asserts that the acts of retaliation by the court are its denial of his motions and the court's resting of his case following

his repeated failures to appear. The defendant, however, has not pointed us to anything in the record that would support his assertion that these actions were done with discriminatory animus rather than, as reflected in the record, as a response to the defendant's failure to appear. As aptly argued by the plaintiff, there was a reasonable and nondiscriminatory basis for the court's actions for which the defendant has failed to account, and, therefore, the defendant's claim of discriminatory retaliation under the ADA necessarily fails.

In sum, even if we assume for the sake of argument that the defendant's ADA claims are properly before us and that he had a right to a reasonable accommodation in accordance with the ADA, the defendant has failed to show that he was denied a reasonable accommodation or that the court retaliated against him for asserting his federal statutory rights. For the reasons provided, the defendant's first two claims are without merit.

II

The defendant next claims that the court improperly relied on the defendant's mental health diagnosis as a basis for limiting his right to visitation and awarding custody to the plaintiff. The plaintiff counters that the court appropriately considered the mental health of the defendant in determining custody and setting conditions regarding visitation. We agree with the plaintiff.

The touchstone of any custody determination is what is in the best interest of the child. General Statutes § 46b-56 (c); *Barros* v. *Barros*, 309 Conn. 499, 517, 72 A.3d 367 (2013). One of the enumerated factors that a court may consider in determining issues of custody and visitation in the context of a divorce is "the mental and physical health of *all* individuals involved, except that a disability of a proposed custodial parent . . . *in and of itself*, shall not be determinative of custody unless the proposed custodial arrangement is *not in*

the best interests of the child . . . ." (Emphasis added.) General Statutes § 46b-56 (c) (13).[18]

In the present case, the court did not award the plaintiff sole custody of O solely on the basis of the defendant's mental health diagnosis. This was but one of a number of reasons provided by the court for its decision and, therefore, was not "in and of itself" determinative of the court's custody order. The defendant has not directed our attention to anything in the record that suggests otherwise or that would support his assertions that the court's consideration of his mental health diagnosis amounted to retaliation or disability discrimination. Moreover, the court's focus was not on the defendant's mental health per se but, rather, the court identified that it was concerned by the defendant's failure to make reasonable progress to address its harmful effect on his parenting of O as set forth in the court's decision. As discussed further in part VI of this opinion, the defendant has failed to demonstrate that the court made any clearly erroneous factual findings regarding his mental health.

It was not improper for the court to rely in part on the defendant's mental health and its effect on the development of O in determining custody. Likewise, it is not the province of this court to reweigh the evidence before the court or to substitute our judgment in this matter. Accordingly, we reject this claim.

III

The defendant further claims that the court improperly relied on a stale custody evaluation in determining the best interest of O. We are not persuaded.

[18] In the context of child protection proceedings, courts have recognized on a fact-specific basis that it may not be in the best interest of a child to be in the custody of a parent who has a mental deficiency or illness, where such illness renders the parent unable to provide the child with necessary care. See, e.g., *In re Antony B.*, 54 Conn. App. 463, 473, 735 A.2d 893 (1999). This is no less the case when considering custody in the context of a marital dissolution action.

The parties stipulated in February, 2018, that Dr. Smith would conduct a custody evaluation. This agreement was approved by the court. Dr. Smith completed her evaluation in December, 2019, and filed her report with the court that same month. Although the trial had been set to begin in March, 2020, the court closed around this time due to the COVID-19 pandemic and trials were suspended. The trial in this matter began in May, 2021, and concluded in March, 2022. Dr. Smith's 2019 evaluation was admitted into evidence, and she testified regarding the substance of her evaluation and her findings and recommendations, all of which were subject to cross-examination by the defendant.

It is well settled that in exercising its considerable discretion in assessing a child's best interest and the ability of parents to meet a child's needs related to custody or visitation, "the court . . . may hear the recommendations of professionals in the family relations field . . . ." (Internal quotation marks omitted.) *Merkel* v. *Hill*, 189 Conn. App. 779, 787, 207 A.3d 1115 (2019). Ultimately, however, "the trial court is bound to consider the [child's] *present* best interests and not what would have been in [his or her] best interests at some previous time." (Emphasis in original; internal quotation marks omitted.) Id., 788. Thus, a "court's reliance on outdated information and past parental conduct in making . . . orders concerning [custody or] parental access may be improper, particularly if the record has adequate current information demonstrating a present ability to parent." *Balaska* v. *Balaska*, 130 Conn. App. 510, 518, 25 A.3d 680 (2011).

In the present case, rather than relying solely on the 2019 custody evaluation, the court had ample current evidence before it of the defendant's present ability to parent. Although the court accepted Dr. Smith's evaluation into evidence, it considered and evaluated it in light of the updated testimony from Dr. Smith and others,

as well as evidence submitted by both parties regarding O's and the parents' current situations. See id. (court's reliance on outdated report did not constitute abuse of discretion because "there was adequate current information in [the] record to support [the court's] orders"). We agree with the plaintiff's assessment in her brief that, "although the custody evaluation of Dr. Smith may have had some limitations due to the delay of the courts being closed due to COVID-19, this goes solely to the weight the trial judge gives the report rather than its admissibility." Because we are convinced from our review of the record that other, more current evidence introduced at trial amply supports the court's custody determination, the court did not abuse its discretion by considering Dr. Smith's custody evaluation.

IV

The defendant claims next that the court improperly required the parties to request leave of the court before filing trial and pretrial motions and denied multiple such requests. The defendant asserts that the court cited no authority permitting it to limit the parties in this way and suggests that it was the court's requiring the parties to seek permission before filing motions that resulted in "this litigation [becoming] one of the longest running custody matters in state history . . . ." The defendant's claim is unavailing.

In support of his claim, the defendant relies on language from *Ahneman* v. *Ahneman*, 243 Conn. 471, 706 A.2d 960 (1998), in which our Supreme Court held that the trial court lacked the discretion to refuse to rule on certain motions filed by the defendant in that case. See id., 482. The court in *Ahneman* stated that trial courts "are in the business of ruling on litigants' contentions, and they generally operate under the rule essential to the efficient administration of justice, that where

a court is vested with jurisdiction over the subject-matter . . . and . . . obtains jurisdiction of the person, it becomes its . . . duty to determine every question which may arise in the cause . . . . This general rule is particularly important in the context of marital dissolution cases because of the likelihood of continuing changes in the parties' circumstances requiring continuing dispute resolution by the court." (Citation omitted; internal quotation marks omitted.) Id., 484. There is nothing in the *Ahneman* decision, however, curtailing a trial court's exercise of its considerable discretion over its docket or expressly barring the type of prohibitory order issued by Judge Simon in the present case. To the contrary, the court in *Ahneman* acknowledged that "exceptions to the general rule that a trial court must consider and decide on a reasonably prompt basis all motions properly placed before it may exist in an extreme, compelling situation. For example, we do not rule out the possibility that a trial court may have discretion *to refuse to entertain or decide motions in order to prevent harassing or vexatious litigation.* . . . Likewise, there may be other circumstances in which a trial court properly could refuse to consider certain motions." (Citations omitted; emphasis added.) Id., 484–85.

Several years after the *Ahneman* decision, this court, in *Strobel* v. *Strobel*, 92 Conn. App. 662, 886 A.2d 865 (2005), opined that a prohibitory order essentially identical to the one rendered by Judge Simon in the present case;[19] see id., 663; constituted a "praiseworthy" attempt by the trial judge to limit the parties' "barrages of repetitive and abusive motions in an apparently ceaseless war of hostility and vindictiveness toward one another and that those motions are not only abusive to the

[19] The trial judge in *Strobel* ordered: "Neither parent shall file any motions or pleadings without prior approval of the court." (Internal quotation marks omitted.) *Strobel* v. *Strobel*, supra, 92 Conn. App. 663.

system but, more importantly, to their now teenage son." Id., 665. The record in the present case reflects no less of a compelling reason for an order attempting to curtail the flood of repetitive and oftentimes frivolous motions filed in this matter. Accordingly, we reject the defendant's claim.

V

The defendant claims that the court improperly awarded sole custody of O to the plaintiff even though the parties had always shared custody and the plaintiff made no "showing of a change of circumstance." We are not persuaded.

In making this claim, the defendant cites case law holding that courts lack the authority to modify existing custody orders in the absence of a material change of circumstances. See *Hall* v. *Hall*, 186 Conn. 118, 122, 439 A.2d 447 (1982) (noting that after *final* decree dissolving marriage enters, our Supreme Court "has limited the broad discretion given the trial court to modify custody orders under . . . § 46b-56 by requiring that modification of a custody award be based upon either a material change of circumstances [that] alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child" (citations omitted)).

Here, up until the time of the dissolution of marriage, the parties shared legal and physical custody of O. Whether such joint custody should continue in the future, however, was precisely the issue that the parties could not agree upon in their separation agreement and left for the court in the present action to decide. Custody had not been finally determined. The cases relied on by the defendant addressing the court's authority to modify a prior custody order are inapposite to the facts

before us. Accordingly, the defendant's claim asserting an improper modification of custody fails.

VI

The defendant next claims that the court erroneously found that the defendant had narcissistic personality disorder. Because there was evidence in the record to support this finding, and we lack a definite and firm conviction that a mistake was made, the defendant's claim fails.

Whether the defendant suffered from a particular medical condition is a factual determination that we review under our clearly erroneous standard of review. See *Malpeso* v. *Malpeso*, 189 Conn. App. 486, 505, 207 A.3d 1085 (2019). As previously stated, "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Coleman* v. *Bembridge*, supra, 207 Conn. App. 34.

Here, the court heard testimony from Dr. Smith that she administered several psychological tests to the defendant in the course of conducting her custody evaluation, including one in which he tested high on the narcissistic personality scale. Dr. Smith was asked during direct examination whether it was her opinion at the time she prepared her report that the defendant "has narcissistic personality disorder?" She responded: "I believe that was my clinical opinion." She was further asked whether it was "typically a temporary condition" if an individual presented with a high score on the narcissism scale. She responded: "So, narcissism and any personality disorder generally tend to be a *long-term pattern* of enduring traits, symptoms and behaviors, typically *not amenable to significant change*, especially if there isn't significant, meaningful treatment."

(Emphasis added.) This testimony was consistent with observations made by Dr. Smith in her custody evaluation, in which she had determined on the basis of multiple sources of information, including her own testing and clinical observations, that the defendant suffers from "very high levels of narcissism/narcissistic personality disorder." Dr. Smith also noted in her evaluation that the defendant's own personal therapist, Robert Fogel, with whom she had consulted, previously diagnosed the defendant with narcissistic personality disorder and had shared this diagnosis with the defendant. Fogel, who testified at the custody hearing for the defendant, confirmed that he had informed Dr. Smith that he had diagnosed the defendant with narcissistic personality disorder.

The evidence in the record adequately supports the court's findings that the defendant has been diagnosed with narcissistic personality disorder and that this diagnosis constituted a "long-term pattern of maladaptive behavior that is not amenable to treatment." We are not left with a definite and firm conviction that any mistake has been made with respect to the court's challenged findings. Accordingly, we reject the defendant's claim that the court's findings were clearly erroneous.

VII

Finally, the defendant claims that the court committed the following evidentiary errors: (1) improperly admitting certain testimony of Lineth Santos, a social worker from the Department of Children and Families (department), and (2) improperly admitting and relying on an affidavit of Dr. Grasso, O's therapist. We reject the defendant's evidentiary claims.

The following additional procedural history is relevant to the defendant's claims. At trial, over repeated

and often duplicative objections by the defendant,[20] the court heard testimony from Santos, who was called as a witness by the plaintiff. Santos testified that she had investigated an anonymous call made to the department concerning the plaintiff's purported physical removal of O from a baseball game in which he was participating. During her testimony, a redacted version of the relevant department investigation protocol was admitted into evidence as a full exhibit. Santos testified that her investigation included, among other things, interviews with O and conversations with Dr. Grasso. Santos testified that, as a result of her investigation, the department discovered no concerns with the plaintiff's actions vis-à-vis the baseball game incident or her ability to parent O, but the department did develop concerns about O's emotional well-being with respect to the defendant. Santos testified that the department subsequently substantiated emotional neglect of O by the defendant. Santos testified in response to questions from the defendant on cross-examination that she had reviewed an affidavit sworn to by Dr. Grasso[21] and that Dr. Grasso's opinion, both as expressed in the affidavit and in interviews, was relied on by the department in its investigation. Santos, however, never testified in a manner that disclosed the actual contents of Dr. Grasso's affidavit.

[20] The defendant filed a motion in limine to preclude the testimony of any and all department officials in this matter. The court denied this blanket request without prejudice to the defendant's right to raise any specific objections at trial with respect to issues concerning privilege or confidentiality. When Santos was called to testify, the defendant renewed his request to preclude her testimony, which the court also denied.

[21] We note that, on July 7, 2021, the plaintiff filed in the present action an application for an emergency ex parte order of custody. Attached as an exhibit in support of the application was an affidavit of the plaintiff asserting that the defendant had "engaged in a pattern of alarming behavior that is erratic, disturbing, delusional, and dangerous for [O]." The application stated that an affidavit of Dr. Grasso also was attached, although that affidavit is not part of the application as it appears in the trial court file. In any event, the court, *Nguyen-O'Dowd, J.*, denied the application without comment on July 8, 2021.

The defendant later attempted to have a copy of Dr. Grasso's affidavit admitted into evidence, but the plaintiff objected on hearsay grounds, and it was marked for identification purposes only.

It is axiomatic that a "trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *Seder* v. *Errato*, 211 Conn. App. 167, 177, 272 A.3d 252, cert. denied, 343 Conn. 917, 274 A.3d 868 (2022). Moreover, "[i]t is well established that this court will not review unpreserved evidentiary claims." *Braham* v. *Commissioner of Correction*, 132 Conn. App. 57, 61, 31 A.3d 71 (2011), cert. denied, 303 Conn. 939, 37 A.3d 153 (2012).

We have thoroughly reviewed the transcripts of Santos' testimony as well as the many objections raised during her testimony by the defendant. We conclude that the defendant has failed to demonstrate how the court abused its broad discretion with respect to the admission of Santos' testimony. To the extent that the defendant has attempted to raise additional objections that were not raised at trial, we decline to review these unpreserved aspects of his claim. With respect to the objections he did raise at trial, we conclude that the court properly ruled on them in the manner that it did for the reasons provided and that further explication by this court is unwarranted.

Furthermore, there is also nothing in the record from which to conclude that the court improperly relied on Dr. Grasso's affidavit in awarding custody to the plaintiff. The court never stated in its memorandum of decision that it relied on Dr. Grasso's affidavit, which, as we have indicated and the defendant agrees, was not

in evidence. The few references to Dr. Grasso by the court in its memorandum of decision are incidental and do not reflect any error in the court's reasoning. This aspect of the defendant's evidentiary claim, therefore, also fails.

In summary, having carefully reviewed the record, the transcripts provided, the parties' briefs, oral argument, and all relevant law, we conclude that the defendant has failed to demonstrate any error by the court that warrants a remand for a new trial in this matter. Accordingly, we affirm the judgment of the court.

The judgment is affirmed.

In this opinion the other judges concurred.

LASCELLES A. CLUE *v.* COMMISSIONER OF CORRECTION (AC 45984)

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

Syllabus

The petitioner appealed to this court from the judgment of the habeas court denying his untimely motion to open and set aside the court's dismissal of his petition for habeas corpus. The petitioner was represented by assigned counsel, W, in his underlying habeas petition, filed in February, 2018. The petitioner was deported to Jamaica in June, 2020. Following the petitioner's deportation, the trial court granted W's caseflow request for a video status conference, in which W represented that his attempts to contact the petitioner had been unsuccessful. At the status conference, the court asked W to file a notice with the court detailing his efforts to communicate with the petitioner and his family. W filed the notice, in which he alleged that there had been a breakdown in his communications with the petitioner, that his efforts to contact the petitioner or members of the petitioner's family had been unsuccessful and that the case could not proceed without the petitioner. The court thereafter issued an order that the matter would be scheduled for a hearing on the court's own motion to dismiss the petition due to the petitioner's failure to contact and cooperate with W in prosecuting the petition with due diligence and provided notice that the matter could be dismissed for failure to appear if the petitioner did not appear for the scheduled hearing. The

court dismissed the underlying habeas petition at a hearing held in February, 2021, at which the petitioner did not appear. The petitioner filed a motion to open the judgment of dismissal in May, 2022, alleging, inter alia, that W had failed to communicate effectively with him and had made material representations about his exercise of due diligence in locating the petitioner. The court denied the petitioner's motion to open on the basis that the petitioner had failed to establish a recognized basis to open the judgment beyond the four month period established by statute (§ 52-212a), and it declined to resolve factual disputes or make credibility determinations because there was no threshold showing of fraud, duress or mutual mistake. *Held*:

1. The habeas court improperly limited the scope of its authority to grant the petitioner's motion to open to a showing that the judgment was obtained by fraud, duress or mistake; the court's authority to grant a late motion to open a judgment was not exclusively limited to those three recognized exceptions, as both this court and our Supreme Court have recognized other equitable exceptions to the four month time limitation in § 52-212a in situations in which the protection of the finality of judgments must give way to principles of fairness and equity.
2. As an issue of first impression, this court held that, given both the significant liberty interests at stake in habeas proceedings and the importance of the right to counsel in such proceedings, the ineffective assistance of habeas counsel under *Strickland* v. *Washington* (466 U.S. 668) is sufficient to invoke the habeas court's common-law authority to open a habeas judgment more than four months after it was rendered: barring a petitioner relief from a judgment that was rendered or not timely opened due to the ineffective assistance of habeas counsel on the sole basis that the statutory period had expired would undermine the fundamental fairness origins underlying the common-law writ of habeas corpus and the very nature of the right to habeas counsel provided by statute (§ 51-296 (a)), and an equitable exception to the four month limitation period is warranted to avoid perpetuating the injustice of a judgment that was rendered or not timely opened due to the constitutionally deficient performance of habeas counsel; moreover, as our Supreme Court recently held in *Rose* v. *Commissioner of Correction* (348 Conn. 333), ineffective assistance of counsel may constitute good cause to excuse the late filing of a habeas petition pursuant to statute (§ 52-470), and this court held that the same reasoning applied to a late motion to open based on a claim of ineffective assistance of habeas counsel; furthermore, this court declined to speculate as to how the habeas court, which explicitly stated in its memorandum of decision that it was not resolving factual disputes or making credibility determinations, would have resolved key factual issues and how it would have exercised its discretion had it not been operating under an unnecessarily limited view of its authority; accordingly, the case was remanded for a new hearing on the petitioner's motion to open.

Argued October 10, 2023—officially released February 20, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment dismissing the petition; thereafter, the court, *Oliver*, *J.*, denied the petitioner's motion to open the judgment, and the petitioner, on the granting of certification to appeal, appealed to this court. *Reversed*; *further proceedings*.

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

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *David Applegate*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. In this certified appeal, the petitioner, Lascelles A. Clue, appeals from the judgment of the habeas court denying his untimely motion to open and set aside the 2021 dismissal of his habeas petition. On appeal, the petitioner claims that the court improperly concluded that its equitable authority to open the judgment outside of the four month period set forth in General Statutes § 52-212a was limited to cases in which the judgment was obtained by fraud, duress, or mutual mistake. We agree and conclude that, in the context of a habeas corpus case, the court has the authority to consider an otherwise untimely motion to open that is based on the ineffective assistance of habeas counsel.[1] Accordingly, we reverse the judgment of the habeas court and remand the case for a new hearing on the petitioner's motion to open.

The following facts, as set forth by the court in its memorandum of decision or as undisputed in the record,

[1] See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

and procedural history are relevant to our resolution of this appeal. The petitioner filed the underlying habeas petition on February 20, 2018, challenging, on the basis of the alleged ineffective assistance of his trial attorneys, a conviction that resulted from a 2011 guilty plea. The petitioner requested that counsel be appointed to represent him in the habeas action, and the Law Office of Christopher Duby, LLC (Duby law firm), was appointed as his counsel. Subsequently, Attorney Patick White, an associate in the firm, filed an appearance with the court as the petitioner's counsel. White represented the petitioner at all relevant times. The court entered a scheduling order on April 5, 2019, which established trial dates for March 30 and 31, 2022. In June, 2020, the petitioner was deported to Jamaica. Prior to being deported, the petitioner successfully obtained relief in another habeas case[2] challenging a different conviction.[3] The petitioner was represented by Attorney Daniel Lage in that habeas case.

On January 14, 2021, White filed a caseflow request for a video status conference. In that request, White represented that the petitioner had been deported and that White's attempts to contact the petitioner, his mother, and his wife had been unsuccessful. The court, *Oliver*, *J.*, granted White's request and held a status conference on January 25, 2021, during which the court requested that White file a notice with the court detailing his efforts to communicate with the petitioner and

[2] Clue v. *State Prison Warden*, Superior Court, judicial district of Tolland, Docket No. CV-15-4007334-S (October 3, 2019).

[3] The court explained that, "[a]fter a trial on the merits, the court, *Newson*, *J.*, granted the [2015 habeas] petition on October 3, 2019, vacated the convictions, and ordered the criminal charges restored to the docket. The respondent [the Commissioner of Correction] appealed from the granted petition for certification to appeal (AC 43537) but withdrew the appeal on March 13, 2020. [Attorney Daniel] Lage continues to represent [the petitioner] on those criminal charges. [The petitioner's] rearrest was ordered, but because he was deported to Jamaica, his rearrest has not been effectuated."

his family. Accordingly, "[o]n January 27, 2021, White filed a notice that there had been a breakdown in communications between him and [the petitioner]. The notice detailed the history of White's interactions with [the petitioner] until his deportation and the efforts thereafter to contact [the petitioner] and his family. White represented that all his efforts to contact [the petitioner], as well as his mother and wife, had been unsuccessful. The notice concluded with the assertion that the case could not proceed without [the petitioner].[4]

"The court issued an order on January 27, 2021, that the matter would be scheduled for a hearing on the court's own motion to dismiss based on [the petitioner's] failure to contact and cooperate with White in prosecuting the instant petition with due diligence. The court also provided notice that the matter may also be dismissed for failure to appear if [the petitioner] absented himself from the upcoming hearing.[5] After a hearing on February 11, 2021, and upon consideration of the previously filed notice as supplemented by White's representations at the hearing, the court dismissed the petition based on [the petitioner's] failure to appear and prosecute the petition with due diligence." (Footnotes added.)

On May 19, 2022, the petitioner filed a motion to open the judgment of dismissal and a supporting memorandum of law. The petitioner claimed: "[H]e did not receive the notices of White's caseflow request and the ensuing hearing; he did not waive his right to be present

[4] White certified that the notice had been served on counsel for the respondent, the Commissioner of Correction, but provided no certification that he had served or attempted to serve the petitioner or any member of his family, and the petitioner claims in his appellate brief that he "was not provided notice of the status conference" that resulted in the written notice prepared by White at the request of the habeas court.

[5] The record is unclear as to what efforts, if any, were made to provide the petitioner with notice of the February 11, 2021 hearing.

at the dismissal hearing; White failed to make reasonable efforts to apprise him of the status of the matter; and White failed to communicate effectively with him, his family contacts, or attorneys who represent him in other cases. . . . [The petitioner ascribed] various failures to White and [asserted] that [White] made material misrepresentations about his exercise of due diligence in locating the petitioner. Those material misrepresentations, which the [petitioner described] as conduct designed to result in the dismissal of the petition absent [the petitioner's] knowledge or consent, resulted in the court dismissing the case.

"The respondent, [the Commissioner of Correction, objected] to the motion to open because it [was] untimely, [the petitioner] failed to keep White apprised of his whereabouts and contact information, and [the petitioner] did not act with diligence in seeking to open the judgment. The respondent . . . also submitted an affidavit from White which detail[ed] his efforts to communicate with [the petitioner] and his family members after his deportation.

"The parties appeared at a hearing on June 17 and July 8, 2022, where [the court] heard testimony from [the petitioner], White, Lage, Fay Ellis (the petitioner's mother), and Kelly Clue (the petitioner's wife). Additionally, [the petitioner] entered several exhibits into evidence," including three letters from the Duby law firm to the petitioner dated June 26, 2018, February 3, 2020, and February 26, 2020; a contact information sheet that the Duby law firm gave to the petitioner, on which the petitioner provided the firm with his wife's and mother's phone numbers; and the transcript of the dismissal hearing.

On the basis of the testimony at the hearing, the habeas court set forth the following additional facts in its September 12, 2022 memorandum of decision. "[The

petitioner] was at a federal detention center for approximately three months prior to his deportation. [The petitioner] and White corresponded with each other and spoke once while [the petitioner] was at the federal detention center. White knew that [the petitioner] would be deported." Accordingly, "White told [the petitioner] that if he were deported, then he would need to provide contact information and instructed [the petitioner] to contact him."

Following the petitioner's deportation, "[b]ecause [White] did not have any contact information for [the petitioner] in Jamaica, [he] tried calling Kelly Clue and Ellis, who were listed on the contact sheet provided by [the petitioner], but he did not write to them. White did not have any specific independent recollection of leaving messages for Kelly Clue and Ellis, but it is his practice to leave such messages. White did not receive any calls back." Ellis testified, however, "that she has never been contacted by White, whether pre or postdeportation." Similarly, Kelly Clue testified that she has never had any contact with White or his law firm.

The petitioner testified that "he had White's phone number in an address book [and] tried calling White two or three times after he was deported, once in August of 2020 and twice in October of 2020 [and that he] left voicemail messages, which included his cell phone number, on White's extension but did not receive any calls back. [The petitioner] did not try to contact White again after October of 2020, because he has paranoia, [post-traumatic stress disorder], and gave up because he thought White gave up. . . . In early 2021, [the petitioner's] cell phone was disconnected, and he obtained the number that he presently has. [The petitioner] did not provide his new number to the Duby law firm." By contrast, Ellis testified that she has "had daily contact [with the petitioner] via phone calls" since his deportation, and "she has had contact with him via . . . video

calls, emails, and text messages." Kelly Clue also "had contact with [the petitioner] via phone calls and emails beginning a few days after his deportation." Moreover, the petitioner spoke with Lage, the attorney representing him in his other habeas proceeding, "numerous times between the summer of 2020 and spring of 2022."

The court stated that the petitioner "had no notice of the January 27, 2021 scheduling order that there would be a hearing on the court's own motion to dismiss based on [the petitioner's] failure to prosecute this case with due diligence, as well as that the matter might be dismissed if [he] failed to appear. In either January or February of 2022, [the petitioner] found out about the dismissal from Kelly Clue, who was checking on the case status before the originally scheduled trial date. . . . Although [the petitioner] was unable to access the Judicial Branch's website from Jamaica, he was able to look up information for the Office of the Chief Public Defender (OCPD) and seek assistance in opening this case. [The petitioner] contacted OCPD about one month after he found out that this case had been dismissed. [The petitioner] searched for White [on the Internet], never asked Lage to contact White, did not write a letter to White, and did not complain to OCPD about White even though he had given up on White."

At the hearing, the petitioner argued that the facts of this case warranted "a quasi-fraud equitable exception to the 120 day rule . . . predicated . . . on ineffective assistance of counsel or attorney negligence." In particular, the petitioner claimed that White "failed to communicate with the petitioner" about the status of his case; failed to "exercise reasonable diligence in contacting the petitioner"; "failed to notify him of the filing of [the] notice [to the court] . . . the status conference . . . and the hearing that this court had . . . on the notice"; and, following the court's dismissal of the case, "made no further . . . efforts to contact [the

petitioner] within [the] 120 day window." Accordingly, the petitioner argued that the notice that White had filed with the court, "when fairly read, was misleading in terms of the diligence . . . exerted by counsel in trying to reach the petitioner following his deportation." "But for [counsel's] failures," the petitioner asserted, "this matter would not have been dismissed . . . ." In response, the respondent argued that the petitioner had not established good cause to open the judgment fifteen months after his case was dismissed because he had failed to pursue his case diligently and contact his attorney.

Following the hearing, the court denied the petitioner's motion "because the petitioner [had] failed to establish a recognized basis to open the judgment beyond the four month period established by . . . § 52-212a." The court reasoned that, "although guided by equitable principles, [it had] constrained authority based on a showing that the judgment was obtained by fraud, duress, or a mutual mistake. There has been no showing of fraud, duress, or . . . a mutual mistake," given that, "[a]t the hearing, [the petitioner] abandoned any claim that is premised on a legal theory of fraud or quasi-fraud." The court refused to resolve factual disputes and make credibility determinations regarding the date of the petitioner's deportation and who was responsible for the lack of communication among the petitioner, his family, and White, stating that "[r]esolving these diverging factual differences is unnecessary to resolve the present motion, and the court need not delve into credibility determinations, because there has been no threshold showing of any fraud, duress, or mutual mistake." This certified appeal followed.

On appeal, the petitioner claims that (1) the court improperly limited the scope of its authority to open a judgment of dismissal after the passage of the four month limitation period in § 52-212a, and (2) ineffective

assistance of habeas counsel is sufficient to invoke the court's authority to grant a late motion to open a judgment. We will address each claim in turn.

We first note our standard of review as to both of the petitioner's claims. "The issue before us in the present case . . . is not whether the trial court properly exercised its discretion . . . but, rather, whether the trial court had authority to do so under the circumstances of this case. . . . This presents a question of law over which we exercise plenary review."[6] (Citation omitted.) *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 166, 75 A.3d 651 (2013); see also *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 239–40, 796 A.2d 1164 (2002) ("[w]hether the trial court had the power to issue the order, as distinct from the question of whether the trial court properly exercised that power, is a question involving the scope of the trial court's inherent powers and, as such, is a question of law").

I

The petitioner first claims that the court improperly limited the scope of its authority to open a judgment of dismissal after the passage of the four month limitation period in § 52-212a by requiring that he make a "threshold" showing of fraud, duress, or mutual mistake. He argues that "[t]his court has recognized an equitable exception to the time limitation set forth in . . . § 52-212a to address injustices in the absence of a showing of fraud, duress, or mutual mistake." In response, the respondent argues that the court applied the proper

[6] To the extent that our resolution of the petitioner's claim requires us to interpret the relevant statutes, our review is also plenary. See *Trumbull* v. *Palmer*, 161 Conn. App. 594, 598–99, 129 A.3d 133 (2015) ("Whether a court has authority to grant a motion to open requires an interpretation of the relevant statutes. Statutory construction, in turn, presents a question of law over which our review is plenary." (Internal quotation marks omitted.)), cert. denied, 320 Conn. 923, 133 A.3d 458 (2016).

legal standard[7] and correctly determined that it lacked the authority to open the judgment. Although we disagree with the petitioner that we have recognized an overarching general equitable exception to the four month limitation period, we nonetheless agree that, in the context of the present habeas corpus case, the court's common-law authority to open the judgment was not as limited as it stated in its memorandum of decision.

The following legal principles guide our review. "Habeas corpus is a civil proceeding. . . . The principles that

[7] The respondent contends that, "[a]lthough the habeas court did not state that cases exist presenting extraordinary exceptions equivalent to the standard common-law categories of fraud, duress and mutual mistake," pursuant to *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 981 A.2d 1068 (2009), the court is nonetheless "presumed to have known our jurisprudence and found no comparable extraordinary circumstances here that would authorize opening [the judgment] beyond [four months]." In *Kaczynski* v. *Kaczynski*, supra, 130–31, our Supreme Court held that, "[w]hen a trial court in a civil matter requiring proof by clear and convincing evidence fails to state what standard of proof it has applied, a reviewing court will presume that the correct standard was used." The respondent quotes this case for the proposition that, "[a]bsent a record that demonstrates that the trial court's reasoning was in error, we presume that the trial court correctly analyzed the law and the facts in rendering its judgment . . . ." (Internal quotation marks omitted.) Id., 130.

As the respondent's brief suggests, however, we apply the presumption that the court applied the correct legal standard only "in the absence of some clear indication to the contrary . . . ." *In re Annessa J.*, 343 Conn. 642, 676, 284 A.3d 562 (2022). In the present case, the court unambiguously stated in its memorandum of decision that, "although guided by equitable principles, [it had] constrained authority based on a showing that the judgment was obtained by fraud, duress, or a mutual mistake. There has been no showing of fraud, duress, or that a mutual mistake occurred." The court reiterated this understanding of its authority at the end of its memorandum of decision, stating that it was unnecessary to resolve factual disputes or make credibility determinations "because there has been no threshold showing of any fraud, duress, or mutual mistake." Although the court acknowledged that § 52-212a "gives a court common-law authority to open the judgment after the four month period," the court nonetheless limited itself to those three generally recognized equitable exceptions to the time limitation. The court's memorandum of decision, therefore, clearly indicates that it was operating under an unnecessarily constrained view of its authority.

govern motions to open or set aside a civil judgment are well established. . . . A motion to open and set aside judgment is governed by . . . § 52-212a and Practice Book § 17-4." (Citation omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 163 Conn. App. 556, 563, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016). Section 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. . . . The parties may waive the provisions of this section or otherwise submit to the jurisdiction of the court . . . ." See also Practice Book § 17-4 (a) (same).

The purpose of § 52-212a is "to protect the finality of judgments." *Kim* v. *Magnotta*, 249 Conn. 94, 102, 733 A.2d 809 (1999); see also *Steve Viglione Sheet Metal Co.* v. *Sakonchick*, 190 Conn. 707, 713, 462 A.2d 1037 (1983) ("[t]he theory underlying . . . rules governing the vacating of judgments is the equitable principle that once a judgment is rendered it is to be considered final . . . and should be left undisturbed by post-trial motions except for a good and compelling reason" (citations omitted)). Consistent with this legislative purpose, our Supreme Court has characterized the four month period "as a constraint, not on the trial court's jurisdictional authority, but on its substantive authority to adjudicate the merits of the case before it." *Kim* v. *Magnotta*, supra, 104.

"Under [§ 52-212a], the trial court is authorized to open a judgment more than four months after it was

Given this clear indication to the contrary, we will not presume that the court applied the correct legal standard. See *In re Annessa J.*, supra, 676.

rendered when any one of the following four exceptions is satisfied: the parties waived the four month limitation; the parties otherwise submitted to the court's jurisdiction; the court's authority to open the judgment is otherwise authorized by law; or the court has continuing jurisdiction over the judgment." *Reinke* v. *Sing*, 328 Conn. 376, 390–91, 179 A.3d 769 (2018). In the present case, the court sent notice of the dismissal of the underlying habeas petition on February 11, 2021. The petitioner filed his motion to open the judgment on May 19, 2022, which is well beyond four months from the date on which the court sent notice of the judgment. Thus, the court would have had authority to open the judgment only if an exception to § 52-212a applied.

"Courts have interpreted the phrase, [u]nless otherwise provided by law, as preserving the common-law authority of a court to open a judgment after the four month period." (Internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 99, 168 A.3d 617 (2017). Although "[t]he law favors finality of judgments"; (internal quotation marks omitted) *Ruiz* v. *Victory Properties, LLC*, 180 Conn. App. 818, 828, 184 A.3d 1254 (2018); our courts also have recognized "that, in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity." *Kim* v. *Magnotta*, supra, 249 Conn. 109. It is well established, for example, that "[c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment obtained by fraud, duress or mutual mistake." *In re Baby Girl B.*, 224 Conn. 263, 283, 618 A.2d 1 (1992).

The court's authority to grant a late motion to open a judgment, however, is not exclusively limited to those three recognized exceptions, as both this court and our Supreme Court previously have recognized other

equitable exceptions to the four month time limitation in § 52-212a.[8]

For example, in *Kim* v. *Magnotta*, supra, 249 Conn. 109, our Supreme Court held that, even after the expiration of the four month limitation period, a trial court has the authority to set aside a stipulated judgment that resulted from a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and not from fraud, duress, accident or mistake. See id., 97 n.3. After concluding that "the discretionary equitable authority"; id., 107; conferred on a trial court by General Statutes § 42-110g (a), a provision of CUTPA, "falls within the 'otherwise provided by law' provision of § 52-212a"; id., 109; the court observed that its conclusion was consistent with our case law on § 52-212a, which "recognizes that, in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. Accordingly, § 52-212a does not permit a person who has committed fraud to rely on a stipulated judgment to shelter gains that were acquired improperly. . . . It is hard to fathom why a person who has committed an unfair trade practice should be treated differently. In both situations, the injured party was unfairly induced to assent to the stipulated judgment." (Citation omitted.) Id.

Similarly, in *Connecticut Savings Bank* v. *Obenauf*, 59 Conn. App. 351, 758 A.2d 363 (2000), the trial court

[8] This court also has recognized that "[a] court may correct a clerical error at any time, even after the expiration of the four month period." (Internal quotation marks omitted.) *Cusano* v. *Burgundy Chevrolet, Inc.*, 55 Conn. App. 655, 659, 740 A.2d 447 (1999), cert. denied, 252 Conn. 942, 747 A.2d 519 (2000); see also *Ryan* v. *Cassella*, 180 Conn. App. 461, 477, 184 A.3d 311 (2018) (holding that "§ 52-212a did not preclude the court from granting [a] motion to correct a technical defect in a party's name" more than four months after entry of default judgment, because to conclude otherwise "would provide [a party] with a windfall as a result of a misnomer" (internal quotation marks omitted)).

rendered judgment for the plaintiff and awarded more than $41,000 in money damages against the defendant transferee of an allegedly fraudulent conveyance, contrary to the law at the time that "a successful claim of fraudulent conveyance could not result in a judgment of liability against the transferee . . . on the underlying debt obligations owed by the transferor." Id., 354–55. More than four months after the judgment, the defendant moved to open the judgment on the basis of "equitable considerations." Id., 352. The trial court denied the motion to open because "the defendant had not alleged . . . fraud, accident, mistake or clerical error . . . ." Id., 353. On appeal, this court held that, despite the fact that a motion to open was filed outside of the four month period, it was necessary to correct the judgment "on the basis of equitable considerations"; id., 355; because it was both "contrary to law at the time of its rendition"; id., 357; and "facially inconsistent with the complaint."[9] Id., 355. Specifically, the court concluded that the defendant "should not in law or in equity be forced to pay a debt for which she was not liable. . . . To allow the plaintiff to benefit from a judgment against the defendant in excess of $41,000 that was contrary to law at the time of its rendition shocks the judicial conscience . . . and violates the principles of equity that govern our application of the law. The court's denial of the defendant's motion to open and set aside the money judgment perpetuated this injustice." (Citations omitted; internal quotation marks omitted.) Id., 357. Accordingly, this court reversed the judgment and remanded the case with direction to grant the defendant's motion. Id., 358.

[9] See Practice Book § 17-41 ("[u]pon a default, the plaintiff can have no greater relief than that demanded in the complaint"); *Altberg* v. *Paul Kovacs Tire Shop, Inc.*, 31 Conn. App. 634, 642–43, 626 A.2d 804 (1993) (remanding case with direction to correct judgment because plaintiff "obtained more relief than that demanded in his complaint").

Finally, in *Nelson* v. *Charlesworth*, 82 Conn. App. 710, 846 A.2d 923 (2004), this court held that an attorney's fraudulent conduct was sufficient to allow the court to exercise its equitable authority to open the judgment after the passage of the four month period even though the judgment itself was not obtained by fraud, deviating from the traditional formulation of that exception.[10] After the court granted the plaintiff's motion for default against the defendant and rendered a judgment awarding damages to the plaintiff, the plaintiff's attorney and the defendant's insurer engaged in settlement discussions but failed to reach an agreement. Id., 711–12. At no time during the settlement discussions did the plaintiff's attorney inform the defendant's insurer of the outstanding judgment; instead, the plaintiff's attorney waited until four months and ten days after the court rendered judgment against the defendant to inform the defendant's insurer of that judgment. Id., 712. This court concluded that, "[a]lthough the judgment proper was not brought about by fraud, the finality of the judgment, that is, the running of the four month period, was vitiated by fraud." Id., 714. Given the apparent willingness of the plaintiff's attorney "to negotiate until just after the four month deadline," this court reasoned that "it [was] difficult to imagine that he was attempting to do anything other than to deceive [the insurer]." Id., 715. We further explained that implicit in the plaintiff's attorney's statement to the defendant's insurer that she was interested in settling the case, and implicit in "the settlement negotiations thereafter, was that there was still a case to be settled, i.e., that the plaintiff had not already obtained a judgment against the defendant. The implicit representations by the plaintiff's attorney that the case

[10] See, e.g., *In re Baby Girl B.*, supra, 224 Conn. 283 ("[c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment *obtained by* fraud, duress or mutual mistake" (emphasis added)).

was still pending and that he had not obtained a judgment could be considered fraud . . . which would allow the court to exercise its equitable powers." Id., 714.

In each of those cases, the reviewing court recognized the trial court's authority to grant a late motion to open a judgment on equitable grounds other than that the judgment itself was procured by fraud, duress, or mutual mistake. Consequently, we conclude that the court in the present case improperly held that its authority to grant the petitioner's motion was limited "based on a showing that the judgment was obtained by fraud, duress, or a mutual mistake."

II

The petitioner next claims that the alleged ineffective assistance[11] of his habeas counsel was sufficient to

[11] The petitioner characterizes his claim that White's notice to the court was misleading as a claim of "quasi-fraud," which he argues, independent of his ineffective assistance of counsel claim, would provide the court with authority to open the judgment following the expiration of the statutory period. During oral argument before this court, counsel for the petitioner explained that a claim of quasi-fraud has the "same legal effects as fraud" but would not require the petitioner to prove that White had the intent to deceive. The petitioner further explains in his brief that, although "the evidence did not demonstrate a showing of actual fraud . . . the instant case evidenced elements of fraud due to the misleading nature of the representations that White had made in the notice filed with the habeas court to accomplish the dismissal of this action."

We are unaware of any case in which our Supreme Court or this court has used the phrase "quasi-fraud" in any circumstance and certainly not as a ground to grant an untimely motion to open. Furthermore, we see little utility in attaching such a title to an equitable ground for an untimely motion to open other than fraud, duress, or mutual mistake. Instead, the focus of the court considering the untimely motion is whether the ground raised is of similar magnitude to fraud, duress, or mutual mistake, such that "the principle of protection of the finality of judgments must give way to the principle of fairness and equity." *Kim* v. *Magnotta*, supra, 249 Conn. 109. Thus, the pertinent question in the present appeal is whether the petitioner's claim of ineffective assistance of counsel, which involved allegations that White performed deficiently through inaction, invokes the court's equitable authority to consider opening the judgment more than four months after it was rendered.

invoke the court's equitable authority to grant the late motion to open. He argues that, "[u]nder the circumstances of this case, White's inaction, coupled with the misleading representations concerning his efforts to communicate with the petitioner, create an equitable basis for reopening the judgment." According to the petitioner, "it would confound reason to preclude a habeas petitioner from reopening a judgment of dismissal after four months when such [dismissal] resulted from appointed counsel's failures."

In response, the respondent argues that, not only does the record not support a finding that White rendered ineffective assistance, "it [also] was unnecessary for the habeas court to make this determination" because, "[a]bsent extraordinary circumstances, attorney negligence, unlike attorney fraud, is not a ground for opening a judgment." During oral argument before this court, however, the respondent conceded that "there might be a case of ineffective assistance of counsel that would fit into [the] 'otherwise provided by law' category if the petitioner showed due diligence on his own part."[12]

For the reasons that follow, we conclude, as a matter of first impression, that the ineffective assistance of

[12] Additionally, the respondent argues that the petitioner's failure to file the underlying habeas petition before the statutory deadline under § 52-470 (c), presumptively without good cause, undermines the petitioner's arguments on appeal. The issue of whether the petitioner can overcome the statutory presumption that his habeas petition was filed late without good cause, however, is an inherently fact bound inquiry that has yet to be addressed by the trial court. See *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 435–36, 274 A.3d 85 (2022) ("a habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony" (internal quotation marks omitted)). Accordingly, we refuse to address that issue on appeal. See *Berka* v. *Middletown*, 205 Conn. App. 213, 220–21, 257 A.3d 384 ("[b]ecause our review is limited to matters in the record, we . . . will not address issues not decided by the trial court" (internal quotation marks omitted)), cert. denied, 337 Conn. 910, 253 A.3d 44, cert. denied, U.S. , 142 S. Ct. 351, 211 L. Ed. 2d 186 (2021).

habeas counsel under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)[13] is sufficient to invoke the court's common-law authority to grant a late motion to open a judgment.

To provide a context for our discussion, we first examine the purpose of the writ of habeas corpus and the nature of the right to the effective assistance of counsel in a habeas corpus proceeding. Although habeas corpus "is a legal and not an equitable remedy"; (internal quotation marks omitted) *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 45, 130 A.3d 268 (2015); "[i]n the exercise of its power under [General Statutes] § 52-470[14] to grant such relief 'as law and justice require,' the [habeas] court, much like a court of equity, has considerable discretion to frame a remedy, so long as that remedy is commensurate with the scope of the constitutional violations which have been established. . . . In the [habeas] court's choice among . . . possible remedies, the decisive factor must be the vindication of the [petitioner's] constitutional rights." (Citations omitted; footnote added; footnote omitted.) *Gaines* v. *Manson*, 194 Conn. 510, 528–29, 481 A.2d 1084 (1984); see also *State* v. *Phidd*, 42 Conn. App. 17, 28, 681 A.2d 310 ("[t]he statutory language 'dispose of

[13] "Under *Strickland*, [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 264, 112 A.3d 1 (2015).

[14] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . ."

the case as law and justice require' gives the habeas court the power to conform a remedy to the particular facts"), cert. denied, 238 Conn. 907, 679 A.2d 2 (1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1115, 137 L. Ed. 2d 315 (1997).

"The right to petition for a writ of habeas corpus is enshrined in both the United States constitution and the Connecticut constitution. See U.S. Const., art. I, § 9; Conn. Const., art. I, § 12. Indeed, it has been observed that the writ of habeas corpus holds an honored position in our jurisprudence. . . . The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . The writ has been described as a unique and extraordinary legal remedy. . . . It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[15] (Citations omitted; internal quotation marks omitted.) *Fine* v. *Commissioner of Correction*, 147 Conn. App. 136, 142–43, 81 A.3d 1209 (2013).

For those reasons, a habeas petitioner, unlike a typical civil litigant, has a "statutory right to habeas counsel pursuant to General Statutes § 51-296,[16] which provides for the appointment of counsel for an indigent person in any habeas corpus proceeding arising from a criminal

[15] This important function of the writ of habeas corpus is not lost where, as here, the petitioner is released from custody during the pendency of his habeas petition and is residing in another country when there remains "a reasonable possibility of prejudicial collateral consequences should [he] seek to lawfully reenter the United States" following his deportation. *State* v. *Jerzy G.*, 326 Conn. 206, 223, 162 A.3d 692 (2017).

[16] "General Statutes § 51-296 (a) provides in relevant part: 'In any criminal action, in any habeas corpus proceeding arising from a criminal matter, in any extradition proceeding, or in any delinquency matter, the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant . . . .'" *Lozada* v. *Warden*, 223 Conn. 834, 838 n.7, 613 A.2d 818 (1992).

matter . . . .' " (Footnote in original.) *Lozada* v. *Warden*, 223 Conn. 834, 838, 613 A.2d 818 (1992). "When counsel is so appointed he must be effective and competent. Otherwise, the appointment is a useless formality." (Internal quotation marks omitted.) Id., 838–39. Thus, although it is not a constitutional right, "the weight of sixth amendment protection [extends] to the . . . statutory right to counsel in habeas proceedings . . . ." *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 132, 866 A.2d 649 (2005).

As this court has observed, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the [s]ixth [a]mendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. . . . That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The [s]ixth [a]mendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. . . . Counsel's role is to ensure that the adversarial testing process works to produce a just result under the standards governing decision." (Citation omitted; internal quotation marks omitted.) *Robinson* v. *Commissioner of Correction*, 167 Conn. App. 809, 821, 144 A.3d 493, cert. denied, 323 Conn. 925, 149 A.3d 982 (2016). The same reasoning applies in the habeas context, as "the right to petition for a writ of habeas corpus, as a means of challenging the legality of a conviction, [is] no less constitutionally significant than the right of a defendant to bring a direct appeal, as a means of challenging a judgment of conviction." *Fine* v. *Commissioner of Correction*, supra, 147 Conn. App. 144.

Mindful of these principles, we conclude that the ineffective assistance of habeas counsel is sufficient to

invoke the court's equitable authority to open a habeas judgment more than four months after it was rendered. Our conclusion finds support in the fundamental fairness origins of the writ of habeas corpus and the importance of the right to habeas counsel in furthering that purpose.[17]

In *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 563, 153 A.3d 1233 (2017), our Supreme Court highlighted the significance of the statutory right to habeas counsel and the fundamental fairness concerns underlying the writ of habeas corpus in support of its conclusion that a petitioner may file a third habeas petition to challenge the effectiveness of the petitioner's counsel in his second habeas proceeding. The court reasoned that, "[g]iven the fundamental fairness origins underlying the common-law writ of habeas corpus, it would

[17] We emphasize that our holding is limited to the context of habeas corpus proceedings that challenge the legality of a criminal conviction. Our holding, therefore, should not be construed as recognizing an exception to the four month limitation period on the basis of ineffective assistance of counsel in any other context in which there is a right to counsel, such as proceedings in juvenile matters. Indeed, this court previously has recognized that the sixth amendment protections that extend to the statutory right to habeas counsel do not similarly extend to a parent's right to counsel in neglect or termination of parental rights proceedings. See *In re Ceana R.*, 177 Conn. App. 758, 772, 172 A.3d 870, cert. denied, 327 Conn. 991, 175 A.3d 1244 (2017); *In re Isaiah J.*, 140 Conn. App. 626, 640, 59 A.3d 892, cert. denied, 308 Conn. 926, 64 A.3d 333, cert. denied sub nom. *Megan J.* v. *Katz*, 571 U.S. 924, 134 S. Ct. 317, 187 L. Ed. 2d 224 (2013). Moreover, our Supreme Court has explained that different legal standards govern claims of ineffective assistance of counsel in termination of parental rights cases and in criminal habeas corpus cases because "the finality considerations in a collateral challenge to a termination of parental rights are drastically different from those presented by a writ of habeas corpus attacking a criminal conviction with respect to the fundamental fairness concerns that drive the availability of the writ as a common-law remedy. . . . [T]he complete deprivation of personal liberty represented by incarceration demands a thorough search for the innocent. In the context of termination cases, extended litigation imposes that burden on the most vulnerable people whom the system and such cases seek to protect: the children." (Citations omitted; internal quotation marks omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 569 n.18, 153 A.3d 1233 (2017).

be anomalous to conclude that a right as significant as the statutory right to counsel in a second habeas petition that ultimately challenges a criminal conviction, and the concomitant right that the attorney be competent, is one that cannot be vindicated by the writ. . . . Given the overriding concerns of fundamental fairness that underlie the writ of habeas corpus, not allowing a third habeas petition would undermine the very nature of the statutory right provided by § 51-296 (a), which . . . extends to a second habeas petition." (Citation omitted.) Id.

Similarly, in the present case, barring relief from a judgment that was rendered or not timely opened due to the ineffective assistance of habeas counsel on the sole basis that the statutory period has expired would undermine "the fundamental fairness origins underlying the common-law writ of habeas corpus" and "the very nature of the statutory right [to habeas counsel] provided by § 51-296 (a)." Id.; see also *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 147, 712 A.2d 947 (1998) (given "the nature of the right involved . . . [a]s a matter of policy, it would be illogical to deny the right to sentence review to a petitioner who has missed the statutory thirty day filing deadline as a result of unconstitutionally deficient representation"); *Fredericks* v. *Reincke*, 152 Conn. 501, 508, 208 A.2d 756 (1965) (although trial courts ordinarily do not have authority to allow late appeals, "where on habeas corpus it has been properly determined that a right of appeal required by the federal constitution has been denied" due to denial of right to competent counsel, "any rule restricting an appeal merely because of lapse of time necessarily is ineffective to preclude an appeal in accordance with federal constitutional requirements"). Accordingly, similar to our reasoning in *Connecticut Savings Bank* v. *Obenauf*, supra, 59 Conn. App. 357, an equitable

exception to the four month limitation period is warranted to avoid perpetuating the injustice of a judgment that was rendered or not timely opened due to habeas counsel's constitutionally deficient performance.

Indeed, in the context of cause and prejudice to excuse procedural default[18] and good cause for delay under § 52-470,[19] our Supreme Court has recognized the distinction between ineffective assistance of counsel and the type of attorney error that typically is insufficient to grant an untimely motion to open. As the court most recently stated in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 347, 304 A.3d 431 (2023), when counsel's constitutionally deficient performance has caused a habeas petitioner to procedurally default on a habeas claim or file a habeas petition outside of the time period set forth in § 52-470, "the [s]ixth [a]mendment itself requires that responsibility for the [error]

[18] Pursuant to the procedural default doctrine, "a petitioner is barred from raising a claim for the first time in a habeas proceeding unless there is cause and prejudice to excuse the procedural default . . . ." *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 347 n.8, 304 A.3d 431 (2023).

[19] General Statutes § 52-470 provides in relevant part: "(c) 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. . . .

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

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 factor, i.e., imputed to the [s]tate." (Internal quotation marks omitted.) Accordingly, the court explained that, in the context of procedural default, "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 . . . [but] not . . . by the ineffective assistance of his counsel." (Internal quotation marks omitted.) Id., 348; see also *Coleman* v. *Thompson*, 501 U.S. 722, 754, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (under "well-settled principles of agency law" client is bound by "alleged attorney error" unless it rises to level of ineffective assistance); *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 570, 941 A.2d 248 (2008) (under procedural default doctrine, "although ignorance or inadvertence is not cause, ineffective assistance of counsel is a legitimate ground for cause" (internal quotation marks omitted)); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 40, 779 A.2d 80 (2001) ("attorney error short of ineffective assistance of counsel does not adequately excuse compliance with our rules of [trial and] appellate procedure" (internal quotation marks omitted)). In *Rose*, our Supreme Court relied on those cases in concluding "that ineffective assistance of counsel . . . [also] 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)." *Rose* v. *Commissioner of Correction*, supra, 348.

We conclude that the same reasoning applies to a late motion to open based on a claim of ineffective assistance of habeas counsel. We recognize that this court consistently has held that an attorney's negligence by itself does not provide a sufficient basis to open a

civil judgment under either § 52-212a or General Statutes § 52-212.[20] See *Dziedzic* v. *Pine Island Marina, LLC*, 143 Conn. App. 644, 653, 72 A.3d 406 (2013) ("[n]egligence of a party or [its] counsel is insufficient for purposes of § 52-212 to set aside a default judgment" (internal quotation marks omitted)); *In re Ilyssa G.*, 105 Conn. App. 41, 48–49, 936 A.2d 674 (2007) (same), cert. denied, 285 Conn. 918, 943 A.3d 475 (2008); *Wren* v. *MacPherson Interiors, Inc.*, 69 Conn. App. 349, 364, 794 A.2d 1043 (2002) ("[t]hough the defendants' prior attorney may deserve some blame, his possible negligence alone does not provide this court with a sufficient reason for holding inapplicable the four month limitation contained in § 52-212a"); *Segretario* v. *Stewart-Warner Corp.*, 9 Conn. App. 355, 363, 519 A.2d 76 (1986) ("[n]egligence of a party or his counsel is insufficient to reinstate the action"). Relying on these cases, the respondent contends that this principle "governs equally in habeas [cases] . . . as in other civil contexts."[21] We are not persuaded, however, that this principle applies when counsel's negligence rises to the level of constitutionally deficient performance.

[20] General Statutes § 52-212 applies specifically to judgments upon default or nonsuit and provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . ."

[21] The respondent cites three habeas cases in support of this argument. None of these cases, however, addressed a trial court's denial of an untimely motion to open a judgment that was allegedly rendered due to the ineffective assistance of habeas counsel and, therefore, these cases do not affect our analysis. See *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 228, 280 A.3d 526 (court did not abuse its discretion in denying motion to open because petitioner failed to meet essential requirement for granting motion to open on basis of newly discovered evidence, namely, "that the evidence

As previously noted in this opinion, habeas corpus proceedings, although civil in nature, "are unique in that they involve the petitioner's liberty and the amount of time the petitioner will be incarcerated." (Internal quotation marks omitted.) *Fine* v. *Commissioner of Correction*, supra, 147 Conn. App. 144. Consequently, our Supreme Court has recognized that a violation of the right to effective assistance of counsel differs substantially from attorney error in a case where there is no such right. It has explained that, although this court has held that "a habeas attorney's ignorance of the law and poor advice that results in the untimely filing of a habeas petition is not an external objective factor sufficient to establish good cause under § 52-470"; *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 348; we have not held "that ineffective assistance of counsel can *never* constitute good cause under § 52-470 as a matter of law." (Emphasis in original.) Id., 349.

Although the procedural rule at issue in *Rose* is specific to habeas corpus proceedings and, therefore, differs from § 52-212a, which applies to all civil judgments, our Supreme Court has recognized that some rules that are generally applicable to civil cases should apply differently in the habeas context. For example, the court limits the application of the doctrine of res judicata, or claim preclusion, in the habeas context "to claims that actually have been raised and litigated in an earlier

which the party seeks to offer could not have been known and with reasonable diligence produced at trial" (internal quotation marks omitted)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022); *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 76–77, 256 A.3d 684 (same), cert. denied, 339 Conn. 909, 261 A.3d 744 (2021); *Carmon* v. *Commissioner of Correction*, 148 Conn. App. 780, 788, 87 A.3d 595 (2014) ("the court acted well within its authority in rendering a default judgment, and . . . it did not abuse its discretion in concluding that such a judgment was warranted" because petitioner failed to provide any appropriate explanation for his failure to comply with pleading requirements under General Statutes § 52-110).

proceeding."[22] (Internal quotation marks omitted.) *Ross* v. *Commissioner of Correction*, 337 Conn. 718, 729, 256 A.3d 118 (2021). As our Supreme Court has observed, quoting the United States Supreme Court in *Sanders* v. *United States*, 373 U.S. 1, 8, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963), "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and the infringement of constitutional rights is alleged." (Internal quotation marks omitted.) *James L.* v. *Commissioner of Correction*, supra, 245 Conn. 142 n.11. Our Supreme Court has further explained that, "[a]lthough the doctrine of res judicata in its fullest sense bars claims that could have been raised in a prior proceeding, such an application in the habeas corpus context would be unduly harsh. . . . Unique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Foremost among those considerations is the interest in making certain that no one is deprived of liberty in violation of his or her constitutional rights." (Internal quotation marks omitted.) *Ross* v. *Commissioner of Correction*, supra, 728–29. The same policy considerations guide our application of the doctrine of collateral estoppel, or issue preclusion, to habeas corpus proceedings. Id., 729.

[22] "[T]he doctrine of res judicata in the habeas context must be read in conjunction with Practice Book § 23-29 (3), which [further] narrows its application." *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d 608 (2009). Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." "Following this analytical pathway, a second petition alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition." *Kearney* v. *Commissioner of Correction*, supra, 235.

Similarly, here, a rigid rule that, in the absence of proof of fraud, duress, or mutual mistake, the negligence of habeas counsel that rises to the level of constitutionally deficient performance is not a valid basis to open a judgment also would be unduly harsh and, therefore, contrary to general principles of equity. See *Holland* v. *Florida*, 560 U.S. 631, 649–51, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (reasoning that rule that attorney misconduct, even if "grossly negligent," cannot justify equitable tolling of statute of limitations on federal habeas claims in absence of proof of bad faith, dishonesty, divided loyalty, mental impairment, or like, "is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet [that] standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling" (internal quotation marks omitted)). For these reasons, we reject the respondent's contention that we should treat ineffective assistance of counsel in a habeas corpus case the same as ordinary attorney negligence in a typical civil case.

In sum, given both the significant liberty interests at stake in habeas proceedings and the importance of the right to counsel in such proceedings, we hold that, unlike attorney negligence in the traditional civil context, ineffective assistance of counsel is sufficient to invoke the court's equitable authority to open a habeas judgment more than four months after it was rendered.

The respondent argues, however, that, even if ineffective assistance of counsel might be a sufficient basis to invoke the court's authority to grant relief from a judgment in some habeas cases, this is not such a case because the petitioner failed to exercise due diligence to communicate with White or to monitor the status of his case. Therefore, according to the respondent, the court "properly exercised its discretion in determining

that the petitioner's conduct obviated any claim for relief on his late motion."

The problem with the respondent's argument is that the court never exercised its discretion in this case. Instead, it concluded that it lacked the authority to do so. To be sure, had the court exercised its discretion, the petitioner's diligence would have been an important consideration.[23] To a significant extent though, the petitioner's lack of diligence in pursuing his habeas petition or filing a timely motion to open is relevant to the second prong of a claim of ineffective assistance of counsel—whether counsel's deficient performance prejudiced the petitioner. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 264, 112 A.3d 1 (2015) ("[t]o satisfy the prejudice prong [under *Strickland*], [the petitioner] must demonstrate that there is a reasonable probability that, *but for counsel's unprofessional errors*, the result of the proceeding would have been different" (emphasis added; internal quotation marks omitted)).

In the present case, the court did not assess the petitioner's ineffective assistance of counsel claim under either prong of *Strickland* and declined to resolve factual disputes relevant to both inquiries. Although the court's discussion of the petitioner's conduct suggests that the court may have viewed his conduct as insufficiently diligent, it is generally unclear whether, in stating certain facts in its memorandum of decision, the court was making factual findings or was simply describing the state of the evidence.[24] Moreover, the

[23] See footnote 25 of this opinion.

[24] The court included the following discussion in its memorandum of decision regarding the parties' conduct in relation to the underlying action: "White's notice accompanying the caseflow request and the affidavit submitted by the respondent detail the unsuccessful efforts to contact [the petitioner] and his family members. Additionally, the notice and affidavit indicate that White was not contacted by [the petitioner] and his family members and provided with [the petitioner's] contact information. Juxtaposed with the present matter is the 2015 habeas and the communications between

court explicitly stated that it was not resolving factual disputes or making credibility determinations "because there [had] been no threshold showing of any fraud, duress, or mutual mistake." Given the court's statement that it was not resolving factual disputes in light of its lack of authority to open the judgment, we decline the respondent's invitation to decide the merits of the petitioner's motion to open on the basis of suggested or implicit findings. See, e.g., *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716, 946 A.2d 1203 ("[w]hen the record on appeal is devoid of factual findings by

Lage and [the petitioner] and his family members. There is little apparent logic in maintaining communications with Lage in the restored criminal charges resulting from the successful 2015 habeas, where [the petitioner] has been ordered rearrested but remains in Jamaica, but not having communications with White in the pending habeas awaiting trial. The success in one habeas would seem to engender pursuing habeas relief in a second pending case, especially because successful challenges to all state convictions have the potential to either eliminate all grounds for removal from the country or prevent reentry. Yet [the petitioner] testified that he called Lage from Jamaica in either June or July of 2020, shortly after his deportation, but did not try to call White until August of 2020, and tried again in October of 2020. [The petitioner] then gave up contacting White. [The petitioner's] habeas testimony provides no explanation why he would contact Lage and maintain regular communications after arriving in Jamaica, but [he] delayed establishing contact with White and made little effort communicating with White. Although this court dismissed the petition on February 11, 2021, neither [the petitioner], who had Internet access in Jamaica, nor Kelly Clue, who divided her time between Connecticut and Jamaica and had Internet access in both places, found out about the dismissal until approximately early 2022. Yet [the petitioner] and Kelly Clue maintained contact with Lage by telephone.

"Although correspondence from White to [the petitioner] was entered into evidence, no telephone records were provided to the court to substantiate any of the cell phone calls. Nor is there any official document that assists this court in establishing when [the petitioner] was deported. According to [the petitioner] and Ellis, he was deported on June 5, 2020. White's notice and affidavit, however, indicate that he called [the petitioner] at the Wyatt Detention Center on June 13, 2020. The time [the petitioner] spent in a Jamaican hospital when he was deported would overlap in large part with the June 5 [through] 13 time frame. *Resolving these diverging factual differences is unnecessary to resolve the present motion, and the court need not delve into credibility determinations, because there has been no threshold showing of any fraud, duress, or mutual mistake.*" (Emphasis added.)

the habeas court as to the performance of counsel, it is improper for an appellate court to make its own factual findings"), cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). Put differently, accepting the respondent's argument would require that we speculate not only as to how the court would have resolved key factual disputes but also as to how it would have exercised its discretion had it not been operating under an unnecessarily limited view of its authority, which we will not do. See, e.g., *State* v. *Hoskie*, 74 Conn. App. 663, 674, 813 A.2d 136 ("we cannot now speculate as to how the court would have responded to a timely request for a continuance"), cert. denied, 263 Conn. 904, 819 A.2d 837 (2003).

Accordingly, we must remand this case for a new hearing on the petitioner's motion to open. See *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015) (concluding that it was "necessary to remand the case to the trial court for a new trial to allow the parties to present their cases with the correct legal standard in mind and to allow the trial court to evaluate the facts in light of this correct legal standard").

On remand, if the court determines that it has authority to open the judgment because the petitioner has satisfied both prongs of the *Strickland* test, the exercise of that authority is left to the court's discretion. See *Newtown* v. *Ostrosky*, 191 Conn. App. 450, 468, 215 A.3d 1212 ("equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment" (internal quotation marks omitted)), cert. denied, 333 Conn. 925, 218 A.3d 68 (2019). Thus, the court must determine, as a threshold matter, whether White's representation of the petitioner in connection with the court's dismissal of the action and with the failure to file a timely motion to open constitutes ineffective assistance under *Strickland*. If the court concludes that both prongs of *Strickland* are satisfied, and

that it therefore has the authority to entertain the petitioner's motion, the court then may consider whether the totality of the facts and circumstances warrant exercising its authority to grant the motion.[25]

The judgment is reversed and the case is remanded for a new hearing on the petitioner's motion to open the judgment of dismissal.

In this opinion the other judges concurred.

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[25] The court may consider factors such as whether the petitioner, despite counsel's ineffective assistance, nevertheless unreasonably delayed in moving to open the judgment; see *Newtown* v. *Ostrosky*, supra, 191 Conn. App. 470–72 (noting that court's authority to entertain defendant's late motion to open based on lack of notice "was not limited by the four month rule established by § 52-212a" but concluding that court did not abuse its discretion in denying motion because defendant waited more than two years before moving to open judgments); whether the petitioner's underlying claim is nonfrivolous; see *In re Baby Girl B.*, supra, 224 Conn. 294 (affirming trial court's decision to grant petition to open judgment terminating mother's parental rights where trial court concluded that "genuine issues exist, which, if established after a full hearing on the merits could constitute a meritorious defense to the allegations of the petition to terminate [the] mother's parental rights" (internal quotation marks omitted)); whether granting the untimely motion to open will unduly prejudice the respondent; see *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 134, 629 A.2d 413 (1993) ("[a] [s]tate's procedural rules . . . [afford] . . . the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal" (internal quotation marks omitted)); whether the petitioner has other options to challenge his conviction, for example, the filing of a new habeas petition; or whether, because he is no longer in custody, opening the habeas judgment is the petitioner's sole opportunity to challenge his judgment of conviction. See *Coppola* v. *Coppola*, 243 Conn. 657, 665, 707 A.2d 281 (1998) (Our Supreme Court prefers "to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure." (Citations omitted; internal quotation marks omitted.)).

CATHERINA CAMERON *v.* JAVIER SANTIAGO
(AC 46440)

Moll, Clark and Seeley, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, alleged assault arising out of a sexual encounter between the parties. The plaintiff alleged that the defendant had not complied with the terms of the plaintiff's consent to the encounter because he did not wear a condom during the entirety of the encounter. The plaintiff brought two prior actions against the defendant, a small claims matter in which the court rendered judgment for the defendant, and an action in the Superior Court alleging breach of contract that resulted in a stipulated judgment for the plaintiff. The trial court in the present case held a pretrial conference, during which it stated that the plaintiff could not continue retrying the case against the defendant. Thereafter, the court issued a written order dismissing the action sua sponte with prejudice, concluding that the plaintiff's claims involved the same parties and factual allegations as her two prior actions. In a subsequent articulation, the court compared the facts of the present case to those of the breach of contract action and explained that its dismissal was based on the prior pending action doctrine. The court also applied this court's holding in *Edgewood Village, Inc.* v. *Housing Authority* (54 Conn. App. 164), and concluded that it could not afford meaningful relief to the plaintiff and that the action, therefore, was moot because both of the plaintiff's actions demanded the same relief, which was available to her via the stipulated judgment rendered in the "prior pending action." On the plaintiff's appeal to this court, *held*:

1. The trial court deprived the plaintiff of procedural due process by sua sponte dismissing her action without giving her notice and affording her an opportunity to be heard with respect to the grounds on which the court based its dismissal: the plaintiff was entitled to adequate notice of the issues that the court intended to address at the pretrial conference, and the court never gave the plaintiff an opportunity to be heard on any of the grounds that it raised sua sponte and on which it based its dismissal of the action; moreover, a court does not have the right to raise sua sponte the prior pending action rule when a moving party has not done so and, accordingly, the court exceeded its authority by acting sua sponte on those grounds as a basis to dismiss the action; furthermore, once the court determined that the plaintiff's action might be moot, it was required to give the parties an opportunity to address the issue, so that they could be heard on the matter, which the court failed to do.
2. The trial court incorrectly concluded that, pursuant to this court's decision in *Edgewood Village, Inc.*, it could not afford the plaintiff any practical

relief and that her action was, therefore, moot: although the trial court's application of *Edgewood Village, Inc.*, was premised on its determination that the present action and the plaintiff's prior breach of contract action demanded the same relief, which the court concluded was available to the plaintiff via her stipulated judgment in "her prior pending action," namely, the breach of contract action, the breach of contract action had already concluded in a stipulated judgment, and, as a result, there was nothing pending before the court that would have rendered the present action moot; moreover, both actions, although related to the same underlying incident, did not involve identical allegations, and practical relief could be afforded to the plaintiff if she were to prevail on her claims in the present action, so long as she could prove her damages in connection therewith.

Submitted on brief November 14, 2023—officially released February 20, 2024

Procedural History

Action to recover damages for, inter alia, the defendant's alleged assault, and for other relief, brought to the Superior Court in the judicial district of Meriden, where the court, *Riley*, *J.*, rendered judgment dismissing the action, from which the plaintiff appealed to this court; thereafter, the trial court, *Riley*, *J.*, denied the plaintiff's motion to reargue and for reconsideration, and the plaintiff filed an amended appeal. *Reversed*; *further proceedings*.

Catherina Cameron, self-represented, filed a brief as the appellant.

Opinion

SEELEY, J. The self-represented plaintiff, Catherina Cameron, appeals from the judgment of the trial court dismissing, sua sponte, her action against the defendant, Javier Santiago.[1] On appeal, she claims that the

[1] The defendant did not file a brief or otherwise participate in this appeal. As a result, on September 7, 2023, this court ordered "that the appeal shall be considered on the basis of the appellant'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 court. Pursuant to Practice Book [§] 70-4, oral argument by the appellee will not be permitted." Subsequently, the plaintiff waived oral argument before this court.

court deprived her of procedural due process by sua sponte dismissing her action, with prejudice, without giving her notice and an opportunity to be heard with respect to the grounds on which the court based its dismissal. We agree with the plaintiff and reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In July, 2016, the plaintiff and the defendant had a sexual encounter in a hotel room. According to the plaintiff, the defendant did not comply with the terms of her consent to that sexual encounter because he did not wear a condom during the entirety of the sexual encounter. In February, 2018, the plaintiff filed a small claims action against the defendant seeking $5000 for medical expenses and pain and suffering stemming from the 2016 sexual encounter with the defendant, alleging that, following the encounter, she experienced anxiety and fear about becoming pregnant or contracting a sexually transmitted disease. In the small claims matter, the court rendered judgment for the defendant after finding that the plaintiff had "failed to prove by a fair preponderance of the evidence her claim for medical expenses and pain and suffering from an alleged sexual assault by the defendant."

Thereafter, in June, 2019, the plaintiff brought an action against the defendant in the Superior Court for breach of contract. The complaint in the breach of contract action, which detailed the same 2016 sexual encounter, alleged that the defendant had failed to pay the plaintiff certain sums of money pursuant to agreements entered into by the parties. In November, 2021, the plaintiff and the defendant entered into a stipulated judgment in the breach of contract action, pursuant to which the defendant is required to pay the plaintiff $10,000 by November, 2024. The defendant has not yet made any payment pursuant to that judgment.

In May, 2022, the plaintiff commenced the present action, alleging that the defendant did not comply with the terms of her consent to the 2016 sexual encounter by failing to wear a condom during the entirety of the sexual encounter. On March 3, 2023, the plaintiff filed an amended complaint alleging claims for assault, battery, intentional and negligent infliction of emotional distress, recklessness, and negligence. On March 8, 2023, the defendant filed an answer. A remote, on-the-record pretrial conference was held on April 14, 2023, at which only the plaintiff appeared and did so as a self-represented party. At the outset of the pretrial conference, the court stated to the plaintiff that, before it would hear from her, it wanted to review the history of the case. It then proceeded to question the plaintiff several times regarding whether the facts of the present case involved the same circumstances concerning her 2016 sexual encounter with the defendant, to which she replied, "[y]es." It also questioned her regarding the two prior actions she had brought related to the 2016 sexual encounter. The court then stated: "[U]nder the law, you cannot continue to keep retrying a case, especially when you've already obtained a judgment, which you did in this case." Even though the plaintiff responded that the defendant waived any defenses, the court simply stated that the present action was brought well beyond the statute of limitations and that it would issue a written order on the matter. It then adjourned the conference.

On April 17, 2023, the court issued a written order dismissing the action sua sponte with prejudice. In the order, the court noted that the plaintiff previously had filed a small claims matter related to the 2016 sexual encounter, which resulted in a judgment for the defendant after a hearing. The court also noted the plaintiff's prior breach of contract action, which resulted in a stipulated judgment, and stated: "The plaintiff now

brings this action again involving the same parties and same factual allegations. A remote, on-the-record pretrial conference was held on April 14, 2023. The plaintiff acknowledged . . . that the claim involves the same parties and factual allegations of the two prior actions, arising from an incident which occurred on July 3, 2016. She stated she believes the defendant should be defaulted and she should be allowed to proceed, despite the matter having already gone to judgment in the [breach of contract] case. The case is dismissed with prejudice. The matter has already been adjudicated through a final stipulated judgment and the present action has been brought well past the statute of limitations." Thereafter, the plaintiff filed a motion to reargue and for reconsideration, which the court denied, and this amended appeal followed.[2]

On May 2, 2023, the plaintiff filed a motion for articulation seeking an articulation and clarification of the legal basis for the trial court's dismissal of her action with prejudice. On May 31, 2023, the court issued a written articulation of its decision. In that articulation, the court first compared the facts of the present case to those of the prior breach of contract action and explained that its dismissal was based on the prior pending action doctrine.[3] Specifically, the court stated:

[2] We note that the plaintiff amended her appeal to include a challenge to the trial court's decision denying her motion to reargue and for reconsideration. The plaintiff, however, never filed supplemental briefing addressing that decision, and her appellate brief is devoid of any argument relating to the trial court's decision denying her motion to reargue and for reconsideration. We, therefore, deem any claim relating thereto abandoned due to inadequate briefing. See *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 800, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

[3] "[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the

"In the present case, the content of the pleadings reveals that both actions arise out of the same course of conduct. Therefore, in the present case and the prior pending action, the liabilities asserted are based entirely on the same underlying facts. In each action, the plaintiff seeks to adjudicate the same underlying rights; therefore, the actions are exactly the same. Accordingly, because the present case and the prior pending action are exactly the same . . . the court has no discretion and must dismiss the present case under the prior pending action doctrine."[4] Next, the court applied this court's holding in *Edgewood Village, Inc.* v. *Housing Authority*, 54 Conn. App. 164, 166–68, 734 A.2d 589 (1999), to the facts of the present case and concluded that it could not afford meaningful relief to the plaintiff and that the action, therefore, was moot. In particular, the court stated that "both of the plaintiff's actions here demand the same relief, which is available to her via the stipulated judgment entered in her prior pending action, and

doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets." (Internal quotation marks omitted.) *Barbara* v. *Colonial Surety Co.*, 221 Conn. App. 337, 351 n.13, 301 A.3d 535, cert. denied sub nom. *Colonial Surety Co.* v. *Phoenix Contracting Group*, 348 Conn. 924, 304 A.3d 443 (2023). "In *Salem Park, Inc.* v. *Salem*, 149 Conn. 141, 176 A.2d 571 (1961), our Supreme Court overruled a plea in abatement made on the ground that a prior action involved the same land and the same issues on the basis that the judgment in the prior action had been rendered and had not been set aside. *Salem Park, Inc.*, espouses the principle that if a judgment in a prior action has been rendered and has not been set aside on appeal, there is no action pending within the meaning of the prior pending action doctrine. . . . [Moreover] [o]nce a case has been withdrawn . . . there is no action pending to implicate the prior pending action doctrine." (Citation omitted; internal quotation marks omitted.) *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, 153 Conn. App. 288, 293 n.7, 101 A.3d 292 (2014).

[4] Notably, the court did not specifically refer to the prior pending action doctrine during the pretrial conference. Following our review of the transcript of the pretrial conference and the court's written order, we conclude that it is apparent from the court's comments during the pretrial conference, when compared to its written order, that the court was alluding to its belief that the action had to be dismissed pursuant to the prior pending action doctrine, although it did not use those words.

the court cannot afford her any further relief than that already pending."

I

On appeal, the plaintiff claims that the court deprived her of procedural due process by dismissing her case, sua sponte, without affording her with notice and an opportunity to be heard regarding the grounds for the court's dismissal. We agree and conclude that, under the circumstances of this case, the court's sua sponte dismissal of the action was improper.

We first set forth our standard of review and governing legal principles. "Whether a party was deprived of his [or her] due process rights is a question of law to which appellate courts grant plenary review. . . . The core interests protected by procedural due process concern the opportunity to be heard at a meaningful time and in a meaningful manner. . . . Fundamental tenets of due process require that all persons directly concerned in the result of an adjudication be given reasonable notice and opportunity to present their claims or defenses. . . . It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard. . . . It is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." (Citation omitted; internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 279–80, 248 A.3d 4 (2021); see also *Coleman* v. *Bembridge*, 207 Conn. App. 28, 45, 263 A.3d 403 (2021); *Jackson* v.

Pennymac Loan Services, LLC, 205 Conn. App. 189, 195–96, 257 A.3d 314 (2021).

Our Supreme Court has stated that, "[f]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Instead, due process is a flexible principle that calls for such procedural protections as the particular situation demands. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his [or her] own arguments and evidence orally." (Citation omitted; internal quotation marks omitted.) *In re DeLeon J.*, 290 Conn. 371, 378, 963 A.2d 53 (2009).

In the present case, the plaintiff was entitled to adequate notice of the issues that the court intended to address at the pretrial conference. The court, furthermore, never gave the plaintiff an opportunity to be heard on any of the grounds that it raised sua sponte and on which it based its dismissal of the action. Accordingly, the court improperly considered and based its dismissal of the action on issues that the plaintiff had no notice would be addressed at the pretrial conference and without giving the plaintiff an opportunity to respond to and address the issues raised. The court's sua sponte dismissal of the action, therefore, violated the plaintiff's right to procedural due process and cannot stand. See, e.g., *Jackson* v. *Pennymac Loan Services, LLC*, supra, 205 Conn. App. 194–98 (court violated plaintiffs' rights to due process when it granted defendant's motion to

dismiss on ground that court raised sua sponte, as plaintiffs were not provided with notice and reasonable opportunity to submit evidence on issue).

We also address the propriety of the court's sua sponte raising issues at the pretrial conference that had not previously been raised by the parties. "[D]ue to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . *Somers* v. *Chan*, 110 Conn. App. 511, 528, 955 A.2d 667 (2008). Additionally, it is axiomatic that parties should be afforded adequate notice of the issues the court intend[s] to address . . . . Id., 529. Thus, a trial court generally acts in excess of its authority when it raises and considers, sua sponte, issues not raised or briefed by the parties. See id. (concluding that court improperly raised and decided issues in its memorandum of decision of which parties were not afforded adequate notice); see also *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015) (we conclude, under the facts of this case, that the court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties)." (Emphasis in original; internal quotation marks omitted.) *Brownstone Exploration & Discovery Park, LLC* v. *Borodkin*, 220 Conn. App. 806, 819–20, 299 A.3d 1189 (2023).

An exception to the general rule that a court is limited to adjudicating issues raised by the parties is that a court may, sua sponte, raise an issue relating to its subject matter jurisdiction, which "involves the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Tirado* v. *Torrington*, 179 Conn. App. 95, 100, 179 A.3d 258 (2018). As this court has stated

previously, "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) Id. In the present case, however, the tort statute of limitations in General Statutes § 52-577 and the prior pending action doctrine do not implicate subject matter jurisdiction. See *Orticelli* v. *Powers*, 197 Conn. 9, 16–17, 495 A.2d 1023 (1985) (statute of limitations in § 52-577 is procedural rather than jurisdictional, which renders it subject to waiver; therefore, trial court erred in raising issue of statute of limitations contained in § 52-577 sua sponte and applying it to bar cause of action); *Tirado* v. *Torrington*, supra, 101 n.7 ("[a]lthough subject matter jurisdiction may be raised at any time, a court is limited in its ability to raise, sua sponte, the issue of lack of subject matter jurisdiction for a plaintiff's failure to timely commence an action, where the statute of limitations 'is procedural and personal rather than substantive or jurisdictional and is thus subject to waiver' "); see also *Luongo Construction & Development, LLC* v. *MacFarlane*, 176 Conn. App. 272, 284, 170 A.3d 57 (prior pending action doctrine "does not truly implicate subject matter jurisdiction" (internal quotation marks omitted)), cert. denied, 327 Conn. 988, 175 A.3d 562 (2017). Moreover, this court has stated previously that a court "does not have the right to raise, sua sponte, the prior pending action rule when the moving party has not done so. To do so would preclude the opposing party from any opportunity to argue that the doctrine does not apply." *Conti* v. *Murphy*, 23 Conn. App. 174, 178, 579 A.2d 576 (1990). Accordingly, the court exceeded its authority by acting sua sponte on those grounds as a basis to dismiss the action. See *Doe* v. *Flanigan*, 201 Conn. App. 411, 434, 243 A.3d 333 ("'[a] trial court lacks authority to render summary judgment on grounds not raised or

briefed by the parties that do not involve the court's subject matter jurisdiction' "), cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

Furthermore, even though mootness implicates a court's subject matter jurisdiction and "can be raised at any stage of the proceedings"; (internal quotation marks omitted) *GMAT Legal Title Trust 2014-1, U.S. Bank, National Assn.* v. *Catale*, 213 Conn. App. 674, 694, 278 A.3d 1057, cert. denied, 345 Conn. 905, 282 A.3d 980 (2022); a court must still comply with the requirements of due process and provide the parties with notice that the issue is being raised and a meaningful opportunity to be heard thereon. *Barros* v. *Barros*, 309 Conn. 499, 507, 72 A.3d 367 (2013) (to satisfy procedural due process, "[p]arties whose rights are to be affected are entitled to be heard" (internal quotation marks omitted)); see, e.g., *Stamford Property Holdings, LLC* v. *Jashari*, 218 Conn. App. 179, 191 and n.10, 291 A.3d 117 (because this court raised mootness issue sua sponte, parties were notified to be prepared to address issue of whether appeal was moot at oral argument), cert. denied, 347 Conn. 901, 296 A.3d 840 (2023); *Taber* v. *Taber*, 210 Conn. App. 331, 336 n.3, 269 A.3d 963 (2022) (parties were given opportunity to file supplemental briefs on issue of whether portion of appeal was moot when mootness issue was raised by this court after oral argument); *Kloiber* v. *Jellen*, 207 Conn. App. 616, 620–21, 263 A.3d 952 (2021) (parties were given opportunity to file supplemental briefs on issue of standing that was raised by this court following oral argument); see generally *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 128, 84 A.3d 840 (2014) (when reviewing court raises issue that parties did not raise, parties must be given opportunity to be heard on issue). Therefore, once the court determined that the plaintiff's action might be moot, it was required to give the parties the

opportunity to address the issue, so that they could be heard on the matter.

II

Although our conclusion that the plaintiff was denied procedural due process is dispositive of this appeal, we also address the plaintiff's claim challenging the court's determination that, pursuant to this court's decision in *Edgewood Village, Inc.* v. *Housing Authority*, supra, 54 Conn. App. 166–68, it could not afford the plaintiff any practical relief and that her action is moot, as this issue concerns the court's subject matter jurisdiction and will likely arise on remand. "Mootness [is a threshold issue that] implicates subject matter jurisdiction, which imposes a duty on the [trial] court to dismiss a case if the court can no longer grant practical relief to the parties." (Internal quotation marks omitted.) *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 581, 92 A.3d 961 (2014). "Since mootness implicates subject matter jurisdiction and raises a question of law, our review . . . is plenary." *Drabik* v. *East Lyme*, 97 Conn. App. 142, 145, 902 A.2d 727 (2006).

An overview of our decision in *Edgewood Village, Inc.*, is first necessary. In that case, the plaintiffs appealed to this court from the trial court's dismissal of their action against the defendant, which was based on the fact that "the plaintiffs' summons did not contain a proper return date or date for filing an appearance." *Edgewood Village, Inc.* v. *Housing Authority*, supra, 54 Conn. App. 166. After the dismissal of their action, the plaintiffs, this time using a proper summons, served a second complaint, which was identical to the first complaint. Id. On appeal, this court concluded: "In this case, the plaintiffs have filed an identical lawsuit to the one that was dismissed. Because both actions demand the same relief, the legal redress that the plaintiffs seek is available to them in their pending action. If this court

were to reverse the trial court's dismissal and order this case reinstated, the plaintiffs could not be afforded any further relief than that which they [could] obtain in the second case, which is pending in the trial court. The relief that a court must be able to provide should be 'meaningful' . . . ." (Citations omitted.) Id., 167. This court, therefore, dismissed the appeal as moot. Id., 168.

In *Edgewood Village*, *Inc.*, the central basis for our determination that the appeal was moot was the fact that the plaintiffs had brought another identical action that sought identical relief and was pending in the trial court. Id., 167. As a result, even if this court reversed the judgment of dismissal in the first action in *Edgewood Village*, *Inc.*, the plaintiffs "could not be afforded any further relief than that which they [could] obtain in the second case, which [was] pending in the trial court." Id. In the present case, the trial court's application of *Edgewood Village*, *Inc.*, was premised on its determination that the present action and the plaintiff's prior breach of contract action both demand the same relief, which the court concluded was available to the plaintiff via her stipulated judgment in "her prior pending action," namely, the breach of contract action. The court therefore concluded that it could not "afford her any further relief than that already pending." The plaintiff's prior breach of contract action against the defendant, however, already had concluded in a stipulated judgment. As a result, there is nothing pending in the trial court that would render the present action moot. Moreover, both actions, although related to the same underlying incident, do not involve identical allegations. Practical relief could be afforded to the plaintiff if she were to prevail on any of her claims in the present action, so long as she can prove her damages in connection therewith and the defendant fails to plead and prove a dispositive special defense. Accordingly, the court's finding

of mootness was based on a misreading of this court's decision in *Edgewood Village, Inc.*

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.