IN RE JULIANY T.*
(AC 47376)

Alvord, Cradle and Harper, Js.

Syllabus

The respondent father appealed from the judgment of the trial court terminating his parental rights as to his minor child. He claimed, inter alia, that his counsel provided ineffective assistance that constituted reversible error, as the deficient performance was of such a magnitude that it created structural error pursuant to *United States* v. *Cronic* (466 U.S. 648). *Held*:

This court declined to presume that the respondent father was prejudiced by his counsel's performance, as the presumption of prejudice standard set forth in *Cronic* does not extend to child protection matters.

The respondent father could not prevail on his claim of ineffective assistance of counsel, as he inadequately briefed the issue of prejudice.

This court rejected the respondent father's claim that he had a constitutional right to a hybrid habeas fact-finding proceeding in the trial court to more fully develop the record in support of his claim that he was denied the effective assistance of counsel, citing the precedent of the Supreme Court in *In re Jonathan M.* (255 Conn. 208) that there were other means of vindicating the right to the effective assistance of counsel through which an indigent parent may challenge a termination judgment, and this court declined to exercise its supervisory authority over the administration of justice to afford the father a right to such a fact-finding proceeding.

Argued September 10, 2024—officially released February 3, 2025**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Nguyen-O'Dowd*, *J.*; judgment terminating the respondents' parental rights, from

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

** February 3, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

which the respondent father appealed to this court. *Affirmed.*

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

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

HARPER, J. The respondent father, Julio T., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his minor child, Juliany.[1] The respondent raises three claims on appeal, each of which emanates from his contention that he was denied the effective assistance of counsel at trial, in violation of his due process rights under the fourteenth amendment to the federal constitution[2] and article first, § 10, of the Connecticut constitution.[3] First, he claims that his counsel's allegedly deficient performance "was of such magnitude that it created structural error as set forth in *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)," and is therefore per se reversible error. Second, he claims that he has a due process right to a hybrid

[1] The court also terminated the parental rights of Juliany's mother, Melanie R. Because she has not appealed from that judgment, we refer to Julio T. as the respondent and to Melanie R. by name throughout this opinion. Unless necessary to our analysis of the claims raised by the respondent, in this opinion we need not and do not address the court's findings and conclusions with respect to Melanie R.

[2] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const., amend. XIV.

[3] Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

habeas fact-finding proceeding in the trial court to further develop the record as to his ineffective assistance of counsel claim because "the procedures available to him to vindicate his right to effective assistance of counsel are inadequate." He further claims that, if he does not have a due process right to a hybrid habeas fact-finding proceeding, this court should exercise its supervisory authority to create one.[4] We affirm the judgment of the trial court and decline the respondent's request that we exercise our supervisory authority.

The following facts, which the court found by clear and convincing evidence or which are otherwise undisputed, and procedural history are relevant to our resolution of this appeal. Juliany was born in December, 2010. Shortly thereafter, in January, 2011, the respondent was arrested and charged with murder. In October, 2013, the respondent was found guilty of murder and, in December, 2013, he was sentenced to fifty years of incarceration. The respondent's maximum release date is January, 2061.

Because he was incarcerated, the respondent was not able to provide care for Juliany, who remained in the care of her mother, Melanie R. See footnote 1 of this opinion. Melanie R. suffered from mental health and substance abuse issues and had "a child protection history dating back to 2011, for medical neglect, educational neglect, physical neglect, physical abuse, and lack of supervision."[5] Juliany "is a special education student

[4] The attorney for the minor child has filed a statement adopting the "factual statements set forth in the [petitioner's] brief" but takes no position as to whether the respondent has a constitutional right to the effective assistance of counsel or a hybrid habeas fact-finding proceeding. She maintains, nonetheless, that, if such rights exist, any violations thereof are "not so prejudicial as to require a reversal of the termination petition as set forth in the [petitioner's] brief" and argues that any further delay in the process of securing a permanent home and legal status would not be in Juliany's best interest.

[5] Melanie R. has two other minor children, Precious R. and Joshua R. The court terminated her parental rights as to them, as well. The respondent is

with her primary disability as emotional disturbance due to changes in her mood and low frustration levels." Juliany has "specialized mental health needs," "has had between eight to nine foster care placements," and has been "qualified for placement in a therapeutic foster home."[6]

"On November 1, 2019, [the Department of Children and Families (department)] received a referral from Juliany's school due to her emotional and behavioral challenges." Melanie R. did not cooperate with the department by engaging in services following this referral, and, on January 21, 2020, the petitioner filed a neglect petition as to Juliany. On March 30, 2020, the petitioner sought and was granted an ex parte order of temporary custody as to Juliany and the court, *Lobo, J.*, issued preliminary specific steps for the respondent. On September 30, 2020, the court, *Dannehy, J.*, adjudicated Juliany neglected, committed her to the care and custody of the petitioner and issued final specific steps for the respondent.[7] The respondent "stood silent as to the neglect adjudication."

After Juliany was removed from Melanie R.'s care in 2020, the department offered the respondent reunification services by encouraging his participation in programs or services available through the Department of

not the father of Precious and Joshua, and his claims in this appeal do not pertain to them.

[6] At the time of trial, Juliany had been residing in a therapeutic foster home since April, 2023.

[7] "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights." (Internal quotation marks omitted.) *In re Amias I.*, 343 Conn. 816, 822 n.6, 276 A.3d 955 (2022). The final specific steps the court issued for the respondent included, among other things, participating in services provided by the Department of Correction (DOC) regarding parenting, substance abuse and mental health and signing "releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress toward identified goals, and for use in future proceedings with this court."

Correction (DOC),[8] and it facilitated phone calls and offered him virtual and in person visits with Juliany.[9] The department's "social workers regularly contacted [the respondent] and his counselor to discuss his participation in services while incarcerated. He completed the VOICES program in June, 2020, which is a victim impact program." The department did not know whether the respondent completed any other programs, however, because he failed to sign a release of information in accordance with the court-ordered specific steps. See footnote 7 of this opinion.

On December 22, 2022, the petitioner filed a petition to terminate the respondent's parental rights on the grounds that (1) Juliany had been abandoned by the respondent "in the sense that the [respondent] failed to maintain a reasonable degree of interest, concern, or responsibility as to the welfare of the child," (2) Juliany previously had been adjudicated neglected and the respondent had failed to achieve a sufficient degree of rehabilitation, and (3) the respondent had no ongoing parent-child relationship with Juliany. A trial on the petition for the termination of parental rights was held on June 6, 2023, before the court, *Nguyen-O'Dowd*, *J.* The petitioner presented the testimony of two witnesses, department social workers Mary Daries and Paola Tierinni, and entered eighteen exhibits. After consulting with his counsel, the respondent testified. He did not call any other witnesses or enter any exhibits.

[8] Because the respondent was incarcerated, the department was unable to directly provide him with services.

[9] Since 2020, the respondent had some contact with Juliany, predominantly by telephone. The record reflects one in person visit in June, 2021. Between August, 2021, and February, 2023, however, Juliany refused to have any contact with the respondent, and the department kept him updated about her. Juliany agreed to resume contact with the respondent in 2023, provided the contact was facilitated by relatives, and this contact had occurred approximately monthly as of the time the court issued its decision. The record does not specify whether this resumed contact has been telephonic, in person, or both.

After the respondent rested his case, the petitioner's counsel advised that the petitioner was withdrawing two of the three alleged grounds for termination of parental rights and was proceeding solely on the ground set forth in General Statutes § 17a-112 (j) (3) (B) (i), which provides in relevant part that Juliany "has been found in a prior proceeding to have been neglected, abused or uncared for and the . . . [respondent] has . . . failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of [Juliany] . . . he . . . could assume a responsible position in the life of [Juliany] . . . ." The petitioner's counsel then argued, in closing argument, that the petitioner had satisfied her burden to prove this ground with evidence that established that the respondent failed to comply with the court-ordered specific steps by providing releases to confirm his engagement in, or successful completion of, DOC services regarding parenting, substance abuse and mental health. The petitioner's counsel also argued that the petitioner made reasonable efforts to reunify the respondent with Juliany and had proven the respondent's inability or unwillingness to benefit from those efforts. Finally, the petitioner's counsel argued that the evidence established that termination of the respondent's parental rights was in Juliany's best interest.

The respondent's counsel then made the following closing argument: "On behalf of [the respondent], I do believe the [petitioner] has appropriately adopted the grounds, ground B, failure to rehabilitate. I think the others are not appropriate.

"As to failure to rehabilitate, [the respondent is] in an unfortunate situation where he's not able to rehabilitate because he is incarcerated. So, his actions or inactions are not wilful, they're consequential, and I don't want to belabor that.

"There is enough today to hear that the child may seek to have a relationship with the [respondent] through the [respondent's] family. It's very difficult to predict the future, but as she matures perhaps she can work out some relationship regardless of the decision of this court. Whether the court decides to terminate the rights of [the respondent] to his child, it doesn't mean the court can terminate any affection or any desire to be a part of the [respondent's life] at some point in time. So, there's enough there to say that Juliany may seek some relationship with [the respondent] at some point in time regardless of the outcome. So, I just wanted to emphasize that [the respondent's] behavior is not wilful.

"His testimony today echoes the reality when you're sentenced for a long time, for practical reasons the [DOC] tends to favor those inmates who have lesser time to serve. And where the time to serve is greater, for efficacy it's distributed inequitably. So, I just want to emphasize what [the respondent] made clear: It's not that he doesn't want to. It's not wilful. He did the best that he could on what was provided, and he's not in complete control of the [DOC]."

On August 21, 2023, the court issued a memorandum of decision in which it terminated the respondent's parental rights. The court found by clear and convincing evidence that the department had made reasonable efforts to reunify Juliany with the respondent and that the respondent was unable or unwilling to benefit from reunification efforts.

The court also found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of Juliany, he could assume a responsible position in her life. In reaching this conclusion, the court observed that the

respondent "has been incarcerated throughout the pendency of this case" and that he had been on notice since early 2020 "as to the expectations of him in the specific steps ordered by the court." To this end, the court acknowledged that the respondent "took advantage of the programs that were available to him" but determined that "this is not enough given Juliany's age[10] and needs and the length of time she has been in [the department's] care. There is still more work to do to ensure that the respondent . . . understands Juliany's emotional and mental health needs." (Footnote added.) Noting that the respondent's maximum release date "is well beyond when Juliany will reach the age of majority," the court concluded that the respondent "would be unable to rehabilitate in time for Juliany." It specified that "the only reasonable conclusion *to be made from the credible testimony and evidence* is that the respondent . . . has failed to attain a level of rehabilitation given Juliany's age and needs" and determined "that the petitioner has shown by clear and convincing evidence that the respondent . . . has failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i)." (Emphasis added.)

In the dispositional phase of the proceedings, the court made findings as to each of the seven statutory factors set forth in § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in Juliany's best interest. Accordingly, the court rendered judgment terminating the respondent's parental rights and appointing the petitioner as Juliany's statutory parent. This appeal followed.

Each of the respondent's claims on appeal derives from his contention that he was denied the effective assistance of counsel at trial. See *In re Jonathan M.*, 255 Conn. 208, 235, 764 A.2d 739 (2001) (confirming

[10] Juliany was twelve years old at the time of trial.

that parent may challenge adequacy of trial counsel in parental rights termination proceedings by way of direct appeal). The respondent argues that his counsel's performance was deficient because he conceded that the petitioner had proven the case for termination when he stated during his closing argument that "the [petitioner] has appropriately adopted the grounds, ground B, failure to rehabilitate." The following principles, therefore, guide our review.

"In Connecticut, a parent who faces the termination of his or her parental rights is entitled, by statute, to the assistance of counsel. . . . Because of the substantial interests involved, a parent in a termination of parental rights hearing has the [statutory] right not only to counsel but to the effective assistance of counsel. . . . Moreover, a parent whose rights have been terminated may assert, on direct appeal, that he or she was deprived of the right to the effective assistance of counsel at trial. . . . In determining whether counsel has been ineffective in a termination proceeding, [this court has] enunciated the following standard: The range of competence . . . requires not errorless counsel, and not counsel judged ineffective by hindsight, but counsel whose performance is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in [that particular area of the] law. . . . The respondent must prove that [counsel's performance] fell below this standard of competency and also that the lack of competency contributed to the termination of parental rights. . . . *A showing of incompetency without a showing of resulting prejudice . . . does not amount to ineffective assistance of counsel.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Peter L.*, 158 Conn. App. 556, 563, 119 A.3d 23 (2015). "Even where a parent in a termination proceeding has a constitutional, rather than merely statutory, right to counsel, the parent must

show resulting prejudice to prevail on a claimed violation of that right." *In re Jaelynn K.-M.*, 229 Conn. App. 371, 382, 327 A.3d 1013 (2024).

"In making such a claim, it is the responsibility of the respondent to create an adequate record pointing to the alleged ineffectiveness and any prejudice the respondent claims resulted from that ineffectiveness. . . . In the absence of findings by the trial court in this regard, we directly review the trial court record." (Citation omitted; internal quotation marks omitted.) *In re Wendy G.-R.*, 225 Conn. App. 194, 205, 314 A.3d 1029, cert. denied, 349 Conn. 916, 316 A.3d 357 (2024).

I

The respondent's first claim on appeal is that he had a federal and state constitutional right to the effective assistance of counsel during the termination proceedings and that his "[t]rial counsel's deficient performance represented structural error" requiring an automatic reversal of the judgment and an order for a new trial. He acknowledges that, "[i]n most cases, a respondent alleging ineffective assistance of counsel in a termination hearing must prove both that the trial counsel's performance was deficient and that the lack of competency contributed to the termination of parental rights" but argues that, "[i]n this case . . . trial counsel's concession that the [petitioner] had proven that the respondent had failed to rehabilitate represents a breakdown in the adversarial process such that the process itself should be deemed unreliable." As such, he maintains that we should presume that he was prejudiced by his counsel's alleged incompetency and reverse the judgment in accordance with the standard set forth in *United States* v. *Cronic*, supra, 466 U.S. 658.

The petitioner claims, in response, that the respondent's right to the effective assistance of counsel is not constitutional in nature and that, even it if was, this

court should not "import *Cronic* . . . into the child protection context," given that "our Supreme Court has declined to adopt an automatic reversal rule that would forgo a harmlessness analysis in child protection cases." The petitioner maintains, therefore, that the respondent must demonstrate both his counsel's incompetence and prejudice resulting therefrom to prevail on his claim of ineffective assistance of counsel and that he has failed to do so. We agree with the petitioner and conclude that, assuming that the respondent had a constitutional right to the effective assistance of counsel at the termination hearing; see *In re Jonathan M.*, supra, 255 Conn. 225 (noting that parent "is constitutionally entitled to the effective assistance of counsel only if he had a constitutional right to appointed counsel in the termination proceeding");[11] *Cronic*'s presumption

[11] The parties agree that whether the respondent had a constitutional right to the effective assistance of counsel under the fourteenth amendment to the federal constitution depends on the outcome of the balancing test set forth in *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27–32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), and its progeny. "[I]n *Lassiter* . . . the United States Supreme Court considered and rejected a claim that the due process clause of the fourteenth amendment requires the appointment of counsel for indigent parents in every parental status termination proceeding. . . . The court read its prior cases as establishing a presumption that an indigent litigant has a right to appointed counsel only when his or her physical liberty is at stake. . . . The court then applied the due process balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—weighing the competing private and governmental interests at stake and the risk of an erroneous decision in the absence of appointed counsel—to determine whether an indigent parent's interest in obtaining the assistance of counsel is sufficiently compelling to overcome that presumption. . . .

"Despite [marshaling] a number of potentially convincing arguments in favor of recognizing a right to counsel . . . the court ultimately declined to hold that due process requires the appointment of counsel whenever a state seeks to terminate the parental rights of an indigent parent. . . . Instead, the court held that whether the federal constitution requires the appointment of counsel is a fact specific determination that must be made by balancing the *Mathews* factors on a case-by-case basis. . . . The court further cautioned that, in light of the presumption against the right to appointed counsel in the absence of a potential deprivation of physical liberty, such a right would exist only [i]f, in a given case, the parent's interests

of prejudice standard does not extend to "this case and other child protection cases where there is a complete breakdown in the adversarial system," as the respondent urges.[12]

Because the respondent's claim is strictly predicated on the applicability of the "standard used by our reviewing courts in *Cronic*," we begin there. In *Cronic*, the United States Supreme Court considered a defendant's appeal from his conviction of mail fraud based on his claim that his sixth amendment right to the effective assistance of counsel[13] had been violated during his criminal trial. *United States* v. *Cronic*, supra, 466 U.S. 651, 658. The court recognized in *Cronic* that "[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system"; id., 653; and that that right "is the right to the effective assistance of counsel." (Internal quotation marks omitted.) Id.,654. The court expressed concern that, "[u]nless the accused receives the effective assistance

[are] at their strongest, the [s]tate's interests [are] at their weakest, and the risks of error [are] at their peak . . . ." (Citations omitted; internal quotation marks omitted.) *In re Amias I.*,343 Conn. 816, 833 n.18, 276 A.3d 955 (2022). With these principles in mind, we assume without deciding that the respondent had a federal constitutional right to the effective assistance counsel. We need not further assume, therefore, that article first, § 10, of the Connecticut constitution independently confers such a right. See *In re Taijha H.-B.*, 333 Conn. 297, 327, 216 A.3d 601 (2019).

[12] The petitioner also argues that, even if the presumption of prejudice standard set forth in *Cronic* is extended to child protection matters, that standard is not implicated by the circumstances of this case. Because we conclude that this standard is not applicable in the context of this child dependency proceeding, we do not address this argument.

[13] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. We note that our Supreme Court "has held that, in termination of parental rights proceedings, parents have no right to counsel under the sixth amendment . . . which [applies] only to criminal defendants," and the respondent does not argue otherwise in this appeal. *In re Amias I.*, 343 Conn. 816, 832 n.17, 276 A.3d 955 (2022), citing *State* v. *Anonymous*, 179 Conn. 155, 159–60, 425 A.2d 939 (1979).

of counsel, a serious risk of injustice infects the trial itself"; (internal quotation marks omitted) id., 656; and explained that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." Id., 658. As such, although the court acknowledged the presumption that an accused's "lawyer is competent to provide the guiding hand that the defendant needs" and maintained that "the burden rests on the accused to demonstrate a constitutional violation," it nonetheless identified three situations involving circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id., 658. Specifically, where there is a "complete denial of counsel" during a critical stage of the proceedings, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; id., 659; and where surrounding circumstances make it unlikely that any lawyer could provide effective assistance, prejudice resulting from ineffective assistance may be presumed. Id., 659–60; see also *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 532, 208 A.3d 296 (explaining that, in *Cronic*, court "established a narrow exception to the general two part . . . test for determining whether a petitioner's [sixth amendment] right to the effective assistance of counsel has been violated"), [14] cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

The respondent argues that, by conceding that the petitioner had proven his failure to rehabilitate, his

[14] That two part test, set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is the same as the two part test the respondent must satisfy, in the absence of an exception, to establish ineffective assistance of counsel in the termination proceeding that gives rise to this appeal. See *In re Peter L.*, supra, 158 Conn. App. 563. Under *Strickland*, a petitioner cannot establish a violation of his sixth amendment right to counsel without first demonstrating that (1) counsel's performance was deficient and (2) this deficiency prejudiced the petitioner's defense. *Strickland* v. *Washington*, supra, 687.

"counsel failed entirely to subject the [petitioner's] case to meaningful adversarial testing" as contemplated by *Cronic*, and that this error "was of a magnitude significant enough that [this court] could conclude that [he] was, in effect, unrepresented during a critical phase of the termination trial." He maintains, therefore, that this court should treat his counsel's concession as structural error by deeming "the process itself . . . presumptively unreliable" and reversing the judgment. See *In re Amias I.*, 343 Conn. 816, 840, 276 A.3d 955 (2022) ("[s]tructural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected" (internal quotation marks omitted)). Our Supreme Court's decision in *In re Amias I.*, however, forecloses the respondent's claim.

In *In re Amias I.*, the respondent mother appealed from the judgments of the trial court terminating her parental rights to her three children. Id., 818–19. The respondent claimed that the trial court violated her children's constitutional right to conflict free representation by failing to inquire into whether the attorney appointed to represent them had a conflict of interest and that the court should treat that failure as structural error subject to automatic reversal. Id., 819–20, 830. Our Supreme Court explained, however, that, on previous occasions when it had applied the structural error doctrine, it had "done so sparingly" and, more to the point, that it never had applied structural error in the child dependency context. Id., 839; see also *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 29, 259 A.3d 1082 (2021) ("[o]nly a small share of constitutional errors are structural, that is, so presumptively harmful that they require automatic reversal"). The court "concluded that the significant differences between child dependency proceedings and other judicial proceedings militate decisively against applying a per se reversible error

rule in dependency cases," and it declined to do so. *In re Amias I.*, supra, 343 Conn. 840.

In reaching this conclusion, our Supreme Court "agree[d] fully with the California Supreme Court's reasoning in *In re James F.*, 42 Cal. 4th 901, 915–16, 174 P.3d 180, 70 Cal. Rptr. 3d 358 (2008), in which that court concluded that the significant differences between child dependency proceedings and other judicial proceedings militate decisively against applying a per se reversible error rule in dependency cases. See id., 917 ('[w]e cannot agree . . . that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child'). '[T]he price that would be paid for [applying such a rule], in the form of needless reversals of dependency judgments, is unacceptably high in light of the strong public interest in prompt resolution of these cases so that the children may receive loving and secure home environments as soon as reasonably possible.' Id., 918." *In re Amias I.*, supra, 343 Conn. 840–41. The same policy considerations are implicated in this child dependency proceeding and thus, we will not presume prejudice here. See id.; see also *In re Jaelynn K.-M.*, supra, 229 Conn. App. 383 (concluding that *Cronic*'s presumption of prejudice was not applicable to constructive deprivation of counsel claim in child dependency proceeding).

It is therefore incumbent on the respondent to prove prejudice to prevail on his claim of ineffective assistance of counsel. See *In re Peter L.*, supra, 158 Conn. App. 563. Apart from arguing that prejudice should be presumed, however, the respondent has not addressed the issue of prejudice in his briefs to this court, let alone proven that his counsel's alleged incompetency contributed to the loss of his parental rights. See, e.g., *In re S. F.*, 229 Conn. App. 1, 10 n.7, 326 A.3d 609 ("[a]nalysis, rather than mere abstract assertion, is

required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)), cert. denied, 350 Conn. 932, 326 A.3d 1108 (2024). We conclude that the respondent cannot prevail on his ineffective assistance of counsel claim because, as the petitioner argues and we agree, he did not brief the issue of prejudice and, thus, his claim is inadequately briefed. See id.

On the basis of the foregoing, we reject the respondent's claim that his trial counsel rendered ineffective assistance at the termination of parental rights trial.

II

The respondent next claims that he has a due process right to a hybrid habeas fact-finding proceeding in the trial court in order to more fully develop the record in support of his claim that he was denied the effective assistance of counsel at trial. He claims that "procedures available to him to vindicate his right to effective assistance of counsel are inadequate." He further claims that, if due process does not afford him such a right, this court should exercise its supervisory authority to afford him that right. These claims warrant little discussion.

As the respondent acknowledges, our Supreme Court concluded in *In re Jonathan M.*, supra, 255 Conn. 227–28, that "due process does not dictate that the petitioner must be permitted to utilize the writ of habeas corpus as a procedural means of attacking collaterally the termination judgment." He further acknowledges that the court saw "no need to utilize [its] supervisory authority to supplement the evidentiary record in direct appeals from such judgments in an effort to create an alternative to the habeas relief sought in this case." Id., 236. In reaching these conclusions, the court explained that there were "other means of vindicating the right to effective assistance of counsel . . . through which an

indigent parent may challenge a termination judgment . . . .'' Id. Specifically, in addition to the right to bring a direct appeal from the termination judgment, a parent may seek to ''open the final judgment of termination and assert a claim of ineffective assistance of counsel''; id., 237; and/or file a petition for a new trial. Id.,239.

Although the respondent argues that the latter two options are inadequate, he did not attempt to avail himself of those options. Moreover, he also correctly acknowledges that, ''to the extent the claims overlap, this court is bound by our Supreme Court's prior ruling'' in *In re Jonathan M.*[15] We are not at liberty to assess the propriety of the ''other means'' that were available to the respondent to vindicate his right to effective assistance of counsel under these circumstances. This court is bound by the precedent of our Supreme Court; see, e.g., *In re Wendy G.-R.*, supra, 225 Conn. App. 201 n.12 (rejecting request to reconsider propriety of other means parent has to vindicate right to effective assistance of counsel set forth in *In re Jonathan M.*); and we therefore reject the respondent's claim that he has a constitutional right to a hybrid habeas fact-finding proceeding, and we decline to exercise our supervisory authority to create one in light of our Supreme Court's recognition of other available remedies in *In re Jonathan M.*

The judgment is affirmed.

In this opinion the other judges concurred.

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[15] We note that the respondent explains in his brief that ''[t]his claim is fully briefed to allow this court an ability to fully examine whether *In re Jonathan M.* forecloses action by this court and to preserve the argument in further proceedings.''

JOSHUA MARCINISZYN ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF SOUTHINGTON ET AL.

(AC 46736)

Suarez, Clark and Lavine, Js.

Syllabus

The plaintiffs, a self-represented nonattorney father and his minor son by and through the father as next friend, appealed from the trial court's denial of their petition for a bill of discovery. They claimed, inter alia, that the court erred when it determined that they had failed to establish probable cause for their claims that the defendants had discriminated against the son in denying him admission to a public high school program in violation of several federal civil rights laws. *Held*:

This court properly considered, sua sponte, the issue of the plaintiff father's standing to bring this appeal in his individual capacity and of his authority to proceed in a representative capacity as a self-represented nonattorney on behalf of his minor son, as exceptional circumstances warranted this court's review, the parties have been afforded an opportunity to be heard, the plaintiffs have failed to raise a colorable claim of prejudice, and the record was adequate for review, even though the parties did not raise the issue in their principal briefs.

The plaintiff father had standing in his individual capacity to appeal from the trial court's decision denying the petition for a bill of discovery, as he was classically aggrieved by the court's decision in that, as one of two plaintiffs in the proceedings before the court, he suffered an injury when the court denied his request to act pursuant to its common-law authority to issue the bill.

The plaintiff father, notwithstanding his aggrievement by the trial court's decision, did not have standing to bring the action in his individual capacity in the first instance because he was not classically aggrieved, as a review of the petition revealed that the injuries alleged therein were exclusively injuries to his minor son and not to him, and the court should have dismissed the petition as to the father for lack of subject matter jurisdiction rather than denying it.

This court dismissed the appeal as to the minor son as the plaintiff father did not have the authority as a self-represented nonattorney to proceed in a representative capacity on behalf of his son, and the father failed to cure that defect by retaining counsel to appear on behalf of the son when this court afforded the father the opportunity to do so.

Argued September 4, 2024—officially released February 11, 2025

Procedural History

Petition for a bill of discovery seeking certain information related to the application process for a high school educational program, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Pierson, J.*; judgment denying the petition, from which the plaintiffs appealed to this court. *Appeal dismissed in part; reversed in part; judgment directed.*

Joshua Marciniszyn, self-represented, the appellant, and for the appellant D (plaintiffs).

Peter J. Murphy, with whom were *Bradley M. Harper* and, on the brief, *Chelsea C. McCallum*, for the appellee (named defendant).

Opinion

CLARK, J. The plaintiffs, Joshua Marciniszyn, who is self-represented, and his minor child D, by and through Marciniszyn as next friend, appeal from the trial court's denial of their petition for a bill of discovery (petition). On appeal, the plaintiffs argue that the court erred when it determined that they failed to establish probable cause for their claims that the defendants, the Board of Education of the Town of Southington and the town of Southington, had discriminated against D in violation of several federal civil rights laws. They also argue that the court improperly granted the defendants a continuance to file an objection to their petition and improperly limited the presentation of testimony at the hearing on the petition. We conclude that Marciniszyn lacked standing to bring this action in his individual capacity. We therefore reverse in part the court's judgment and remand the case with direction to dismiss the petition as to Marciniszyn in his individual capacity. We dismiss the appeal as to D because Marciniszyn lacks authority, as a self-represented nonattorney, to proceed in a representative capacity on D's behalf before this court.

The following undisputed facts and procedural history are relevant to this appeal. Southington High School operates an educational program called the Southington Regional Agriculture program (AG program). Students from the towns of Southington, Berlin, Farmington, Bristol, New Britain, Cheshire, Plainville, Terryville, Waterbury, and Wolcott are eligible to apply to the AG program, but not all students who apply are accepted. D applied to the AG program for the 2023–2024 school year and was placed on a waiting list.

The plaintiffs commenced this action on March 7, 2023. They filed their petition, captioned as "Joshua Marciniszyn [and] Joshua Marciniszyn P/P/A[1] (Minor Child) [D], Plaintiff v. [Defendants]." They sought an order directing the defendants to disclose, inter alia, "the [t]raining [m]anual used, referenced, and implemented, to evaluate all the applications" to the AG program; "every and all, applications, separated into those initially accepted, those put on wait lists, and those rejected," including information about applicants' grades, test scores, and recommendations; internal and external communications to and from "decision makers, including but not limited to, the principal, vice principal, superintendent, teachers, [and] school board"; and "social media research conducted on each student." They also sought to compel the defendants to answer certain interrogatories, including: "Please state in detail why [D] was not selected at the initial selection process?" "What additional steps could [D] have completed to secure placement?" And "[p]lease describe the complete and entire methodology . . . used to reach the determination of students accepted, rejected, and placed on the wait list . . . ."

[1] "Per proxima amici, or [PPA], means by or through the next friend, and is employed when an adult brings suit on behalf of a minor, who was unable to maintain an action on his own behalf at common law." (Internal quotation marks omitted.) *Marciniszyn* v. *Taylor*, Superior Court, judicial district of Waterbury, Docket No. CV-20-5026268-S (March 19, 2021).

The plaintiffs alleged that they were entitled to this information because the defendants had discriminated against D in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; Title VI[2] of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; and "Title 42 of the C.F.R., et al."[3] The plaintiffs further alleged that the defendants "wilfully and maliciously acted in bad faith and with extreme prejudice" when they put D on a waiting list for the AG program and that this decision constituted discrimination against D "based on race, (biracial birth), sex, gender, sexual orientation, sexual orientation of parent, [individualized education program] status, disease or diagnosis, place of current residence, place of current educational district, place of current educational school and/or other factors that this discovery will reveal." In support of these claims of discrimination, the plaintiffs alleged that D had been placed on a waiting list despite being a uniquely strong candidate for admission to the AG program, as evidenced by his grades, standardized test scores, and extracurricular activities.

The plaintiffs further alleged that the defendants' decision to place D on a waiting list impeded D's future college and career plans. In particular, they claimed

[2] Although the plaintiffs did not, in their petition, expressly list Title VI among the civil rights statutes that they accused the defendants of violating, they cited elsewhere in their petition to the language of Title VI as setting forth a "standard" that, they claimed, the defendants had breached. Mindful that self-represented parties' pleadings should be construed "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569, 877 A.2d 761 (2005); we construe the plaintiffs' petition to allege probable cause for a Title VI violation.

[3] In a later filing, the plaintiffs also claimed that the defendants had violated "all other federal and state laws, to which publicly funded schools are subject to."

that D was "entitled to remedy" for: "[l]oss of education that would prepare him for the career path he has chosen"; "[l]oss of education that would appear on his resume that college acceptance boards review"; [l]oss of education that would position him to receive scholarships and grants to further his education beyond high school"; "[l]ifetime loss of income in his chosen career, as a result of lost education . . . [and] [l]oss of educational information and resources that would be unknown to him, giving students that attend, the advantage over him in the same career field."

Following briefing and oral argument,[4] the trial court, *Pierson*, *J.*, denied the petition on July 7, 2023. The court concluded that "[t]he . . . claims of discrimination are premised on the assumption that, as [D], an excellent student, was denied admission to the [AG] program, such denial must have been based on impermissible discrimination of some kind. Such an assumption is insufficient to give rise to an inference of intentional or otherwise prohibited discrimination. The application is devoid of detailed facts demonstrating that [D's] characteristics affected, in any way, the defendants' decision to place him on the 'wait list.' " (Emphasis omitted.) The court concluded that the plaintiffs

[4] Prior to oral argument on the plaintiffs' petition in the trial court, the court, over the plaintiffs' objection, continued the matter from April 10 to May 1, 2023, in order to allow the defendants time to file an objection to the petition and the plaintiffs time to file a reply thereto. On the date scheduled for oral argument on the petition, before he began his argument, Marciniszyn asked if the trial court would be allowing testimony, stating that D was available to authenticate certain exhibits that the plaintiffs had filed. The court replied that testimony would be unnecessary because the defendants had not objected to the exhibits. Although the plaintiffs, in this appeal, challenge both the continuance order and the exclusion of D's proffered testimony, along with the court's determination that they had failed to establish probable cause for a bill of discovery, we do not reach the merits of their claims in light of our conclusions herein that Marciniszyn lacked standing in his individual capacity to bring this action and lacks authority as a self-represented nonattorney to proceed on D's behalf before this court.

were using their petition as a means of conducting a " 'fishing expedition.' " This appeal followed.

On September 30, 2024, following oral argument before this court, we sua sponte ordered the parties to submit supplemental memoranda addressing (1) whether Marciniszyn has standing to bring this appeal in his individual capacity, and (2) whether, in light of this court's decision in *Lowe* v. *Shelton*, 83 Conn. App. 750, 755–59, 851 A.2d 1183, cert. denied, 271 Conn. 915, 859 A.2d 568 (2004), Marciniszyn—who is neither an attorney licensed to practice law in Connecticut, nor admitted pro hac vice—is authorized, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D, and, if not, whether and how that defect may be cured. The parties filed supplemental memoranda in accordance with this order.

Thereafter, on October 23, 2024, we ordered that the adjudication of this appeal be stayed for sixty days in order to afford Marciniszyn an opportunity to retain an attorney licensed to practice and in good standing in Connecticut to represent D in this appeal.[5] We further specified that this attorney, if retained, must file an appearance with this court within sixty days, along with a statement specifying (1) whether they intended to adopt the plaintiffs' brief or submit a substitute brief in lieu thereof, and (2) whether they sought reargument of the appeal. We cautioned that, should Marciniszyn fail to comply with this order, the appeal as to D may be dismissed.

Marciniszyn did not retain counsel to represent D within sixty days of our October 23, 2024 order. On

[5] As a minor, D may not represent himself. See, e.g., *V. V.* v. *V. V.*, 218 Conn. App. 157, 168, 291 A.3d 109 (2023) ("a child may bring a civil action only by a guardian or next friend, whose responsibility it is to ensure that the interests of the ward are well represented" (internal quotation marks omitted)).

December 19, 2024, the plaintiffs filed a motion requesting an extension of time of ninety days to secure counsel for D. The defendants did not file a response. We denied the motion on January 2, 2025, and lifted the stay. The appeal is now ready for adjudication.

I

As a preliminary matter, in their supplemental memorandum to this court, the plaintiffs claim that it is improper for us to raise and decide, sua sponte, the issues of Marciniszyn's standing to bring this appeal in his individual capacity and of his authority to proceed in a representative capacity on behalf of D. In particular, the plaintiffs argue that no exceptional circumstances justify our consideration of these issues and that our consideration of these issues would prejudice them. We disagree.

"Our appellate courts generally do not consider issues that were not raised by the parties. . . . This is because our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues . . . . There are, however, well established exceptions to this rule." (Citations omitted; internal quotation marks omitted.) *State* v. *Connor*, 321 Conn. 350, 362, 138 A.3d 265 (2016). "[W]ith respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised . . . the reviewing court (1) must do so when that issue implicates the court's subject matter jurisdiction, and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 128, 84 A.3d 840 (2014) (*Blumberg*). The record must also be

adequate for review of the unpreserved issue. See, e.g., *Matos* v. *Ortiz*, 166 Conn. App. 775, 792, 144 A.3d 425 (2016).

"Exceptional circumstances [justifying sua sponte review of an unpreserved issue in the court's discretion] exist when the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims. . . . To satisfy concerns of fundamental fairness, at a minimum, the parties must be provided sufficient notice that the court intends to consider an issue. It is implicit that an opportunity to be heard must be a meaningful opportunity . . . . The parties must be allowed time to review the record with that issue in mind, to conduct research, and to prepare a response. . . . Additionally, [p]rejudice may be found, for example, when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 59, 225 A.3d 953 (2020). "[B]ecause it may be difficult for a party to prove definitively that it would have proceeded in a different manner and, as a result, would suffer unfair prejudice if the reviewing court were to consider the unpreserved issue, once that party makes a colorable claim of such prejudice, the burden shifts to the other party to establish that the first party will not be prejudiced by the reviewing court's consideration of the issue." (Internal quotation marks omitted.) *State* v. *Connor*, supra, 321 Conn. 373–74.

The issue of Marciniszyn's standing in his individual capacity implicates subject matter jurisdiction as to him; see, e.g., *Portfolio Recovery Associates, LLC* v. *Healy*, 158 Conn. App. 113, 115, 118 A.3d 637 (2015); and this court is therefore required to raise and decide

the issue sua sponte. By contrast, the issue of Marciniszyn's authority, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D does not implicate subject matter jurisdiction. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 759 ("the filing of an appeal on behalf of a minor by a nonattorney parent does not implicate subject matter jurisdiction"). We are convinced, however, that sua sponte consideration of this latter issue is proper because exceptional circumstances warrant our review, the parties have been afforded an opportunity to be heard, the plaintiffs have failed to raise a colorable claim of prejudice, and the record is adequate for review.

In *Lowe* v. *Shelton*, supra, 83 Conn. App. 756–59, this court held that, in general, nonattorney parents may not represent their minor children on appeal without the assistance of an attorney. The court in *Lowe* reasoned that " 'it is not in the interests of minors or incompetents that they be represented by [nonattorneys]. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.' " Id., 757, quoting *Cheung* v. *Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). Because "[t]he choice to appear [in a self-represented capacity] is not a true choice for minors who under state law . . . cannot determine their own legal actions . . . [t]here is . . . no individual choice to proceed [in a self-represented capacity] for courts to respect, and the sole policy at stake concerns the exclusion of [nonlicensed] persons to appear as attorneys on behalf of others." (Internal quotation marks omitted.) *Lowe* v. *Shelton*, supra, 757. As the court in *Lowe* explained, "[t]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings

that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, e.g., to avoid litigating unfounded or vexatious claims." (Internal quotation marks omitted.) Id., 758.[6]

We begin with the question of whether exceptional circumstances justify our sua sponte review of Marciniszyn's authority, as a self-represented nonattorney, to proceed in a representative capacity on behalf of D. We note at the outset that this court in *Lowe* reached its holding only after ordering supplemental briefs at oral argument on the questions of (1) whether the court had subject matter jurisdiction over the appeal because it was filed by the plaintiff's parents without the aid of an attorney, and (2) whether any defect resulting from the parents' filing of the appeal was curable. See id., 753 (describing supplemental brief order without analysis of why order was proper). Moreover, although we are unaware of any case in which this court or our Supreme Court has squarely discussed the propriety of a court's consideration, sua sponte, of nonattorney self-represented parents' authority to "represent" their children, our research reveals that at least six of the federal circuit courts of appeals—including the United States Court of Appeals for the Second Circuit, whose case law influenced this court's holding in *Lowe*—have considered this issue sua sponte. See, e.g., *Dunlop* v. *Commissioner of Social Security*, 518 Fed. Appx. 691, 692 n.1 (11th Cir. 2013), cert. denied sub nom. *Dunlop* v.

[6] Contrary to the plaintiffs' assertion, this language does not require the court, before concluding that a *Lowe* defect exists, to conduct an individualized evaluation of whether a nonattorney, self-represented parent acting in a representative capacity on behalf of his child would create "unusual burdens" for his adversaries and the court. Rather, the court in *Lowe* discussed the burdens imposed by self-represented parties' litigation simply as one rationale for its ultimate holding. See *Lowe* v. *Shelton*, 83 Conn. App. 758–59.

Colvin, 572 U.S. 1005, 134 S. Ct. 1521, 188 L. Ed. 2d 455 (2014); *Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1299 (10th Cir. 2011); *Myers* v. *Loudoun County Public Schools*, 418 F.3d 395, 399 (4th Cir. 2005); *McPherson* v. *School District No. 186*, 32 Fed. Appx. 769, 770 (7th Cir. 2002); *Wenger* v. *Canastota Central School District*, 146 F.3d 123, 125 (2d Cir. 1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1267, 143 L. Ed. 2d 363 (1999); *Osei-Afriyie* v. *Medical College of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991); see also *Harris* v. *Apfel*, 209 F.3d 413, 414 (5th Cir. 2000) (addressing nonattorney, self-represented parent's authority to represent child in Social Security appeal when issue was raised for first time by appellee on appeal).[7]

[7] We are aware of one circuit that has taken a different approach. In *W. J.* v. *Secretary of Health & Human Services*, 93 F.4th 1228, 1235–37 (Fed. Cir.), cert. denied sub nom. *W. J.* v. *Becerra*, U.S. , S. Ct. , L. Ed. 2d (2024), the United States Court of Appeals for the Federal Circuit sua sponte ordered supplemental briefing on the question of whether a minor's self-represented parents were authorized to act in a representative capacity on behalf of their child in prosecuting, and appealing the denial of, a claim for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300a-1 et seq. (Vaccine Act). After reviewing the parties' supplemental briefing, the court concluded that "this case does not require us to answer our own question." Id., 1236. The court explained that dismissal of the case would be inefficient and unfair in light of the fact that the government, even after the order for supplemental briefing, had not asked that the appeal be dismissed; that the Rules of the Court of Federal Claims, where the claim had been filed, and procedural rules for Vaccine Act cases expressly permitted such representation; that the Federal Circuit had adjudicated the merits of claims brought by self-represented parents on behalf of their children in several prior nonprecedential decisions; and that the case, which had been fully briefed and argued, had been working its way through the courts for three years and was predicated on alleged injuries that were more than seventeen years old. Id.

W. J., like all the federal cases we cite herein, is not binding on this court and constitutes, at most, persuasive authority only. In any event, the circumstances that motivated the Federal Circuit to refuse to decide the representation question in *W. J.* are either absent from or carry significantly less force in this case. Here, the defendants, following our order for supplemental memoranda, have requested that we conclude that Marciniszyn lacks authority to proceed on behalf of D. Moreover, this court's holding in *Lowe*, which predates the inception of this case by almost two decades and with

We find the reasoning of the United States Court of Appeals for the Second Circuit in *Wenger* to be persuasive. In that case, the court stated that, because "[t]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him," courts have a duty, sua sponte, to inquire as to the propriety of—and to restrain—self-represented nonattorney parents' representation of their children. (Internal quotation marks omitted.) *Wenger* v. *Canastota Central School District*, supra, 146 F.3d 125. This court's holding in *Lowe* was informed by, and expressed, that same solicitude for minors' entitlement to trained legal representation so that they may effectively litigate their claims. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 757 ("[t]he purpose for requiring an attorney is to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents" (internal quotation marks omitted)). This concern likewise informs our conclusion that it is appropriate for this court to raise and decide the question of Marciniszyn's authority, as a self-represented

which the plaintiffs are well acquainted; see footnote 8 of this opinion; expressly forbids self-represented nonattorney parents without a personal interest at stake from proceeding on their child's behalf, and the plaintiffs have cited no statute or rule of practice to the contrary. In the one case of which we are aware in which this court decided the merits of an appeal that suffered from a *Lowe* defect, it did so without any discussion of or attempt to distinguish the decision in *Lowe*. See *Shockley* v. *Okeke*, 92 Conn. App. 76, 882 A.2d 1244 (2005), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007) (certification improvidently granted). Moreover, in a dissenting opinion in *Shockley*, Judge Schaller—the author of *Lowe*—considered the defect a threshold issue that implicated this court's authority to decide the appeal and would have given the parties an opportunity to brief the issue and cure the defect. See id., 86–92 (*Schaller*, *J.*, dissenting). Finally, notwithstanding the plaintiffs' assertion that "a substantial period has [e]lapsed" since D's alleged injury—his placement on a waiting list—this event occurred, by the plaintiffs' own representations, in February, 2023; the case was filed in March, 2023; and oral argument before this court occurred in September, 2024. This is a far cry from the more than *seventeen years* between injury and adjudication that the court confronted in *W. J.*

nonattorney, to proceed in a representative capacity on behalf of D, even though the parties did not raise the issue in their principal briefs.

Sua sponte consideration of this issue is also warranted in light of Connecticut's prohibition against the unauthorized practice of law. It is well established that "[a self-represented] party may not appear on behalf of another [self-represented] party . . . [and] [t]o do so would be to engage in the unauthorized practice of law." (Citation omitted.) *Collard & Roe, P.C.* v. *Klein*, 87 Conn. App. 337, 343–44 n.3, 865 A.2d 500, cert. denied, 274 Conn. 904, 876 A.2d 13 (2005); see also General Statutes § 51-88. As our Supreme Court has explained, the various functions inherent in the practice of law "require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations . . . [and] [i]t is of importance to the welfare of the public that these manifold customary functions [of practicing law] be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Patton*, 239 Conn. 251, 255, 683 A.2d 1359 (1996); accord *Collinsgru* v. *Palmyra Board of Education*, 161 F.3d 225, 231 (3d Cir. 1998) ("Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims. . . . Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice." (Citation omitted.)). In keeping with these strong public policy considerations, this court has not hesitated in

other contexts to consider, sua sponte, whether a self-represented party attempting to proceed before this court in a representative capacity was engaged in the unauthorized practice of law. See, e.g., *Cazenovia Creek Funding I, LLC* v. *Roman*, 223 Conn. App. 739, 743, 309 A.3d 419 (2024); *Ellis* v. *Cohen*, 118 Conn. App. 211, 214 n.8, 982 A.2d 1130 (2009). The plaintiffs have set forth no compelling justification for why we should take a different course here. We therefore conclude that the interests of justice, fairness, integrity of the courts and consistency of the law militate in favor of our considering, sua sponte, Marciniszyn's authority as a self-represented nonattorney to proceed before this court in a representative capacity on behalf of D, and significantly outweigh the interest in enforcing procedural rules governing the preservation of claims.

The plaintiffs do not argue that we have deprived them of a meaningful opportunity to be heard on this issue and, indeed, our September 30, 2024 order for supplemental memoranda has afforded them such an opportunity. See, e.g., *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 126 n.9, 172 A.3d 1228 (2017) (explaining that *Blumberg* "calls for supplemental briefing when a reviewing court raises an unpreserved issue sua sponte" (emphasis omitted)); *Shockley* v. *Okeke*, 92 Conn. App. 76, 91–92, 882 A.2d 1244 (2005) (*Schaller, J.*, dissenting) ("[b]ecause the lack of authority to proceed without counsel . . . implicates our authority to decide the appeal, I would give the parties an opportunity to address the *Lowe* problem by ordering supplemental briefs" (citation omitted)), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007) (certification improvidently granted).

With respect to prejudice, the plaintiffs assert that our consideration of this issue will cause them "extreme prejudice" because a substantial amount of time has already elapsed since D was notified that he had been

placed on a waiting list for the AG program. The plaintiffs do not, however, attempt to explain how, had the issue of Marciniszyn's authority as a self-represented nonattorney to proceed on D's behalf arisen in the trial court, they would have presented any additional evidence or otherwise proceeded differently—which is the relevant inquiry when determining whether review of an unpreserved issue would prejudice a party. See, e.g., *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 813–14, 277 A.3d 200 (2022).[8] The plaintiffs have thus failed to raise a colorable claim of prejudice.

Finally, the record is adequate for review of this issue. As we discuss in greater detail in parts II and III of this opinion, the question requires no fact-finding on our part—it is undisputed that Marciniszyn is a self-represented nonattorney who is attempting to act as D's next friend—and instead requires us simply to assess the propriety of this representative relationship on the basis of the plaintiffs' pleading and established legal principles. See, e.g., *Matos* v. *Ortiz*, supra, 166 Conn. App. 794 (record is adequate for review of unpreserved issue when issue presents "a pure question of law and the relevant facts are undisputed"). Therefore, we conclude that sua sponte consideration of Marciniszyn's standing in his individual capacity, and of his authority as a self-represented nonattorney to proceed in a representative capacity on behalf of D, is proper.

II

We next consider the question of Marciniszyn's standing, in his individual capacity. In their supplemental

[8] We note that, before they commenced the present action, the plaintiffs previously confronted motions to dismiss and for default, predicated on *Lowe*, in a separate action in which Marciniszyn sought to proceed on D's behalf without the assistance of an attorney. See *Marciniszyn* v. *Taylor*, Superior Court, judicial district of Waterbury, Docket No. CV-20-5026268-S; see also, e.g., *Jackson* v. *Drury*, 191 Conn. App. 587, 590 n.4, 216 A.3d 768 ("[a]n appellate court may take judicial notice of files in the same or other cases"), cert. denied, 333 Conn. 938, 218 A.3d 1050 (2019).

memorandum, the plaintiffs argue that Marciniszyn has standing to bring this appeal because he was a named party in the proceedings before the trial court and "has legally cognizable economic, social, and emotional intertwined interests" in D's admission to the AG program, in connection with D's future college admissions prospects, financial aid and scholarship opportunities, and employment and earning potential. We agree that Marciniszyn is aggrieved by the trial court's decision denying the petition and, thus, has standing, in his individual capacity, to bring this appeal. We further conclude, however, that Marciniszyn lacked standing in his individual capacity to bring this action in the first instance because he has not established that he has suffered a direct injury, traceable to the defendants' conduct, to a legally protected interest belonging to him. As such, the trial court should have dismissed, rather than denied, the petition as to Marciniszyn in his individual capacity.

We begin with a brief discussion of the difference between appellate standing and a party's standing to bring an action in the first instance. In order to establish standing in, and thereby invoke the jurisdiction of, either this court or the trial court, a plaintiff bears the burden of establishing that he or she is aggrieved. Cf. *Perry* v. *Perry*, 312 Conn. 600, 620, 95 A.3d 500 (2014); *Martinelli* v. *Martinelli*, 226 Conn. App. 563, 572–73, 319 A.3d 198 (2024); see also *Lewin* v. *United States Surgical Corp.*, 21 Conn. App. 629, 631, 575 A.2d 262 ("[t]he burden of proving aggrievement rests with the plaintiffs who have claimed it"), cert. denied, 216 Conn. 801, 577 A.2d 716 (1990). "There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features." (Internal quotation marks omitted.) *In re Ava W.*, 336 Conn. 545, 554, 248 A.3d 675 (2020). "The fundamental test for determining [classical] aggrievement

encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, 330 Conn. 447, 455, 195 A.3d 1123 (2018). Statutory aggrievement, meanwhile, "exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *In re Criminal Complaint*, 350 Conn. 633, 639, 325 A.3d 921 (2024).

As our Supreme Court has emphasized, however, "[s]tanding for purposes of bringing an action differs from the aggrievement requirement for appellate review under [General Statutes] § 52-263." *In re Ava W.*, supra, 336 Conn. 555. When analyzing whether a plaintiff is classically aggrieved for purposes of bringing an action, the court must assess whether the plaintiff has made a colorable allegation of direct injury, in an individual or representative capacity, to a protected interest, that is traceable to the conduct of the defendant. See, e.g., *Frillici* v. *Westport*, 264 Conn. 266, 280–81, 823 A.2d 1172 (2003). A party can be classically "aggrieved" for purposes of appellate standing, by contrast, when he affirmatively requests that a court act, and his request is denied—even if he lacked standing to bring the action in the trial court. See, e.g., *In re Ava W.*, supra, 555–57. In the context of the appellate standing inquiry, it is the request for judicial relief itself—and not the underlying

factual allegations marshaled in support of that request—that establishes the requisite "specific personal and legal interest," and it is the court's denial of that request that constitutes the requisite injury. Id., 555. The reviewing court retains, however, the obligation to consider—even sua sponte—whether a plaintiff in a case over which it has appellate jurisdiction had standing to bring the action in the first place. See, e.g., *Smith* v. *Snyder*, 267 Conn. 456, 460 n.5, 839 A.2d 589 (2004); see also *State* v. *Bryan*, 229 Conn. App. 364, 366 n.3, 327 A.3d 467 (2024) ("[i]t is well established . . . that [t]he trial court's lack of subject matter jurisdiction does not . . . deprive this court of appellate jurisdiction to determine whether the trial court had jurisdiction" (internal quotation marks omitted)).

Although our order for supplemental memoranda asked the parties to address Marciniszyn's standing, in his individual capacity, to bring this appeal, the parties' submissions largely focus on whether the underlying claims asserted in the action were personal to Marciniszyn or instead were predicated solely on injuries to D. Properly understood, this analysis addresses, not Marciniszyn's *appellate* standing but, rather, his standing to bring this action in his individual capacity in the first instance. We therefore address Marciniszyn's standing, in his individual capacity, both to appeal and to bring this action. We afford these issues plenary review. See, e.g., *C. M.* v. *R. M.*, 219 Conn. App. 57, 65, 293 A.3d 968 (2023); *Johnson* v. *Rell*, 119 Conn. App. 730, 736, 990 A.2d 354 (2010).

A

We begin with Marciniszyn's standing to appeal. Because Marciniszyn does not allege that he is statutorily aggrieved, he must establish that he has been classically aggrieved by the trial court's decision. See, e.g., *In re Probate Appeal of Kusmit*, 188 Conn. App. 196,

201, 204 A.3d 776 (2019). Upon our review of the record and the parties' supplemental memoranda, we conclude that he has done so. As one of two plaintiffs in the proceedings before the trial court, Marciniszyn affirmatively requested that the court act, pursuant to its common-law authority, to issue a bill of discovery. The trial court then denied this request, thereby causing Marciniszyn to suffer an injury. He is therefore classically aggrieved by the trial court's decision. See, e.g., *In re Ava W.*, supra, 336 Conn. 555–57 (mother was classically aggrieved by trial court's denial of motion for posttermination visitation "because she was a party to the underlying litigation who requested that the trial court act pursuant to its common-law authority" and trial court denied her request). He thus has standing to maintain this appeal in his individual capacity.

B

We next consider whether Marciniszyn, notwithstanding his aggrievement by the trial court's decision, had standing to bring the action in his individual capacity in the first instance. The legal principles underlying our inquiry are well established. "The requirement that a party have standing is fundamental. [A] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Freedom of Information Commission*, 161 Conn. App. 654, 658–59, 129 A.3d 721 (2015), cert. denied, 321 Conn. 901, 136 A.3d 642 (2016).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather, it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue." (Citation omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 486, 815 A.2d 1188 (2003).

As we have discussed, "[s]tanding is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected. . . . [O]nly those individuals who have suffered a direct injury would have standing." (Citation omitted; internal quotation marks omitted.) *Martinelli* v. *Martinelli*, supra, 226 Conn. App. 572–73. Conclusory statements devoid of adequate supporting factual allegations, however, do not establish the requisite protected interest. See, e.g., *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 405, 234 A.3d 111 (2020).

The plaintiffs do not claim that Marciniszyn is authorized by statute to bring this action. Thus, in order for

Marciniszyn to have standing to bring this action in his individual capacity, the plaintiffs must establish that he is classically aggrieved, i.e., that he has set forth a colorable claim of direct injury, traceable to the defendants' conduct, to a personal, legally protected interest. See, e.g., *Andross* v. *West Hartford*, 285 Conn. 309, 323, 939 A.2d 1146 (2008). A review of the petition,[9] however—reading its allegations in the light most favorable to the plaintiffs—reveals that the injuries alleged therein are exclusively injuries to D, not to Marciniszyn. It is D's right to be free from discrimination, D's college and career prospects, and D's future earning potential that the plaintiffs allege have been harmed by the defendants' decision to place D on a waiting list. As such, the plaintiffs' allegations do not demonstrate that Marciniszyn—as opposed to D—was classically aggrieved in his individual capacity. See, e.g., *Shockley* v. *Okeke*, supra, 92 Conn. App. 84–85 (Superior Court properly dismissed mother's probate appeal from denial of minor child's name change application for lack of subject matter jurisdiction where "the only matter properly before either the Probate Court or the Superior Court was the child's right to a change of name" and, "[a]s the plaintiff had no legal interest at issue, she was not aggrieved by the decision of the Probate Court denying the application for a change of name").

The fact that the plaintiffs now claim, in their supplemental memorandum, that Marciniszyn has "legally cognizable economic, social, and emotional intertwined interests" of his own in D's ability to attend the AG program—interests that the plaintiffs value at "hundreds of thousands . . . if not millions" of dollars—does not change our conclusion. This is so for two reasons. First, the plaintiffs never made any such asser-

[9] The plaintiffs' reply to the defendants' objection to the petition largely mirrored the allegations in the petition and did not set forth any additional claims of direct harm to Marciniszyn.

tion in their petition, and "a memorandum of law is not a proper vehicle for supplementing the factual allegations in a complaint . . . ." (Internal quotation marks omitted.) *Ross* v. *Commissioner of Correction*, 217 Conn. App. 286, 324, 288 A.3d 1055, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023). Second, even if it were proper for us to consider the plaintiffs' new allegations as part of our standing analysis, these allegations are wholly conclusory. The plaintiffs do not state with any specificity what Marciniszyn's "economic, social, and emotional intertwined interests" actually are, describe how those interests have been injured by D's placement on a waiting list, or explain how they calculated the monetary value of those interests. In the absence of adequate supporting factual allegations, these threadbare claims do not sufficiently allege classical aggrievement. See, e.g., *Hendel's Investors Co.* v. *Zoning Board of Appeals*, 62 Conn. App. 263, 274, 771 A.2d 182 (2001) (conclusory statements that " '[p]laintiff is aggrieved by the decision of the [d]efendant' " and " '[t]he [p]laintiff has a specific personal and legal property interest which was specifically and injuriously affected by the action of the [d]efendant' " are insufficient to establish aggrievement). We therefore reverse in part the trial court's denial of the petition on the merits and remand with instructions to dismiss the petition with respect to Marciniszyn in his individual capacity.[10]

[10] We emphasize that Marciniszyn—independent of the question of his authority to represent D's interests as a self-represented nonattorney, which we discuss in part III of this opinion—had standing in a *representative* capacity to assert claims on D's behalf in the trial court. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 755; accord *In re Tayquon H.*, 76 Conn. App. 693, 698–99, 821 A.2d 796 (2003) ("[a]lthough, generally speaking, a person has no standing to assert the rights of another, when the parties include a guardian and a minor ward . . . the guardian is indeed entitled to assert the legal rights of her ward" (footnote omitted)). Throughout proceedings in the trial court, however, Marciniszyn purported to proceed *both* as D's next friend *and* in his individual capacity. As he failed to establish any direct injury to himself, Marciniszyn did not have standing to proceed in his individual capacity; he only had standing to proceed as D's next friend.

III

We now consider whether, in light of this court's decision in *Lowe*, Marciniszyn has the authority as a self-represented nonattorney to proceed in a representative capacity on behalf of D, or whether the appeal as to D should be dismissed. The plaintiffs argue that *Lowe* is distinguishable from the present case. We disagree.

As we have explained, in *Lowe*, this court held that, as a general matter, a nonattorney, self-represented parent lacks the authority to maintain an appeal on behalf of his minor child. See *Lowe* v. *Shelton*, supra, 83 Conn. App. 755–59. The court left open, however, the possibility that a nonattorney, self-represented parent may be authorized to proceed on his minor child's behalf when the parent also has a personal interest at stake in the action. Id., 758–59. In particular, the court in *Lowe* distinguished the matter before it from the scenario that the United States Court of Appeals for the Second Circuit confronted in *Machadio* v. *Apfel*, 276 F.3d 103 (2d Cir. 2002).

In *Machadio*, the court held that a nonattorney, self-represented parent may represent her minor child in an appeal from a denial of supplemental security income (SSI) benefits, when that parent "has a sufficient interest in the case and meets basic standards of competence . . . ." Id., 107. The court in *Machadio* further concluded that the district court had not erred in permitting the self-represented plaintiff parent to proceed on her child's behalf, because—in addition to meeting the basic standard of competency to proceed—she had a personal financial stake in the government's decision as to whether to pay SSI benefits. Id., 106–108. This was so, the court explained, because the plaintiff parent was responsible for the cost of her child's alleged disability, and, "[i]f [the child] qualifie[d] for disability

benefits, then the federal government [would] assume some of the costs associated with [her] condition, freeing the plaintiff's limited resources for other living expenses." Id., 107. In *Lowe*, by contrast, this court determined that the parents seeking to maintain the appeal—who had accused a school official of libeling their son but had raised no claims of their own—had not been directly harmed by the lower court's judgment in the defendants' favor and thus had no interest at stake. *Lowe* v. *Shelton*, supra, 83 Conn. App. 758–59. This court therefore concluded that the parents in *Lowe* could not represent their minor son without an attorney's assistance. Id., 759.

The plaintiffs claim that this case is analogous to *Machadio* because Marciniszyn and D both have interests in the outcome of the matter. For the reasons we set forth in part II of this opinion, however, Marciniszyn has failed to establish that he, as opposed to D, has any direct interest at stake in the trial court's resolution of the matter. Accordingly, as with the parents in *Lowe*, "[t]he [plaintiffs'] reliance on [*Machadio*] . . . is misplaced." Id., 758. We therefore conclude that Marciniszyn, as a self-represented nonattorney, lacks the authority to maintain this appeal on D's behalf.

In *Lowe*, this court held that when a nonattorney, self-represented parent without an interest at stake in the case files an appeal on behalf of his minor child, the appeal suffers from a curable defect. Id., 760. This court in *Lowe* identified two ways in which that defect may be cured: either by having counsel appear on behalf of the minor child; or by the child filing his own self-represented appearance, if he has reached the age of majority during the pendency of the appeal. Id., 761. As we have explained, we provided the plaintiffs with an opportunity to cure the defect by affording Marciniszyn sixty days in which to retain counsel to appear on D's behalf. See, e.g., *Munoz* v. *Stableford*, Superior Court,

judicial district of New Haven, Docket No. CV-13-5034701-S (January 10, 2014) (57 Conn. L. Rptr. 454, 455) (affording parent sixty days to cure *Lowe* defect by retaining counsel). He has not done so. Nor has D reached the age of majority, such that he would be eligible to file a self-represented appearance.[11] Accordingly, we dismiss the appeal as to D.

The appeal is dismissed as to D; the judgment denying the petition as to Marciniszyn in his individual capacity is reversed and the case is remanded with direction to render judgment dismissing the petition as to Marciniszyn for lack of subject matter jurisdiction; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MYRON CAMOZZI *v.* ERIC PIERCE
(AC 46938)

Suarez, Westbrook and Keller, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant on the complaint and on the count of the defendant's counterclaim seeking to quiet title to a certain parcel of real property. A 1951 deed conveyed the entirety of a five acre tract of property, which included the parcel in dispute in the present action, to G. In 1975, G signed a deed as grantor that used the same boundary description as the 1951 deed but included a different

[11] In their supplemental memorandum, the plaintiffs suggest that this court should allow them to cure the *Lowe* defect by staying adjudication of the appeal until D reaches the age of majority and then permitting D to file a self-represented appearance. The record reflects that D is currently sixteen years old. The age of majority in this state is eighteen years. See General Statutes § 1-1d. The plaintiffs' proposed "cure" would thus delay the resolution of this appeal by more than one year, in contravention of our responsibility to "[process] cases in an orderly and expeditious manner." *Srager* v. *Koenig*, 42 Conn. App. 617, 622, 681 A.2d 323, cert. denied, 239 Conn. 935, 684 A.2d 709 (1996), and cert. denied, 239 Conn. 936, 684 A.2d 709 (1996). The plaintiffs cite no authority or other extenuating circumstances to justify such an extraordinary delay in the proceedings, and we decline to adopt this course of action.

acreage call. On appeal, the plaintiff claimed, inter alia, that the court improperly found that the 1975 deed conveyed the entirety of the property that had been conveyed by the 1951 deed, including the disputed parcel. *Held*:

The trial court's finding that the 1975 deed did not sever the disputed parcel from the property was not clearly erroneous, as the court, noting that an established rule of deed construction provides that boundary descriptions prevail over acreage calls and that the 1975 deed and the 1951 deed used the same adjoining owner descriptions as the boundaries of the property, properly relied on the adjoining owner descriptions instead of the acreage calls in determining that the disputed parcel was not severed from the property.

The trial court's finding that no evidence other than the acreage call in the 1975 deed indicated that the disputed parcel was severed from the property was not clearly erroneous.

Argued November 13, 2024—officially released February 11, 2025

Procedural History

Action, inter alia, seeking a declaratory judgment as to the title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim; thereafter, the case was tried to the court, *Shah*, *J.*; subsequently, the plaintiff withdrew his claim for statutory theft, and the court, *Shah*, *J.*, rendered judgment for the defendant on the remaining counts of the complaint and on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Robert J. Piscitelli, for the appellant (plaintiff).

Andrew P. Barsom, for the appellee (defendant).

Opinion

WESTBROOK, J. In this action regarding title to a 1.46 acre parcel of land (disputed parcel), the plaintiff, Myron Camozzi, appeals from the judgment of the trial court rendered in favor of the defendant, Eric Pierce, on the plaintiff's complaint seeking declaratory and injunctive relief and alleging trespass and theft and on the defendant's counterclaim alleging that he is the

owner of the disputed parcel. On appeal, the plaintiff claims that the court improperly found (1) that the chain of title to 105 Westbrook Road in Deep River (property) included the disputed parcel, and (2) that no evidence other than the acreage call[1] indicates that the disputed parcel was severed from the property.[2] We disagree and, accordingly, affirm the judgment of the court.

The following facts and procedural history were found by the trial court or are undisputed in the record. In 1951, Marie Cook conveyed the property subject to this appeal, a five acre parcel of land, to George J. Ressler (George I) by warranty deed.[3] In 1975, George

[1] "An 'acreage call' is the designated quantity of land as specified in a deed." *U.S. Bank National Assn.* v. *Palmer*, 88 Conn. App. 330, 331 n.1, 869 A.2d 666 (2005).

[2] In his principal appellate brief, the plaintiff asserts four separate claims of error. For ease of discussion, we address certain claims together. Specifically, the plaintiff's first claim, that the court erred in finding that the 1975 deed conveyed the entire property, his second claim, that the court erred in determining that the deeds' descriptions of which lands border the property (adjoining owner description) are more reliable than the acreage call for determining the property's boundary, and his third claim, that the court erred in affording more weight to the boundary description than the acreage call in determining whether the property includes the disputed parcel, each posit that the court improperly favored the adjoining owner description instead of the acreage call in construing the chain of title to the property. We therefore address the plaintiff's first, second, and third claims together.

[3] In 1951, Cook conveyed two parcels of land to George I. The 1951 deed applicable to both parcels specifies that the other parcel conveyed by Cook contained "about one (1) acre, more or less." Cook's conveyance of this other parcel is not relevant to this appeal.

The 1951 deed describes the parcel that is the subject of this appeal as "containing twenty-six (26) acres, more or less." Below the term "twenty-six (26) acres" is a notation of "5 acres." During the trial in this matter, the following exchange occurred between the plaintiff's counsel and Richard Gates, the plaintiff's expert witness, regarding this discrepancy:

"Q. Now I'm going to show you . . . a deed from [Cook] back to George [I]. Do you recognize that deed?

"A. Yes, sir. I do.

"Q. And is there a difference in the description between the two prior deeds? I'm sorry, the acreage call.

"A. Yes. It's the twenty-six acres . . . . [T]his document was bracketed and underneath it, someone wrote five acres . . . . [T]his was done in 1951.

I conveyed the property to his grandson, George M. Ressler (George II), by quitclaim deed. Although the 1975 deed purported to convey a parcel containing only four acres, more or less, it provided the same boundary description as the 1951 deed.[4]

In 1996, George II conveyed the property to himself and Anna Ressler (Resslers) using the same boundary and acreage descriptions as set forth in the 1975 deed. In 1997, the Resslers granted a mortgage on the property to Long Beach Mortgage Company, which subsequently assigned the mortgage to Norwest Bank Minnesota, N.A. Norwest Bank Minnesota, N.A., foreclosed on the property in 2000 and conveyed it to the plaintiff by limited warranty deed on October 5, 2001. The 2001 deed contained the same boundary and acreage descriptions as set forth in the 1975 deed.

On December 4, 2001, Russell Waldo completed a survey of the property (Waldo survey). The Waldo survey showed that the plaintiff owned a 5.12 acre parcel bound northerly by land now or formerly of George I and land now or formerly of Agnes Ressler. In 2002, in a separate lawsuit, the Resslers sought a temporary injunction against the plaintiff with respect to the property. See *Ressler* v. *Camozzi*, Superior Court, judicial

"Q. And . . . was it your opinion that the five acres was a more accurate depiction of this parcel?

"A. Yes, sir."

Because neither party disputes on appeal that the 1951 deed from Cook to George I conveyed a parcel containing five acres, more or less, all references to the 1951 deed are to Cook's conveyance of the second parcel containing five acres, more or less.

[4] The 1951 and 1975 deeds both describe the parcel being conveyed using substantially the same language. The 1975 deed describes the parcel as follows: "Bounded northerly by land now or formerly of George [I], and land now or formerly of Charles Heidtman, Sr., partly by each; easterly by land now or formerly of Natalie Isaacs; southerly by land now or formerly of said Natalie Isaacs, and land now or formerly of Charles Heidtman, Jr., partly by each; and westerly by land now or formerly of said Charles Heidtman, Jr. and by highway, partly by each . . . ."

district of Middlesex, Docket No. CV-02-0097742-S (February 10, 2004). In 2003, Richard Gates completed an additional survey of the property (Gates survey). The Gates survey showed that the plaintiff owned a 3.66 acre portion of the property that was bound northerly by the disputed parcel, a 1.46 acre parcel belonging to the estate of George I. The Gates survey additionally showed that the disputed parcel was bound northerly by land now or formerly of the estate of George I and land now or formerly of Agnes Ressler. On February 10, 2004, in the matter between the plaintiff and the Resslers, the court, *Hon. Daniel F. Spallone*, judge trial referee, rendered judgment by stipulation in which the Resslers forfeited any rights that they may have had to the property, including to the disputed parcel. This stipulation was not recorded in the land records.

On June 8, 2004, the administrator of the estate of Agnes Ressler conveyed the entire property, including the disputed parcel, to the plaintiff by quitclaim deed (2004 deed), describing the property as the 5.12 acre parcel depicted in the Waldo survey. The 2004 deed states: "The purpose and intent of this deed is to confirm the boundary line between the herein described property, which is currently owned by the [plaintiff], and adjoining property currently owned by the Grantor, confirming that the Grantor makes no claim of ownership in any of said herein described property, as such has never been owned by [the] Grantor."

In 2005, the plaintiff mortgaged the property to Webster Bank (bank) using the same boundary and acreage description as set forth in the 1975 deed. The bank subsequently foreclosed on the property, and, on February 25, 2019, the Superior Court rendered a judgment of foreclosure by sale. On March 28, 2019, after the judgment of foreclosure was rendered but before the foreclosure sale took place, the plaintiff conveyed the disputed parcel, "containing 1.46 acres," to Elizabeth

Morgan by quitclaim deed.[5] The bank obtained title to the property on May 24, 2019, following the foreclosure sale, and subsequently sold it to the Federal National Mortgage Association (Fannie Mae) by quitclaim deed on July 12, 2019. The bank's deed to Fannie Mae used the same boundary and acreage description as set forth in the 1975 deed. On March 13, 2020, Fannie Mae conveyed the property to the defendant by special warranty deed. The defendant recorded his deed in the land records on March 26, 2020. On June 17, 2020, Morgan conveyed the disputed parcel back to the plaintiff by quitclaim deed. Despite the foreclosure and conveyances, the plaintiff has continued to occupy the disputed parcel since 2004.[6]

On August 19, 2022, the plaintiff commenced this action against the defendant regarding the disputed parcel. In his complaint, the plaintiff sought a declaratory judgment that he holds title to the disputed parcel[7] and

[5] We note that the plaintiff does not argue that he severed the disputed parcel from the property by way of the March 28, 2019 quitclaim deed to Morgan and that he is entitled to the disputed parcel as a result of such severance. Rather, the plaintiff's argument on appeal is that the disputed parcel has been excluded from the property's chain of title since George I severed the disputed parcel in 1975, and, therefore, the bank's 2005 mortgage on the property excluded the disputed parcel. We conclude in part II of this opinion, however, that the court properly found that George I did not sever the disputed parcel in 1975 and that the plaintiff granted the bank a mortgage on the entire property. Furthermore, Elton Harvey, the defendant's expert, testified that the plaintiff conveyed the disputed parcel to Morgan *subject to the bank's mortgage* and, when Morgan conveyed the disputed parcel back to the plaintiff on June 17, 2020, she no longer held title to convey because of the bank's foreclosure. Because the plaintiff does not raise any further claims regarding the significance of his conveyance to Morgan and her subsequent conveyance back to him, we do not discuss any additional legal implications of the plaintiff's conveyance to Morgan.

[6] There is a garage located on the disputed parcel, which the plaintiff inhabited.

[7] In particular, the plaintiff sought "an order pursuant to [General Statutes §] 52-29 declaring that the plaintiff is the owner of the [disputed parcel] free and clear of any claim by the defendant." Section 52-29 provides in relevant part: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration . . . ."

a permanent injunction against the defendant's use of the disputed parcel. He also stated claims against the defendant for trespass and statutory theft. On December 22, 2022, the defendant filed an amended answer, which included a statement, pursuant to General Statutes § 47-31 (d),[8] and a special defense alleging that he is the owner of the disputed parcel by virtue of the March 13, 2020 deed from Fannie Mae. The defendant also asserted a counterclaim against the plaintiff in which he sought a judgment, pursuant to § 47-31, that he is the owner of the disputed parcel free and clear of any interest of the plaintiff. The plaintiff thereafter filed a reply containing a statement, pursuant to § 47-31 (d), that he claims an interest in the disputed parcel.

The matter was tried before the court, *Shah*, *J.*, on June 13, 2023. Both parties presented the testimony of expert land surveyors in support of their claims. Gates, the plaintiff's expert, and Elton Harvey, the defendant's expert, both agreed that George I acquired the property in 1951 and conveyed a parcel to George II in 1975. The experts disagreed, however, as to whether the 1975 deed severed the disputed parcel from the property.

Ordinarily, actions to determine title in real property are governed by General Statutes § 47-31; see *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 9, 682 A.2d 1046 (1996); which provides in relevant part: "An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it . . . for the purpose of determining . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. . . ." Nevertheless, "the distinction [between a declaratory judgment action and a quiet title action] is without a difference. Although actions for declaratory judgments most often involve contract disputes, declaratory judgments also involve property rights." *Gemmell* v. *Lee*, 42 Conn. App. 682, 686 n.5, 680 A.2d 346 (1996).

[8] General Statutes § 47-31 (d) provides: "Each defendant shall, in his answer, state whether or not he claims any estate or interest in, or encumbrance on, the property, or any part of it, and, if so, the nature and extent of the estate, interest or encumbrance which he claims, and he shall set out the manner in which the estate, interest or encumbrance is claimed to be derived."

Gates testified that the plaintiff holds title to the disputed parcel because the acreage calls in the chain of title indicate that the disputed parcel was severed from the property. Harvey, on the other hand, explained that "every property description in the eighty-two year chain of title to the . . . property uses the same description, which calls for [the] property to be bounded on the north by the properties that are shown on [the Gates survey] as being the adjoining properties to the north of the disputed parcel. . . . If the disputed parcel was not part of the defendant's property, then his property would be bounded on the north by the disputed parcel, which is contrary to what the land records reflect." (Citations omitted.)

On September 7, 2023, the court issued a memorandum of decision in which it made the following findings: "As [a deed's description of which lands border the property (adjoining owner description)] is the most reliable call for determining a property's boundary, that call established that the disputed parcel is part of the property that was conveyed to the plaintiff in [2001], was mortgaged by the plaintiff in [2005], was the subject of the lis pendens in [2018], was the subject of the committee deed in [2019], was the subject of the deed [to Fannie Mae] in [2019], and was conveyed to the defendant in [2020]. Additionally, there is no record of the prior lawsuit or the terms of any stipulated judgment evidencing any ownership of the plaintiff in the land records, and the plaintiff did not offer the stipulation into evidence." The court further found the following: "[T]he defendant has shown that he has legal title to the disputed parcel through the special warranty deed he was granted on March [13], 2020. Although there is a discrepancy in the description of the total acreages between some of the deeds in the chain of title, the court is satisfied that the boundary descriptions identical in

all the deeds provide for the same transfer of land, which includes the disputed parcel."

On the basis of these findings, the court rendered judgment for the defendant on the plaintiff's complaint because (1) the defendant held title to the disputed parcel by virtue of the 2020 deed from Fannie Mae and (2) the plaintiff was the record owner of the disputed parcel until 2019 and thus could not demonstrate that he acquired title to the disputed parcel by adverse possession.[9] The court additionally found that the plaintiff could not prove his trespass claim because he is not the owner of the disputed parcel, and he had abandoned his statutory theft claim in his posttrial brief. The court also rendered judgment for the defendant on his quiet title counterclaim. This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth our standard of review. "[A] court's interpretation of the language of a deed presents a question of law. Therefore, insofar as our assessment of the judgment involves the court's interpretation of [a] deed of conveyance, our review is plenary." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Palmer*, 88 Conn. App. 330, 334, 869 A.2d 666 (2005). "In conducting a plenary review we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Mazzeo*, 195 Conn. App. 357, 369, 225 A.3d 290 (2020). "To the extent that

[9] "[T]he essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner." (Internal quotation marks omitted.) *Roberson* v. *Aubin*, 120 Conn. App. 72, 74, 990 A.2d 1239 (2010). The court found that "the plaintiff owned the disputed parcel until 2019, so he cannot show that he held the disputed parcel by ousting another rightful owner without the consent of the owner."

the court has made findings of fact, our review is limited to a determination of whether the court's conclusions were clearly erroneous." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Palmer*, supra, 334. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *Circulent, Inc.* v. *Hatch & Bailey Co.*, 217 Conn. App. 622, 630, 289 A.3d 609 (2023). With these principles in mind, we turn to the plaintiff's claims on appeal.

I

The plaintiff first claims that the court improperly found that the 1975 deed conveyed the entire property, including the disputed parcel, to George II because (1) the 1975 deed is clear and unambiguous, (2) the language of the 1975 deed conveyed only four acres of the property, and (3) both experts agree that George I retained the disputed parcel. He further argues that the court improperly relied on the adjoining owner description instead of the acreage call in determining whether the 1975 deed conveyed the disputed parcel to George II. We are not persuaded.

"In determining the location of a boundary line expressed in a deed, if the description is clear and unambiguous, it governs and the actual intent of the parties is irrelevant. . . . When the description of a boundary line in a deed is ambiguous, however, the question of what the parties intended that line to be is

one of fact for the trial court. . . . In the construction of an ambiguous instrument of conveyance, the decisive question of fact is the intent of the parties to the instrument." (Citation omitted; internal quotation marks omitted.) *Gleason* v. *Atkins*, 225 Conn. App. 745, 765, 317 A.3d 1168, cert. denied, 350 Conn. 901, 322 A.3d 1059 (2024).

We begin with the language of the 1975 deed, which describes the parcel being conveyed as follows: "Bounded northerly by land now or formerly of George [I], and land now or formerly of Charles Heidtman, Sr., partly by each; easterly by land now or formerly of Natalie Isaacs; southerly by land now or formerly of said Natalie Isaacs, and land now or formerly of Charles Heidtman, Jr., partly by each; and westerly by land now or formerly of said Charles Heidtman, Jr. and by highway, partly by each, containing four (4) acres, more or less. Being a portion of the [five acre] parcel described in a deed from Marie Cook to George [I] dated November 8, 1951 . . . ."

In the present matter, the parties disagree as to whether we should employ a plenary or a clearly erroneous standard of review. The plaintiff argues that the 1975 deed is clear and unambiguous as to its acreage call and, therefore, plenary review applies. The defendant, on the other hand, argues that this appeal does not require us to construe a deed and, therefore, we review the trial court's findings of fact for clear error. Alternatively, the defendant argues that the 1975 deed is clear and unambiguous as to its boundary description and, therefore, plenary review applies. Insofar as this appeal requires us to review the court's finding of the grantor's intent as expressed in the 1975 deed, it involves the construction of a deed. See *Gleason* v. *Atkins*, supra, 225 Conn. App. 782 (appellate court construed deed to determine boundary line of property).

Therefore, we must first determine whether the 1975 deed is ambiguous.

Although both parties argue that the 1975 deed is clear and unambiguous, they assert different interpretations of the grantor's intent. We are mindful that "[t]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 783, 290 A.3d 801 (2023). However, "[a] latent ambiguity arises from extraneous or collateral facts that make the meaning of a deed uncertain although its language is clear and unambiguous on its face. . . . Latent ambiguity exists where, although language in a deed appears to be certain on its face, it is rendered uncertain when compared to the land that it is purported to describe." (Internal quotation marks omitted.) *Williams* v. *Green Power Ventures, LLC*, 221 Conn. App. 657, 679–80 n.12, 303 A.3d 13 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024). Such is the case here.

Even if the boundary description and acreage call appear clear and unambiguous on the face of the 1975 deed, the two descriptions conflict when compared with the property. Although the boundary description, in light of the 1951 deed's boundary description and the Waldo survey, reasonably implies that the parcel contains five acres, more or less, the acreage call describes a parcel containing four acres, more or less, and the parties disagree as to which description prevails. Thus, a latent ambiguity exists in the 1975 deed because the grantor's intent is unclear as to whether he intended to convey four or 5.12 acres. We therefore review the court's finding of the grantor's intent for clear error. See *Stefanoni* v. *Duncan*, 282 Conn. 686, 704, 923 A.2d 737 (2007) ("[w]hen there is a latent ambiguity, the meaning of the ambiguous . . . deed is an

issue of fact for the trial court and we cannot disturb its finding, based as it is upon evidence of the surrounding circumstances and the situation of the property, which legally supports it" (internal quotation marks omitted)).

"Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed . . . and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . In the construction of a deed or grant, the language is to be construed in connection with, and in reference to, the nature and condition of the subject matter of the grant at the time the instrument is executed, and the obvious purpose the parties had in view. . . . [I]f the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity." (Internal quotation marks omitted.) *Gleason* v. *Atkins*, supra, 225 Conn. App. 765–66.

The plaintiff argues that the language of the 1975 deed shows that George I conveyed a portion of the property to George II and retained the remaining portion. In support of his argument, the plaintiff points to the provisions of the 1975 deed that describe the parcel as "containing four (4) acres, more or less," and as "[b]eing a portion of the [five acre] parcel described in [the 1951] deed from Marie Cook to George [I] . . . ." The defendant, on the other hand, argues that the 1975 deed contained the same boundary descriptions as the 1951 deed and, therefore, the 1975 deed conveyed the entire property, including the disputed parcel, to George

II. The trial court agreed with the defendant, and we conclude that its finding is not clearly erroneous.

"[W]hen a deed sets forth two different descriptions of the property to be conveyed, the one containing the less certainty must yield to that possessing the greater, if apparent conflict between the two cannot be reconciled." (Internal quotation marks omitted.) *Rocamora* v. *Heaney*, 144 Conn. App. 658, 667, 74 A.3d 457 (2013). "It is well settled as a rule of the construction of deeds that [w]here the boundaries of land are described by known and fixed monuments which are definite and certain, the monuments will prevail over courses and distances." (Internal quotation marks omitted.) *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 10, 682 A.2d 1046 (1996). "Adjacent land may be a monument if the boundary of it is fixed." *Marshall* v. *Soffer*, 58 Conn. App. 737, 744, 756 A.2d 284 (2000); see also *Koennicke* v. *Maiorano*, supra, 11 ("[t]he land of an adjoining owner whose boundaries can be fixed by known monuments is also considered to be a monument to establish a boundary"). "On the other end of the spectrum, [t]he general rule is that the designated quantity of land called for, here acreage, is the least reliable aspect of the description determining the intent by the parties." (Internal quotation marks omitted.) *Thurlow* v. *Hulten*, 173 Conn. App. 694, 726, 164 A.3d 858 (2017); see also *U.S. Bank National Assn.* v. *Palmer*, supra, 88 Conn. App. 335 ("[i]t is widely recognized that acreage calls are the least reliable interpretation of a description"). Accordingly, "[t]he court attaches little weight to the call for [the number of] acres," especially when "[the] deed uses the words 'more or less,' indicating that the parties to that deed did not intend the acreage call to be precise." *Thurlow* v. *Hulten*, supra, 714.

Here, the 1951 deed conveyed five acres, more or less, to George I, and the 1975 deed purportedly conveyed four acres, more or less, to George II. The acreage

calls, therefore, could be read to suggest that George I conveyed a portion of the property that he acquired in 1951 and retained the remaining portion. Both deeds, however, describe the same adjoining owners as the boundaries of the property; see footnote 4 of this opinion; suggesting that the intent of the 1951 and 1975 deeds was to convey the same property. Harvey testified that, since 1941, the description of abutting owners in the chain of title to the property has remained the same with calls for the property to be bound northerly by the properties that are north of the disputed parcel. He further testified that, had George I retained the disputed parcel, the 1975 deed would have referred to the disputed parcel as the property's northern boundary. Moreover, although the 1975 deed states that the parcel being conveyed is a *portion* of the parcel conveyed in the 1951 deed, there is no evidence in the record to show that George I retained the disputed parcel as neither he nor his estate ever conveyed the disputed parcel separate from the property.

The plaintiff contends that both experts agreed on the basis of the 1975 deed that George I retained the disputed parcel, but his assertion is belied by the record. Although Harvey's report initially stated that the reduction in the acreage call from five acres to four acres "would lead to the logical conclusion that there was a remaining portion of the property in George [I] after this conveyance," the report ultimately concluded that the 1975 deed did not sever the disputed parcel. Harvey also testified at trial that the 1975 deed conveyed the entire property, including the disputed parcel, to George II on the basis of the bounding owner descriptions in each deed in the chain of title. He further testified that it is not unusual for acreage calls in a deed to be different from the actual acreage of a property. Thus, the court reasonably could have found that Harvey did not

agree with Gates that George I retained the disputed parcel.

Moreover, the court, as the trier of fact, was entitled to determine what portion, if any, of the expert opinions to credit or reject. "It is well settled that the credibility of an expert witness is a matter to be determined by the trier of fact. . . . The credibility of expert witnesses and the weight to be given to their testimony . . . is determined by the trier of fact. . . . [T]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The [trial] judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Citations omitted; internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 455, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017); see also *Menard* v. *State*, 346 Conn. 506, 521–22, 291 A.3d 1025 (2023) ("a trier of fact may accept or reject, in whole or in part, the testimony of an expert"). Thus, the court was entitled to credit Harvey's expert opinion that George I did not retain the disputed parcel in the 1975 deed.

The adjoining owner description in the 1975 deed indicates that George I conveyed the same property to George II that Cook had conveyed to George I in 1951. Because boundary descriptions prevail over acreage calls, the trial court's finding that the 1975 deed did not sever the disputed parcel from the property is not clearly erroneous.

The plaintiff nevertheless argues that the court improperly relied on the adjoining owner description instead of the acreage call in determining whether the 1975 deed conveyed the disputed parcel to George II

because (1) the court disregarded George I's clear intent as expressed in the 1975 deed, (2) the acreage call is more reliable than the boundary description, (3) George I did not need to change the adjoining owner description in the 1975 deed, and (4) there is no significance to the fact that the names of the abutters remained the same in all of the deeds in the multiple chains of title. We disagree.

Here, the plaintiff asked the court to quiet title on the basis of the acreage calls in the property's chain of title, which describe a parcel containing four acres, more or less. The defendant, on the other hand, asked the court to quiet title on the basis of the boundary descriptions in the property's chain of title, which indicate that the chain of title conveys the same property that Cook conveyed to George I in 1951. The court noted that, although the acreage call in the 1975 deed arguably would support a finding that George I retained the disputed parcel, the boundary description indicates that he conveyed the entire property. The court thereafter determined that "[the adjoining owner description] is the most reliable call for determining a property's boundary [and] that call established that the disputed parcel is part of the property . . . ." (Internal quotation marks omitted.)

The plaintiff argues that the court's reliance on the adjoining owner description in the 1975 deed disregards George I's clearly expressed intent to retain the disputed parcel and, therefore, "is contrary to the rules of construction." As we have already discussed, however, the established rules of construction provide that "[w]here the boundaries of land are described by known and fixed monuments," including adjacent land with fixed boundaries, such descriptions prevail over acreage calls, which are the least reliable land description. (Internal quotation marks omitted.) *Thurlow* v. *Hulten*, supra, 173 Conn. App. 726. Thus, the court's finding as

to George I's intent as expressed by the language of the boundary description in the 1975 deed is not clearly erroneous.

Although the plaintiff acknowledges that our case law provides that boundary descriptions are more reliable than acreage calls, he contends that the rule should not apply in this case because the acreage call in the 1975 deed is reliable. We are not persuaded.

The 1975 deed expressly describes the parcel as containing four acres, *more or less*, indicating that the acreage call is, at best, an estimate rather than a precise measurement of the parcel. See id., 714. There was also a discrepancy in the property's acreage when Cook conveyed it to George I in the 1951 deed. See footnote 3 of this opinion. Moreover, Harvey testified that acreage calls are the last factor to consider, after natural or artificial monument calls and metes and bounds descriptions, when determining a property's boundaries. This opinion is supported by our case law, which consistently states that acreage calls are an unreliable method for identifying property. See *Feuer* v. *Henderson*, 181 Conn. 454, 461, 435 A.2d 1011 (1980) ("any discrepancy between acreage designated in deeds and that determined by a surveyor, as found by the court, can be accounted for by the fact that many old deeds contain imprecise measurements"); *Steinman* v. *Maier*, 179 Conn. 574, 575, 427 A.2d 828 (1980) ("the designation of unsurveyed acreage contained in old deeds is quite unreliable"); *Thurlow* v. *Hulten*, supra, 173 Conn. App. 714 ("the words 'more or less,' indicat[e] that the parties to that deed did not intend the acreage call to be precise"). Accordingly, the court reasonably could have inferred that George I did not know the precise acreage of the property and intended the 1975 deed's acreage call to be an estimate rather than a precise and reliable description of the property. Thus, the court's finding

that the adjoining owner description is more reliable than the acreage call is not clearly erroneous.

The plaintiff additionally argues that the boundary description does not show that George I conveyed the entire property to George II because George I was the northern abutter before and after the 1975 conveyance and, therefore, the adjoining owner description did not need to be changed. Specifically, he argues that the 1951 deed referred to George I as the northern abutter because he owned the land to the north of the property, and he remained the northern abutter in the 1975 deed because he retained the disputed parcel. Again, we disagree.

The plaintiff's argument disregards the express language of the 1951 and 1975 deeds, which describe the property as "[b]ounded northerly by land [now or formerly] of George [I], *and land* [*now or formerly*] *of Charles Heidtman, Sr., partly by each* . . . ." (Emphasis added.) Although Heidtman, Sr., appears in the chain of title to land north of the disputed parcel, there is no evidence in the record that he ever held title to the property or the disputed parcel. Accordingly, if George I intended the disputed parcel to be the property's northern boundary, then the 1975 deed would describe the northern boundary as the land of George I *only*, rather than the lands of both George I *and* Heidtman, Sr. Because the 1951 and 1975 deeds refer to the lands of George I and Heidtman, Sr., as the northern boundary, the court's findings that the 1951 and 1975 deeds conveyed the same property is not clearly erroneous.

Finally, the plaintiff argues that the adjoining owner descriptions in the chain of title have no bearing on the determination of the property's boundaries because it is not unusual for a deed to leave the names of abutters unchanged. In support of this argument, the plaintiff points to the chains of title to the property and its

abutters to "demonstrate that the names of abutters were not updated each time there was a conveyance of property, even if those individuals no longer owned the abutting property." We are not persuaded.

Even if the adjoining owner descriptions in the property's chain of title reflect names of people who no longer own the adjoining lands, the parties can identify those lands by tracing the chains of title. Therefore, the adjoining owner descriptions in the chain of title to the property are reliable because they allow the parties to identify the adjoining properties. See *Marshall* v. *Soffer*, supra, 58 Conn. App. 744 (parties could identify property's boundary where deed described adjoining property as "now or formerly of Katherine Link Knapp" (internal quotation marks omitted)).

Thus, because the chain of title expressly refers to adjoining lands as the property's boundaries, the court properly relied on the adjoining owner descriptions instead of the acreage calls in determining that the disputed parcel was not severed from the property.

II

The plaintiff next claims that the court improperly found that "there is no other support that the disputed parcel was and remained a separate property, as Harvey testified to after searching title to the adjoining properties to determine if there was a remaining parcel that George [I] had not conveyed." The plaintiff argues that this finding is clearly erroneous because (1) George I retained title to the disputed parcel until the plaintiff purchased it in 2004, (2) the Gates survey identified the disputed parcel as separate from the property, (3) the plaintiff has improved, occupied, maintained, insured, and paid the taxes on the disputed parcel since 2004, (4) the plaintiff did not mortgage the disputed parcel to the bank and, therefore, the bank could not foreclose

on it, and (5) the defendant did not acquire the disputed parcel. We disagree.

The plaintiff first argues that the court's finding is clearly erroneous because George I retained the disputed parcel in the 1975 deed and held title to it until his heirs, the Resslers, filed the quiet title action against the plaintiff, which was settled when the Resslers sold the disputed parcel to the plaintiff in 2004. As previously discussed in this opinion, however, George I did not retain title to the disputed parcel when he conveyed it to George II in 1975. Furthermore, each conveyance between 1975, when George II acquired title, and 2001, when the plaintiff first acquired title, used the same boundary description and acreage call as the 1975 deed. Accordingly, the court reasonably could have inferred that each conveyance between 1975 and 2001 conveyed the entire property, including the disputed parcel.

Moreover, the plaintiff argues that he acquired the disputed parcel as a distinct parcel in 2004, but the 2004 deed expressly conveyed the 5.12 acre parcel depicted in the Waldo survey, which shows the disputed parcel as part of the property. "[A] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein. . . . [T]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as though they were expressly recited therein." (Internal quotation marks omitted.) *Walters* v. *Servidio*, 227 Conn. App. 1, 11, 320 A.3d 1008 (2024). Because the deed specifies the Waldo survey, that depiction governs our interpretation of the description in the deed. See *Gleason* v. *Atkins*, supra, 225 Conn. App. 769 ("[b]ecause the [deed] specifies that [a] map describes the parcel of land intended, that map is controlling as to our interpretation of the description provided in the deed"). Additionally, the 2004 deed states

that the parties intended to *confirm* the property's boundary line, that the estate of Agnes Ressler never owned the property, and that the property consists of 5.12 acres. If the plaintiff had purchased the disputed parcel from the estate of Agnes Ressler, then the deed would state that it conveyed a parcel containing 1.46 acres previously owned by the estate of Agnes Ressler. Accordingly, the court reasonably could have inferred that the plaintiff did not purchase the disputed parcel in 2004.

The plaintiff nevertheless argues that the court's finding is clearly erroneous because the Gates survey, prepared by the plaintiff's expert in 2003, after the plaintiff acquired the property, shows the disputed parcel and the property as two separate parcels. The Gates survey, however, was not referenced in any deed in the chain of title to the property. The Gates survey, therefore, does not alter the boundary descriptions in the chain of title. See *Marshall* v. *Soffer*, supra, 58 Conn. App. 742 ("map was not referenced in any deed, and no deed description after that date in the chain of title of either the plaintiffs or the defendant was amended to reflect any change in the boundaries of land conveyed," so map did not "alter the plaintiffs' deeded description"). Moreover, the record reveals that the Gates survey existed at the time of the 2004 deed to the plaintiff. The court, therefore, reasonably could have inferred that if the disputed parcel was separated from the property, the deed would have specified the Gates survey instead of the Waldo survey. Thus, the Gates survey does not render the court's finding clearly erroneous.

The plaintiff next argues that the court's finding is clearly erroneous because he has improved, occupied, maintained, insured, and paid the taxes on the disputed parcel since 2004. He specifically argues that he fixed the building located on the disputed parcel, that he cleaned up the land, that he paid taxes and insurance

on the land, and that the disputed parcel has its own driveway. The defendant, on the other hand, argues that the plaintiff produced no evidence to show that he maintained the disputed parcel separately from the property. We agree with the defendant.

Although the plaintiff argues that he maintained the disputed parcel separately, he did not introduce any evidence, such as bills or checks, showing that he paid property taxes and insurance on the disputed parcel *separate* from those he paid on the property. Even if the disputed parcel has its own driveway, the plaintiff admits that it does not have its own address. Moreover, the record reveals that the plaintiff applied for a zoning permit in 2003 using the Waldo survey's depiction of the property as a 5.12 acre parcel. The only evidence that the plaintiff offered to support his argument that he maintained the disputed parcel separately was his own testimony, which the court was free to credit or reject. See *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony" (internal quotation marks omitted)); *Rocamora* v. *Heaney*, supra, 144 Conn. App. 668 ("[an appellate] court does not try issues of fact or pass upon the credibility of witnesses" (internal quotation marks omitted)). Thus, the court reasonably could have inferred that the plaintiff had once owned and maintained the *entire* property, including the disputed parcel. The court's finding that no evidence supports the plaintiff's contrary contention, therefore, is not clearly erroneous.

Finally, the plaintiff argues that he did not mortgage the disputed parcel to the bank, that the bank did not foreclose on the disputed parcel, and, therefore, the bank did not sell the disputed parcel to the defendant. Specifically, he argues that each conveyance of the

property between 1975 and 2020 excluded the disputed parcel. As we have already discussed at length, however, each relevant conveyance of the property since 1951 conveyed the entire property, including the disputed parcel. Thus, when the plaintiff mortgaged the property in 2005, using the same boundary description as the 1975 deed, he mortgaged the entire property, including the disputed parcel. Consequently, when the bank subsequently foreclosed on the property, obtained title, and sold it to the defendant, it obtained title to and sold the disputed parcel. Although each conveyance described the parcel as four acres, more or less, the adjoining owner descriptions consistently describe the same parcel that Cook conveyed to George I in 1951. Therefore, the record supports the court's findings that the plaintiff mortgaged the disputed parcel and that the bank foreclosed on and sold the disputed parcel to the defendant. Therefore, the court's finding that "there is no . . . support that the disputed parcel was and remained a separate property" other than the acreage call is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER PETROCELLI *v.* CITY OF SHELTON ET AL.
(AC 46773)

Moll, Westbrook and Eveleigh, Js.

Syllabus

The defendant state of Connecticut appealed from the trial court's judgment denying its motion to dismiss the count of the plaintiff's complaint asserted against it. The defendant claimed that the plaintiff's cause of action for personal injuries pursuant to statute (§ 13a-144) was barred by the doctrine of sovereign immunity because the defendant had abandoned that portion of the defective sidewalk where the plaintiff fell and, thus, the court lacked subject matter jurisdiction over her claim. *Held*:

The trial court properly denied the motion to dismiss because the question of abandonment involved a disputed issue of fact, which was critical to the determination of whether the court had subject matter jurisdiction, and the court had discretion to postpone resolution of that question until after a trial on the merits.

Argued November 14, 2024—officially released February 11, 2025

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective state highway, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where United Illuminating Company was cited in as a defendant; thereafter, the court, *Frechette, J.*, granted the motions for summary judgment filed by the defendant Center Motorsports, LLC, et al.; subsequently, the court denied the motion to dismiss filed by the defendant state of Connecticut, and the defendant state of Connecticut appealed to this court. *Affirmed.*

Kevin S. Coyne, for the appellant (defendant state of Connecticut).

Jeremy C. Virgil, with whom was *Kyle D. Souza*, for the appellee (plaintiff).

Matthew L. Studer, with whom, on the brief, was *Jonathan D. Berchem*, for the appellee (named defendant).

Opinion

EVELEIGH, J. In this action brought, in part, pursuant to the state highway defect statute, General Statutes § 13a-144,[1] the defendant, the state of Connecticut,[2]

[1] General Statutes § 13a-144, which serves as a waiver of the state's sovereign immunity for monetary claims seeking recovery for injuries caused by highway defects, provides in relevant part: "Any person injured in person or property through the neglect or default of the state . . . by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . ."

[2] The city of Shelton (city), United Illuminating Company, Barone Properties, LLC, and Center Motorsports, LLC, also were named as defendants in

appeals from the judgment of the trial court denying its motion to dismiss the claims asserted against it by the plaintiff, Jennifer Petrocelli, on the ground that they are barred by sovereign immunity.[3] On appeal, the state claims that the court improperly denied the motion to dismiss because it did not have a duty to maintain and repair the area where the alleged injury occurred and, thus, is entitled to sovereign immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The plaintiff alleges the following facts. On January 11, 2020, at approximately 9:15 p.m., the plaintiff was walking on the sidewalk adjacent to Center Street in Shelton. Center Street is a public highway that is heavily traveled, and its adjacent sidewalks are open to and used by pedestrians on a regular basis. The plaintiff stepped into an open utility handhole[4] on the sidewalk in front of 61 Center Street, which caused her to fall. Consequently, the plaintiff sustained personal injuries and has a diminished capacity to earn a living. The plaintiff provided the state with written notice on March 23, 2020, advising the state of the injuries she sustained from the allegedly defective handhole.

The plaintiff commenced the present action in February, 2021. The operative complaint, filed on August 9,

the plaintiff's complaint. The city is participating as an appellee in the present appeal. The court rendered summary judgment in favor of the remaining defendants, and they are not participating in this appeal.

[3] "Although the denial of a motion to dismiss generally is an interlocutory ruling that does not constitute an appealable final judgment, the denial of a motion to dismiss filed on the basis of a colorable claim of sovereign immunity is an immediately appealable final judgment." *Filippi* v. *Sullivan*, 273 Conn. 1, 6 n.5, 866 A.2d 599 (2005).

[4] Merriam-Webster's Online Dictionary defines a "handhole" in relevant part as "a shallow form of manhole giving access to a top row of ducts in an underground electrical system." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/handhole (last visited February 3, 2025).

The plaintiff described the open handhole as a "hole/depression in the sidewalk with two large screws/bolts sticking up near its edges."

2021, asserts five counts. The first count is a municipal highway defect claim against the city of Shelton (city) pursuant to General Statutes § 13a-149. The second count alleges that the plaintiff is entitled to relief against the state pursuant to § 13a-144. The third, fourth, and fifth counts sound in negligence and are directed, respectively, against two businesses that own property abutting the sidewalk where the plaintiff was injured and United Illuminating Company.[5]

On July 21, 2021, the state filed a motion to dismiss the second count of the operative complaint pursuant to Practice Book § 10-30 et seq., arguing that the plaintiff's claim did not fall within the waiver of sovereign immunity contained in § 13a-144. In its memorandum of law in support of its motion to dismiss, the state argued that it did not have a duty pursuant to § 13a-144 to maintain the sidewalk where the alleged incident occurred and, therefore, the court lacked subject matter jurisdiction over the plaintiff's claim.

On November 4, 2022, the plaintiff filed an objection to the state's motion to dismiss. On June 1, 2023, the plaintiff filed a supplemental objection to the state's motion to dismiss along with several exhibits. In the plaintiff's supplemental objection, she referenced the state's revised responses to the city's first request for admissions, which had been filed with the court on January 5 and March 23, 2023. In those responses, the state admitted that it owned the handhole located on the sidewalk directly in front of 61 Center Street.[6] Specifically, the state first admitted that the handhole was owned by the state "at some time prior to [January 11, 2020]," and then subsequently admitted that the handhole was owned by the state "from 1992 until [it]

[5] The court rendered summary judgment in favor of the defendants named in these counts. See footnote 2 of this opinion.

[6] In its previous response to the plaintiff's request for admissions, the state had denied owning the handhole.

was taken out of service and abandoned in 1997." The state further admitted that the handhole contains an abandoned loop detection system, which was serviced by the state and controlled the traffic light at an intersection on Center Street.

In her supplemental objection, the plaintiff argued that, even if the state intended to abandon the handhole, it did not do so in a proper manner because it failed to remove the handhole. In support of her argument, the plaintiff cited deposition testimony from Arnold Ozols, an employee with the Department of Transportation (department) who supervises traffic signal maintenance and highway illumination. Ozols averred that if a handhole is abandoned, it should be removed and the ground should be "put . . . back to grade or patched."[7] The plaintiff also cited § 11.18.03 of the Standard Specifications for Roads, Bridges and Incidental Construction, Form 814A (1995),[8] as promulgated by the department, which relates to the removal and/or relocation of traffic signal equipment and states, among other things, that "[e]quipment shall be removed in such a manner as to cause no hazard to pedestrians," and, "[w]hen poles, foundations, etc. are removed, the hole shall be backfilled with clean fill material, which shall be compacted and the ground restored to a grade and condition compatible with the surrounding area."

On June 6, 2023, the city filed a memorandum in opposition to the state's motion to dismiss, along with several exhibits. The exhibits included an affidavit from Rimas Balsys, the city engineer, in which he averred that certain intersections on Center Street, "including all supporting equipment and wiring, are owned, controlled, and maintained by the [state]"; that, to the best

[7] Ozols' deposition testimony was included in the exhibits attached to the plaintiff's supplemental objection.

[8] The standard specifications also were included in the plaintiff's exhibits.

of his knowledge, "the handhole contains an abandoned loop detection system"; and that "[t]he [c]ity never owned, maintained or controlled the subject handhol[e] utility box, its cover or the electrical wiring and utility components encapsulated therein."

The state subsequently filed its responses to the city's fourth request for admissions in which it admitted that, on January 14, 2020, the state received a notification from the Shelton Police Department about the handhole identified in the notice attached to the plaintiff's complaint. On that same date, the state put a cover on the handhole, but it advised the city at that time that it did not believe that the handhole was one maintained by the state. The state again admitted that it installed the handhole as part of an intersection redesign in 1992 but stated that the handhole was abandoned and taken out of service in 1997 and that the handhole remained within the confines of a sidewalk maintained by the city. The state further admitted that it did not have a copy of any written notice to the city advising it that the state intended to and/or planned to abandon the handhole.

On July 21, 2023, following a hearing held on July 19, 2023, the court, *Frechette*, *J.*, issued a written order denying the state's motion to dismiss. The court concluded that the issue of abandonment is a question of fact for the jury to decide and, therefore, rejected the state's argument that it is not liable as a matter of law. The court explained: "As pointed out in the plaintiff's supplemental objection . . . the [state] admits that it owned the handhole some time prior to [January 11, 2020] . . . until it was taken out of service and abandoned in 1997. It is also not disputed that, on January 14, 2020, three days after the plaintiff's fall, the [state] exercised control over the handhole by replacing the broken cover with a new cover that very well fit the handhole. Having admitted ownership of the handhole,

the question of abandonment is clearly a question of fact which the jury will have to decide at trial. Moreover, the state's subsequent repair of the handhole belies its claim of abandonment. Accordingly, the [state's] motion to dismiss is denied." (Internal quotation marks omitted.) This appeal followed.

We begin by setting forth the relevant principles of law and the applicable standard of review. "It is the established law of our state that the state is immune from suit unless the state, by appropriate legislation, consents to be sued. . . . The legislature waived the state's sovereign immunity from suit in certain prescribed instances by the enactment of § 13a-144. . . . The statute imposes the duty to keep the state highways in repair upon . . . the [C]ommissioner [of Transportation] . . . and authorizes civil actions against the state for injuries caused by the neglect or default of the state . . . by means of any defective highway . . . . There being no right of action against the sovereign state at common law, the [plaintiff] must first prevail, if at all, under § 13a-144. . . .

"[T]he doctrine of sovereign immunity implicates [a court's] subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . 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. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations . . . ." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 348–49, 141 A.3d 784 (2016).

"[I]f the complaint is supplemented by undisputed facts established by [1] affidavits submitted in support

of the motion to dismiss . . . [2] other types of undisputed evidence . . . and/or [3] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] . . . .[9]

"Conversely, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. . . . The trial court may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." (Citation omitted; footnote in original; internal quotation marks omitted.) *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 635–36, 216 A.3d 753, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

"We review a trial court's denial of a motion to dismiss on the ground of sovereign immunity, based on an application of § 13a-144, de novo. . . . [W]hether a highway is defective may involve issues of fact, but

[9] "Other types of undisputed evidence that a trial court may consider in deciding a motion to dismiss includes deposition testimony submitted in support or opposition thereto." *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 635 n.6, 216 A.3d 753, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law over which we exercise plenary review. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 350.

In the present case, we conclude that the court properly denied the state's motion to dismiss on the ground that the question of whether the state abandoned the handhole involves a disputed issue of fact that is critical to the determination of whether the court has subject matter jurisdiction pursuant to § 13a-144.

Section 13a-144 provides in relevant part that "[t]he commissioner and the state shall not be liable in damages for injury to person or property when such injury occurred on any highway or part thereof abandoned by the state or on any portion of a highway not a state highway but connecting with or crossing a state highway, which portion is not within the traveled portion of such state highway. . . ."

The parties have cited no case law, and we have found none, in which this court or our Supreme Court has examined the issue of abandonment in the context of § 13a-144. Nevertheless, in other circumstances, this court has repeatedly concluded that the issue of abandonment is a question of fact. See, e.g., *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 21, 48 A.3d 107 (abandonment of highway in context of claim for easement), cert. denied, 307 Conn. 932, 56 A.3d 715 (2012); see also *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 396, 183 A.3d 1176 (2018) (abandonment of easement).

Because the question of whether the state abandoned the handhole involves a critical factual dispute, the court had the discretion to postpone the resolution of that issue until a trial on the merits occurred. "[W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits." (Citations omitted; footnote omitted.) *Conboy* v. *State*, 292 Conn. 642, 652–53, 974 A.2d 669 (2009). The trial court "may [also] in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." Id., 653 n.16; see also *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 369 n.27 (" 'critical factual dispute[s]' " existed regarding whether culvert was highway defect and whether child was traveler on highway for purposes of § 13a-144, which prevented court from resolving jurisdictional question).

On appeal, the state claims that the court improperly denied its motion to dismiss because the "uncontroverted" evidence that it had not used or maintained the handhole since 1997 established that it had abandoned the handhole.[10] The state argues that the court improperly relied on the evidence of its remedial repair of the handhole, subsequent to the plaintiff's alleged fall, as an indication that it did not abandon the handhole. The state argues that such evidence is relevant to a common-

[10] To the extent that the state also argues that it did not have a duty to maintain the handhole, regardless of whether it was abandoned, because it was located on a sidewalk that is not within the state highway system, we are not persuaded.

This court addressed a similar issue in *Dudley* v. *Commissioner of Transportation*, supra, 191 Conn. App. 641–46, which involved an allegedly defective manhole cover. In *Dudley*, the trial court rejected the state's argument

law negligence claim, not a statutory claim pursuant to § 13a-144. The state also contends that the plaintiff's claim that the state's method of abandonment was improper or negligent similarly is not relevant to a cause of action under § 13a-144.[11] We are not persuaded.

Section 13a-144 is silent as to the manner in which the state may establish that it abandoned a highway, or part thereof, pursuant to that provision. Accordingly, we look to common-law principles governing abandonment for guidance. See, e.g., *Escobar-Santana* v. *State*, 347 Conn. 601, 618, 298 A.3d 1222 (2023) (because legislature did not directly address question in statutory

that it did not have a duty pursuant to § 13a-144 to maintain or repair the sidewalk on which the plaintiff allegedly was injured, determining that the plaintiff's claim was not that the state had a duty to maintain the sidewalk but, instead, that the state had a duty to maintain the allegedly defective manhole cover. Id., 634. On appeal, this court agreed with the trial court that the case "is not a sidewalk maintenance case [but, instead] is a state highway storm drain system maintenance case." (Internal quotation marks omitted.) Id., 644. This court ultimately concluded that the allegedly defective manhole cover was within the definition of "highway defect" pursuant to § 13a-144, as the record reflected that the allegedly defective manhole cover was located near the traveled portion of the state highway, arguably within the state's right-of-way line, served state owned and operated highways, and existed solely to service the state highway. Id., 646.

In the present case, similar to *Dudley*, the plaintiff's claim is not that the sidewalk was defective but, rather, that the handhole was defective. At oral argument before this court, the state seemed to acknowledge that *Dudley* controls this issue. Specifically, the state acknowledged that, faced with *Dudley*, it could not argue that it did not have a duty to maintain the handhole if it had not abandoned the handhole. Similarly, the state conceded that, if the handhole was still in use, it would have had a duty to maintain the handhole, even though it is located on a sidewalk. The state also admitted that the sidewalk where the plaintiff fell was located within the state's right-of-way line. See *Ferreira* v. *Pringle*, 255 Conn. 330, 350–51, 766 A.2d 400 (2001) (state liability applied to defect embedded within shoulder of road seven feet from paved area within state's right-of-way line).

[11] The state argues that the plaintiff's claim that the state did not properly abandon the handhole would, instead, arguably be a basis for a claim to the Claims Commissioner. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 443 n.6, 195 A.3d 664 (2018) (Claims Commissioner may grant party permission to sue state for negligence pursuant to General Statutes § 4-141 et seq.).

language, court looked to state's common law for additional guidance).

"While nonuse of [a] highway may, in some circumstances, conclusively establish the intent to abandon . . . where abandonment is found there most frequently is some affirmative act of an intention to abandon." (Citation omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 21. "[A]bandonment implies . . . a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances . . . . Most frequently, where abandonment has been held established, there has been found present some affirmative act indicative of an intention to abandon . . . but nonuser, as of an easement, or other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment. The weight and effect of such conduct depends not only upon its duration but also upon its character and the accompanying circumstances." (Internal quotation marks omitted.) *Nichols* v. *Oxford*, 182 Conn. App. 674, 680–81, 191 A.3d 219, cert. denied, 330 Conn. 912, 193 A.3d 560 (2018).

On the basis of the foregoing, the fact finder[12] may ultimately find that the state's nonuse of the handhole, from 1997 until the alleged incident in 2020, reflected its intention to abandon the handhole. The state, however, has provided no legal support for its argument that its nonuse of the handhole during that time *conclusively* established, *as a matter of law*, that it abandoned the

[12] In the event that there is a jury trial, the factual question of whether the state abandoned the handhole shall be submitted to the jury by way of a special interrogatory, and the court shall reserve for itself the ultimate question of whether, on the basis of the facts found, it has jurisdiction over the plaintiff's claim. See *Sanchez* v. *Hartford*, 227 Conn. App. 771, 775, 322 A.3d 1108 (court submitted interrogatories to jury to make factual findings and reserved for itself question of whether governmental immunity would apply to facts presented), cert. denied, 350 Conn. 922, 325 A.3d 1093 (2024).

handhole. The fact finder may find, after further factual development, that the state's nonuse of the handhole should have been accompanied by an affirmative act in order to indicate an intent to abandon, or that its failure to remove the handhole and its remedial repair of the handhole,[13] as currently reflected in the plaintiff's exhibits, demonstrate that it did not abandon the handhole. There is, again, no legal support for the state's contention that the fact finder would be prohibited from considering such evidence in its analysis.

At this stage of the proceedings, the arguments advanced by the plaintiff and the city in opposition to the state's motion to dismiss, along with the exhibits included in support thereof, sufficiently placed into dispute the issue of abandonment, such that the court had discretion to postpone resolution of the jurisdictional question until after a full trial on the merits has occurred. See *Conboy* v. *State*, supra, 292 Conn. 653 n.16. Accordingly, we conclude that the court properly denied the state's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

J. C.-S. *v.* J. G.*
(AC 47655)

Elgo, Moll and Seeley, Js.

Syllabus

The plaintiff appealed from the trial court's judgment denying his application for a civil protection order against the defendant. The plaintiff claimed, inter

[13] Section 4-7 (a) of the Connecticut Code of Evidence provides in relevant part that evidence of subsequent remedial measures "is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective

alia, that the court violated his right to self-representation by limiting the manner in which he was permitted to present evidence in support of his application. *Held*:

This court declined to address the merits of the plaintiff's claims because he failed to provide this court with an adequate record pursuant to the rule of practice (§ 61-10 (a)), as, instead of providing the complete transcript from the hearing on the application, he provided only self-selected excerpts.

Submitted on briefs January 15—officially released February 11, 2025

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. John F. Kavanewsky, Jr.*, judge trial referee, denied the application, and the plaintiff appealed to this court. *Affirmed.*

J. C.-S., self-represented, filed a brief as the appellant (plaintiff).

Opinion

PER CURIAM. The self-represented plaintiff, J. C.-S., appeals from the judgment of the trial court denying his application for a civil protection order against the defendant, J. G., pursuant to General Statutes § 46b-16a.[1] The plaintiff's claims on appeal distill into two parts, namely, whether the court (1) erred in ruling, in the absence of a motion for protective order, that the defendant and a nonparty witness were not required to testify or produce documents pursuant to subpoenas that had issued and had been served, and (2) violated the plaintiff's right to self-representation by limiting the manner in which he was permitted to present evidence

order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

[1] The defendant did not file a brief or otherwise participate in the present appeal.

in support of his application.[2] We decline to address the merits of these claims because the plaintiff has failed to provide this court with an adequate record. Thus, we affirm the judgment of the trial court.

The record reflects the following facts and procedural history. On March 8, 2024, pursuant to § 46b-16a, the plaintiff filed an application for a civil protection order. In his application and the unsworn statement filed therewith, the plaintiff alleged that the defendant was stalking him and causing him to fear for his safety. On that same day, the court, *Vizcarrondo*, *J.*, scheduled a hearing, having found that the allegations of the plaintiff's unsworn statement satisfied the requirements of § 46b-16a (a).[3] On April 29, 2024, the court, *Hon. John F. Kavanewsky*, *Jr.*, judge trial referee, conducted the hearing, at which the defendant was represented by

[2] The plaintiff also claims that the court erred in denying his motions for contempt, which were filed on April 30 and May 2, 2024, and were directed to the defendant and a nonparty witness. That claim is not properly before us. On May 20, 2024, the plaintiff filed the present appeal. The court denied the motions for contempt on June 5 and May 21, 2024, respectively.

Practice Book § 61-9 provides in relevant part: "If the trial court issues an additional decision after an appeal has been filed that the appellant wants to appeal, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1. . . ."

The plaintiff did not file an amended appeal to include a claim regarding the denial of his motions for contempt. Accordingly, we need not review that claim. See *Jewett* v. *Jewett*, 265 Conn. 669, 673 n.4, 830 A.2d 193 (2003); *Worth* v. *Commissioner of Transportation*, 135 Conn. App. 506, 508 n.2, 43 A.3d 199, cert. denied, 305 Conn. 919, 47 A.3d 389 (2012).

[3] General Statutes § 46b-16a (a) provides in relevant part: "Any person who has been the victim of . . . stalking may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such . . . stalking and does not qualify to seek relief under section 46b-15. As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes such person to reasonably fear for his or her physical safety."

counsel. At the conclusion of the hearing, the court denied the application. This appeal followed.

Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." "The general purpose of [the relevant] rules of practice . . . [requiring the appellant to provide a sufficient record] is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . This court also has explained that [a]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record . . . . Without the necessary factual and legal conclusions . . . any decision made by us respecting [the claims raised on appeal] would be entirely speculative." (Citation omitted; internal quotation marks omitted.) *R & P Realty Co.* v. *Peerless Indemnity Ins. Co.*, 193 Conn. App. 374, 379, 219 A.3d 429 (2019).

In this appeal, the plaintiff has presented claims that require us to have a complete and accurate picture of what occurred during the hearing. The plaintiff has not provided this court, however, with a complete transcript of the hearing, opting instead to provide only self-selected excerpts.[4] In the absence of a complete transcript, we would have to resort to speculation in order to evaluate the plaintiff's claims, which we decline to do. See id., 380 (this court declined to review appellate claim where plaintiffs provided only partial trial

[4] Notably, the plaintiff's transcript order form instructs the court reporter's office in part that "[t]he [defendant's] counsel shouldn't be on the transcript . . . ."

transcript); *Buehler* v. *Buehler*, 175 Conn. App. 375, 382, 167 A.3d 1108 (2017) (this court declined to review appellate claim because defendant failed to provide complete transcript of relevant hearing); *Calo-Turner* v. *Turner*, 83 Conn. App. 53, 56–57, 847 A.2d 1085 (2004) (this court declined to review appellate claim where defendant failed to provide complete transcript of trial proceedings). Accordingly, we decline to review the plaintiff's claims.

The judgment is affirmed.

S. S. *v.* J. S.*
(AC 47525)

Elgo, Cradle and Clark, Js.

Syllabus

The defendant appealed from the trial court's judgment granting the plaintiff's motion, filed pursuant to statute (§ 46b-15 (g)), to extend an order of civil protection issued against the defendant. The defendant claimed that the court abused its discretion in extending the order because there was insufficient evidence that the defendant posed a continuous threat of present physical pain or physical injury to the plaintiff. *Held*:

The trial court's decision to extend the order of civil protection was not an abuse of its discretion because the evidence was sufficient to show that the defendant posed a continuous threat of present physical pain or physical injury to the plaintiff, including evidence that the plaintiff resided in a home that was jointly owned by the parties, they were in the midst of a contested dissolution action, and there were criminal changes still pending against the defendant for an incident in which he assaulted the plaintiff.

Argued November 18, 2024—officially released February 11, 2025

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

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of New Haven, where the court, *Gould*, *J.*, issued an ex parte civil protection order; thereafter, the court, *Grossman*, *J.*, issued an order of civil protection in accordance with a stipulation entered into by the parties; subsequently, the court, *Hon. James G. Kenefick*, *Jr.*, judge trial referee, granted the plaintiff's motion to extend the order of civil protection, and the defendant appealed to this court. *Affirmed.*

Remington E. Copertino, certified legal intern, with whom were *Richard A. Rochlin* and *Elise Cousineau*, for the appellant (defendant).

Opinion

CLARK, J. The defendant, J. S., appeals from the judgment of the trial court granting the motion filed by the self-represented plaintiff, S. S., to extend a restraining order issued against him pursuant to General Statutes § 46b-15.[1] On appeal, the defendant claims that the court abused its discretion in extending the order because

[1] General Statutes § 46b-15 provides in relevant part: "(a) Any family or household member . . . who is the victim of domestic violence, as defined in section 46b-1, by another family or household member may make an application to the Superior Court for relief under this section.

* * *

"(g) No order of the court shall exceed one year, except that an order may be extended by the court upon motion of the applicant for such additional time as the court deems necessary. . . ."

General Statutes § 46b-1 provides in relevant part: "(b) As used in this title, 'domestic violence' means: (1) A continuous threat of present physical pain or physical injury against a family or household member . . . (2) stalking . . . of such family or household member; (3) a pattern of threatening . . . of such family or household member or a third party that intimidates such family or household member; or (4) coercive control of such family or household member, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. . . ."

there was insufficient evidence that, at the time the plaintiff sought the extension, the defendant posed a continuous threat of present physical pain or physical injury to her.[2] We affirm the judgment of the court.

The following facts, as found by the trial court or as otherwise undisputed in the record, and procedural history are relevant to this appeal. On February 8, 2023, the plaintiff filed an ex parte application in New Haven Superior Court for relief from abuse against the defendant pursuant to § 46b-15 (application). At the time of the application, the parties, who had been married for more than thirty years and who have three adult children, were engaged in a contested dissolution action in the Superior Court in Middletown. The parties previously had resided together in their marital home in Guilford, but, following the events alleged in the application, the defendant moved to Florida, where he has resided during the pendency of this case.

In her affidavit accompanying the application, the plaintiff averred the following under oath. The defendant put a recording device in the plaintiff's purse without her knowledge, which he used to record her while she was at work. On November 14, 2022, when the plaintiff arrived home from work, the defendant, who was drunk, confronted her with a recording he had taken of her, which he falsely believed captured audio of her having sex with a coworker in her cubicle. He ordered the plaintiff to sit down and then "back handed [the plaintiff] so hard that [she] flew off the chair [she] was sitting in." The plaintiff attempted to hide under a desk, but the defendant continued to hit her. She then went upstairs to use the bathroom, but the defendant followed her, "back handed [her] repeatedly" while she

[2] The plaintiff did not file a brief with this court. We therefore consider the appeal solely on the basis of the defendant's brief, oral argument, and the record. See, e.g., *Kathrynne S.* v. *Swetz*, 191 Conn. App. 850, 852 n.2, 216 A.3d 858 (2019).

was sitting on the toilet, and then picked her up by the neck and held her against the wall. The defendant "ripped clumps of hair out of [the plaintiff's] head" and left bruises "all over [her] body." The next day, the plaintiff called out of work because she had been badly beaten and had "lost [her] voice from screaming in fear the day before."

The plaintiff further averred that, throughout their marriage, the defendant had engaged in acts of domestic violence, such as pushing her and pulling hair out of her head. In the past, the plaintiff's children had to "get into the middle of the [defendant] and [the plaintiff] in order to protect [her] from his violence." Two weeks before the November 14, 2022 incident, the defendant drunkenly confronted the plaintiff in the bathroom and said: " '[H]ow about we just end it now. I will put a bullet in your head and a bullet in my head.' " The defendant is a retired Connecticut state trooper who had access to guns, and, following his retirement from the state police in 2014, "[h]is drinking and aggressive behavior became out of control." The defendant had previously exhibited jealous and controlling behaviors, including isolating the plaintiff from her family and demanding that the plaintiff call back any number on her phone that he did not recognize so that he could make sure that the number belonged to a woman.

On February 7, 2023, one day before the inception of this case, the defendant was arrested in connection with the events described in the application. He was charged in New Haven Superior Court with strangulation in the second degree in violation of General Statutes § 53a-64bb, assault in the third degree in violation of General Statutes § 53a-61, threatening in the second degree in violation of General Statutes § 53a-62, and disorderly conduct in violation of General Statutes § 53a-182. A criminal protective order was issued against him. The criminal case is still pending, and, at oral

argument before this court in November, 2024, counsel for the defendant represented that the criminal protective order remains in effect.

On February 8, 2023, the same day the plaintiff filed her application, the court, *Gould*, *J.*, granted the application and issued an ex parte restraining order against the defendant for a period of one week. On February 15, 2023, the parties stipulated to the entry of a restraining order against the defendant for one year, with the exception that the order would not apply to any of the parties' pets. That same day, following a remote hearing[3] at which all parties were present, the court, *Grossman*, *J.*, accepted the stipulation as fair and equitable under the circumstances and made it an order of the court. The restraining order required the defendant, inter alia, to "[s]urrender or transfer all firearms and ammunition"; not to "assault, threaten, abuse, harass, follow, interfere with, or stalk" the plaintiff; to "[s]tay 100 yards away from [the plaintiff]" and to stay away from her residence; and not to contact the plaintiff in any manner.[4] The defendant complied with the terms of this order as well as with the terms of the criminal protective order.

On January 30, 2024, the plaintiff moved for an extension of the restraining order. The defendant opposed this motion. The court, *Hon. James G. Kenefick, Jr.*, judge trial referee, held a remote hearing on the plaintiff's motion on February 14, 2024, at which all parties were present but only the plaintiff testified. In her testimony, the plaintiff stated that, for her "peace of mind,"

[3] Proceedings before the trial court were held remotely so that the defendant could appear without having to travel to Connecticut from Florida.

[4] The criminal protective order is not part of the record. At the February 14, 2024 hearing, however—which we discuss subsequently in this opinion—the court consulted the protection order registry, located the criminal protective order, and summarized its terms as "no assaulting, threatening, et cetera, stay away from the home, no contact, he can return once to get his belongings, stay 100 yards away . . . ."

she wanted the restraining order to continue because the parties' dissolution litigation was ongoing and she "still [was] not comfortable with just letting this go." She added that "[i]t doesn't matter [that the defendant] lives in Florida right now; he could easily get on a plane or in a car and come here." She explained that the parties continued to jointly own the marital home and stated: "I'm not comfortable with [the restraining order] ending. Absolutely not. . . . I mean, if they could extend [the restraining order] longer than a year after this, I would appreciate that." She affirmed the truth of the statements that she made in the affidavit accompanying her original application.

The court continued the matter to March 20, 2024—leaving the restraining order in effect until that date—in order to allow the defendant time to file a brief addressing the court's statutory authority to extend the order. The defendant filed his brief on March 7, 2024. On March 20, 2024, the court issued an order extending the restraining order for an additional year. The court found the plaintiff's testimony at the February 14, 2024 hearing to have been credible. The court further found that the allegations of abuse set forth in the affidavit accompanying the application were "very significant and serious"; that the defendant was arrested in connection with this abuse and was currently subject to a criminal protective order with no expiration date; that, although the defendant resided in Florida, the parties were engaged in contested dissolution litigation and continued to jointly own the marital home where the plaintiff resided; and that, notwithstanding the defendant's compliance with the restraining order and criminal protective order, the plaintiff "is still fearful of the [defendant] because of the significant abuse she suffered from him in the past." This appeal followed.[5]

[5] On March 27, 2024, one week after the restraining order was extended, the defendant notified the court overseeing the parties' dissolution action that the parties had settled the dissolution, which had been scheduled for

The defendant claims that the court abused its discretion in granting the plaintiff's motion for an extension of the restraining order because the plaintiff failed to present sufficient evidence that he posed a continuous threat of present physical pain or injury to her.[6] In

trial starting on April 2, 2024. On April 2, 2024, two days before this appeal was filed, the dissolution court, *Sanchez-Figueroa*, *J.*, rendered a judgment of uncontested dissolution. Three months later, on July 2, 2024, the plaintiff filed a motion for contempt, which the dissolution court, *Nugent*, *J.*, marked off on October 2, 2024. The most recent docket entry in the parties' dissolution action is dated October 2, 2024.

[6] In support of his claim that this court, in reviewing the extension of a restraining order under § 46b-15 (g), should assess whether there is sufficient evidence that the party subject to the order poses a continuous threat of present physical pain or physical injury to the plaintiff, the defendant relies on this court's decision in *Joni S.* v. *Ricky S.*, 124 Conn. App. 170, 3 A.3d 1061 (2010). In *Joni S.*, this court applied the "continuous threat" standard in an appeal from the trial court's extension of a restraining order and concluded that, because sufficient evidence established the existence of such a threat, the trial court had not erred in granting the extension. Id., 175. The court in *Joni S.* derived the "continuous threat" standard from the language of § 46b-15 (a), which, at the time, provided in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury by another family or household member . . . may make an application to the Superior Court for relief under this section." General Statutes (Rev. to 2009) § 46b-15 (a); see also *Joni S.* v. *Ricky S.*, supra, 171 n.1, 173.

Since this court's decision in *Joni S.*, § 46b-15 has been amended several times. See, e.g., Public Acts 2021, No. 21-78, § 2. The revision of the statute that has been in effect throughout the present case provides in relevant part: "(a) Any family or household member . . . *who is the victim of domestic violence, as defined in section 46b-1*, by another family or household member may make an application to the Superior Court for relief under this section." (Emphasis added.) General Statutes § 46b-15 (a).

General Statutes § 46b-1 (b) defines " 'domestic violence' " to include "[a] continuous threat of present physical pain or physical injury," but also to encompass other behaviors, such as "stalking," "a pattern of threatening," and "coercive control . . . ." See footnote 1 of this opinion.

Because we conclude that the plaintiff in the present case presented sufficient evidence of a continuous threat of present physical pain or physical injury, we need not and do not consider whether sufficient evidence of any of the other behaviors enumerated in § 46b-1 (b), in the absence of sufficient evidence of a continuous threat of present physical pain or physical injury, would justify the court, in its discretion, in extending a restraining order issued pursuant to § 46b-15.

particular, he claims that the plaintiff's testimony at the February 14, 2024 hearing established that she had only a "vague, unsupported and unspecified sense of discomfort" with allowing the restraining order to expire and that, because she did not bring a "singular specific allegation" of problematic behavior to the court's attention, she failed to set forth an adequate justification for an extension. We are not persuaded.

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . .

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 361–62, 190 A.3d 68 (2018). We are mindful that "trial courts have a distinct advantage over an appellate court in dealing with domestic relations, where all of the surrounding circumstances and the appearance and attitude of the parties are so significant. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . as [t]he conclusions which we might reach, were we sitting as the trial court, are irrelevant." (Internal quotation marks omitted.) *R. H.* v. *M. S.*, 220 Conn. App. 212, 224–25, 297 A.3d 592 (2023).

The court found, and the defendant does not dispute, that, at the time of the hearing on the plaintiff's motion, the parties continued to jointly own the marital home where the plaintiff resided; they were in the midst of a contested dissolution action; and there were criminal charges still pending against the defendant, who remained subject to a criminal protective order. The court reasonably could have concluded from these facts that the defendant's attitude toward the plaintiff remained volatile and vulnerable to the emotional strain that matrimonial litigation can engender and that the defendant, had he decided to travel to Connecticut, could have gained access to the plaintiff more easily than if she lived in a residence of which she was the sole owner or tenant.[7] Moreover, the court properly considered the outstanding criminal protective order that had issued as a result of the defendant's alleged conduct in assessing whether he posed a continuous threat to the plaintiff. See *Rosemarie B.-F.* v. *Curtis P.*, 133 Conn. App. 472, 477, 38 A.3d 138 (2012) (issuance of criminal protective order in connection with plaintiff's domestic violence allegations manifested judicial finding that defendant had violent tendencies and had acted aggressively toward plaintiff). Lastly, the court reasonably could have considered these facts and conclusions to be particularly salient to its risk assessment in light of the defendant's history of abuse toward the plaintiff. The allegations in the plaintiff's affidavit accompanying her original application—the truth of which the plaintiff affirmed in testimony that the court found credible—were extremely serious. They described a history of assaultive and controlling behavior by the defendant that spanned more than three decades of marriage, culminating in a brutal act of physical violence that led to felony charges being brought against the defendant.

[7] We note that, in her affidavit, the plaintiff alleged that nine days after the defendant moved to Florida, he returned to the marital home and "scream[ed] that he wanted [the plaintiff] and [her] son out of the house."

The defendant points to his compliance with the restraining order and his current residence in Florida as evidence that he no longer poses a threat of physical injury to the plaintiff.[8] These were certainly appropriate factors for the court to consider in rendering its decision, but they did not compel the court to allow the restraining order to expire. Nothing in the language of § 46b-15 expressly requires, as a precondition of extending a restraining order, that a defendant have violated the order or resided within a certain proximity of the plaintiff. See, e.g., *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 346 Conn. 391, 410, 291 A.3d 64 (2023) ("[i]t is not the role of this court to engraft additional requirements onto clear statutory language" (internal quotation marks omitted)); *Putman* v. *Kennedy*, 104 Conn. App. 26, 34, 932 A.2d 434 (2007) ("[N]either a pattern of abuse nor the [victim's] subjective fear of the defendant is a requirement for the finding of a continuous threat. Had the legislature intended these factors to be requirements, the statute would have stated so explicitly. . . . It would defy the prophylactic purpose of the statute to impose an absolute bar on relief until the person for whom protection was sought had suffered multiple physical abuses." (Citations omitted.)), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008). To the contrary, § 46b-15 (g) affords the court broad discretion in determining whether to extend a restraining order; the statute provides that the court may do so "for such additional time as [it] deems necessary." General Statutes § 46b-15 (g); see, e.g., *Stein* v. *Hillebrand*, 240 Conn. 35, 41, 688 A.2d 1317 (1997) ("the statutory language authorizing security on such terms as the court may deem desirable underlines the legislature's intent to confer broad judicial discretion on [the

[8] At oral argument before this court, the defendant narrowed his position, arguing that his compliance with the restraining order, *standing alone*, should have barred the court from extending the order as a matter of law. We reject that argument for the reasons we set forth in this opinion.

court]" (internal quotation marks omitted)). The court properly considered the facts highlighted by the defendant but nonetheless concluded, in its discretion, that they did not outweigh other evidence tending to show that he posed a continuous threat to the plaintiff. It is not the function of this court to reweigh that evidence. See, e.g., *Downing* v. *Dragone*, 216 Conn. App. 306, 331–32, 285 A.3d 59 (2022), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023).

Because the evidence was sufficient to show that the defendant posed a continuous threat of present physical pain or physical injury, we cannot conclude that the court's decision to extend the restraining order by one additional year constituted an abuse of its discretion.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] On November 8, 2024, the defendant filed a notice of supplemental authority pursuant to Practice Book § 67-10, in which he cites this court's recent decision in *S. S.* v. *D. M.*, 228 Conn. App. 559, 324 A.3d 233 (2024), to illustrate "how the court heavily weighs specific behaviors when making the necessary factual findings to determine whether grounds exist for continuing a civil protective order" and for the proposition that "specificity and seriousness in pleading" are required in order to secure an extension of a restraining order. We are not persuaded that *S. S.* is apposite to the present case.

In *S. S.*, this court reversed the judgment of the trial court granting the plaintiff's application for an order of civil protection pursuant to General Statutes § 46b-16a on the basis of stalking. *S. S.* v. *D. M.*, supra, 228 Conn. App. 567–68. This court concluded that the trial court had abused its discretion by failing to make factual findings that there were reasonable grounds to believe that the defendant had stalked and would continue to stalk the plaintiff. Id., 567. The defendant in the present case, however, does not claim that the court failed to make the necessary factual findings to support the extension of the restraining order; instead, he argues that the evidence before the court was insufficient to justify the extension. These claims are distinct. Indeed, in *S. S.*, the defendant had made a separate claim that the evidence was insufficient to establish reasonable grounds to believe that he had stalked the plaintiff, and this court expressly declined to reach that claim. Id., 565 n.5. *S. S.* thus sheds little, if any, light on the appropriate resolution of this appeal.

KIMBERLY ELDRIDGE *v.* HOSPITAL OF CENTRAL CONNECTICUT
(AC 46868)

Moll, Suarez and Prescott, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant, rendered following its grant of the defendant's motion for summary judgment on the plaintiff's complaint alleging, inter alia, employment discrimination based on disability. The plaintiff claimed, inter alia, that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether the defendant's reasons for its termination of her employment were pretextual in nature. *Held*:

The trial court properly granted the defendant's motion for summary judgment on the plaintiff's claim of disability discrimination, as it properly applied the burden shifting framework of *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792) to evaluate the discrimination claim, and, after the defendant presented unrefuted evidence that its termination of the plaintiff's employment was not based on her disability, the burden shifted to the plaintiff, and the plaintiff failed to present any evidence that the defendant's reasons for terminating her employment were pretextual.

The trial court properly granted the defendant's motion for summary judgment on the plaintiff's claim that the defendant failed to provide her with a reasonable accommodation for her disability, as the plaintiff failed to present evidence to raise a genuine issue of material fact that she initiated a request for a reasonable accommodation or that the defendant had a position available to which she could have been reassigned prior to the termination of her employment.

Argued September 9, 2024—officially released February 11, 2025

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Knox*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

David R. Jimenez, with whom were *Adam J. Lyke*, and, on the brief, *Jessica L. Draper*, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Kimberly Eldridge, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Hospital of Central Connecticut, with respect to her claims under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq., for disability discrimination, failure to accommodate, and retaliation.[1] The plaintiff raises two claims. First, with respect to her allegation of disability discrimination, the plaintiff claims that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether the defendant's reasons for the termination of her employment were pretextual in nature. Second, in connection with her claim that the defendant failed to provide her with a reasonable accommodation for her disability, the plaintiff claims that the court improperly concluded that a genuine issue of material fact did not exist with respect to whether she made a good faith request for an accommodation. We affirm the judgment of the court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following undisputed facts and procedural history. The defendant hired the plaintiff as a licensed registered nurse on or about March 6, 2017. The plaintiff suffers from several conditions including alcoholism and bipolar disorder. In May, 2018, the plaintiff began a medical leave of absence pursuant to both the federal Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. (2018), and the Connecticut Family and Medical Leave Act (CFMLA), General Statutes § 31-51kk

[1] The plaintiff has not challenged the court's summary judgment with respect to her retaliation claim set forth in the third count of her complaint.

et seq., to undergo treatment for alcoholism and bipolar disorder, as well as depression. By the time the plaintiff went on leave, the defendant was aware of her medical conditions. The plaintiff was entitled to up to twelve weeks of leave under the FMLA and up to sixteen weeks of leave under the CFMLA.

During the plaintiff's leave of absence, the Department of Public Health (department) began investigating the plaintiff's history of alcohol abuse. At the conclusion of the investigation, the department expressed concerns as to the impact the plaintiff's alcoholism had on her ability to work as a nurse and recommended disciplinary action. In response to the department's findings and recommendation, the Board of Examiners for Nursing suspended the plaintiff's Connecticut nursing license as of August 22, 2018. The plaintiff's license remained suspended until she voluntarily surrendered it on May 28, 2019.

On October 17, 2018, Prudential Insurance Company of America, the third-party administrator through which the defendant managed its employees' leaves of absences, informed the plaintiff that, although she had exhausted her FMLA leave as of August 6, 2018, and her CFMLA leave as of September 3, 2018, her leave benefits would be further extended through November 11, 2018. On November 12, 2018, the defendant terminated the plaintiff's employment. As of the date of termination, the plaintiff's nursing license remained suspended, she had not provided the defendant with a return to work date, and she had not informed the defendant as to whether she would ever be able to return to work.

On February 19, 2021, the plaintiff commenced this action against the defendant.[2] In her complaint, the

[2] A person alleging discriminatory work practices in violation of CFEPA must exhaust his or her administrative remedies by filing a complaint with the Commission on Human Rights and Opportunities (CHRO) in accordance with General Statutes § 46a-82. Only after obtaining a release of jurisdiction

plaintiff alleged, inter alia, that the defendant discriminated against her on the basis of disability in violation of General Statutes § 46a-60 (b) (1) when it unlawfully terminated her employment due to her disability and failed to engage in the required good faith interactive process to provide her with a reasonable accommodation. On February 28, 2023, the defendant filed a motion for summary judgment accompanied by a memorandum of law. Attached to its memorandum were affidavits, excerpts from the plaintiff's deposition, and other documentary evidence. On May 30, 2023, the plaintiff filed a memorandum in opposition to the defendant's motion which included additional documentary evidence. The court heard oral argument on June 20, 2023.

On August 11, 2023, the court issued a memorandum of decision in which it concluded that there were no genuine issues of material fact with respect to the plaintiff's claims and that the defendant was entitled to judgment as a matter of law. With respect to the disability discrimination claim set forth in count one of the plaintiff's complaint, the court determined that, although the plaintiff had established a prima facie case of disability discrimination under the *McDonnell Douglas*[3] framework, the defendant had articulated legitimate, nondiscriminatory reasons for the termination. The court determined that the plaintiff subsequently failed to present evidence that created a genuine issue of material

from the CHRO may that person pursue a civil action in the Superior Court. See General Statutes § 46a-100. Any such action must be brought within ninety days of receipt of the CHRO release. General Statutes § 46a-101 (e). Moreover, any such action must be brought within two years from the date of the filing of the CHRO complaint. General Statutes § 46a-102. In the present case, the plaintiff obtained a release of jurisdiction from the CHRO on November 30, 2020.

[3] Adapted from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny, the *McDonnell Douglas* framework is the test generally employed in assessing discrimination claims under Connecticut law. See *Cooling* v. *Torrington*, 221 Conn. App. 567, 583 n.11, 302 A.3d 319 (2023).

fact that the defendant's proffered reasons for the termination were pretextual. Furthermore, the court determined that the defendant was entitled to judgment as a matter of law on the plaintiff's claim for failure to accommodate, as the plaintiff failed to identify any request for accommodation made prior to termination. This appeal followed.

We begin by setting forth the applicable standard of review. "The standards governing our review of a court's decision to grant a defendant's motion for summary judgment are well settled. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and [only on such a showing] the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Cooling* v. *Torrington*, 221 Conn. App. 567, 582–83, 302 A.3d 319 (2023).

I

The plaintiff first claims that the court erred in granting the defendant's motion for summary judgment with respect to her disability discrimination claim set forth in count one of her complaint. Specifically, the plaintiff argues that the court erred in applying the *McDonnell Douglas* framework. Alternatively, she argues that, even if the *McDonnell Douglas* framework applied, the court erred in first determining that the defendant satisfied its burden to identify legitimate, nondiscriminatory reasons for termination and then determining that she failed to raise a genuine issue of material fact as to whether those reasons were pretextual. The defendant counters that the court correctly applied the *McDonnell Douglas* framework and concluded that the defendant was entitled to judgment as a matter of law on count one. We agree with the defendant.

We begin by setting forth the following relevant legal principles. Under CFEPA, "employers may not discriminate against certain protected classes of individuals . . . ." *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 775, 105 A.3d 103 (2014). Section 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice . . . (1) [f]or an employer . . . to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of mental disability . . . [or] physical disability. . . ."

In order to establish a prima facie case of employment discrimination "based on adverse employment action under the burden shifting analysis enumerated by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and adopted by [our Supreme Court] in *Ford* v. *Blue Cross & Blue Shield of Connecticut*,

Inc., 216 Conn. 40, 53–54, 578 A.2d 1054 (1990) . . . the complainant must prove that: (1) [s]he [was] in the protected class; (2) [s]he was qualified for the position; (3) [s]he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 705–706, 900 A.2d 498 (2006). "The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) Id., 705.

"To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] . . . . Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Citation omitted; internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28–29, 206 A.3d 194 (2019). "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation marks omitted.) *Bombero* v. *Warner-Lambert*

Co., 142 F. Supp. 2d 196, 203 n.7 (D. Conn. 2000), aff'd, 9 Fed. Appx. 38 (2d Cir. 2001).

As a threshold issue, we address the plaintiff's claim that, by applying *McDonnell Douglas*, the court applied an improper legal standard in evaluating her disability discrimination claim. She argues that, "[w]hen the reason given by the employer for the adverse employment action is unrelated to the employee's disability, the *McDonnell Douglas* approach can be used to weed out nonviable claims of discrimination based on circumstantial evidence." She contends, however, that, "[w]hen the parties agree that the employer complains of conduct that is the direct result of the employee's disability . . . there is no need to evaluate whether the employer's adverse employment action made in response to that conduct is pretextual." She further asserts that "[a] plaintiff cannot come forward with evidence of pretext where the very reason for the adverse employment action is the disability related extended medical leave of absence." It is fundamentally at odds with CFEPA, she argues, to require a plaintiff claiming disability discrimination to establish pretext when the employer has terminated the individual's employment because of her disability.

The plaintiff's argument assumes that the defendant's adverse employment action is in direct response to the plaintiff's disability. The defendant, however, presented unrefuted evidence that its termination of the plaintiff's employment was not based on her disability. The defendant articulated two nondiscriminatory bases for its termination of the plaintiff's employment: her failure to return to work and her inability to work as a registered nurse due to the loss of her Connecticut nursing license. Under these circumstances, the *McDonnell Douglas* framework of analysis is an appropriate method to employ. Consequently, the burden shifted to the plaintiff to present evidence demonstrating, either

directly or by inference, the existence of a genuine issue of material fact with respect to whether these bases were pretextual.

We next consider whether the court properly applied the *McDonnell Douglas* pretext model of analysis. In the present case, the court determined, and we agree, that the plaintiff satisfied her burden to make out a prima facie case and that the defendant satisfied its burden to identify legitimate, nondiscriminatory reasons for termination. After the defendant set forth its two legitimate and nondiscriminatory justifications for termination, under the *McDonnell Douglas* framework, the burden shifted back to the plaintiff to present sufficient evidence to create a genuine issue of material fact as to whether those stated reasons were pretexts for discrimination. She, however, has failed to offer any evidence that the defendant's legitimate reasons are pretextual. Instead, she maintains that this is not a pretext case. For the reasons stated earlier in this opinion, we disagree. After a thorough review of the record, we agree with the court that the plaintiff did not satisfy her burden under the *McDonnell Douglas* framework because she failed to offer any evidence of pretext. Accordingly, we conclude that the court properly applied the *McDonnell Douglas* framework and rendered summary judgment in favor of the defendant on the plaintiff's claim of disability discrimination.

II

The plaintiff next claims that the court erred in granting summary judgment in favor of the defendant on her failure to accommodate claim because it improperly concluded that a genuine issue of material fact did not exist with respect to whether she made a good faith request for an accommodation. We disagree.

We turn to relevant state law regarding employment discrimination premised on a failure to reasonably

accommodate a disability. "Section 46a-60 (b) (1) requires employers to reasonably accommodate an employee's disability. . . . In order to survive a motion for summary judgment on a reasonable accommodation claim, the plaintiff must produce enough evidence for a reasonable jury to find that (1) [she] is disabled within the meaning of the [statute], (2) [she] was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it. . . . If the employee has made such a prima facie showing, the burden shifts to the employer to show that such an accommodation would impose an undue hardship on its business." (Citation omitted; internal quotation marks omitted.) *Bartolotta* v. *Human Resources Agency of New Britain, Inc.*, 224 Conn. App. 248, 272–73, 312 A.3d 59, cert. denied, 349 Conn. 908, 313 A.3d 513 (2024). At issue in the present case is the court's conclusion that the plaintiff failed to satisfy her burden, under both the second and third prongs, by failing to produce evidence that she initiated the interactive process with a request for accommodations while still employed by the defendant.

"Our Supreme Court has interpreted CFEPA, consistent with analogous federal law; see *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 403–404, 415–16, 944 A.2d 925 (2008); to require an employer and an employee to engage in an informal, interactive process . . . [to] identify the precise limitations resulting from [an employee's] disability and potential reasonable accommodations that could overcome those limitations. . . . The need for bilateral discussion arises because each party holds information the other does not have or cannot easily obtain. . . . The employee bears the burden of initiating the interactive process

and must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion. . . . A plaintiff who fails to initiate or to participate in the interactive process in good faith cannot prevail on an employment discrimination claim under CFEPA. . . . Once the employee has initiated the informal interactive process, the employer has a duty of good faith compliance." (Internal quotation marks omitted.) *Cooling* v. *Torrington*, supra, 221 Conn. App. 584.

"The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment . . . . To satisfy this burden, [the] [p]laintiff must establish both that [her] requested accommodation would enable [her] to perform the essential functions of [her] job and that it would allow [her] to do so at or around the time at which it is sought." (Citation omitted; internal quotation marks omitted.) *Thomson* v. *Dept. of Social Services*, 176 Conn. App. 122, 129, 169 A.3d 256, cert. denied, 327 Conn. 962, 172 A.3d 800 (2017).

In the present case, the plaintiff argues that there are two types of accommodations at issue: (1) a medical leave of absence, and (2) job reassignment. A medical leave of absence is a recognized accommodation; however, "[t]he duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover, nor does it force an employer to investigate every aspect of an employee's condition before terminating [her] . . . based on [an] inability to work." (Internal quotation marks omitted.) Id., 130. Reassignment to an alternative position is also a recognized accommodation; however, a "plaintiff requesting reassignment as [an] accommodation [is] required to demonstrate the existence, at or around the

time when accommodation was sought, of an existing vacant position to which she could have been reassigned." (Internal quotation marks omitted.) Id., 129.

In addition to arguing that the record contains no evidence that the plaintiff initiated the good faith interactive process, as is required for the defendant to be obligated to engage in that process, the defendant asserts that the plaintiff's arguments premised on those alleged accommodations fail because "(1) it is not required to hold open the plaintiff's position for an indefinite period of time and (2) the plaintiff has produced no evidence of a vacant role that the defendant could have placed her in before the end of her employment." The defendant argues that the record is simply devoid of any evidence that the plaintiff initiated the good faith interactive process with a request for a reasonable accommodation prior to termination. As the court noted in its memorandum of decision, "[even] the plaintiff's [own] opposition memorandum does not point the court to evidence that she actually requested an accommodation while still employed with the defendant."

With respect to the leave of absence claim, the plaintiff admits that, as of the date of termination, she had not provided the defendant with a return to work date or even notified the defendant that she would ever be able to return to work. With respect to the claim of job reassignment, the plaintiff maintains that she may have been qualified for a position in the dietary field or as a registered medical assistant. The plaintiff, however, did not submit any evidence that the defendant had a vacant position in either of these areas during the period between the commencement of her leave and the termination of her employment. The plaintiff admits that she never applied for an alternative position with the defendant until after termination. Therefore, the plaintiff has not produced any evidence to raise a genuine

issue of material fact that there was a position to which she could have been reassigned as an accommodation prior to termination.

Accordingly, the trial court properly rendered summary judgment in favor of the defendant on the plaintiff's claim for failure to accommodate.

The judgment is affirmed.

In this opinion the other judges concurred.