STATE OF CONNECTICUT *v.* MALIK T. DUNBAR (AC 46846)

Suarez, Clark and Seeley, Js.

Syllabus

The defendant, who had been on probation in connection with his convictions, in two separate criminal dockets, of larceny in the second degree and sexual assault in the second degree, appealed to this court from the judgments of the trial court revoking his probation and imposing an effective sentence of seven years of incarceration. He claimed, inter alia, that the court violated his constitutional due process right to cross-examine adverse witnesses by failing to engage in a balancing analysis pursuant to *State* v. *Shakir* (130 Conn. App. 458) before admitting certain hearsay evidence. *Held*:

The trial court's finding that the defendant violated his probation in the sexual assault case was not based on his discharge from a certain sex offender treatment program and, thus, the defendant's claim that the court violated his constitutional right to due process by admitting certain evidence concerning his discharge from that program failed.

The trial court, having properly admitted into evidence, under the business records exception to the rule against hearsay, a discharge report from a domestic violence program that the defendant was required to attend as a special condition of his probation in the larceny case was not required, under *Shakir*, to balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examination prior to admitting the report into evidence.

The trial court did not abuse its discretion in revoking the defendant's probation in each case, as the record demonstrated that the court properly considered the beneficial purposes of probation and balanced the defendant's interests in liberty and rehabilitation against the need to protect the public in rendering its judgments.

Argued February 10—officially released June 24, 2025

Procedural History

Information, in each of two cases, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the cases were consolidated and tried to the court, *Kwak*, *J.*; judgment in each case revoking probation, from which the defendant appealed to this court. *Affirmed.*

Chad L. Edgar, assigned counsel, for the appellant (defendant).

Olivia M. Hally, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Alexandra Arroyo* and *Marsha Beckford*, deputy assistant state's attorneys, for the appellee (state).

Opinion

SEELEY, J. The defendant, Malik T. Dunbar, appeals from the judgments of the trial court finding him in violation of, and revoking, his probations, pursuant to General Statutes § 53a-32,[1] that were imposed under two separate criminal dockets. On appeal, the defendant claims that the court (1) violated his right to due process under the federal constitution by failing to engage in a due process balancing analysis under *State* v. *Shakir*, 130 Conn. App. 458, 467, 22 A.3d 1285, cert.

[1] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . .

"(c) Upon . . . an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. . . .

"(d) If such violation is established, the court may . . . (4) revoke the sentence of probation . . . . If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence. . . ."

denied, 302 Conn. 931, 28 A.3d 345 (2011),[2] before admitting certain hearsay evidence and (2) abused its discretion in revoking his probation. We disagree and affirm the judgments.

The following facts, which the court reasonably could have found, and procedural history are relevant to our resolution of this appeal. The defendant was serving two separate terms of probation stemming from his convictions in two criminal cases. In *State* v. *Dunbar*, Superior Court, judicial district of Waterbury, Docket No. CR-14-0426962-T, he was convicted, on a plea of guilty, of larceny in the second degree in violation of General Statutes § 53a-123 (larceny case) and sentenced to ten years of incarceration, execution suspended after four years, followed by three years of probation. His probationary period initially commenced on September 10, 2018; however, on February 13, 2020, following a hearing, the court found the defendant in violation of his probation, revoked his probation and sentenced him to six years of incarceration, execution suspended after eighteen months, followed by probation for the remainder of the originally imposed term of probation. In addition to the standard conditions of probation that were imposed on the defendant, the court added, as a special condition, that he "[c]omplete the Explore program," a twenty-six session program

[2] Our courts previously have identified this analysis in a variety of ways, including as a "balancing test"; *State* v. *Polanco*, 165 Conn. App. 563, 571, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016); as the "*Shakir* balancing test"; *State* v. *Tucker*, 179 Conn. App. 270, 281, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018); and as the "*Crespo* balancing test"; *State* v. *Wade*, 351 Conn. 745, 761, 333 A.3d 90 (2025); see *State* v. *Crespo*, 190 Conn. App. 639, 647, 211 A.3d 1027 (2019); whereas, it is referred to as an "interest-of-justice determination" by federal courts. (Internal quotation marks omitted.) *United States* v. *Diaz*, 986 F.3d 202, 211 (2d Cir. 2021). Because the parties and the court all have referred to the test in the present case as the *Shakir* balancing analysis, for the sake of consistency we do so as well in this opinion.

designed to educate participants on domestic violence, which is administered by Wheeler Clinic.

In *State* v. *Dunbar*, Superior Court, judicial district of Waterbury, Docket No. CR-19-0457609-T, the defendant was convicted, on a plea of guilty, of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) (sexual assault case) on April 1, 2021. In that case, he was sentenced to ten years of incarceration, execution suspended after two years, followed by ten years of probation with special conditions. The conditions of probation imposed in relation to the defendant's sexual assault case required, inter alia, that he (1) "[s]ubmit to any medical and/or psychological examination, urinalysis, alcohol and/or drug testing, and/or counseling sessions required by the [c]ourt"; (2) register as a sex offender for a period of ten years; (3) not move from his place of residence or sleep elsewhere overnight without notifying and obtaining the permission of a probation officer; (4) engage in "[s]ex offender evaluation and treatment as deemed appropriate" by [the] Office of Adult Probation,[3] which required him to engage in a sex offender treatment program at The Connection, "a statewide community based human services agency that connects individuals with a variety of resources"; *In re Caiden B.*, 220 Conn. App. 326, 330, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023); (5) not have any contact with the victim and comply with a standing criminal protective order that was in effect until 2070 and that prohibited him from contacting the victim; (6) "notify [his] [p]robation [o]fficer of any new or existing romantic or sexual relationship"; and (7) not go to or loiter near places primarily used by children under the age of sixteen or where children might congregate, including, inter alia, any "malls,"

[3] We note that, in 2022, the Office of Adult Probation was dissolved and replaced with Adult Probation Services. See footnote 18 of this opinion. We will use both office titles in this opinion as appropriate.

"fairs," "carnivals," "flea market[s]" or "beaches." The defendant's probationary period for both cases commenced on October 28, 2021, upon his release from the custody of the Department of Correction.

By April, 2022, Deanna Recchia, the defendant's probation officer, had become aware of numerous potential violations of probation committed by the defendant. First, in January, 2022, she learned that the defendant twice had gone to the Brass Mill Center, a mall in Waterbury. Next, in February, 2022, during a compliance check of the defendant's cell phone, she learned that he had contacted the victim in his sexual assault case. Later that month, Recchia was notified that the defendant had been discharged from Wheeler Clinic after refusing to agree to comply with the intake and attendance rules for participation in the Explore program. Then, in March, 2022, Recchia learned that the defendant had begun a new romantic relationship and moved from his place of residence without notifying her. At some point, Recchia also became aware that the defendant had been unsuccessfully discharged from services at The Connection. Finally, on April 21, 2022, Recchia discovered that the defendant had failed to update his address on the sex offender registry during a sex offender registry compliance check. Recchia subsequently applied for two warrants to arrest the defendant—one for each of his separate terms of probation—and, on April 29, 2022, the court issued arrest warrants for the defendant for violations of probation pursuant to § 53a-32. The defendant was arrested on May 5, 2022. Subsequently, Recchia requested and received a discharge report from Wheeler Clinic relating to the defendant's discharge from the Explore program (discharge report).[4]

[4] The discharge report from Wheeler Clinic is dated June 5, 2023, was prepared by "Kelly W.," and was transmitted electronically from Wheeler Clinic to Recchia. The title at the top of the document reads: "Judicial Branch Court Support Services Division Explore Discharge Report." The report contains a "[f]inal [m]onth [p]rogress [n]ote" stating that "[the defen-

A consolidated probation revocation hearing took place before the court, *Kwak*, *J.*, on June 12, 2023. At the outset of the hearing, as a preliminary matter, defense counsel raised a concern to the court regarding certain hearsay evidence that the state might elicit from Recchia regarding, inter alia, the defendant's participation in the court-ordered programs at Wheeler Clinic and The Connection, and requested that the court perform a balancing test pursuant to *State* v. *Shakir*, supra, 130 Conn. App. 467,[5] when deciding whether to admit such hearsay evidence.[6] The court responded that it

dant] did not attend any Explore group sessions." It also contains a "[d]etails" section that lists various entries from February, 2021, to February, 2022, summarizing unsuccessful attempts made by staff at Wheeler Clinic to complete the defendant's intake, as well as attempts that had been made to contact the defendant and any responses from him, including that he would not "agree to group rules as attendance policy is not reasonable." A notation on the report states that, because the defendant "refused to agree to the rules and expectations of the Explore [p]rogram," the client care coordinator for the program "was unable to complete the intake and recommended that the [defendant] follow up directly with his probation officer." The report further notes that the defendant was discharged from Wheeler Clinic on February 23, 2022, due to his refusal to agree to the rules and expectations of the program.

[5] "In *State* v. *Shakir*, [supra, 130 Conn. App. 467], we noted that the due process safeguards [guaranteed in a probation revocation proceeding] are codified in Federal Rule of Criminal Procedure 32.1 and include 'an opportunity to . . . question any adverse witness unless the court determines that the interest of justice does not require the witness to appear. . . .' . . . We further explained that the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . Specifically, we cited to case law from the United States Court of Appeals for the Second Circuit and stated: 'In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay.' " (Citation omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 570–71, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016).

[6] Specifically, defense counsel stated in relevant part: "[T]he defense anticipates that the state is going to . . . bring on one witness, the probation officer who supervised [the defendant] and then through that probation officer intends to elicit hearsay evidence about information they didn't have

would "take [counsel's] objections into mind" as the case moved forward with the presentation of evidence. The court then heard testimony from Recchia, who described the previously discussed violations of probation by the defendant as alleged by her in the arrest warrants.

During the state's direct examination of Recchia, defense counsel again objected when the prosecutor asked Recchia if she had "receive[d] information as to whether [the defendant] had completed his court-ordered [Explore] program" and if she "ever sp[oke] to anyone over at the Explore program as to what exactly happened." Defense counsel stated that the ground for his objection was hearsay and asked "that the court perform a balancing test as in *Shakir* to determine whether or not somebody from Explore should come here. I think the court needs to come to a determination of why . . . a witness isn't being called in order to allow hearsay testimony about what they would testify to." The court overruled both objections. In doing so, the court stated: "[O]bviously, we have a discharge report which is a business record kept in a normal business so, that's allowed, and since the information is in there, I'm going to allow . . . Recchia to testify as to what she heard from Wheeler Clinic. So, based

firsthand knowledge of. For example, his participation in the sex offender program, [and] his participation in the Explore program. Both of those are run by other entities . . . and the defense anticipates the hearsay testimony is going to come in through this one witness on each of these topics . . . . So, we ask that instead of, you know, objecting at the exact moment that these things may be elicited, I just ask now that the state or the court consider . . . [*Shakir*] and perform a balancing test when deciding whether or not to admit the hearsay evidence in those . . . areas from those . . . sources. The court would need to find good cause for specifically not allowing confrontation, that case relies on the confrontation—the right to confront witnesses against [the defendant] and by not having these people come in, it limits his right to confrontation so there needs to be, the defense would argue, some justifiable reason for not bringing these people in to testify in front of the court and allow them to be cross-examined."

on her experience as well as the number of times that she speaks with providers from Wheeler [Clinic], not on just [the defendant's] case but in other cases, I find that it's reliable so I'm going to overrule your motion to have other people from Wheeler Clinic be here in person."

Nonetheless, defense counsel further argued that "the [discharge report] is not in evidence at this point. It's a business record . . . . [T]here's no one from Wheeler [Clinic] to authenticate it as that, and under *Shakir* the court's heard nothing about why this witness hasn't been produced. There needs to be good cause as to why we're using hearsay . . . rather than somebody from there and I would argue if the excuse is, 'We just didn't call them because we didn't think we had to,' I don't believe that's sufficient to allow somebody else to testify to the information that they know." After hearing from the prosecutor,[7] the court reiterated its prior ruling on the defendant's hearsay objections, stating: "I'm going to allow . . . Recchia to continue to provide testimony and, if I believe that there's [a] need for someone from Wheeler Clinic to be here in person, then I can make that decision afterwards." The state subsequently laid a foundation for Recchia's familiarity with the discharge report, eliciting testimony from her that Adult Probation Services electronically receives such discharge reports "when someone is discharged either successfully or unsuccessfully," and that such

[7] In response to defense counsel's objections, the prosecutor argued: "[T]he state didn't produce the witness from Wheeler [Clinic] because it's not necessary because it is reliable that he did not successfully complete the program. It's reliable because probation works with—the probation office works with Wheeler Clinic on supervising thousands of probationers. Quite frankly, there is case law . . . that treatment letters are admissible at a violation of probation hearing. So, [defense] counsel's—I think his reliance on *Shakir* is misplaced because reliable hearsay is admissible, and I think that's exactly what we have here."

documents are prepared in the ordinary course of business at or near the time when the probationer is discharged.

The state then offered the discharge report as a full exhibit, and defense counsel requested an opportunity to conduct voir dire.[8] Following his voir dire, defense counsel objected to the admission of the discharge report into evidence on hearsay grounds and asked the court to engage in a *Shakir* balancing analysis. Specifically, defense counsel argued that the discharge report did not qualify as a business record because "it was not produced . . . close to the time [of] the events that are described in it" and because Recchia was not the proper witness through which the alleged business record could be introduced, as she did not produce the document herself.[9] After excusing the witness, taking

[8] Defense counsel's voir dire proceeded as follows:

"[Defense Counsel]: When was that document produced?

"[Recchia]: Because it was a subpoenaed document, I called and asked them to actually send it and then I provided [it] to the judge per our policy for treatment records.

"[Defense Counsel]: I'm going to ask it again, when was that document produced?

"[Recchia]: This is dated June 5 of 2023.

"[Defense Counsel]: Okay, and did you produce that document?

"[Recchia]: I did not produce this document. I requested the document from Wheeler [Clinic], and they sent it. I then printed it and provided it to the court and to the judge that was going to be sitting in and asked to provide a copy to the state's attorney and the defense attorney for this [violation of probation] hearing."

[9] In particular, defense counsel argued in relevant part: "I would object that the document is hearsay, it was not produced even close to the time [of] the events that are described in it. It was produced days ago and it's describing events that happened over a year ago and it wasn't produced by this witness, there's not a proper foundation to submit this document in evidence as a business record. . . . [I]n order for it to be admitted as a business record, it has to be generated close in time to the events that are described within the record. This was not. This was generated in preparation for this hearing, not to document the events that are described in it. It was produced the other day . . . . [This is] talking about things that happened in 2021 and 2022, as the witness said. Here we are in the middle of June of 2023. So, just on that part of a business record admission it shouldn't come

a brief recess and hearing from the prosecutor and defense counsel, the court overruled the defendant's objection, stating in relevant part: "I reviewed [§ 8-4 of] the Connecticut Code of Evidence[10] . . . which specifically talks about the admissibility of business entries even without the preparer being present go[ing] to the weight of the evidence, not to admissibility. So, I'm going to deny your motion to preclude this document because [the] court finds that it is a business record." (Footnote added.) Following the court's ruling, the discharge report was admitted into evidence, and the state continued with its direct examination of Recchia.

Shortly thereafter, the state questioned Recchia about whether the defendant was compliant with his court-ordered participation in the program at The Connection, to which defense counsel objected, arguing in relevant part: "[T]hey haven't produced the witness. I'd ask that the court make a finding under . . . *Shakir* that there's good cause for not producing someone from The Connection to provide testimony about [the defendant's] work in that program." In response, the prosecutor argued in relevant part: "[T]his is reliable hearsay

in. But then also, this isn't the witness where this would come in as a business record. This is a witness who had requested the document be produced by somebody else but didn't produce it [her]self. . . . It's something that [she] obtained in the course of [her] work, but it's not something that she produced. So, on those two grounds I'd say this just isn't the witness to bring it in and it wasn't produced close enough in time to the events that are described today. . . . [U]nder *Shakir*, there needs to be a weighing of [the defendant's] constitutional right, and this is for a violation of probation hearing, to confront witnesses against him with this reason for why this person isn't here."

[10] Section 8-4 of the Connecticut Code of Evidence provides in relevant part: "(b) . . . The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . ."

that is probative as to why [the defendant] was unsuccessful in his probation. So, the state is not required to produce them because again, the rules of evidence do not apply to this type of hearing." After hearing from both of the parties' counsel, the court overruled the defendant's objection without providing an explanation, and the contested question was then asked and answered.[11]

At the close of the evidentiary phase, the court recessed briefly before returning and making the following relevant findings. The court found that the state had proven, by a fair preponderance of the evidence, that the defendant had violated the conditions of his probation, and it found Recchia's testimony concerning the defendant's activities "to be very credible . . . ." The court then set forth the specific conditions of which it had found the defendant to be in violation, namely, the conditions that he complete the Explore program, inform the sex offender registry of his current address, not start a new romantic relationship without prior approval, not contact the victim of the sexual assault in violation of the standing criminal protective order, and stay away from areas where minors may be present, which included malls.[12]

[11] In particular, the relevant questioning of Recchia by the state proceeded as follows:

"[The Prosecutor]: Did you receive any information as to [the defendant] with regard to his compliance in The Connection program?

"[Recchia]: Yes.

"[The Prosecutor]: And what was that?

"[Recchia]: Well, he was noncompliant for several variables. One was he communicated with the victim. One was not attending sessions regularly. His first intake appointment, my recollection is he had overslept and didn't make the first appointment, and I believe that's in my warrant. But when he did complete his intake, he didn't attend as he was scheduled to, and [engaged in] victim contact and noncompliance with probation. Therefore, he was unsuccessfully discharged."

[12] Notably, the court did not find a violation of probation on the basis of the defendant's discharge from sex offender treatment at The Connection.

Thereafter, the court heard from counsel regarding the dispositional phase,[13] after which it found that the "beneficial aspects of probation were not being served" by the defendant continuing probation. Notably, the court stated: "I need to consider the well-being of society and the victim in this matter, particularly the victim in this matter, the underlying [sexual assault case]. [The] court is extremely concerned that, after pleading guilty to this charge, sex with a minor fourteen year old, he continued to contact the victim in violation of a standing criminal protective order. I'm very concerned with that and as well as the conditions of probation. [The] court finds that society will not be well served with [the] defendant continuing on probation." The court also stated its belief that the defendant "was basically picking and choosing what he wanted to follow, and [that] he can't do that," and that "all [of] those factors necessitate that the defendant no longer be on probation." It therefore rendered judgments[14] revoking the defendant's separate term of probation in each case and sentenced the defendant to a total effective term of seven years of incarceration.[15] This appeal followed.

I

On appeal, the defendant claims that the court's admission of certain hearsay evidence at the revocation of probation hearing violated his constitutional right to

[13] We note that, during the evidentiary phase, Recchia testified as to her belief that continuing the defendant's probation would not serve a useful rehabilitative purpose for the defendant due to his issues with authority and history of noncompliance with conditions of probation.

[14] We note that, although the record does not contain a written decision of the trial court, it does include a signed transcript of the court's oral decision. See Practice Book § 64-1 (a).

[15] With respect to the sexual assault case, the court sentenced the defendant to seven of the eight years of incarceration that had been suspended. As to the larceny case, the court sentenced the defendant to four years and six months of incarceration that had been suspended, to run concurrently with the sentence it imposed in the sexual assault case.

due process. Specifically, his claim pertains to three pieces of evidence: (1) Recchia's testimony about the defendant's discharge from the program at The Connection, which relates to the sexual assault case; (2) a letter concerning the defendant's discharge from the sex offender treatment program at The Connection (letter), which also concerns the sexual assault case; and (3) the discharge report from the Explore program, which concerns the larceny case.[16]

[16] On appeal, the defendant has not raised a separate claim concerning Recchia's *testimony about* the discharge report. Although he notes in his principal appellate brief that defense counsel objected at trial to hearsay testimony from Recchia about the defendant's discharge from the Explore program, the claim raised in his appellate brief focuses on the court's admission of the discharge report under the business records exception to the hearsay rule. In the section of his brief addressing the harmfulness of the court's alleged error in admitting the report, he asserts, without citation to authority, that "the trial court also erroneously admitted into evidence statements from representatives of the [Explore program] regarding [the defendant's] discharge because they were not made by the declarants in court but through the probation officer. They were rank hearsay not subject to any hearsay exception. Without the discharge [report] and the hearsay statements of the [program's] representatives, the [court] had no basis to find that [the defendant] was discharged from . . . the Explore . . . program." To the extent that this can be construed as raising a due process claim regarding the admission of Recchia's testimony, we conclude that any such claim is inadequately briefed and decline to review it. See, e.g., *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008) (noting that when "an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" (internal quotation marks omitted)); *State* v. *Nathaniel T.*, 230 Conn. App. 45, 52–53, 329 A.3d 285 (2024) (declining to review claim as inadequately briefed when defendant did not provide any analysis or citation to authority in support of claim).

Although the defendant's failure to challenge Recchia's testimony about his discharge from the Explore program would ordinarily be fatal to his challenge to the admission of that same information via the discharge report; see, e.g., *State* v. *Martinez*, 171 Conn. App. 702, 758 n.20, 158 A.3d 373 (any error in failure to suppress defendant's written statement to police would have been harmless given that statement was cumulative of other evidence, admission of which defendant did not challenge), cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017); we nevertheless address his claim regarding the admission of the discharge report under the business records exception to the hearsay rule, given the lack of clarity in his brief.

We begin by setting forth our standard of review and general principles of law pertaining to revocation of probation proceedings. "A revocation of probation hearing has two distinct components and two purposes. A factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. If a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . . [A] probation revocation proceeding is civil in nature and, therefore, does not require all of the procedural components associated with an adversary criminal proceeding. . . . As such, the state's burden in probation revocation proceedings is governed by the fair preponderance of the evidence standard, which is the ordinary civil standard of proof." (Citation omitted; internal quotation marks omitted.) *State* v. *Giovanni P.*, 155 Conn. App. 322, 326, 110 A.3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015).

"Whether a party was deprived of his due process rights is a question of law to which appellate courts grant plenary review." (Internal quotation marks omitted.) *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 279, 248 A.3d 4 (2021). "The due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in the process of revoking the conditional liberty created by probation. . . . Th[is] . . . [c]ourt, relying on United States Supreme Court cases, has held that those federal due process protections include a defendant's right—albeit, not an absolute right—to confront adverse witnesses at a probation revocation hearing. See *State* v. *Shakir*, [supra, 130 Conn. App. 467–68 and 467 n.6] . . . see also *Gagnon* v. *Scarpelli*, [411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)] (due process guarantees are

identical for revocation of parole, probation and supervised release); *Morrissey* v. *Brewer*, [408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)] (due process mandates at parole revocation hearings the right to confront and cross-examine adverse witnesses . . . unless the hearing officer specifically finds good cause for not allowing confrontation . . .). In [*State* v. *Crespo*, 190 Conn. App. 639, 647, 211 A.3d 1027 (2019)], th[is] . . . [c]ourt reiterated its previous holdings and held that [t]he exercise of the right to confront adverse witnesses in a probation revocation proceeding is not absolute, but rather entails a balancing inquiry conducted by the court, in which the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to appear . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Wade*, 351 Conn. 745, 758–60, 333 A.3d 90 (2025).

We also, however, have recognized that "[f]ederal decisions have suggested . . . that [a] court is not required to conduct such balancing in all circumstances. [U]nder [*United States* v. *Jones*, 299 F.3d 103, 113 (2d Cir. 2002)], *the balancing analysis need not be made* where the proffered out-of-court statement is admissible under an established exception to the hearsay rule." (Emphasis added; internal quotation marks omitted.) *State* v. *Giovanni P.*, supra, 155 Conn. App. 335; see id., 336. With these principles in mind, we turn to the defendant's due process claim.

A

We first address the defendant's due process claim as it relates to the evidence at issue in the sexual assault case. The defendant claims that the court violated his constitutional right to due process by admitting into evidence a letter concerning his discharge from sex offender treatment at The Connection, as well as Recchia's hearsay testimony about his discharge from The Connection. We disagree.

First, the defendant misconstrues the court's decision because, although the letter was referenced at trial during Recchia's testimony, the letter was never admitted into evidence as a full exhibit. Second, although Recchia testified about the defendant's noncompliance with the program at The Connection, the court did not base its determination that the defendant violated his probation on his discharge from The Connection. Rather, the transcript of the revocation of probation proceeding shows that the court found that the defendant violated his probation in the sexual assault case by (1) failing to update his address with the sex offender registry, (2) starting a new romantic relationship without notifying his probation officer, (3) violating a standing criminal protective order by having contact with the victim, and (4) violating the condition of his probation that he stay away from areas where minors may be present.[17] The defendant's claim with respect to the letter and testimony relating to his discharge from The Connection is thus premised on a ground on which the court did not base its decision. In other words, because the court's finding that the defendant violated his probation in the sexual assault case was not based on his discharge from

[17] The defendant has not challenged these other findings that supported the court's determination that he violated his probation in the sexual assault case. In his principal appellate brief, he states: "Here, [the defendant] was found in violation of other conditions of probation where the evidence supporting those violations cannot be successfully challenged."

the program at The Connection, his claim that the court revoked his probation on the basis of improperly admitted evidence concerning his discharge from the program at The Connection necessarily fails. See *State* v. *Muhammad*, 117 Conn. App. 181, 185–87, 979 A.2d 501 (2009) (there was no merit to claim that court revoked defendant's probation on basis of clearly erroneous finding when record showed that court did not base decision to revoke probation on alleged finding); see also *State* v. *Brito*, 170 Conn. App. 269, 295 n.9, 154 A.3d 535 (declining to address aspect of claim that concerned ground on which court did not base its decision), cert. denied, 324 Conn. 925, 155 A.3d 755 (2017); *Chief Disciplinary Counsel* v. *Rozbicki*, 150 Conn. App. 472, 482 n.8, 91 A.3d 932 (claim that court improperly based denial of motion for summary judgment on defendant's failure to plead preclusion claims by way of special defense was misplaced because court did not base its decision on that ground), cert. denied, 314 Conn. 931, 102 A.3d 83 (2014).

B

Next, the defendant claims that the court violated his constitutional due process right to cross-examine adverse witnesses by failing to engage in a balancing analysis pursuant to *Shakir* when it admitted the discharge report into evidence. We disagree.

The following additional facts are relevant to our resolution of his claim. Recchia testified that she has been working as a probation officer for eighteen years and that her work "entails ensuring that [probationers] are complying with court orders, community safety, and also aiding in their rehabilitation . . . . " As part of her duties, she regularly refers probationers "for programs associated with their risk and needs," she works "closely with treatment providers," and she is responsible for making "daily decisions on anything

that's going on with [probationers] and for communicating and collaborating with treatment agencies . . . ." When a court orders a specific treatment as a condition of probation, like the requirement that the defendant complete the Explore program, Recchia makes a "referral for the program that the court ordered and then [she makes] sure that—[she] attempt[s] to make sure that the [probationer] completes—participates and completes that program successfully." She explained further that, "once a referral is made, the treatment provider will let [her] know when the intake is scheduled for or when the intake is completed and when the [probationer] is scheduled to begin their program. . . . Treatment providers provide status reports [at] a minimum of once a month. If someone is not compliant with what we are asking them to do, such as an intake or attending treatment sessions, then they will be letting us know a probationer missed a treatment session, we get those notices all the time. Any time it's one of our providers, when someone misses a treatment session, or does not do what they are asked . . . then we are notified. . . . The treatment provider puts information into their case management system and then that information gets put in our case management information system if it's one of our providers." Wheeler Clinic is a contracted provider with the Judicial Branch's Court Support Services Division.[18]

With respect to the Explore program in particular, Recchia testified that she regularly communicates with

[18] General Statutes § 51-1d provides in relevant part: "There is established a Court Support Services Division within the Judicial Branch consisting of Adult Probation Services, Family Services, Pretrial Services, Juvenile Services and Juvenile Clinical, Educational and Residential Services. Notwithstanding any provision of the general statutes, the duties of the various offices, divisions and personnel which comprise the Court Support Services Division are transferred to the Court Support Services Division, and the Office of Adult Probation, Office of Alternative Sanctions, Office of the Bail Commission, Family Division and Juvenile Detention Services Division are dissolved. . . ."

individuals responsible for administering the program with regard to all probationers, not just the defendant, and that such individuals regularly give her updates regarding how probationers are doing. She further testified that she received information that the defendant had been discharged from the Explore program in February, 2022, "because he did not agree to comply with their rules of doing the intake and attending the treatment sessions." When asked if she ever spoke with anyone at the Explore program as to what exactly happened, she responded that she did. The prosecutor then showed her the defendant's discharge report from the Explore program, and she explained that she receives such documents electronically for any probationer that is discharged from the program and that such document is prepared in the ordinary course of business, at or near the time when the probationer is discharged. When questioned by defense counsel, Recchia acknowledged that she did not produce the document but, rather, had requested it, and that, after it was sent to her electronically, she printed it and provided it to the court.

Because the court overruled the defendant's objection to the admission of the discharge report on the ground that it was admissible as a business record, we first must examine whether the court's ruling was proper, as we have stated that, if the "proffered out-of-court statement is admissible under an established exception to the hearsay rule"; (internal quotation marks omitted) *State* v. *Giovanni P.*, supra, 155 Conn. App. 335; a court need not undertake a *Shakir* balancing analysis. See id.

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . If the proffered evidence consists of business records, the court must determine whether the documents satisfy the

modest requirements under [General Statutes] § 52-180[19] to admit them under the business records exception to the hearsay rule. . . . To be admissible under the business record[s] exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, [1] that the record was made in the regular course of business, [2] that it was the regular course of such business to make such a record, and [3] that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . In applying the business records exception, the statute . . . should be liberally interpreted. . . . In part, this is because the statute recognizes the inherent trustworthiness of documents created for business rather than litigation purposes. . . . [Our Supreme Court] repeatedly has held that [i]t is not necessary . . . that the witness have been the entrant himself or in the employ of the business when the entry was made. . . . It is sufficient for a witness to testify that it was the regular business practice to create a document within a reasonable time after the occurrence of the event. This is sufficient to ensure that the document was created at

[19] General Statutes § 52-180 provides in relevant part: "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . ."

the time when the event was fresh in the author's mind. . . . To require the defendant to produce a witness that could testify from personal knowledge as to the specific time that a particular document was made would unduly constrain the use of the business records exception and directly contradict the liberal interpretation that this court has accorded to § 52-180." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Williams*, 202 Conn. App. 355, 364–65, 245 A.3d 830, cert. denied, 336 Conn. 917, 245 A.3d 802 (2021).

"To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 116–17, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). Because the defendant challenges the applicability of the business records exception in the present case, we apply plenary review to his claim. See *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 631, 161 A.3d 562 (2017).

On appeal, the parties do not dispute that the discharge report contains hearsay. Rather, the defendant's sole basis for claiming that the court improperly admitted the discharge report pursuant to the business records exception to the hearsay rule is that Recchia was not the proper person through whom the exhibit should have been admitted. Specifically, he contends that "the witness has to be able to speak knowingly of the practices that generated the record at issue. Here, [Recchia] was not an employee of the Explore program.

Further, she was not able to speak to the Explore program's recordkeeping practices. All that she could speak to was that she was in regular receipt of reports from the Explore program rather than that she produced such reports." He refers to Recchia's "outsider status" in arguing that she did not "demonstrate any firsthand knowledge of the program's recordkeeping practices." We are not persuaded.

This court addressed circumstances similar to those in the present case in *State* v. *Huckabee*, 54 Conn. App. 758, 738 A.2d 681 (1999). The sole issue on appeal in *Huckabee* was "whether the trial court improperly admitted into evidence an attendance report without which the defendant claim[ed] there was insufficient evidence to find a probation violation." Id., 759. The defendant's probation officer in *Huckabee*, Suzanne Kuziak, had referred the defendant to "Project More, a service provider for the alternative incarceration center program." Id., 760. The Office of Adult Probation makes "referrals to and contracts with the alternative incarceration program and Project More [but] neither entity is part of the [O]ffice of [A]dult [P]robation." Id. Kuziak subsequently "received a report from . . . Project More dated January 10, 1997, that indicated that the defendant had missed twenty-one days by that date and that the alternative incarceration program was seeking to terminate him. Kuziak testified that she is required to keep records of the defendant's attendance at the alternative incarceration program as part of the supervision. After admonishing the defendant about the need to improve his attendance and persuading the alternative incarceration program not to terminate him, Kuziak noted that the defendant's attendance slipped again in February and that he also missed two appointments with her. Kuziak applied for a warrant for the defendant's arrest on February 19, 1997. Upon finding a probation violation by a preponderance of the evidence,

the trial court revoked probation . . . . [On appeal] [t]he defendant claim[ed] that the trial court improperly admitted Project More's attendance report, that the report was hearsay and that, but for the improper admission of this report, there would have been insufficient evidence to support the trial court's finding of a violation." (Footnote omitted.) Id., 760–61.

This court in *Huckabee* rejected the defendant's claim on appeal, stating: "Kuziak testified that the [O]ffice of [A]dult [P]robation contracted with the alternative incarceration program for its services. The program provided regular attendance records, and it was Kuziak's duty to keep those records. Kuziak testified that she had utilized the records regularly to keep track of persons on probation and that she had found them to be reliable. We conclude that the trial court properly admitted the attendance report under the business records exception." Id., 762–63.

Similarly, in the present case, the state presented testimony from Recchia that it was within the normal course of business for the Explore program, as a contracted provider of services, to provide her with regular updates regarding, inter alia, the defendant's attendance and compliance with the program, and that it was her responsibility as the defendant's probation officer to ensure that he was complying with the court's orders. In fact, when the prosecutor asked Recchia about the defendant's discharge report from the Explore program, she explained that she receives such documents electronically for any probationer that is discharged from the program and that such document is prepared in the ordinary course of business, at or near the time when the probationer is discharged.

In light of *Huckabee* and the liberal interpretation we must afford to § 52-180; see *State* v. *Williams*, supra, 202 Conn. App. 364; we conclude that the defendant

has failed to demonstrate that the court's admission of the discharge report under the business records exception to the rule against hearsay was improper. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Internal quotation marks omitted.) *State* v. *Papineau*, 182 Conn. App. 756, 771–72, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). As we already have pointed out, the only ground that the defendant asserts on appeal in support of his challenge to admission of the discharge report concerns Recchia and whether she had the requisite knowledge regarding the report to establish its admission as a business record. Although the defendant acknowledges that a witness testifying regarding a business record need not be the preparer of the record or an employee of the business that generated the record, he nonetheless repeatedly refers in his appellate brief to the fact that Recchia is not an employee of the Explore program. "[Our Supreme Court, however] repeatedly has held that [i]t is not necessary . . . that the witness have been the entrant himself or in the employ of the business when the entry was made. . . . It is sufficient for a witness to testify that it was the regular business practice to create a document within a reasonable time after the occurrence of the event." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 202 Conn. App. 364–65. Moreover, § 52-180 (b) clearly states that "[t]he writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded," and that such facts, "including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility." See also Conn. Code Evid. § 8-4 (b).

Therefore, with respect to the question of whether the discharge report should have been admitted as a business record, it is of no consequence that Recchia did not produce the document or work for the Explore program. Her testimony, which the court specifically credited, provided a sufficient basis for the court's admission of the discharge report under the business records exception to the hearsay rule.

Accordingly, because we have concluded that the discharge report was admitted properly under the business records exception to the hearsay rule, the court was not required, under *Shakir*, to balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examination prior to admitting the report into evidence. See *State* v. *Shakir*, supra, 130 Conn. App. 467; see also *State* v. *Crespo*, supra, 190 Conn. App. 647. The defendant's due process claim, therefore, fails.

II

The defendant also claims that the court abused its discretion in revoking his probation. We disagree.

"The standard of review of the trial court's decision at the sentencing phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with

broad discretion. . . . In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society. . . . The important interests in the probationer's liberty and rehabilitation must be balanced, however, against the need to protect the public." (Citation omitted; internal quotation marks omitted.) *State* v. *Rodriguez*, 130 Conn. App. 645, 649–50, 23 A.3d 826 (2011), aff'd, 320 Conn. 694, 132 A.3d 731 (2016).

In the present case, the court rendered judgments revoking the defendant's separate terms of probation in each case. With respect to the sexual assault case, the court sentenced the defendant to seven of the eight years of incarceration that had been suspended, noting that it was "going to give him some credit . . . [and not] sentence him to the full eight years." As to the larceny case, the court sentenced the defendant to four years and six months of incarceration that had been suspended, to run concurrently with the sentence imposed in the sexual assault case. The court sentenced the defendant to a total effective term of seven years of incarceration.

On appeal, the defendant asserts that the court's decision to revoke his probation was focused on his discharges from the Explore and Connection programs, which he contends were not properly before the court. In other words, he claims that the court revoked his probation "partially, if not primarily, on evidence that should not have been considered [which] rendered the [court's] decision without a solid foundation." In the dispositional phase of the proceeding, however, the court never made a reference to The Connection or any evidence relating to it, let alone make any finding indicating that it was revoking the defendant's probation in the sexual assault case on the basis of his failure to complete the program at The Connection, and as we

already have stated in this opinion, the court did not find the defendant in violation of that condition of his probation in the sexual assault case. In light thereof, and given our conclusion in part I B of this opinion rejecting the defendant's claim regarding the hearsay evidence related to the Explore program, this claim necessarily fails as well.

In the disposition phase, the court determined that the "beneficial aspects of probation were not being served" by the defendant continuing probation, that it had to "consider the well-being of society" and the fourteen year old victim in the underlying sexual assault case, that it was "extremely concerned" that the defendant had contacted the victim in violation of a standing criminal protective order, and that "society will not be well served with [the] defendant continuing on probation." The record demonstrates that the court, in deciding to revoke the defendant's probations in both cases, properly considered the beneficial purposes of probation, namely, the defendant's rehabilitation and the protection of society, and balanced the defendant's interests in liberty and rehabilitation against the need to protect the public. See *State* v. *Rodriguez*, supra, 130 Conn. App. 650. The defendant has not otherwise challenged these findings. On the basis of the record before us and affording every reasonable presumption in favor of the correctness of the court's decision, we cannot conclude that the court abused its discretion in revoking the defendant's probations and sentencing him to a total effective term of seven years of incarceration.

The judgments are affirmed.

In this opinion the other judges concurred.

ALECIA EMRICH *v.* MICHAEL EMRICH
(AC 47619)

Cradle, C. J., and Alvord and Westbrook, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed from the judgment of the trial court granting in part her postjudgment motions for modification of alimony and for fees and costs. She claimed, inter alia, that the court failed to properly consider all of the criteria set forth in the statute (§ 46b-82) governing alimony. *Held*:

The trial court did not abuse its discretion in granting in part the plaintiff's motions to modify alimony and for fees and costs, as the court expressly stated that it considered the factors set forth in § 46b-82 and its thorough and well reasoned decision reflected that careful consideration, and, to the extent that the court did not expressly address certain factors in its memorandum of decision, it is well settled that it was not required to do so.

Argued April 15—officially released June 24, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pinkus*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' settlement agreement; thereafter, the court, *O'Neill*, *J.*, granted in part the plaintiff's motions for modification of alimony and for fees and costs and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Alecia Emrich, self-represented, the appellant (plaintiff).

Michael Emrich, self-represented, the appellee (defendant).

Opinion

PER CURIAM. In this postjudgment dissolution matter, the plaintiff, Alecia Emrich, appeals from the judgment of the trial court ordering the defendant, Michael

Emrich, to pay alimony to her in the amount of $2125 per month for a period of two years beyond the fourteen year period set forth in the parties' dissolution judgment. The plaintiff claims that the court abused its discretion in issuing that alimony order on the grounds that it (1) failed to properly consider all of the criteria set forth in General Statutes § 46b-82; (2) did not "scrutinize the parties' financial affidavits equally"; (3) failed to consider the defendant's own hand at the depletion of his property settlement; and (4) erroneously characterized her request for further alimony as a request for funds to expend on her children versus funds for "her benefit" to fulfill "her need to see her children and grandchildren." (Emphasis omitted.) The plaintiff also claims that the court abused its discretion by declining to award additional court costs to her "as a self-represented party when she had only $8865.29 left in her bank account." We affirm the judgment of the trial court.

The following procedural history is relevant to the plaintiff's claims on appeal. The marriage of the parties was dissolved in February, 2008. Under the terms of a settlement agreement incorporated into the dissolution judgment, the defendant was obligated to pay the plaintiff $8500 per month in alimony until the occurrence of certain specified events or fourteen years from the date of dissolution, whichever came first. The agreement further provided that, in the event that alimony was not terminated sooner than fourteen years from the date of the dissolution judgment, "there shall be a 'second look' which shall be a de novo determination by [the] court . . . without having to prove changed circumstance[s]. At that time, said court shall enter an appropriate alimony order, if any, retroactive to the date of termination, based upon the respective financial circumstances of the parties and all factors then relevant in the establishment of alimony orders." In 2009, the alimony order was modified to $2125 per month due

to a substantial change in the defendant's financial circumstances after he lost his job as an attorney at a Manhattan law firm and ultimately accepted a job in a nonlegal position.

On May 22, 2023, the plaintiff filed a motion for alimony determination review and modification in accordance with the second look provision of the settlement agreement. In her motion, the plaintiff asked the court to "issue an increased alimony order so that [she] can maintain her family's home, enjoy her life and enjoy her grandchildren." She also asked for "an increased alimony order sufficient to allow [her] to maintain her family's home and [to pay] her escalating medical costs."

On November 7, 2023, the plaintiff filed a motion for fees and costs associated with her alimony motion wherein she claimed costs for "filing fees, serving fees, photocopying and office supply expenses" in the total amount of $4781.23 as of that date.[1] The plaintiff asked for reimbursement for those expenses, in addition to any additional costs incurred by her between the date of the filing of her motion and the hearing dates.

The court, *O'Neill*, *J.*, held a four day evidentiary hearing on the plaintiff's alimony motion and her associated motion for fees and costs.[2] On March 28, 2024, the court issued a memorandum of decision on the motions. At the outset, the court noted that it considered the factors set forth in § 46b-82 for determining alimony, such as the age, health, amount and sources of income, estate and needs of the parties. The court then found that both the plaintiff, who is fifty-nine years old, and

[1] At the hearing, the plaintiff claimed increased expenses for a total of $6425.04.

[2] The court also heard two motions for contempt filed by the plaintiff. The court's judgments on those motions have not been challenged on appeal.

the defendant, who is sixty-five years old, are in relatively good health and have accumulated significant wealth, which should allow them to live comfortably now and through their retirement years. Regarding the plaintiff, the court found that she has accumulated significant assets and has a net worth of approximately $2.3 million. The court noted that the overriding theme at trial was the plaintiff's claim that the parties' adult children like the defendant more because he can spend more money on them due to his high salary and that her expressed goal in pursuing an increased alimony order was to "level the playing field." The court disagreed with the plaintiff that the defendant should pay her additional alimony for that reason but agreed that she needed additional support to pay her expenses for a limited period of time. The court found that it would be fair and equitable to extend alimony payments of $2125 per month for twenty-four months and for the defendant to receive a credit for payments that he made after the fourteen year termination date set in the dissolution judgment. The court rejected the plaintiff's argument that the alimony award should be modifiable as to the amount and term, finding that it would not be fair, equitable or reasonable under the circumstances. The court also granted, in part, the plaintiff's motion for fees and costs and awarded her $419.70, which included a filing fee of $180, a state marshal service fee of $116.85, and a transcript fee of $122.85.

The plaintiff thereafter filed a motion for reargument and articulation. The court issued an order articulating certain matters as requested by the plaintiff. Relevant to the issues raised by the plaintiff on appeal, the court articulated: "The additional annual expenses set forth on the last pages of the financial affidavits ($6914 and $8805) do not change the court's analysis and decision, or the court's conclusions and orders, including the order that the defendant shall pay additional alimony

for a limited period of time. As noted in the decision, the plaintiff has accumulated significant assets and reported a net worth of approximately $2.3 million. After taking into account the relevant statutory factors, the court finds that the additional support of $2125 over twenty-four months is fair and equitable under the facts and circumstances of this case." This appeal followed.

On appeal, the plaintiff asserts several challenges, as stated previously, to the trial court's alimony order. "We review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . In determining whether the trial court's broad legal discretion is abused, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . We apply that standard of review because it reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties." (Internal quotation marks omitted.) *Hallock* v. *Hallock*, 228 Conn. App. 81, 85–86, 324 A.3d 193 (2024).

"The decision of whether to award alimony to a party rests in the discretion of the trial court after consideration of the statutory factors set forth in § 46b-82. . . . Stated differently, § 46b-82 governs awards of alimony. That section requires the trial court to consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties

and the award, if any, which the court may make pursuant to [General Statutes §] 46b-81 . . . . In awarding alimony, [t]he court must consider all of these criteria. . . . It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express findings as to each statutory factor. . . . The trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case." (Citation omitted; internal quotation marks omitted.) Id., 94.

Here, the court expressly stated that it considered the factors set forth in § 46b-82 and its thorough and well reasoned decision reflects that careful consideration. To the extent the court did not expressly address certain factors, it is well settled that it was not required to do so. We have reviewed the briefs and arguments of the parties and the extensive record of the proceedings before the trial court and we conclude that the court's order that the defendant pay alimony in the amount of $2125 for twenty-four months did not constitute an abuse of its discretion, nor did its order awarding the plaintiff fees and costs in the amount of $419.70.

The judgment is affirmed.

MANUFACTURERS & TRADERS TRUST COMPANY *v.* THERESA VIRGULAK (AC 47623)

Suarez, Clark and Westbrook, Js.

Syllabus

The defendant property owner, against whom the plaintiff bank sought to foreclose on a judgment lien for unpaid property taxes, appealed from the trial court's judgment of foreclosure by sale following its granting of the plaintiff's motion to dismiss her special defenses and a three count counterclaim sounding in vexatious litigation. The defendant claimed, inter alia, that the court improperly granted the plaintiff's motion to dismiss her counterclaim on the grounds of res judicata and collateral estoppel. In a prior

foreclosure action brought by the plaintiff, the court rendered judgment for the defendant on all counts of the complaint except the plaintiff's claim of unjust enrichment for property tax payments that the plaintiff had made on the property. *Held*:

The trial court properly dismissed the defendant's special defenses because they constituted impermissible collateral attacks on the judgment in the prior action, as each special defense sought to contest the validity and enforceability of the judgment in the prior action, a judgment which the defendant did not appeal or seek to open, and none of those special defenses established an entirely obvious lack of jurisdiction on the part of the rendering court, such that they were not subject to dismissal.

The trial court improperly concluded that the defendant's counterclaim was barred by res judicata, as a claim alleging vexatious litigation may not be brought in the same action as that which the defendant claims is vexatious, and, therefore, the defendant was required to wait until the prior action had terminated before bringing her vexatious litigation claims.

The trial court improperly concluded that the doctrine of collateral estoppel was applicable to the defendant's counterclaim, as none of the issues that the defendant sought to litigate by way of her counterclaim were determined by the court in the prior action, nor were they necessary to its decision.

Argued April 23—officially released June 24, 2025

Procedural History

Action to foreclose a judgment lien on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Charles T. Lee*, judge trial referee, granted the plaintiff's motion to dismiss the defendant's special defenses and counterclaim; thereafter, the court, *Hon. John F. Kavanewsky, Jr.*, judge trial referee, rendered judgment of foreclosure by sale, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Alexander H. Schwartz, for the appellant (defendant).

Brian D. Rich, with whom, on the brief, was *Jenna T. Cutler*, for the appellee (plaintiff).

Opinion

CLARK, J. In this action to foreclose on a judgment lien, the defendant, Theresa Virgulak, appeals from the decision of the trial court granting the motion filed by the plaintiff, Manufacturers & Traders Trust Company, also known as M&T Bank, to dismiss her special defenses and counterclaim and from the subsequent judgment of foreclosure by sale. On appeal, the defendant claims that the court improperly granted the plaintiff's motion to dismiss her (1) three special defenses and (2) three count counterclaim sounding in vexatious litigation. We disagree with the defendant's first claim but agree with her second claim.[1] We therefore affirm in part and reverse in part the judgment of the court.

The following facts, as previously set forth by this court, and procedural history are relevant to this appeal. In 2013, JPMorgan Chase Bank, National Association (JPMorgan Chase), commenced a foreclosure action (prior action) against the defendant and her husband, Robert J. Virgulak (Robert). "On or about December 11, 2006, [Robert] executed and delivered to [JPMorgan Chase] a note for a loan in the principal amount of $533,000 (note). The defendant was not a signatory on the note. On the same date, the defendant signed a document titled 'Open-End Mortgage Deed' (mortgage)

[1] Although the defendant's principal appellate brief does not label her challenges to the dismissal of her special defenses and counterclaim as separate claims, we divide our discussion of the special defenses and counterclaim into two separate sections of this opinion in light of our decision to affirm the judgment of the trial court as to the special defenses and reverse the judgment as to the counterclaim.

The defendant also claims on appeal that the trial court should have retroactively applied our Supreme Court's decision in *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 249 A.3d 327 (2020), to bar the plaintiff from recovery of property tax payments. In light of our conclusion in part I of this opinion that the defendant's second special defense—which asserted the same claim—constituted an impermissible collateral attack on a judgment rendered in a prior foreclosure action involving the same parties, we reject this claim.

for residential property she owns at 14 Bayne Court in Norwalk (property). The mortgage recited that it was given to secure a note dated December 11, 2006, and recited that the note was signed by the defendant as 'Borrower' in the amount of $533,000. The term 'Borrower' is defined in the mortgage deed as 'THERESA VIRGULAK, MARRIED.' The mortgage did not reference Robert. The defendant did not sign any guarantee.

"On or about February 1, 2010, after JPMorgan Chase failed to receive payments in accordance with the terms of the note, the note went into default and JPMorgan Chase elected to accelerate the balance due. . . . [I]n February, 2013, JPMorgan Chase commenced [the prior] action against the couple. The action sought to foreclose the mortgage that JPMorgan Chase claimed to have on the property. In September, 2014, JPMorgan Chase withdrew the [prior] action against Robert, as he had filed for bankruptcy and been granted an unconditional discharge of the debt.

"Thereafter, JPMorgan Chase filed a motion to substitute party plaintiff, stating that it had assigned the subject mortgage deed and note to Hudson City Savings Bank (Hudson). This motion was granted by the court [*Heller*, *J.*] on August 18, 2015.

"On September 25, 2015, the defendant filed a motion for summary judgment arguing that Hudson was precluded from foreclosing the mortgage. In particular, she argued that she had not defaulted under the terms of the note because she was never a party to a promissory note with the plaintiff or any of its predecessors-in-interest. The motion was denied by the court [*Hon. Kevin Tierney*, judge trial referee] on January 14, 2016, on the basis of the court's determination that an issue of material fact remained with respect to whether the mortgage deed provided reasonable notice to third parties that the defendant was securing Robert's obligation.

"On March 18, 2016, the defendant served Hudson with requests for admission. On May 6, 2016, Hudson filed notice with the court that it had responded to the defendant's requests.

"On August 9, 2016, [the plaintiff], into which Hudson had merged, filed a motion to substitute itself as the party plaintiff and requested leave to amend the complaint in order to add two additional causes of action. The court [*Heller*, *J.*] granted the motion on August 15, 2016. In the first count of the plaintiff's three count amended complaint, the plaintiff sought a judgment of foreclosure against [the defendant and Robert]. In the second count, it sought equitable reformation of the note in order to include the defendant as a borrower on the note. In the third count, the plaintiff pleaded that the defendant had been unjustly enriched because (1) the proceeds of the note were used to pay off loans which she was obligated to pay and (2) she had free use of the subject property without satisfying the terms of the mortgage, which she had executed. . . .

"On April 12, 2017 [following a trial before the court, *Hon. David R. Tobin*, judge trial referee], the court issued its memorandum of decision. The court found in favor of the defendant on the foreclosure and reformation counts of the complaint. In particular, the court stated, among other things, that '[t]he court finds that the plaintiff has not sustained its burden of proving, by clear and convincing evidence, that it [was] entitled to the equitable remedy of reformation of the mortgage deed . . . . Accordingly, the court finds the issues on the second count for [the defendant] and against the plaintiff. Since the plaintiff failed to present any authority to the court which would allow the plaintiff to prevail on the first count [foreclosure claim] in the absence of reformation of the mortgage deed, the court [also] finds the issues on the first count for [the defendant] and against the plaintiff.'

"The court then proceeded to address the plaintiff's unjust enrichment claim, noting that the defendant had been benefitted in several respects as a result of the loan that Robert had obtained . . . . The court ultimately determined that the plaintiff's responses to the [defendant's] requests for admissions [in which the plaintiff admitted, inter alia, that the defendant did not owe any money to the plaintiff] precluded any recovery on its unjust enrichment claim, except for the property tax payments that the defendant conceded that she owed to the plaintiff." (Footnotes omitted.) *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 692–97, 218 A.3d 596 (2019), aff'd, 341 Conn. 750, 267 A.3d 753 (2022). The court found that the plaintiff was entitled to $65,807.96 in damages on the unjust enrichment count for the property taxes that it had paid on the property.

The plaintiff appealed, and the judgment was affirmed both by this court and by our Supreme Court. See id., 692. The defendant did not appeal, nor did she move to open the judgment. On March 7, 2022, following the affirmance of the judgment by our Supreme Court, the plaintiff filed a motion for judgment in accordance with our Supreme Court's opinion, which the court, *Spader*, *J.*, granted on April 28, 2022. The court's April 28, 2022 order provided in relevant part: "Upon review of the record, the court grants the plaintiff's motion as to count three of the complaint. Judgment shall enter for the plaintiff on count three for financial damages in the amount of $65,807.96 as of the date of trial. . . ."

On June 28, 2022, the defendant commenced an action against JPMorgan Chase, Hudson, and the plaintiff, in which she asserted three counts sounding in common-law and statutory vexatious litigation pursuant to General Statutes § 52-568.[2] See generally *Virgulak*

[2] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint

v. *JPMorgan Chase Bank, N.A.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-22-6057307-S (vexatious litigation action). In her revised complaint dated September 12, 2022, the defendant alleged in relevant part that the prior action had terminated in her favor and that the plaintiff, JPMorgan Chase, and Hudson had commenced and prosecuted the prior action with malice and without probable cause. Her complaint did not challenge the validity of, or otherwise mention, the damages award for property taxes on the unjust enrichment count that had been rendered by the trial court in favor of the plaintiff in the prior action. The defendant subsequently withdrew the vexatious litigation action on May 8, 2023, prior to trial.

On February 22, 2023, while the vexatious litigation action was still pending, the plaintiff commenced the present action. In its complaint, the plaintiff alleged that, on May 9, 2022, shortly after Judge Spader granted its motion for judgment in accordance with our Supreme Court's decision, it had caused a judgment lien on the property—based on the judgment in the prior action—to be recorded in the Norwalk town clerk's office. The plaintiff further alleged that the judgment had never been paid in whole or in part. It sought foreclosure of the judgment lien, prejudgment and postjudgment interest, costs, a reasonable attorney's fee, and such other relief as the court deemed just and proper.

On May 2, 2023, the defendant filed an answer, special defenses, setoff, and counterclaim. She set forth three special defenses: (1) that the "plaintiff is barred from pursuing this action on account of its actions in the

commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

[prior action]" (first special defense); (2) that the "plaintiff is barred from pursuing this action because it illegally and unlawfully sought in personam to collect funds from the defendant instead of pursuing a deficiency judgment" (second special defense); and (3) that, "[b]ecause the plaintiff lost the [prior] action between the parties in the Superior Court, the Appellate Court, and the Supreme Court, it had no right to collect real estate taxes in the [prior] action," rendering the "judgment it seeks to enforce . . . void" (third special defense). In her setoff, which immediately followed her special defenses, the defendant requested that, "[s]hould the [court] find that the judgment [in the prior action] is valid and enforceable, any funds the defendant owes should be set off against any judgment the defendant receives through her [counterclaim]." In her counterclaim, the defendant set forth three counts sounding in common-law and statutory vexatious litigation that mirrored those she had asserted in her complaint in the vexatious litigation action.

On May 10, 2023, the plaintiff filed a motion to dismiss the defendant's counterclaim and special defenses, accompanied by a memorandum of law. The plaintiff argued therein that the defendant's three special defenses and counterclaim were barred by res judicata and collateral estoppel.[3] In particular, the plaintiff

[3] We note that, in the heading of the section of the memorandum of law that addressed res judicata, the plaintiff made no mention of the counterclaim, stating only: "The special defenses are also barred by the doctrine of res judicata." However, in the body of its argument within that section, the plaintiff argued that "[the defendant's] defenses, *as well as the factual basis for her purported* [*counterclaim*] . . . could have been—and were—raised in the [prior] action" and further claimed that res judicata barred the defendant from litigating "her *claims and defenses*" in the present action. (Emphasis added.) Moreover, the motion to dismiss itself argued that "both the [special] defenses and [counterclaim] are barred by the doctrines of res judicata and collateral estoppel . . . ." Finally, the defendant's principal appellate brief, which refers to the plaintiff's motion to dismiss as a motion "to dismiss the counterclaim and special defenses based on res judicata and collateral estoppel" and accuses the plaintiff of impermissibly "rais[ing]

argued that "[t]he . . . subject[s] of these special defenses and [the counterclaim] were conclusively litigated and decided by the Superior Court [in the prior action]; indeed, they were essential to the court's entering of judgment in the first place." The plaintiff also argued that the defendant "had a full and fair opportunity to plead and litigate her claims and defenses in [the prior] action," "[t]he court reviewed the claims provided and entered its ruling accordingly," and "all of these claims have had a ruling by way of the Superior Court's entry of final judgment . . . ."

The defendant filed an objection to the motion to dismiss on July 10, 2023. In her objection, the defendant argued, inter alia, that her second and third special defenses were supported by *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 650, 249 A.3d 327 (2020), in which our Supreme Court held that, in the context of a strict foreclosure action, the only procedure available to a plaintiff to recover its mortgage debt—including payments advanced to pay real estate taxes—is a deficiency judgment. The plaintiff filed a reply on July 11, 2023.

On October 11, 2023, the court, *Hon. Charles T. Lee*, judge trial referee, issued a memorandum of decision in which it granted the plaintiff's motion to dismiss. The court determined that each special defense asserted by the defendant was invalid. With respect to the first special defense, the court concluded that it was deficient because (1) it failed to allege any relevant facts in violation of the requirements of Practice Book § 10-1,[4] and (2) "the court finds no actions taken by the

collateral estoppel or res judicata as a defense to . . . the [counterclaim]," makes clear that the defendant understood the plaintiff to be arguing that both res judicata and collateral estoppel barred the counterclaim.

[4] Practice Book § 10-1 provides: "Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation. If any such pleading does not fully disclose the

plaintiff in the [prior] action which would prevent it from seeking to enforce the judgment against the defendant for recoupment of taxes." With respect to the second special defense, the court determined that the plaintiff "was under no obligation to seek a deficiency judgment" and that *Essaghof* did not apply because "the present case is not . . . a [strict foreclosure] proceeding. . . . Rather . . . the monetary award of $65,807.96 was granted under the third count [in the prior action] for unjust enrichment in failing to comply with the mortgage's contractual requirement of paying taxes on the mortgaged property." With respect to the third special defense, the court concluded that it was invalid because the defendant's contention that the plaintiff had "lost" the prior action was, in the court's view, "not consistent with the pleadings or facts in the record," in that the plaintiff had "won the third count, and its claim for recovery of taxes it paid on the mortgaged property was specifically authorized by every court to consider the question." As for the counterclaim, the court concluded that the defendant's vexatious litigation claims were barred by res judicata and collateral estoppel. In particular, the court concluded that the present action was not based on the foreclosure and equitable reformation counts on which the plaintiff had lost in the prior action but, rather, on the unjust enrichment count, on which the plaintiff had received the $65,807.96 damages award for property tax payments. It accordingly stated that "[t]he finding that this action is based on the affirmed claim for money damages in the [prior action] . . . clearly satisfies the requirements of the doctrines of res judicata and collateral estoppel, rendering this counterclaim invalid."

ground of claim or defense, the judicial authority may order a fuller and more particular statement; and, if in the opinion of the judicial authority the pleadings do not sufficiently define the issues in dispute, it may direct the parties to prepare other issues, and such issues shall, if the parties differ, be settled by the judicial authority."

The plaintiff thereafter filed a motion for summary judgment as to liability, which the court, *Hon. John F. Kavanewsky, Jr.*, judge trial referee, granted on February 21, 2024. On March 15, 2024, the plaintiff filed a motion for a judgment of foreclosure by sale, which the court granted on May 1, 2024. This appeal followed.[5]

I

The defendant claims that the trial court should have permitted her to raise her special defenses in the context of the present case because her obligation to reimburse the plaintiff for property tax payments flowed from the plaintiff's alleged misconduct in instituting and maintaining the prior action. In response, the plaintiff argues, inter alia, that the special defenses constituted impermissible collateral attacks on the judgment in the prior action.[6] We agree with the plaintiff.

[5] On October 30, 2023, pursuant to Practice Book § 61-5, the defendant filed a notice of intent to appeal from Judge Lee's October 11, 2023 decision granting the plaintiff's motion to dismiss.

[6] Because the trial court did not dismiss the special defenses on this ground, we construe the plaintiff's principal appellate brief as raising an alternative ground to affirm the trial court's judgment. It is well established that, "[w]here the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Citation omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, 259 Conn. 592, 599, 790 A.2d 1178 (2002). Affirmance of a judgment on an alternative ground is proper when the issue presents a question of law, the essential facts of which are undisputed and over which our review is plenary, and when our consideration of the issue will not subject the appellant to prejudice or unfair surprise. See, e.g., *Grady* v. *Somers*, 294 Conn. 324, 349 n.28, 984 A.2d 684 (2009).

In the present case, the question of whether the defendant's special defenses constituted impermissible collateral attacks on the judgment in the prior action presents a question of law, over which our review is plenary. See, e.g., *Ciarleglio* v. *Martin*, 228 Conn. App. 241, 257–58, 325 A.3d 219, cert. denied, 350 Conn. 920, 325 A.3d 218 (2024). No essential facts pertinent to this claim are in dispute. Moreover, the plaintiff raised this alternative ground for affirmance in its principal appellate brief, and, although she elected not to do so, the defendant had the opportunity to file a reply brief. See, e.g., *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752,

The following legal principles and standards of review are relevant to our review of this claim. "A collateral attack is an attack upon a judgment, decree or order offered in an action or proceeding other than that in which it was obtained, in support of the contentions of an adversary in the action or proceeding . . . ." (Internal quotation marks omitted.) *Patrick* v. *111 Clearview Drive, LLC*, 224 Conn. App. 401, 410, 313 A.3d 391 (2024). "Black's Law Dictionary defines the phrase 'collateral attack' as, inter alia, '[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective.' " Id., 411 n.9. "A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. . . . The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." (Citation omitted.) *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 248, 232 A.3d 1279 (2020).

"[I]t is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate

761, 250 A.3d 731 (observing that appellant will suffer no prejudice from consideration of alternative grounds for affirmance when appellant "has the opportunity to respond to [those] grounds in the reply brief" (internal quotation marks omitted)), cert. denied, 336 Conn. 946, 251 A.3d 77 (2021). Accordingly, we consider the alternative ground for affirmance advanced by the plaintiff.

proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Citation omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016).

"[U]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal *entirely invalid*, he or she must resort to direct proceedings to correct perceived wrongs, rather than to a collateral proceeding. . . . [T]o sustain a collateral attack on a judgment, the lack of jurisdiction must be entirely obvious and . . . the alleged deficiency must amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Schoenhorn* v. *Moss*, 347 Conn. 501, 515, 298 A.3d 236 (2023). "Additionally, [i]f a court has never acquired jurisdiction over a defendant [by proper service of process] . . . any judgment ultimately entered is void and subject to vacation or collateral attack." (Internal quotation marks omitted.) *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 411. "[A] court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Lesser procedural irregularities . . . do not make a final judgment void." (Citations omitted; internal quotation marks omitted.) *Meinket* v. *Levinson*, 193 Conn. 110, 115, 474 A.2d 454 (1984).

The question of whether the defendant's special defenses constituted impermissible collateral attacks on the judgment in the prior action presents a question

of law, over which our review is plenary. See, e.g., *Boyajian* v. *Planning & Zoning Commission*, 206 Conn. App. 118, 124, 259 A.3d 699 (2021). To the extent that our resolution of this issue requires us to interpret the defendant's answer, special defenses, setoff, and counterclaim, that, too, presents a question of law over which our review is plenary. See, e.g., *Perez* v. *Cumba*, 138 Conn. App. 351, 367, 51 A.3d 1156 (construction of pleadings is question of law subject to plenary review), cert. denied, 307 Conn. 935, 56 A.3d 712 (2012).

Each of the defendant's special defenses in the present case asserted that the judgment upon which the plaintiff sought to foreclose—and which the defendant had neither appealed nor sought to open—was ineffective, by pointing to various alleged defects in the manner in which that judgment was rendered. The first special defense claimed that the plaintiff's unspecified "actions in the [prior action]" precluded it from foreclosing on the lien; the second claimed that the judgment "illegally and unlawfully" had been obtained by means other than a deficiency judgment; and the third claimed that "the judgment [the plaintiff] seeks to enforce is void" because the plaintiff "had no right to collect real estate taxes in the [prior] action." Moreover, the setoff immediately following the special defenses—which requested that, "[*s*]*hould the* [*court*] *find that the judgment* [*in the prior action*] *is valid and enforceable*, any funds the defendant owes should be set off against any judgment the defendant receives through her [counterclaim]"—underscores that the special defenses sought to contest the validity and enforceability of the judgment in the prior action. (Emphasis added.) As such, we conclude that the three special defenses constituted collateral attacks on that judgment. Cf., e.g., *Warner* v. *Brochendorff*, 136 Conn. App. 24, 35, 43 A.3d 785 (special defense in judgment lien foreclosure claiming that underlying judgment was obtained through

fraud and was unenforceable because plaintiff had induced court to employ improper measure of damages constituted impermissible collateral attack), cert. denied, 306 Conn. 902, 52 A.3d 728 (2012).

Having concluded that the special defenses constituted collateral attacks on the judgment, we now consider whether they nonetheless established an "entirely obvious" lack of jurisdiction on the part of the rendering court, such that they were not subject to dismissal. We note at the outset that none of the special defenses claimed that the court in the prior action failed to obtain personal jurisdiction over the defendant by improper service of process. With respect to subject matter jurisdiction, neither the first special defense's vague assertion that the plaintiff's "actions in the [prior action]" precluded it from foreclosing on the lien in the present case, nor the third special defense's conclusory assertion that the plaintiff had "no right to collect real estate taxes in the [prior] action" because it "lost" that action, make a colorable showing—let alone an obvious one—that the rendering court was somehow incompetent to entertain the prior action, including the plaintiff's claim for unjust enrichment. As such, we readily conclude that the first and third special defenses amounted to impermissible collateral attacks.

With respect to the second special defense, which challenged the plaintiff's right to recover property taxes on the basis of our Supreme Court's holding in *Essaghof*, we conclude that this collateral attack was impermissible as well. Nothing in *Essaghof* indicates that the holding of that case upon which the defendant relied in pleading her second special defense—namely, that a trial court in a strict foreclosure proceeding may not order a defendant to reimburse the plaintiff for property tax payments outside of a deficiency judgment—is jurisdictional. Indeed, the word "jurisdiction" does not appear in *Essaghof*; nor did our Supreme

Court, in concluding in that case that the trial court's order directing the defendants to reimburse the plaintiff for property taxes was an abuse of discretion,[7] order that the plaintiff's claim for reimbursement of property taxes be dismissed. Cf., e.g., *Pelc* v. *Southington Dental Associates, P.C.*, 232 Conn. App. 393, 413, A.3d (2025), petition for cert. filed (Conn. May 27, 2025) (No. 240383). Rather, our Supreme Court in *Essaghof* framed the issue on appeal as "whether the trial court's order [in that case] requiring the defendants to reimburse the plaintiff for tax and insurance premium advancements *was a valid exercise of the court's equitable authority*" in light of the statutory scheme governing strict foreclosure proceedings; (emphasis added) *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 336 Conn. 639; which presents a question distinct from that of the court's subject matter jurisdiction. See, e.g., *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999) (explaining that, "[a]lthough related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction" and that latter addresses court's "authority or competence to decide the class of cases to which the action belongs" whereas former concerns "the way in which [the court's] power [to hear and determine] must be exercised in order to comply with the terms of the statute" (internal quotation marks omitted)). As such—even if we assume that the plaintiff could not seek damages for property taxes in the prior action without running afoul of *Essaghof*—in relying on *Essaghof* to claim, in the present case, that the plaintiff "illegally and unlawfully" had procured the judgment

[7] The very fact that our Supreme Court in *Essaghof* reviewed the trial court's order under an abuse of discretion standard further indicates the nonjurisdictional character of its holding. Cf., e.g., *Pennymac Corp.* v. *Tarzia*, 215 Conn. App. 190, 200 n.8, 281 A.3d 469 (2022) (declining to apply abuse of discretion standard in reviewing trial court's conclusion that it had subject matter jurisdiction because "[t]he issue of subject matter jurisdiction is not a matter of discretion").

in the prior action without pursuing a deficiency judgment, the defendant was not raising an "entirely obvious" claim that the rendering court lacked subject matter jurisdiction. The second special defense, therefore, also constituted an impermissible collateral attack.

For the foregoing reasons, we conclude that the defendant's three special defenses constituted impermissible collateral attacks on the judgment in the prior action. The court therefore properly dismissed the special defenses.

II

The defendant also claims that the court improperly concluded that her counterclaim was barred by res judicata and collateral estoppel. In response, the plaintiff argues that the defendant's counterclaim sought to use "the facade of vexatious litigation to obtain another opportunity to relitigate the [prior] judgment" and to "relitigate issues that were already decided by a trial court, [this court], and [our] Supreme Court . . . ." The plaintiff also argues, as alternative grounds for affirmance, that the counterclaim did not state a legally sufficient claim for vexatious litigation and that it constituted an impermissible collateral attack on the judgment in the prior action. We agree with the defendant and are unpersuaded by the alternative grounds for affirmance advanced by the plaintiff.[8]

We note, at the outset of our analysis, that the plaintiff's claims that the counterclaim was barred by res judicata and collateral estoppel should have been

[8] Because the trial court did not decide the issue, and the plaintiff has not raised it on appeal, we express no view as to whether the counterclaim satisfies the transaction test for counterclaims set forth in Practice Book § 10-10, which provides in relevant part: "In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ."

asserted as affirmative defenses. See, e.g., *Wells Fargo Bank, National Assn.* v. *Doreus*, 218 Conn. App. 77, 82 n.5, 290 A.3d 921 ("[r]es judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded"), cert. denied, 347 Conn. 904, 297 A.3d 198 (2023); *Elder* v. *Kauffman*, 204 Conn. App. 818, 824, 254 A.3d 1001 (2021) ("res judicata properly is raised by means of a special defense and . . . generally is not raised by a motion to dismiss"). We nonetheless address the merits of the trial court's application of the doctrines of res judicata and collateral estoppel to the counterclaim, as the parties have asked us to do, because the trial court's dismissal of the counterclaim on that basis indicates that the issue is likely to arise on remand.[9] Under these circumstances, judicial economy counsels in favor of our resolving the defendant's claim as it has been framed for and submitted to us.

A

We begin with the trial court's conclusion that the counterclaim was barred by res judicata and collateral estoppel. The following legal principles and standard of review are relevant to our analysis. "The applicability of the doctrines of res judicata or collateral estoppel presents a question of law, over which our review is plenary." *Somers* v. *Chan*, 110 Conn. App. 511, 526, 955 A.2d 667 (2008). "Under the doctrine of res judicata [or claim preclusion], a final judgment, when rendered on the merits, is an absolute bar to a subsequent action,

[9] Notwithstanding the plaintiff's failure properly to plead res judicata and collateral estoppel, the record does not reflect that the defendant ever objected to the plaintiff's claims that the counterclaim was barred by res judicata and collateral estoppel on the basis that those claims had not been raised in the appropriate manner. Therefore, if we did not reach the merits of the trial court's application of res judicata and collateral estoppel to the counterclaim, upon remand, the plaintiff would be entitled to raise those preclusion claims. See, e.g., *Singhaviroj* v. *Board of Education*, 124 Conn. App. 228, 234, 4 A.3d 851 (2010); *Carnese* v. *Middleton*, 27 Conn. App. 530, 537, 608 A.2d 700 (1992).

between the same parties or those in privity with them, upon the same claim." (Internal quotation marks omitted.) *Milford* v. *Andresakis*, 52 Conn. App. 454, 460, 726 A.2d 1170, cert. denied, 248 Conn. 922, 733 A.2d 845 (1999). "In order for res judicata to apply, four elements must be met: (1) the [prior] judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity [in the prior action] to litigate the [omitted claim] fully; and (4) the same underlying claim must be at issue." (Internal quotation marks omitted.) *Solon* v. *Slater*, 345 Conn. 794, 825, 287 A.3d 574 (2023). "[T]he essential concept of the modern rule of [res judicata] is that a judgment against [a party] is preclusive not simply when it is on the merits but when the procedure in the first action afforded [the party] a fair opportunity to get to the merits." (Internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 459, 998 A.2d 766 (2010).

"Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent

action. . . . Before collateral estoppel applies [however] there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . In other words, collateral estoppel has no application in the absence of an identical issue. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Internal quotation marks omitted.) *Elwell* v. *Kellogg*, 220 Conn. App. 822, 840–41, 299 A.3d 1166, cert. denied, 348 Conn. 927, 304 A.3d 861 (2023).

"In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation marks omitted.) *Rockwell* v. *Rockwell*, 196 Conn. App. 763, 769–70, 230 A.3d 889 (2020).

We do not agree with the trial court's conclusion that the defendant's counterclaim, which sounded in common-law and statutory vexatious litigation and sought money damages on the basis of the plaintiff's conduct in connection with the claims that the defendant actually prevailed on in the prior action, was

barred by res judicata on the basis of the judgment rendered in the prior action. In order for res judicata to bar a claim, the party asserting that claim must have had an adequate opportunity fully to litigate it in the prior action. See, e.g., *Solon* v. *Slater*, supra, 345 Conn. 825. It is well established, however, that "a counterclaim alleging vexatious litigation may not be brought in the same action as that which the defendant claims is vexatious"; *Somers* v. *Chan*, supra, 110 Conn. App. 542; see also, e.g., *U.S. Bank National Assn.* v. *Bennett*, 195 Conn. App. 96, 105, 223 A.3d 381 (2019); moreover, this court previously has affirmed the dismissal, on ripeness grounds, of a vexatious litigation action predicated on a separate action that had not yet fully terminated. See *Scalise* v. *East Greyrock, LLC*, 148 Conn. App. 176, 184, 85 A.3d 7, cert. denied, 311 Conn. 946, 90 A.3d 976 (2014). The reason for these decisions is straightforward: "[A] claim for vexatious litigation requires a plaintiff to allege that the *previous lawsuit* was initiated maliciously . . . [and that this] *prior litigation* terminated in [her] favor"; (emphasis in original; internal quotation marks omitted) *Somers* v. *Chan*, supra, 542; which she cannot do while the action she claims to be vexatious remains pending. The defendant, thus, could not have litigated her vexatious litigation claims in the context of the prior action, because that was the very action that she claimed was vexatious. She was required to wait until the prior action had terminated before bringing her vexatious litigation claims.

We also disagree with the trial court that the defendant's counterclaim was barred by collateral estoppel. None of the issues that the defendant sought to litigate by way of her counterclaim—namely, whether the prior action was brought with malice or whether the plaintiff lacked probable cause, i.e., a "reasonable, good faith belief" in the facts alleged—were determined by the court in the prior action, nor were they necessary to

its decision. Rather, a review of Judge Tobin's memorandum of decision in the prior action reveals that his decision addressed the following issues: the parties' intent in signing the mortgage deed, in the context of a claim seeking equitable reformation of the deed;[10] whether, in the absence of reformation of the deed, the plaintiff would be able to prevail on its foreclosure claim; whether the defendant had received benefits for which she unjustly failed to pay the plaintiff, to the plaintiff's detriment; whether the merits of the prior action would be served, or the defendant prejudiced, by permitting the plaintiff to withdraw certain factual admissions it previously had made; whether the defendant had waived her right to rely on those admissions; and whether the defendant's special defenses, none of which raised the same issues presented by the counterclaim,[11] precluded the plaintiff from recovering damages for property taxes. As such, the doctrine of collateral estoppel was inapplicable. The trial court's dismissal of the counterclaim on the basis of res judicata and collateral estoppel was therefore improper.

B

We now turn to the alternative grounds for affirmance advanced by the plaintiff. First, the plaintiff argues that

[10] In its complaint in the prior action, the plaintiff sought equitable reformation of the note, rather than the mortgage deed. In its posttrial brief, however, it changed its position and sought reformation of the deed rather than the note.

[11] The defendant asserted the following special defenses in the prior action: "(1) the plaintiff misapplied funds paid on the loan in contravention to the loan documents; (2) the plaintiff failed to give proper notice of default and acceleration; (3) the parties entered into an oral forbearance agreement; (4) the plaintiff acted in a commercially unreasonable manner with respect to the [defendant and Robert's] obligations under the loan; (5) the plaintiff violated the implied covenant of good faith and fair dealing; (6) the mortgage debt was discharged in bankruptcy proceedings filed by Robert; (7) the determination of the United States Bankruptcy Court that the note executed by Robert was unsecured estops the plaintiff from claiming a security interest in [the property]; [and] (8) the plaintiff's claims are barred by the applicable statute of limitations."

the counterclaim did not state a legally sufficient claim for vexatious litigation because "the instant matter, which [the defendant] claims amounts to vexatious litigation, was brought to enforce the sole count of the [prior action] that was entered in [the plaintiff's] favor." (Emphasis omitted.) We reject this argument. Insofar as the plaintiff challenges the legal sufficiency of the counterclaim, rather than the court's jurisdiction to entertain it, it raises a basis for striking, rather than dismissing, the counterclaim. See, e.g., *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 723 n.6, 161 A.3d 630 (2017) (observing that "[a] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court," whereas "the motion to strike attacks the sufficiency of the pleadings" (internal quotation marks omitted)). Moreover, the counterclaim did not allege that the *present* action amounted to vexatious litigation; rather, it alleged that the *prior* action amounted to vexatious litigation.[12] The plaintiff's argument therefore attacks the sufficiency of a claim that the defendant did not raise.

Second, the plaintiff contends that the counterclaim constituted an impermissible collateral attack on the judgment in the prior action. Although our Supreme Court has cautioned that vexatious litigation claims

[12] Although the plaintiff's principal appellate brief is not a model of clarity, we do not understand the plaintiff to argue that the defendant cannot establish that the prior action terminated in her favor simply because the plaintiff obtained a money judgment in connection with the unjust enrichment count. To the contrary, the plaintiff expressly—and correctly—concedes that, under certain limited circumstances, "a claim for vexatious litigation can be brought even if the [prior] action was only partially terminated in [the defendant's] favor." See, e.g., *Scalise* v. *East Greyrock, LLC*, supra, 148 Conn. App. 183 n.10; see also, e.g., *Janetka* v. *Dabe*, 892 F.2d 187, 190 (2d Cir. 1989). Because the parties have not briefed the question, we express no view as to whether those circumstances apply in the present case.

may operate as impermissible collateral attacks in the absence of a favorable termination of the action alleged to be vexatious; see, e.g., *DeLaurentis* v. *New Haven*, 220 Conn. 225, 251, 597 A.2d 807 (1991); the plaintiff does not expressly argue, and indeed appears to avoid making any claim, that the defendant cannot satisfy the favorable termination requirement with respect to the prior action. See footnote 12 of this opinion. Moreover, the counterclaim does not make any claims as to the validity or enforceability of the judgment for property taxes and, indeed, does not even mention it. The plaintiff's argument therefore fails.

The judgment is reversed with respect to the dismissal of the defendant's counterclaim and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.