OFFICIAL

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PROCEEDINGS

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MAY, 2008—JULY, 2008

BY

KEVIN J. LOFTUS
Reporter of Judicial Decisions

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* See General Statutes § 52-434c.

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ATTORNEY GENERAL

HON. RICHARD BLUMENTHAL

NOTES

[1] Retired June 20, 2008, under constitutional limitation as to age.

Unless otherwise indicated, the statute book referred to as the General Statutes in the opinions in this volume is the Revision of 1958, revised to 2005; the Practice Book is the Connecticut Practice Book (Current Ed.) as supplemented by rules of court published in the Connecticut Law Journal.

The month given at the top of each page is that within which the opinion was filed.

* See General Statutes § 51-50i.

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Personal injury; uninsured motorist benefits; whether trial court's factual findings were clearly erroneous; whether trial court improperly concluded that plaintiff violated statute (§ 14-283 [e]) that requires operator of motor vehicle in immediate vicinity of approaching emergency vehicle to drive to position parallel to right-hand curb of roadway and to stop and remain there until emergency vehicle has passed; whether trial court properly found that plaintiff was within immediate vicinity of police vehicles and was thus required to comply with provisions of § 14-283 (e); claim that plaintiff did not violate § 14-283 (e) because it was more practical to grant right-of-way by turning left; credibility of witnesses; whether trial court's finding that plaintiff was 25 percent comparatively negligent was clearly erroneous; proximate cause.
Neuman, Hall *v.* (Memorandum Decision) 902
New Haven *v.* God's Corner Church, Inc. 134
Foreclosure; jurisdiction; whether statute (§ 52-350d) that affords jurisdiction to Superior Court for purposes of postjudgment procedures only until satisfaction of judgment, deprived court of jurisdiction to consider motion to determine debt after redemption and satisfaction of the judgment; postjudgment procedure defined by statute (§ 52-350a [15]) as any procedure commenced after rendition of money judgment; whether judgment of foreclosure is money judgment for purposes of postjudgment procedures; whether proceedings following judgment of foreclosure by sale postjudgment proceedings as defined by § 52-350a (15).
New Haven Housing Authority *v.* Goodwin 500
Summary process; whether trial court abused discretion in denying motions to open judgment rendered in accordance with stipulation and for reargument without affording defendant evidentiary

hearing to demonstrate that she did not understand stipulation she had signed and that her mistake was due to her limited cognitive abilities.

O'Dell, Viola *v.* 760
Outlaw, State *v.* 772

Page *v.* State Marshal Commission 668
Injunction; action to enjoin defendant state marshal commission from implementing certain policy as to state marshals; whether trial court properly granted motion to dismiss; claim that appeal was moot; whether trial court properly determined that, on basis of doctrine of sovereign immunity, it lacked subject matter jurisdiction; whether exceptions to doctrine of sovereign immunity applied; claim that commission deprived plaintiff of liberty by imposing policy that compelled his attendance at courthouse; whether plaintiff was deprived of property interest; whether action fell within exception to doctrine of sovereign immunity that applies when officer of state acts in excess of statutory authority.
Perry, State *v.* 788
Pierre-Louis *v.* Pierre-Louis (Memorandum Decision) 905
Pinder *v.* Commissioner of Correction (Memorandum Decision) 904
Plainfield Board of Education *v.* Local R1-126, National Assn. of Government Employees 35
Arbitration; application to vacate; whether board of education violated parties' collective bargaining agreement when it assigned work of absent full-time employees to part-time employees without first offering overtime to full-time employees; claim that award not final and definite because time period for which damages were to be paid could not be ascertained and because board did not have information and records necessary to implement award; whether award necessitated further negotiation; whether award inconsistent with provision of collective bargaining agreement; whether arbitrators' interpretation of subject provision improper.
Planning & Zoning Commission of Shelton, Gaida *v.* 19
Polanco, State *v.* (Memorandum Decision) 903
Porter *v.* Morrill 652
Quiet title; claim that description of disputed parcel in 1816 deed was legally insufficient to convey title to plaintiff's predecessor in title; whether trial court properly considered relevant extrinsic evidence found in land records to locate disputed parcel; whether trial court's finding that plaintiff was record owner of disputed parcel was clearly erroneous; credibility of witnesses; whether trial court's finding that defendant failed to prove adverse possession of disputed parcel was clearly erroneous.
Public Storage, Inc., Gilmore *v.* 143

Regan, Mann *v.* 566
Rocque, Commissioner of Environmental Protection, Ertel *v.*. . . 48
Rodriguez *v.* Commissioner of Correction 489
Habeas corpus; whether habeas court abused discretion in denying petition for certification to appeal.
Rodriguez *v.* Saucier 599
Personal injury; whether trial court properly granted motion for summary judgment and determined that action was barred by doctrine of collateral estoppel; claim that collateral estoppel was inapplicable because of unavailability of appellate review of small claims judgment obtained by defendant; claim that prior small claims judgment for property damage did not bar subsequent action for personal injuries arising out of same accident.

Sabanovic *v.* Sabanovic. 89
Dissolution of marriage; application for relief from abuse; motions to seal or limit disclosure of documents in both dissolution and relief from abuse actions relating to allegations of sexual abuse of parties' two minor children; reviewability of claim that trial court improperly revoked orders sealing portions of files in both actions; failure to file motion for articulation.
Sabanovic, Haseljic *v.*. 89
Sanders *v.* Dias 283
Trespass; injunction; claim that trial court improperly found easement by implication where defendants in their counterclaim pleaded only right-of-way by necessity; claim that trial court improperly applied law regarding easements by implication; unity of title doctrine; whether improper for trial court to consider that there once existed unity of title with respect to properties in question; whether trial court's finding of easement by implication clearly erroneous; failure of trial court, in recognizing right-of-way over plaintiff's driveway, to define scope of easement or its precise location.
Santos, State *v.* 250
Saucier, Rodriguez *v.* 599
Savin *v.* Bozelko (Memorandum Decision). 906
Sawicki, Marshall *v.*. 418
Scott, State *v.* 146
Seymour Inland Wetlands Commission, Fanotto *v.* 235
Shelton Planning & Zoning Commission, Gaida *v.* 19
Shevchuk, Giannamore *v.* 303
Smith Bros. Woodland Management, LLC *v.* Zoning Board of Appeals of Brookfield 621
Zoning; whether trial court improperly sustained zoning appeal; whether trial court improperly determined that certificate of zoning compliance that had been issued for subject property was not binding on plaintiff and that plaintiff therefore could continue all valid, nonconforming uses of property; whether zoning board

of appeals had substantial evidence before it that certificate of zoning compliance explicitly provided what was permitted and not permitted on property.

Sokoloski *v.* McCorison. 296

Quiet title; whether trial court's finding that plaintiff was owner in fee simple of disputed land clearly erroneous; credibility of witnesses.

Solano *v.* Calegari 731

Contracts; motion to dismiss on ground that plaintiff had failed to obtain jurisdiction over defendant pursuant to long arm statute (§ 52-59b); claim that trial court improperly considered motion to dismiss without first vacating judgment of default for failure to plead that had been entered against defendant; whether trial court improperly determined that plaintiff had failed to prove that requirements of § 52-59b had been satisfied with respect to defendant, nonresident individual; whether evidence supported finding that defendant transacted business in this state; claim that long arm jurisdiction existed because defendant committed tortious act in this state by making fraudulent misrepresentation; reviewability of unpreserved claim that trial court failed to afford plaintiff due process when it improperly expanded scope of hearing and denied him right to present evidence; failure to request review of unpreserved constitutional claim pursuant to State *v.* Golding *(213 Conn. 233) or plain error doctrine; claim that trial court improperly treated motion to dismiss as motion for summary judgment and thereby improperly ruled on merits of fraudulent misrepresentation count.*

Somers West Towne Houses, Inc. *v.* LAS Properties Ltd. Partnership. 426

Foreclosure; statutory lien for unpaid common charges on condominium unit; challenge to legality of vote ratifying proposed budget for condominium community; claim that trial court improperly decided issue of material fact and made incorrect conclusion thereon when it interpreted applicable provision (§ 47-245 [c]) of Common Interest Ownership Act (§ 47-200 et seq.) and concluded that budget had been ratified pursuant to § 47-245 (c); whether trial court properly concluded that statute clearly provides that majority of all unit owners is necessary to reject budget proposal; whether trial court properly determined that only sole general partner of defendant was authorized to cast vote as owner of defendant's unit; whether trial court improperly decided issue of material fact in making that determination.

Spells *v.* Commissioner of Correction 192

Habeas corpus; claim of ineffective assistance of trial counsel; whether trial counsel's decision not to seek disqualification of trial judge after petitioner caused courtroom disturbance was sound trial strategy; whether counsel ineffective by not proffering certain hair sample test results as evidence at trial; whether petitioner prejudiced by counsel's failure to submit test results; whether outcome of trial likely would have been different.

Sprague, State *v.* 146
Sproviero *v.* J.M. Scott Associates, Inc.. 454
Landlord-tenant; breach of commercial lease; whether trial court improperly concluded that plaintiff tenants were not liable for costs that defendant landlord incurred in repairing and maintaining septic system; whether tenants' fixed tenancy was converted to tenancy at sufferance when landlord served tenants with notice to quit in prior summary process action; claim that because tenants had prevailed in summary process action, their lease obligations, including their obligation to maintain septic system, were revived retroactively when their tenancy at sufferance was converted back to leasehold estate; whether trial court improperly found that tenants were not liable for nuisance; whether trial court's finding that tenants did not breach lease during time that it was in effect was clearly erroneous; whether trial court's finding that neighboring tenants were at fault for sewage breakouts was clearly erroneous.
St. Germain *v.* LaBrie 587
Injunction; action to enjoin defendant former roommates of plaintiff from damaging or removing plaintiff's personal property; whether trial court properly granted motions to dismiss for lack of subject matter jurisdiction that portion of complaint that sought to control activities of persons on premises; standing; whether trial court improperly dismissed for lack of subject matter jurisdiction that portion of complaint seeking to enjoin defendants from damaging or removing plaintiff's personal property; whether trial court abused discretion in denying motion for disqualification of judicial authority and for mistrial; whether trial court improperly failed to rule on motion for continuance; whether trial court improperly permitted third party to speak in open court during oral argument on motions to dismiss; harmless error.
State *v.* Blake 336
Revocation of probation; claim that evidence did not support finding that defendant had violated probation; credibility of witnesses; reviewability of claim that trial court violated defendant's right to allocution when it denied request for continuance of dispositional phase of violation of probation hearing to wait for final resolution of criminal charges on retrial.
State *v.* Callahan. 605
Accelerated rehabilitation; making false statement second degree; issuance of letter of apology as condition of participation in statutory (§ 54-56e) accelerated rehabilitation program; termination of accelerated rehabilitation for insincere apology; whether trial court's order violated right against self-incrimination due to pendency of underlying criminal proceedings; whether order inconsistent with principle that participation in program does not constitute acknowledgment of guilt; whether trial court had authority to decide whether letter purporting to be apology was in fact apology; whether court's order was improper because preju-

dicial to unresolved issues in pending civil litigation initiated by defendant.

State *v.* Farmer 82

Kidnapping second degree; assault third degree; acquittal of sexual assault first degree; claim that trial court should not have admitted constancy of accusation testimony without informing jury to disregard it with respect to kidnapping and assault charges; claim of defects in jury instructions on constancy of accusation testimony; suggested future jury instruction on constancy of accusation testimony.

State *v.* Francis (Memorandum Decision) 901

State *v.* Garcia 533

Possession of cocaine with intent to sell by person who is not drug-dependent; possession of controlled substance with intent to sell within 1500 feet of school; possession of marijuana with intent to sell; possession of marijuana with intent to sell within 1500 feet of school; claim that trial court improperly denied motion in limine to preclude admission into evidence of cash found in defendant's car following arrest; whether trial court abused discretion in determining that cash was probative of defendant's participation in drug sales and therefore relevant to intent to sell drugs and to crimes charged; claim that trial court improperly denied motion to suppress cash recovered from car because boxes containing cash were found and opened at arrest scene without warrant in violation of defendant's constitutional rights; whether lawful custodial arrest of motor vehicle operator justifies contemporaneous search of entire passenger compartment of automobile regardless of whether arrestee actually had control over area; whether cash found in trunk was recovered pursuant to valid inventory search of vehicle; credibility of witnesses; whether trial court properly ordered forfeiture of cash seized from vehicle pursuant to statute (§ 54-36a [c]); claim that money could be forfeited only after in rem hearing pursuant to statute (§ 54-36h).

State *v.* Gay 211

Assault second degree with motor vehicle; operating motor vehicle while under influence of intoxicating liquor or drugs; assault of public safety officer; challenge to trial court's denial of motions to withdraw guilty pleas; ineffective assistance of trial counsel in conducting pretrial investigation, in failing to read and analyze transcripts from defendant's probation hearing and in misleading defendant as to ramifications of pleading guilty; whether pretrial investigation adequate; whether petitioner prejudiced; whether counsel prepared for trial; whether guilty pleas knowingly made.

State *v.* Goriss 264

Risk of injury to child; whether trial court correctly denied motion for judgment of acquittal notwithstanding verdict; claim that jury's verdict finding defendant guilty of risk of injury charge logically could not be reconciled with jury's not guilty finding on charge of sexual assault first degree; whether trial court properly

exercised discretion in denying motion to permit defendant to testify as surrebuttal witness to rebut rebuttal testimony of police detective; whether defendant demonstrated that compelling circumstances existed for admission of his proffered surrebuttal testimony or that omission of such evidence raised doubt as to propriety of jury's verdict.

State *v.* Lewis 486

Murder; felony murder; whether trial court properly dismissed motion to correct illegal disposition; subject matter jurisdiction; whether trial court improperly construed rules of practice (§ 43-22); whether motion to correct challenged petitioner's conviction rather than sentence or disposition of conviction.

State *v.* Messam 744

Possession of narcotics; whether trial court abused discretion in denying motion for disclosure of identity of confidential informant; whether trial court abused discretion in denying motion for mistrial; uncharged misconduct evidence; reviewability of unpreserved claim that defendant's right to fair trial was violated when trial court's sequestration order was not followed by some of witnesses.

State *v.* Mitchell 388

Assault third degree; whether trial court improperly denied motion to suppress statements that defendant gave to police prior to being informed of his Miranda *rights; whether defendant in custody at time statements were made; whether trooper's questioning of defendant amounted to interrogation; whether improper admission of statements harmless beyond reasonable doubt; whether trial court abused discretion in denying motion to suppress victim's identification of defendant as perpetrator during show-up; whether show-up unnecessarily suggestive; whether trial court properly determined that identification nevertheless reliable under totality of circumstances; whether trial court improperly declined to sanction state for failure of police officer to produce field notes he took during his initial investigation.*

State *v.* Muckle 146

Disorderly conduct; demonstration at Planned Parenthood clinic; sufficiency of evidence to establish that defendants obstructed or intended to obstruct pedestrian traffic in violation of statute (§ 53a-182 [a] [5]); whether trial court reasonably could have found that defendants obstructed pedestrian traffic by forcing pedestrians to walk off sidewalk.

State *v.* Outlaw. 772

Failure to appear first degree; whether trial court properly denied motion for judgment of acquittal; whether there was sufficient evidence from which jury reasonably could have found that defendant wilfully failed to appear for sentencing; credibility of witnesses; whether trial court abused discretion in permitting state to introduce evidence of defendant's guilty plea to two felonies, including names of felonies; harmless error.

State *v.* Perry 788
Assault first degree; attempt to commit assault first degree; whether trial court improperly referred to person defendant allegedly stabbed as "victim" in its final jury instructions; whether trial court improperly instructed jury on reasonable doubt.
State *v.* Polanco (Memorandum Decision) 903
State *v.* Santos 250
Violation of probation; sexual assault and failure to report to probation officer; whether trial court's findings that defendant violated terms of his probation by committing sexual assault in first and second degrees were clearly erroneous; whether sufficient evidence of fear of physical injury; whether arrest warrant application or violation of probation provided sufficient notice of alleged violations of probation for failure to report to probation officer; claim that due process violated because there was unreasonable preaccusation delay in charging defendant with violation of probation for failing to report several years earlier.
State *v.* Scott 146
Disorderly conduct; demonstration at Planned Parenthood clinic; sufficiency of evidence to establish that defendants obstructed or intended to obstruct pedestrian traffic in violation of statute (§ 53a-182 [a] [5]); whether trial court reasonably could have found that defendants obstructed pedestrian traffic by forcing pedestrians to walk off sidewalk.
State *v.* Sprague 146
Disorderly conduct; demonstration at Planned Parenthood clinic; sufficiency of evidence to establish that defendants obstructed or intended to obstruct pedestrian traffic in violation of statute (§ 53a-182 [a] [5]); whether trial court reasonably could have found that defendants obstructed pedestrian traffic by forcing pedestrians to walk off sidewalk.
State *v.* Stith 126
Threatening second degree; risk of injury to child; whether trial court abused discretion in denying motion to withdraw guilty plea; claim that guilty plea was involuntary because defendant was under influence of medication that affected his ability to comprehend plea process at time he entered plea; whether defendant satisfied burden of proving that plea was not knowing, intelligent and voluntary because it was entered without effective assistance of counsel; claim that plea was not knowingly and intelligently made because court failed to explain elements of offenses.
State *v.* Telford 435
Sexual assault first degree; sexual assault third degree; risk of injury to child; whether trial court properly admitted videotape and transcript of interview of complainant by clinical social worker; medical care exception to rule against hearsay; whether complainant understood that statements were for medical diagnosis or treatment; whether interview conducted for forensic rather than medical purpose; whether evidence unfairly bolstered complainant's testimony; relevance; corroborative evidence.

State *v.* Whealton 172
Possession of narcotics with intent to sell by person who is not drug-dependent; possession of narcotics with intent to sell within 1500 feet of public housing project; possession of drug paraphernalia in drug factory situation; possession of less than four ounces of marijuana; denial of motion to suppress evidence obtained by police in warrantless searches of defendant's vehicle and his girlfriend's apartment; claim that search of vehicle invalid because police had no cause to inventory vehicle prior to turning it over to private towing company; adequacy of record to review defendant's claim, raised for first time on appeal, that search of apartment unlawful because he objected to it where no evidence of defendant's use of, access to and control over apartment.
State *v.* Williams 556
Operating motor vehicle while under influence of intoxicating liquor or drugs; claim that trial court abused discretion and deprived defendant of right to impartial jury when it discharged regular juror and replaced her with alternate juror and denied motion for continuance; whether defendant established that he was harmed by replacement of regular juror with alternate juror.
State Marshal Commission, Page *v.* 668
Statewide Grievance Committee *v.* Johnson 74
Attorney discipline; appeal from judgment suspending defendant attorney from practice of law for eighteen months; whether trial court conducted presentment proceeding de novo; whether defendant denied due process; whether defendant had full and fair opportunity to cross-examine complainant at prior hearing; admission of prior testimony of unavailable witness.
Stith, State *v.* 126
Sutcliffe *v.* FleetBoston Financial Corp. 799
Conversion; action alleging conversion and that defendant bank negligently paid settlement check, which was payable to plaintiff, on forged signature to plaintiff's former attorney; whether trial court abused discretion in admitting into evidence certain testimony and documents relating to attorney's payments to plaintiff in amount of her interest in settlement check; whether trial court improperly instructed jury on bank's special defense that plaintiff had received her interest in settlement check as result of attorney's payments; whether trial court abused discretion in denying motion for directed verdict; whether there was sufficient evidence to support verdict.
Synthes-Stratec, Inc., Breen *v.* 105

Telford, State *v.* 435
Torrance Family Ltd. Partnership, Laser Contracting, LLC *v.* 222

Viola *v.* O'Dell 760
Legal malpractice; claim that trial court improperly concluded that no genuine issue of material fact existed as to whether defendant's

negligence had caused plaintiffs any harm; whether trial court's determination that plaintiffs could not have prevailed in underlying zoning appeal had defendant filed timely appellate brief was supported by substantial evidence; whether board properly determined that plaintiffs' landscaping business was not permitted use; claim that trial court improperly failed to consider certain allegedly dispositive evidence.

Wasko *v.* Farley 156
Negligence; personal injuries; automobile accident; challenge to authority of senior judge to hear case without parties' consent; whether trial court improperly compelled plaintiff's attendance at jury selection; whether judge who presided over jury selection should have recused himself from pretrial proceedings; whether trial court properly declined plaintiff's request for instruction on damages resulting from costs allegedly incurred by plaintiff's limited liability company dental practice as result of her injuries where action brought in individual capacity; challenge to trial court's jury instruction on mitigation of damages.

Watrous *v.* Watrous 813
Dissolution of marriage; whether court's financial order requiring defendant to obtain medical and life insurance was improper; whether trial court's finding that plaintiff was unable to work was supported by sufficient evidence; whether trial court's finding as to defendant's earning capacity supported by evidence; credibility of witnesses; whether trial court abused discretion in ordering plaintiff to retain sole custody of parties' minor child; claim that there was insufficient evidence as to several factors enumerated in statute (§ 46b-56 [c]) governing child custody orders; whether trial court properly considered best interest of child in its award of sole custody to plaintiff; whether trial court abused discretion in denying motion for continuance to obtain counsel; reviewability of claim that defendant was denied due process and fair trial as result of his inability to represent himself and trial court's failure, sua sponte, to raise issue of his competency; failure to request review of unpreserved claim under plain error doctrine or test set forth in State *v.* Golding *(213 Conn. 233); claim that trial court improperly found defendant in contempt of court and established purge amount on basis of erroneous arrearage and for time period not alleged in motion for contempt; whether allegation of continuing course of conduct; allegation of judicial bias; reviewability of claim that trial court improperly awarded plaintiff attorney's fees; failure to seek articulation of basis for trial court's decision.*

Wells, Iacurci *v.* 274
West *v.* Commissioner of Correction (Memorandum Decision) . . 906
Westport, Martin *v.* 710
Westview Carlton Group, LLC, Connecticut Light & Power Co. *v.* 633

Whealton, State *v.* 172
Williams *v.* Freedom of Information Commission 471
Freedom of information request; claim that documents received from town were improperly certified and that plaintiff was overcharged for copies of records received; whether trial court, in evaluating defendant's conclusions concerning meaning of statutory (§ 1-212 [e]) terms "certifying" and "page," employed improper standard of review when it considered meaning of those terms to be factual questions subject to deferential scope of review; whether terms, as used in freedom of information act (§ 1-200 et seq.), presented questions of statutory interpretation; plenary standard of review; whether trial court properly determined that town, which certified that copies provided to plaintiff were true copies of originals, met its statutory obligation of providing certified copies of relevant documents to plaintiff; whether trial court properly determined that, pursuant to § 1-212 (e), "page" meant one side of piece of paper; whether fee charged for copy of page referred to fee that may be charged for copy of each side of piece of paper.
Williams, State *v.* 556

Zoning Board of Appeals of Brookfield, Smith Bros. Woodland Management, LLC *v.* 621

APPENDIX

Hon. Sidney S. Landau 907

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JOHN CABRAL *v.* COMMISSIONER OF CORRECTION
(AC 27929)

Bishop, McLachlan and Harper, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court, after finding that his trial counsel was deficient in failing to present the petitioner's testimony during a hearing on a motion to suppress a statement the petitioner had made to the police, improperly determined that the petitioner was not prejudiced thereby; the habeas court properly determined both that it was very unlikely that the petitioner's testimony concerning his version of the circumstances surrounding his statement, which was revealed in substance during the petitioner's testimony at his criminal trial, would have affected the trial court's ruling on the motion to suppress and that even if the trial court had granted the motion to suppress and excluded the petitioner's statement, the outcome of the trial likely would have been the same, as the state had a strong case even without the evidence at issue.
2. The petitioner could not prevail on his claim that his counsel was deficient in failing to object on hearsay grounds to the admissibility of a certain tape recording of a conversation between L and A, which had been recorded by the police and concerned and furthered an alleged ongoing conspiracy involving the petitioner: on the state's appeal following certification from this court's reversal of the petitioner's conviction on his direct appeal, the Supreme Court determined that the state properly introduced the tape recording seeking to establish a conspiracy between

A and the petitioner, A's statements in furtherance of the alleged ongoing conspiracy with the petitioner were the statements of a coconspirator and, thus, were admissible under the coconspirator exception to the hearsay rule, and even if L was not a coconspirator at the time of the recording, his statements during the taped two party telephone conversation were nonetheless admissible under the rules of evidence (§ 1-5 [a]), as they provided necessary context for the finder of fact fairly to consider and to evaluate A's statements; moreover, even if the petitioner's counsel was deficient in failing to raise a hearsay objection, the petitioner was unable to demonstrate that counsel's failure in that regard caused him any prejudice.

Argued January 10—officially released May 27, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. Joseph J. Purtill*, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Mary Boehlert, special public defender, for the appellant (petitioner).

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, John Cabral, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus in which he alleged that he was denied the effective assistance of trial counsel. The petitioner claims that the court improperly determined that (1) trial counsel's failure to present testimony from him at a suppression hearing was not prejudicial to him and (2) trial counsel's failure to object to the admissibility of certain evidence at trial was not an instance of deficient representation. We affirm the judgment of the habeas court.

In 2000, a jury found the petitioner guilty of conspiracy to possess one kilogram or more of marijuana with intent to sell in violation of General Statutes §§ 53a-48 and 21a-278 (b) as well as attempt to possess one kilogram or more of marijuana with intent to sell in violation of General Statutes §§ 53a-49 (a) (1) and 21a-278 (b). The trial court rendered judgment in accordance with the verdict and sentenced the petitioner to a total effective term of imprisonment of eight years, suspended after six years, and five years probation.

The petitioner brought a direct appeal to this court, and this court reversed the judgment of conviction and remanded the case for a new trial. *State* v. *Cabral*, 75 Conn. App. 304, 815 A.2d 1234 (2003), rev'd, 275 Conn. 514, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005). After our Supreme Court granted the state's petition for certification to appeal, our Supreme Court reversed the judgment of this court and upheld the judgment of conviction. *State* v. *Cabral*, 275 Conn. 514, 517, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005).

Our Supreme Court summarized the facts that the jury reasonably could have found on the basis of the evidence presented at trial: "In 1995, the [petitioner] met David Levarge, who lived next door to the [petitioner's] mother-in-law. The [petitioner and Levarge] became friends and routinely socialized. In or about 1997, the [petitioner] introduced Levarge to his friend, Robert Anderson, and the three men became friends.

"In early October, 1998, Anderson approached the [petitioner] to purchase some marijuana, but the [petitioner] said he had none. Anderson then told the [petitioner] that he knew someone named 'Pete' from California from whom he could buy marijuana. Subsequently, Anderson ordered three pounds of marijuana from Pete for which he and the [petitioner] agreed to

pay $3000. They also decided to have the marijuana delivered to Levarge's house because the [petitioner] did not want the police to trace the marijuana to his house.

"Sometime in mid-October, 1998, Anderson learned from the [petitioner] and Levarge that the marijuana had not yet arrived. Anderson contacted Pete, who informed him that the marijuana had been shipped to and received at the address provided. Pete asked for telephone numbers for the [petitioner] and Levarge.

"On October 28, 1998, Levarge, who did not testify at trial, went to the state police barracks in Montville and spoke to Trooper Robert Bardelli. From there, the two men proceeded to Levarge's home. When they arrived, the telephone rang. The answering machine picked up, and a voice said that Levarge 'had better show up with the package he was supposed to have.'

"Shortly thereafter, Levarge climbed into a crawl space in his home and retrieved three pounds of marijuana, which he handed to Bardelli. Bardelli notified his supervisor and assembled a team of officers to come to Levarge's home where they formulated a course of action. Bardelli requested that Levarge make a telephone call to Anderson. In that conversation, which was monitored and recorded by the state police, Levarge told Anderson that he now had the marijuana. He also explained that he had not been home to receive the shipment because he had taken his son to a physician and that he had told that to the [petitioner]. He told Anderson that he would leave the package in the backseat of his son's car and that Anderson should have the [petitioner] pick it up.

"On that same day, at approximately 7:30 p.m., the police fabricated a package and placed it in Levarge's son's vehicle, which was parked at Levarge's residence. At approximately 8:45 p.m., the [petitioner] appeared

and retrieved the package from the vehicle. As the [petitioner] began to depart, the police left their surveillance locations, announced their presence, converged on the [petitioner] and arrested him. Bardelli testified that he read the [petitioner] his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), at the time of his arrest.

"The police then drove the [petitioner] to a gasoline station approximately five minutes from Levarge's house. While in the police cruiser at the gasoline station, the [petitioner] told the police that Anderson had sent him to pick up the [marijuana]. When the police asked him to put his statement in writing, he declined and stated that he wanted to consult with an attorney." (Internal quotation marks omitted.) *State* v. *Cabral*, supra, 275 Conn. 518–19.

In 2002, while awaiting the disposition of his direct appeal, the petitioner brought an amended petition for a writ of habeas corpus. The petitioner alleged that his confinement was illegal because his trial counsel, John O'Brien, rendered ineffective assistance in many ways and thereby violated his due process right to a fair trial. Relevant to the claims raised on appeal, the petitioner alleged that O'Brien improperly "failed to present the testimony of witnesses with exculpatory testimony at pre-trial motions and trial, including but not limited to testimony of [the] [p]etitioner or others relative to [his] [m]otion to [s]uppress [evidence] dated June 28, 2000." The petitioner also alleged that O'Brien improperly "failed to properly object to hearsay evidence . . . ." The respondent, the commissioner of correction, denied that the petitioner's confinement was illegal and, with regard to the petitioner's specific claims of ineffective assistance, left the petitioner to his proof.

Following a hearing, during which the court received evidence including testimony from the petitioner and

O'Brien, the court issued a memorandum of decision denying the petition. The court subsequently granted the petition for certification to appeal; see General Statutes § 52-470 (b); and this appeal followed.

Before turning to the two claims raised in this appeal, we first set forth the applicable principles of law and the legal standard that govern our review. "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. Const., amend. VI. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

"In *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable. . . .

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness. . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel

was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 741–42, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

"Turning to the prejudice component of the *Strickland* test, "[i]t is not enough for the [petitioner] to show that the errors [made by counsel] had some conceivable effect on the outcome of the proceeding. . . . Rather, [the petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . . A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." (Citation omitted; internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 85

Conn. App. 544, 550, 857 A.2d 986, cert. denied, 272 Conn. 903, 863 A.2d 696 (2004).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Thus, [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 habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Citation omitted; internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007). "Although a habeas court's findings of fact are reviewed under a clearly erroneous standard of review, questions of law are subject to plenary review." *Tyson* v. *Commissioner of Correction*, 261 Conn. 806, 816, 808 A.2d 653 (2002), cert. denied sub nom. *Tyson* v. *Armstrong*, 538 U.S. 1005, 123 S. Ct. 1914, 155 L. Ed. 2d 836 (2003).

I

The petitioner first claims that after properly determining that O'Brien was ineffective by failing to present his testimony during a suppression hearing, the habeas court improperly concluded that he failed to demonstrate that O'Brien's deficient representation in this regard was a basis on which to grant his petition. We disagree.

At the petitioner's criminal trial, O'Brien moved to suppress the statement that the petitioner made to police shortly after he had been taken into custody on October 28, 1998. This statement was the petitioner's admission that Anderson had sent him to Levarge's residence to pick up marijuana. The statement was admitted into evidence during the petitioner's criminal

trial. The habeas court found that "[t]he principal issue on the motion to suppress was whether or not the petitioner was advised of his *Miranda* rights and, if he was so advised, whether his statement was given before or after the advisement." The court thereafter made the following findings concerning what transpired during the hearing on the motion to suppress and O'Brien's representation of the petitioner therein: "The only people who were present at the time [of the petitioner's arrest] were three police officers and the petitioner. These were the only parties who could testify on the issue [concerning the admissibility of the petitioner's admission at the time of his arrest].

"The only person who testified during the suppression hearing was Trooper Bardelli. The petitioner was not called to testify. During the habeas trial, attorney O'Brien did not recall whether or not he had called the petitioner to testify at the hearing. From the trial transcript and the judge's decision denying the motion to suppress, it is clear that [the petitioner] did not testify.

"Trooper Bardelli testified that he advised the petitioner of his rights at the time of his arrest and that the incriminating statement was made by the petitioner after he had been so advised. The petitioner was then asked if he would put his statement in writing. When he declined to do so and stated that he wished to consult with an attorney, no further questions were asked. Trooper Bardelli also testified that the petitioner was again formally advised of his *Miranda* rights later at the police station and that a memorandum indicating the time of this advisement was made. The officer stated that this second advisement was standard procedure. The subsequent testimony of the other officers [during the trial] was consistent with Bardelli's testimony at the suppression hearing. It would not have been in the

petitioner's best interest to have called the officers to testify on his behalf.

"No reason has been advanced by [O'Brien] as to why the petitioner was not called to testify at the suppression hearing. As the trial court stated in its memorandum of decision during the motion to suppress: 'Although [the petitioner] could have done so with impunity, he did not testify at the suppression hearing.'

"Bardelli's testimony was not challenged or impugned in any way. By not testifying at the suppression hearing, the petitioner forfeited whatever chance he might have had to suppress the statement. [During the habeas proceeding, O'Brien] offered no reason for his failure to present his client's version as to what took place at the time of his arrest. It must be concluded that this failure to call his client to testify at the suppression hearing constituted ineffective assistance of counsel."

The court thereafter made the following findings and conclusions concerning the prejudice, if any, that inured to the petitioner as a result of O'Brien's failure to call him as a witness during the suppression hearing: "[At his criminal trial] the petitioner testified on his own behalf at the conclusion of the state's case. His testimony, as it applies to his statement to the police, was that he was going to Anderson's home to watch a fight on television and that Anderson had called him and asked him to pick up a bag at Levarge's house [and described] where it could be found. The petitioner stated that he assumed the bag contained salsa and tomatoes. He testified that he had never tried to obtain marijuana and was not under the impression that marijuana was in the package he picked up.

"It was further stated by the petitioner that he was not advised of his rights at the time of his arrest and that he had never before seen Trooper Bardelli in his

whole life. His testimony was that he informed the officers [at the scene that] he was there to pick up salsa and tomatoes.

"[At his criminal trial] the petitioner's testimony was countered by the testimony of Officers Cote Floyd, Charles Flynn, Sergeants Jeffrey Hotsky and James Morin of the Connecticut state police. The testimony of all of these officers confirmed Bardelli's presence at the scene when the petitioner was arrested. Officer Floyd's testimony also confirmed that Bardelli informed the petitioner of his *Miranda* rights at the time of arrest.

"Presumably, if the petitioner had testified at the suppression hearing, his testimony would have been substantially the same as his [trial] testimony. This testimony was that he had never seen Bardelli before and was not advised of his rights at the time of his arrest. Where all of the evidence concerning the admissibility of the statements came before the judge, it is difficult to see how the petitioner was prejudiced by his attorney's not calling him to testify at the suppression hearing. Certainly, the trial judge, if he had been convinced that the petitioner's version of the event was true and that he had not been properly advised by Bardelli prior to [making] his statement, would have been constrained to rectify the situation so that the ends of justice would prevail.

"There was also a question as to how incriminating the statement was. All of the evidence indicates that the petitioner picked up a package that was in the parked car. In his initial testimony [at the suppression hearing], Bardelli stated that the petitioner's statement was that he 'just picked up a package for Mr. Anderson.' This was not consistent with the petitioner's testimony [at trial]. In his subsequent testimony [at trial], Bardelli stated that the petitioner used the word 'marijuana,' rather than package. Attorney O'Brien was able to

cross-examine the officer on this point and present to the jury the inconsistency of the officer's testimony concerning the statement that the petitioner made.

"Considering all of the evidence, it appears unlikely that the motion to suppress would have been granted even if the petitioner [had] testified [at the suppression hearing]. However, if the motion had been granted and the petitioner's statement was not allowed into evidence, the state still had a strong case, which, in all likelihood, would have resulted in the same verdict of guilty. Considering all of the [previously discussed] factors, it must be concluded that the petitioner has failed to prove that he suffered any prejudice because he did not testify at the suppression hearing."

The petitioner challenges the habeas court's conclusion that even if the trial court had excluded his statement, the outcome of the trial likely would have been the same. To this end, the petitioner attempts to persuade us that, without using this statement, the state would have been unable to demonstrate that he was part of any conspiracy. The petitioner discounts the other evidence on which the state relied to demonstrate that a conspiracy existed. For these reasons, the petitioner claims that the habeas court "erred when it erroneously found [that] the petitioner was not prejudiced by the ineffectiveness of his attorney."

The petitioner's analysis is faulty in that it overlooks the gist of the habeas court's decision with regard to this issue. The court devoted much of its analysis to explaining why the petitioner's testimony at the suppression hearing likely would have had no effect on the trial court's denial of the motion to suppress. The court also went on to observe that because the petitioner testified in his defense at trial, the trial court had an opportunity to hear his testimony concerning the circumstances of his statement to the police and to

exclude his statement if the court determined that it was obtained in contravention of his rights, as had been alleged in the motion to suppress. Additionally, the habeas court, in the latter part of its analysis, stated that the state had a strong case absent the evidence at issue.

On the basis of the habeas court's findings and our review of the record, we conclude that the court reasonably and logically determined that it was very unlikely that the petitioner's testimony concerning his version of the circumstances surrounding his statement, which the petitioner acknowledges was revealed in substance during his testimony at the criminal trial, would have affected the trial court's ruling on the motion to suppress. The testimony elicited at trial reflects that the state had strong evidence corroborating Bardelli's testimony that the petitioner made the statement at issue after being advised of his rights. The record also reflects that after the petitioner testified concerning his recollection of these events, the trial court did not revisit the issue raised in the motion to suppress. Thus, not only did five witnesses contradict the petitioner's testimony, but the court did not revisit the issue raised in the motion to suppress so as to indicate that it deemed the petitioner's version of events to be credible.

The petitioner cannot overcome the initial burden of demonstrating that it was likely that O'Brien's ineffectiveness affected the court's ruling on his motion to suppress. He also cannot overcome the burden of demonstrating that even if such a showing had been made, the court's adverse ruling likely affected the guilty verdict reached by the jury. We agree with the habeas court's assessment of the overall strength of the state's case. In the absence of the petitioner's admission as to his criminal purpose in obtaining the package from Levarge's automobile, the other evidence presented by the state strongly supported the guilty verdict. In short,

the state presented compelling circumstantial evidence with regard to the petitioner's presence at Levarge's automobile on the evening of October 28, 1998. This evidence tended to demonstrate that the petitioner was a conspirator in a drug related enterprise. Even had the court suppressed the incriminating statement that he made to the police, it is highly unlikely that the petitioner's defense, which was that he was merely obtaining salsa and tomatoes from Levarge's automobile, would have fared any better in the eyes of the jury.

For these reasons, we conclude that the court properly determined that the petitioner had not demonstrated that there was a reasonable probability that, but for O'Brien's failure to call him as a witness during the suppression hearing, the result of the trial would have been different.

II

The petitioner next claims that the court improperly failed to conclude that O'Brien rendered ineffective assistance in failing to object to the admissibility of certain evidence on hearsay grounds. We disagree.

Our Supreme Court's recitation of the following relevant facts and procedural history from the petitioner's trial is useful to our resolution of the petitioner's claim: "One of the offenses with which the [petitioner] was charged was conspiracy to possess more than one kilogram of marijuana with the intent to sell. The information alleged that the [petitioner] had committed the following two overt acts in furtherance of the conspiracy: (1) '[the petitioner] arranged with . . . Anderson to have marijuana delivered to the home of . . . Levarge'; and (2) '[he later] went to [Levarge's] home . . . to pick up marijuana for the purpose of delivering it to . . . Anderson . . . .'

"[T]he evidence adduced at trial established that, after Levarge approached Bardelli with information

regarding the package of marijuana, the police arranged for Levarge to make a telephone call to Anderson. In that call, which the police tape-recorded, Levarge notified Anderson that the shipment had arrived, and Anderson agreed to send the [petitioner] to pick up the package of marijuana from a vehicle that was parked outside Levarge's home. The state notified the [petitioner] that it intended to introduce into evidence the tape recording of the conversation between Levarge and Anderson.

"The [petitioner] objected to the state's use of that tape recording. In particular, the [petitioner] claimed that, because Levarge was acting as an agent of the police when he telephoned Anderson, he was not a coconspirator within the meaning of this state's conspiracy statute. See General Statutes § 53a-48 (a). In support of his contention, the [petitioner] relied on *State* v. *Grullon*, 212 Conn. 195, 198–99, 203, 562 A.2d 481 (1989), in which this court held that an accused cannot be guilty of conspiracy unless the state has proven beyond a reasonable doubt that the accused conspired with a person other than a police informant or agent. The [petitioner] asserted that, because Levarge was acting as an agent of the police prior to placing the telephone call to Anderson, he was 'contaminated' when he made that call. The [petitioner] further asserted that that 'contamination flow[ed] downward from Levarge to Anderson,' and 'across to both [the petitioner] and Anderson,' with the result that the tape-recorded conversation could not be used to establish the existence of a conspiracy between Anderson and the [petitioner], apparently because the conspiracy was no longer ongoing once Levarge had agreed to cooperate and to place the telephone call. The trial court [overruled] the [petitioner's] objection and permitted the state to introduce the tape recording into evidence." *State* v. *Cabral*, supra, 275 Conn. 528–30. The petitioner did not object on hearsay

grounds to the state's use of the tape-recorded conversation; id., 529 n.10; but also argued that the tape was unduly prejudicial in that it contained "certain expletives that were part of the conversation." Id., 530 n.11.

The petitioner argued before the habeas court that O'Brien was ineffective in that he did not object on hearsay grounds to the tape recording. The habeas court noted that O'Brien had objected to the tape recording on the ground that *Grullon* prohibited its admission. The habeas court also noted that when the petitioner, in his direct appeal, challenged the trial court's admission of the tape on that ground, this court agreed and reversed the judgment of conviction, in part, on that basis. See *State* v. *Cabral*, supra, 75 Conn. App. 317. The habeas court reasoned: "While it is true that attorney O'Brien did not raise the hearsay issue before the trial court, he did object to the admissibility [of the tape] on proper legal grounds, which were upheld by the Appellate Court. It cannot, then, be found that the attorney was deficient in the performance of his duties with respect to the admission of the tape into evidence."

In his direct appeal to this court, the petitioner claimed that the tape-recorded conversation was inadmissible because Levarge's statements did not fall within any recognized hearsay exception. *State* v. *Cabral*, supra, 75 Conn. App. 316. This court reasoned that, under *Grullon*, Levarge was not a member of a conspiracy when police recorded his conversation with Anderson and, thus, statements by Levarge within the tape-recorded conversation did not fall within the coconspirator exception to the hearsay rule, Conn. Code Evid. § 8-3 (1) (D). *State* v. *Cabral*, supra, 316. After concluding that the trial court improperly admitted the evidence, this court further concluded that the petitioner demonstrated that the court's ruling was not harmless but "undermined confidence in the fairness of the verdict." Id., 318.

Our Supreme Court determined that this court improvidently had reviewed and afforded relief on the basis of the hearsay claim because O'Brien had not raised a hearsay objection before the trial court. *State* v. *Cabral*, supra, 275 Conn. 531. The court declined to review this nonconstitutional claim. Id.

The petitioner now claims that O'Brien's failure to raise the hearsay objection at trial amounted to ineffective assistance and that such conduct prejudiced him both at trial and during the appeal process. The petitioner argues: "If O'Brien had articulated a proper legal objection to the inclusion of the tapes, there is the likelihood that the trial court would have recognized the inappropriateness of admitting the tapes, and the jury would not have had the conversation between Levarge and Anderson to consider. It would have been highly likely then that the state could not have met its burden of proving the petitioner's guilt beyond a reasonable doubt."

As set forth previously, our Supreme Court discussed the nature of the objections raised by O'Brien at trial. The court rejected the petitioner's claim that the tape was unduly prejudicial. *State* v. *Cabral*, supra, 275 Conn. 531 n.13. The court also rejected the claim raised under *Grullon*, noting that "the state was not seeking to establish a conspiracy between Levarge and the [petitioner] but, rather, between Anderson and the [petitioner]." Id. As evidenced by this ruling, the court determined that Levarge's statements on the tape recording did not render the evidence inadmissible.

The court's reasoning guides our analysis of the hearsay claim on which the petitioner bases this claim. It is undisputed that the tape recording at issue included statements made by Levarge and Anderson that concerned and furthered the alleged ongoing conspiracy involving the petitioner. The petitioner argues that the

statements constituted inadmissible hearsay and that the coconspirator exception to the hearsay rule did not apply. "A statement that is being offered against a party and is . . . (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy" is not excluded by the hearsay rule. Conn. Code Evid. § 8-3 (1). As our Supreme Court noted in rejecting the petitioner's claim raised solely under *Grullon*, the state properly introduced the tape recording seeking to establish a conspiracy between Anderson and the petitioner. *State* v. *Cabral*, supra, 275 Conn. 531 n.13. Regardless of whether Levarge was a coconspirator at the time that the police recorded the conversation at issue, the taped conversation made it more likely than not that the petitioner and Anderson were coconspirators as the state alleged. Anderson's statements in furtherance of the alleged ongoing conspiracy with the petitioner were the statements of the petitioner's coconspirator and, thus, were admissible under the coconspirator exception to the hearsay rule. Even if we assume that Levarge was not a coconspirator at the time the tape recording was made and that his statements were not otherwise admissible, his statements during the taped two party telephone conversation were nonetheless admissible, as the state argues, because they provided necessary context for the finder of fact fairly to consider and to evaluate Anderson's statements. See Conn. Code Evid. § 1-5 (a).[1]

[1] Section 1-5 (a) of the Connecticut Code of Evidence provides: "Contemporaneous introduction by proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it."

" 'Statement,' as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible." Conn. Code Evid. § 1-5 (a), commentary.

The record reflects that O'Brien strenuously challenged the admissibility of the tape recording on two distinct grounds. Even if we assume arguendo that O'Brien was deficient in failing to raise a hearsay objection, we conclude that the petitioner is unable to demonstrate that O'Brien's failure in this regard caused him any prejudice. The tape recording was admissible under our rules of evidence. Accordingly, the petitioner's ineffective assistance claim fails under *Strickland*'s second prong.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSEPHINE GAIDA ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF SHELTON
(AC 28421)

Flynn, C. J., and Lavery and West, Js.

Syllabus

The plaintiffs appealed to the trial court from the decision of the defendant planning and zoning commission of the city of Shelton approving an amendment to the zoning map that changed the zone of the plaintiffs' property from a primarily light industrial zone with a small portion in a residential zone to an entirely residential zone. The trial court rendered judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. They claimed, inter alia, that notice of a rescheduled public hearing on the proposed amendment to the zoning map was inadequate. *Held*:

1. The trial court improperly determined that, pursuant to statute (§ 8-7d [d]), no notice was required because the zoning commission initiated its own action to amend the zoning map, it being clear from the legislative history of § 8-7 that the legislature intended that a public hearing be held to afford interested parties the opportunity to be heard on a proposed zoning change and never intended to dispense with the notice requirement in the case of a land use body's own initiation of zoning changes; nevertheless, the trial court's determination that notice of the public hearing on the proposed amendment to the zoning map was

adequate was proper under the circumstances here, where notice properly was published for the initial public hearing, which sufficiently apprised any interested party that a public hearing on the zoning amendment was to be held and enabled interested individuals to prepare for and be present at that hearing, and where the public hearing on that issue was cancelled and rescheduled on the same day on which it originally had been scheduled and the commission thereafter published notice in the newspaper that it had rescheduled the public hearing until a certain date, although it was not required to do so, to alert interested parties of the rescheduling.

2. The zoning map change initiated by the commission, which concerned a small area of land and was out of harmony with the comprehensive plan for zoning, constituted spot zoning and was therefore illegal: the commission's stated reason that the zone change was necessary to have the zoning scheme in line with property boundaries was not supported by the record, which showed that the zone change left more properties unchanged than affected properties that were changed, that the unchanged properties were similarly situated in that, like the plaintiffs' property, part of the property was in a residential zone and the rest was in a light industrial zone, and that a similar zoning scheme existed in a number of other areas shown on the zoning map, where, although zoning boundaries and property lines did not match up, the commission did not seek to make alterations when it was making the alteration challenged here; moreover, there was no evidence presented that there would be an effort undertaken by the commission so that all of the zoning boundaries would conform to property lines or that there was a public need for the change.

Argued November 13, 2007—officially released May 27, 2008

Procedural History

Appeal from the decision by the defendant amending a zoning map changing certain of the plaintiffs' real property from light industrial to residential, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Stevens*, *J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Ian Angus Cole, for the appellants (plaintiffs).

Thomas J. Welch, with whom, on the brief, was *John H. Welch, Jr.*, for the appellee (defendant).

Opinion

LAVERY, J. The plaintiffs, Josephine Gaida and Jack Gaida, appeal from the judgment of the trial court dismissing their appeal from the decision of the defendant, the planning and zoning commission of the city of Shelton (commission), approving an amendment to the zoning map that changed the zone of the plaintiffs' property from a primarily light industrial zone (IA-2) with a small portion in a residential zone (R-1) to an entirely residential zone. On appeal, the plaintiffs claim that the court improperly concluded that (1) notice of the rescheduled public hearing was not required to conform to the provisions of General Statutes § 8-7d (a)[1] and (2) the alteration of the zoning scheme did not constitute impermissible spot zoning. We conclude that notice was proper but that the map amendment was indeed spot zoning and, accordingly, reverse the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiffs own real property in Shelton designated as 405 Long Hill Avenue. The property is located between Route 8 and Long Hill Avenue, two roads that run approximately parallel to each other. The overall zoning scheme of the area is a mixture of commercial, light industrial and residential. Until April, 2004, the R-1 zone was set at a distance of about 200 feet west of,

[1] General Statutes § 8-7d provides in relevant part: "(a) In all matters wherein a formal petition, application, request or appeal must be submitted to a zoning commission . . . [n]otice of the hearing shall be published in a newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days, the first not more than fifteen days or less than ten days and the last not less than two days before the date set for the hearing. . . .

"(d) The provisions of subsection (a) of this section shall not apply to any action initiated by any zoning commission, planning commission or planning and zoning commission regarding adoption or change of any zoning regulation or boundary or any subdivision regulation. . . ."

and parallel to, Long Hill Avenue, without regard for property lines. From this boundary line to Route 8, the area was zoned IA-2 light industrial. Most of the plaintiffs' property lay in the IA-2 zone; however, the only road access available to the property was through a forty foot wide access strip in the R-1 zoned area from Long Hill Avenue. The Shelton zoning regulations prevent a property owner from accessing his or her industrially zoned property by way of a residentially zoned property.

On February 13, 2003, the Shelton zoning enforcement officer served the plaintiffs with an order to cease and desist "any removal, filling, or grading of rock or dirt at 405 Long Hill Avenue" and to "remove all commercial related equipment" because "the entire property is located in a R-1 zone." The plaintiffs filed an application for a variance of the zoning regulations so that they could access their property for a use permitted in an IA-2 zone. At about the same time, the commission initiated proceedings to change the zone designation of the subject property so that it would lie entirely within an R-1 zone.

The commission scheduled a public hearing for January 27, 2004, to consider the proposed amendment to the zoning map. The commission published notice of the public hearing on January 15, 2004, and again on January 22, 2004, in the Connecticut Post. The meeting was cancelled due to inclement weather, and the hearing was rescheduled on January 27, 2004, for February 5, 2004. The commission published notice of this meeting in the Connecticut Post on January 29, 2004, and February 3, 2004. The public hearing was held on February 5, 2004, and continued to February 10, 2004. On April 13, 2004, the commission adopted a resolution that approved the proposed zone change affecting the plaintiffs' property. Notice of this decision was published on April 22, 2004.

The plaintiffs appealed from the commission's decision to the Superior Court, which dismissed the appeal. The court first determined that notice of the public hearing on February 5, 2004, was proper and adequate, concluding that the commission was exempt from the notice requirements of § 8-7d (a) because the zoning change was a self-initiated action. The court then rejected the plaintiffs' claims that the zone change was spot zoning. It found that the first prong of the test to identify spot zoning, namely, the size of the area of land affected by the zone change; see *Campion* v. *Board of Aldermen*, 85 Conn. App. 820, 849 n.21, 859 A.2d 586 (2004), rev'd on other grounds, 278 Conn. 500, 899 A.2d 542 (2006); was met, but it also found that substantial evidence in the record supported the commission's decision that the zone change was in accordance with the zoning regulations and comprehensive plan. See id.

On August 2, 2005, the plaintiffs moved to open the judgment and to reargue. The motion to reargue was granted, but the motion to open was denied and the dismissal of the appeal was reaffirmed. The court was persuaded by the commission's argument that notice was proper in this case pursuant to the plain language of General Statutes §§ 8-3[2] and 8-7d, which explicitly exempts the commission from the notice requirements. Following that decision, the plaintiffs filed the present appeal after this court granted their petition for certification to appeal. Additional facts will be set forth as necessary.

[2] General Statutes § 8-3 (a) provides in relevant part: "Such zoning commission shall provide for the manner in which regulations under section 8-2 or 8-2j and the boundaries of zoning districts shall be respectively established or changed. No such regulation or boundary shall become effective or be established or changed until after a public hearing in relation thereto, held by a majority of the members of the zoning commission or a committee thereof appointed for that purpose consisting of at least five members. Such hearing shall be held in accordance with the provisions of section 8-7d. . . ."

I

The plaintiffs claim that the court improperly held that the commission had satisfied the notice requirement pursuant to §§ 8-3 and 8-7d. The commission argues that § 8-7d (d) is plain and unambiguous. Although we agree with the court's conclusion that the notice was adequate, we do so for different reasons.

"Whether the notice published by the commission complied with the statutory requirements is a mixed question of fact and law." *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, 281 Conn. 66, 72, 912 A.2d 1008 (2007). In the present case, there is no dispute as to the facts found by the court on this issue. Rather, the dispute arises from the court's application of § 8-7d (d) to those facts. Accordingly, our review of this issue of law is plenary. See *Bridgeport* v. *Plan & Zoning Commission*, 277 Conn. 268, 275, 890 A.2d 540 (2006); see also *Carr* v. *Planning & Zoning Commission*, 273 Conn. 573, 588, 872 A.2d 385 (2005).

The following additional facts and procedural history are necessary to our resolution of the plaintiffs' claim. The plaintiffs do not make a claim that notice was improper for the originally scheduled meeting on January 27, 2004. The plaintiffs also do not raise any claim in connection with the continuation of the meeting to February 10, 2004. The plaintiffs' sole claim on this issue is addressed to the hearing held on February 5, 2004, because the publication of notice was not within the intervals prescribed by § 8-7d (a). The court ruled for the commission both in its original memorandum of decision and in its subsequent memorandum of decision on the plaintiffs' motion to open and to reargue. On both occasions, the court relied on § 8-7d (d) for its conclusion that no notice is required when a zoning commission initiates its own action to amend the zoning

map. Specifically, in the second memorandum of decision, the court focused on the plain language of § 8-7d (d).

We begin with a discussion of the court's reasoning. Well established principles govern our construction of § 8-7d. "It is a basic tenet of statutory construction that the intent of the legislature is to be found not in an isolated phrase or sentence but, rather, from the statutory scheme as a whole. *State* v. *Breton*, 235 Conn. 206, 226, 663 A.2d 1026 (1995); see also *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 136, 827 A.2d 659 (2003) (in ascertaining statutory meaning, we look to, inter alia, relationship of statute to other legislation); *Waterbury* v. *Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002) (statutes relating to same subject matter are construed so as to create rational, coherent and consistent body of law)." (Internal quotation marks omitted.) *State* v. *Wilcox*, 105 Conn. App. 24, 31, 936 A.2d 295 (2007), cert. denied, 286 Conn. 909, 944 A.2d 981 (2008). "[U]nder General Statutes § 1-2z, we cannot look beyond the text of the statutory language if that language, as applied to the facts of the case, is plain and unambiguous and does not yield a bizarre or unworkable result." (Internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 105 Conn. App. 124, 132, 936 A.2d 716 (2008). Further, "[w]hen changes have been introduced by amendment to a statute, the presumed change does not go any further than that which is expressly declared or necessarily implied. . . . We cannot impute to the legislature . . . in the absence of an intent clearly expressed in the act, [an intent] to enact [a statute] which involves a departure from existing statutory law." (Citation omitted; internal quotation marks omitted.) *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 699–700, 699 A.2d 1003 (1997).

As discussed in *Carr* v. *Woolwich*, 7 Conn. App. 684, 510 A.2d 1358, cert. denied, 201 Conn. 804, 513 A.2d 698 (1986), overruled in part by *Leo Fedus & Sons Construction Co.* v. *Zoning Board of Appeals*, 225 Conn. 432, 446 n.7, 623 A.2d 1007 (1993), prior to 1977, "General Statutes § 8-7d did no more than provide that 'in all matters wherein a formal application, request or approval must be submitted to a zoning commission, planning and zoning commission or zoning board of appeals, the date of receipt of such application' would be measured from the agency's next regularly scheduled meeting or thirty-five days from the application date, whichever was sooner." Id., 690; see Public Acts 1977, No. 77-450, § 4. With the passage of No. 77-450 of the 1977 Public Acts, § 8-7d (d) was added to the statute and provided an exception to the time limits of subsection (a). "This exception recognizes that, where a zoning agency is considering adoption of or change in a zoning regulation or boundary, it is acting in its legislative capacity and should not, therefore, be restricted by the mandatory time limits of General Statutes § 8-7d (a). This exception is in turn limited, however, to the situation in which the proposal for legislative adoption or change is 'initiated by . . . [the] zoning or plan or zoning and planning commission.' " *Carr* v. *Woolwich*, supra, 698; see R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 2:3, p. 30.

Number 03-177 of the 2003 Public Acts, titled, "An Act Concerning Consistency in Municipal Land Use Administrative Review Processes," altered the statutory scheme by placing the notice requirements that formerly had been part of § 8-3 (a) into § 8-7d (a). No changes were made, however, to § 8-7d (d). Representative Stephen Fontana asserted that the "bill standardizes the [time frames] that local land use boards and commissions must use to act upon applications and the notification requirements that they must follow for

hearings that they hold to review those applications. This bill does not, however, change the substantive jurisdiction or responsibilities of any of these local agencies." 46 H.R. Proc., Pt. 11, 2003 Sess., pp. 3588–89. There is further comment that the section in the public act relevant to § 8-7d "creates a standardized process itself." Id., p. 3589.

There is no expressed intent in the 2003 act itself or the legislative history that there is a departure from then existing statutory law. See *Iovieno* v. *Commissioner of Correction*, supra, 242 Conn. 699–700. The application of this subsection to the entirety of § 8-7d (a) leads to a bizarre and unworkable result never anticipated by the legislature. Adopting the court's interpretation results in a statutory scheme that creates overbroad powers in zoning boards and commissions, allowing them to alter the zoning maps without notice and thereby hindering any interested parties' ability to be heard on the proposed changes. In reviewing chapter 124 of the General Statutes, which encompasses the zoning statutes, we are persuaded that the legislature intended that a public hearing be held that affords interested parties the opportunity to be heard on a proposed change. See General Statutes § 8-3 (a) and (b).

We are further convinced of this interpretation from our review of recent legislative history. In addressing Public Acts 2006, No. 06-80, which encompass the most recent alterations to § 8-7d,[3] both the House of Representatives and the Senate discussed the increased

[3] Public Acts 2006, No. 06-80, amended the notice provisions of § 8-7(d) to provide in relevant part: "(g) (1) Any zoning commission, planning commission or planning and zoning commission initiating any action regarding adoption or change of any zoning regulation or boundary or any subdivision regulation or regarding the preparation or amendment of the plan of conservation and development shall provide notice of such action in accordance with this subsection in addition to any other notice required under any provision of the general statutes.

"(2) A zoning commission, planning commission or planning and zoning commission shall establish a public notice registry of landowners, electors

notice requirements that were needed when a land use body initiates a zone change or subdivision regulation change. See 49 S. Proc., Pt. 8, 2006 Sess., pp. 2580–85; 49 H.R. Proc., Pt. 7, 2006 Sess., pp. 2206–15, 2257–88. In discussing increased notice, Representative Lewis J. Wallace, Jr., remarked that "when a municipality initiates a change in its land use regulations, and typically, that's either done when a municipality implements a plan of conservation and development, or some city-wide zoning change . . . [*a*]*t this point, a municipality is only required to put a legal notice in the newspaper.*" (Emphasis added.) 49 H.R. Proc., Pt. 7, 2006 Sess., p. 2207. He further commented that the new provisions in § 8-7d (g) are "secondary to the legal

and nonprofit organizations qualified as tax-exempt organizations under the provisions of Section 501 (c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, requesting notice under this subsection. Each municipality shall notify residents of such registry and the process for registering for notice under this subsection. The zoning commission, planning commission or planning and zoning commission shall place on such registry the names and addresses of any such landowner, elector or organization upon written request of such landowner, elector or organization. A landowner, elector or organization may request such notice be sent by mail or by electronic mail. The name and address of a landowner, elector or organization who requests to be placed on the public notice registry shall remain on such registry for a period of three years after the establishment of such registry. Thereafter any land owner, elector or organization may request to be placed on such registry for additional periods of three years.

"(3) Any notice under this subsection shall be mailed to all landowners, electors and organizations in the public notice registry not later than seven days prior to the commencement of the public hearing on such action, if feasible. Such notice may be mailed by electronic mail if the zoning commission, planning commission or planning and zoning commission or the municipality has an electronic mail service provider.

"(4) No zoning commission, planning commission or planning and zoning commission shall be civilly liable to any landowner, elector or nonprofit organization requesting notice under this subsection with respect to any act done or omitted in good faith or through a bona fide error that occurred despite reasonable procedures maintained by the zoning commission, planning commission or planning and zoning commission to prevent such errors in complying with the provisions of this section."

notice that the municipality has to print in the newspaper of general circulation . . . .'' Id., p. 2263.[4] The transcript of the proceedings from the Senate echoes this legislative view that notice was required in the form of a newspaper advertisement. Senator Eric D. Coleman, in making his argument for the increased notice, stated that ''the current notice requirements, when changes are initiated by a land use body, which involve newspaper publication, do not constitute effective notice to many of the residents of the town . . . .'' 49 S. Proc., Pt. 8, 2006 Sess., p. 2582. This clearly shows that it was never the intent of the legislature to dispense with the notice requirement on a land use body's initiation of zoning changes but that instead it interpreted the statute as requiring notice in the form that the commission used in this case—through a newspaper advertisement. Therefore, the court's interpretation of this statute would clearly lead to a bizarre and unintended result.

Nevertheless, albeit for different reasons, the court correctly concluded that the notice in this case was adequate. The holding in *Roncari Industries, Inc.*, is controlling in this case. Our Supreme Court concluded that the language now encompassed in § 8-7d (a) ''does not require the publication of additional notices when the public hearing is continued or rescheduled; the statute is silent with regard to notice when the hearing is postponed.''[5] *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, supra, 281 Conn. 73.

Our courts ''repeatedly have held that the fundamental reason for the requirement of notice [in § 8-7d] is

[4] See also Representative Wallace's statement that ''the municipality is *still* required to put the legal notice in the newspaper.'' (Emphasis added.) 49 H.R. Proc., Pt. 7, 2006 Sess., p. 2214.

[5] The public hearing at issue in *Roncari Industries, Inc.*, was scheduled for 2001, prior to Public Acts 2003, No. 03-177, which deleted the notice requirement in § 8-3 (a) and placed a substantially similar notice requirement in § 8-7d (a).

to advise all affected parties of the opportunity to be heard and to be apprised of the relief sought. . . . Adequate notice will enable parties having an interest to know what is projected and, thus, to have an opportunity to protest. . . . Furthermore, it is well recognized that [t]he purpose of [the procedural requirements of § 8-7d (a)] is fairly and sufficiently to apprise those who may be affected by the proposed action of the nature and character of the proposed action so as to enable them to prepare intelligently for the hearing." (Citations omitted, internal quotation marks omitted.) Id., 73–74.

Because it was undisputed that notice properly was published for the initial public hearing, those notices sufficiently apprised any interested party that a public hearing on the zoning amendment was to be held and enabled interested individuals to prepare for and be present at that meeting. Furthermore, the public hearing on this issue was rescheduled on the same day the original meeting was cancelled.[6] The commission thereafter published notice in the Connecticut Post that it had rescheduled the public hearing until February 5, 2004. This was not required to alert interested parties of the rescheduling and was not defective under §§ 8-3 (a) or 8-7 (d).

II

The plaintiffs next claim that the zoning map change initiated by the commission[7] was spot zoning and therefore violated the police powers of the town and the

[6] The defendant's notice of cancellation and notice of special meeting were both dated January 27, 2004, as evidenced in exhibits N and O of the second supplemental return of record, filed December 9, 2004.

[7] Our Supreme Court has reviewed land use body initiated zoning changes for spot zoning in *Pierrepont* v. *Zoning Commission*, 154 Conn. 463, 226 A.2d 659 (1967), *Metropolitan Homes, Inc.* v. *Town Plan & Zoning Commission*, 152 Conn. 7, 202 A.2d 241 (1964), and *Village Builders, Inc.* v. *Town Plan & Zoning Commission*, 145 Conn. 218, 140 A.2d 477 (1958). Although spot zoning was not found in these cases, the case law does not preclude a finding of spot zoning when a land use body rather than an individual applicant initiates the zone change. Other jurisdictions have found an impro-

uniformity requirements of General Statutes § 8-2.[8] The commission argues that the court correctly ruled that there was substantial evidence in the record to support its position that the zone change was in accord with the comprehensive town zoning plan. We agree with the plaintiffs.

"The standard of review according to which courts must analyze challenges to legislative decisions of local zoning authorities is well settled. In such circumstances, it is not the function of the court to retry the case. Conclusions reached by the [zoning authority]

priety to exist in situations in which the rezoning of a small parcel of land disadvantages the owner of that land. See *Caputo* v. *Board of Appeals*, 331 Mass. 547, 120 N.E.2d 753 (1954); *Lowe* v. *Missoula*, 165 Mont. 38, 525 P.2d 551 (1974).

[8] General Statutes § 8-2 (a) provides in relevant part: "The zoning commission of each city, town or borough . . . may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23. Such regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. . . ."

must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the agency. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the agency supports the decision reached." (Citations omitted; internal quotation marks omitted.) *Konigsberg* v. *Board of Aldermen*, 283 Conn. 553, 582, 930 A.2d 1 (2007).

Spot zoning is "impermissible in this state." *Campion* v. *Board of Aldermen*, supra, 85 Conn. App. 849–50, 859; see also *Morningside Assn.* v. *Planning & Zoning Board*, 162 Conn. 154, 161, 292 A.2d 893 (1972). Spot zoning had been defined as "the reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood. . . . Two elements must be satisfied before spot zoning can be said to exist. First, the zone change must concern a small area of land. Second, the change must be out of harmony with the comprehensive plan for zoning adopted to serve the needs of the community as a whole. . . . The vice of spot zoning lies in the fact that it singles out for special treatment a lot or a small area in a way that does not further such a [comprehensive] plan." (Citation omitted; internal quotation marks omitted.) *Campion* v. *Board of Aldermen*, supra, 849 n.21. "A 'comprehensive plan' means a general plan to control and direct the use and development of property in a municipality or a large part of it by dividing it into districts according to the present and potential use of the properties. . . . Action by a zoning authority which gives to a single lot or a small area privileges which are not extended to other land in the vicinity is in general against sound public policy and obnoxious to the law." (Citations omitted.) *Bartram* v. *Zoning Commission*, 136 Conn. 89, 93, 68 A.2d 308 (1949). "The

obvious purpose of the requirement of uniformity in the regulations is to assure property owners that there shall be no improper discrimination, all owners of the same class and in the same district being treated alike . . . .'' (Internal quotation marks omitted.) *Bartsch* v. *Planning & Zoning Commission*, 6 Conn. App. 686, 689, 506 A.2d 1093 (1986). ''Although we recognize that not every extension of an existing district is, ipso facto, a compliance with a comprehensive plan and consequently not spot zoning . . . [t]he ultimate test is whether, upon the facts and circumstances before the zoning authority, the extension is, primarily, an orderly development of an existing district which serves a public need in a reasonable way or whether it is an attempt to accommodate an individual property owner.'' (Internal quotation marks omitted.) *Konigsberg* v. *Board of Aldermen*, supra, 283 Conn. 592–93, quoting *Wade* v. *Town Plan & Zoning*, 145 Conn. 592, 596, 145 A.2d 597 (1958).

Using this two-pronged test, the court concluded that the first prong ''is arguably met'' but that substantial evidence in the record supported the commission's decision that this zone change was in accord with the comprehensive plan. The first prong, that the area must be small in size, is more than arguably met through admissions by the commission and the facts on the record. The planning and zoning administrator twice stated that this area was ''small'' but an area that needed to be addressed after it had been recognized by his staff that the zoning boundaries and the property lines did not conform. Further, the record shows that this area consisted of six lots, one that was the lot in issue, two of the lots backed up to the industrial portion of the plaintiffs' land, and the remaining three lots were bisected by the zoning boundary. The plaintiffs' lot was uniquely situated because the primary portion of their

lot was in the IA-2 zone, having only a throughway through the residential zone.

The record also reveals that this zoning amendment was initiated by the town at about the time that the plaintiffs filed their appeal challenging the cease and desist order because even though the order claimed that the property was within the R-1 zone, it actually was primarily within the IA-2 zone. Further, the planning and zoning administrator noted in his presentation of the proposed change that, on the plaintiffs' property, the town "had some legal billing" because the plaintiffs claimed that they had a nonresidential use on their land, which the planning and zoning department believed they did not. The commission stated that its reason for approving the zone change was to have the zoning scheme in line with property boundaries. There was a comment by the planning and zoning administrator that when the zoning maps were first drawn forty years ago, no one knew where the property lines were, so the lines were set parallel to the streets. He stated that had it been known where the property lines fell, the lines would have been put along the property's boundaries.

A review of the record, however, shows that the stated rationale for the amendment is not legally supported. The record clearly shows that the zone change leaves more properties in that area unchanged than changed. These unchanged properties are similarly situated, in that part of the property is in the residential zone and the rest is in the light industrial zone. The properties left unaffected also are along Long Hill Avenue directly to the northeast and south of the property affected by the zoning amendment. A similar zoning scheme exists in a number of the other areas shown on the zoning map, where the zoning boundaries and the property lines do not match up, which the commission did not seek to alter when it was altering this zoning scheme. There also was no policy or evidence

presented that there would be an effort undertaken by the commission so that all of the zoning boundaries would conform to property lines or that there was a public need for the change. This goes against the policy of uniformity and § 8-2. Further, because the overall zoning scheme of the area is a mixture of commercial, light industrial and residential properties, removing the light industrial zone from this portion of the area is not advancing the zoning scheme. The record does not reasonably support the actions of the commission, and the amendment constituted spot zoning and was, therefore, illegal.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiffs' appeal.

In this opinion the other judges concurred.

BOARD OF EDUCATION OF THE TOWN OF PLAINFIELD *v.* LOCAL R1-126, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
(AC 28804)

Bishop, Beach and Berdon, Js.

Syllabus

The plaintiff board of education sought to vacate an arbitration award issued in favor of the defendant union, which is the exclusive bargaining representative of the plaintiff's custodial and maintenance employees. The arbitrators agreed with the union's claim that the plaintiff had violated the parties' collective bargaining agreement when it assigned the work of absent full-time employees to part-time employees without first offering that work on an overtime basis to full-time employees. The trial court rendered judgment denying the application to vacate the arbitration award, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on its claim that the award was not final and definite and, therefore, should have been vacated because the time period for which damages were to be paid could not be ascertained and

because the plaintiff did not have the information and records necessary to implement the award, thus rendering the calculation of the award open to negotiation; the language of the award in this case did not require the parties to engage in future negotiation and ordered the plaintiff to pay full-time employees for missed overtime opportunities during a certain period of time, thereby fixing the plaintiff's obligation and providing the plaintiff sufficient guidance on how to fulfill that obligation, and the plaintiff's alleged inability to calculate damages under the award did not compel the conclusion that the award was indefinite or that it failed to fix definitively the rights and obligations of the parties.

2. The plaintiff could not prevail on its claim that the arbitrators had exceeded their power by issuing an award that was inconsistent with a provision of the collective bargaining agreement that permitted the plaintiff to assign a part-time employee to do work at a location where there is an absence by a full-time employee; the arbitrators did not ignore the terms of the agreement, but rather offered a detailed interpretation of the subject provision, which they determined was rendered inapplicable during the first four weeks of a full-time employee's absence, and the plaintiff's claim that the subject provision was deleted and modified was in fact a disagreement with the arbitrators' interpretation of the bargaining agreement.

Argued March 17—officially released May 27, 2008

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Windham at Putnam and tried to the court, *Booth*, *J.*; judgment denying the application, from which the plaintiff appealed to this court. *Affirmed.*

William R. Connon, with whom, on the brief, was *Brooke H. Sherer*, for the appellant (plaintiff).

Scott C. Jelescheff, regional counsel, with whom, on the brief, was *Michael J. Brady*, staff attorney, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, the board of education of the town of Plainfield (board), appeals from the judgment of the trial court denying its application to vacate an arbitration award in favor of the defendant, Local R1-126, National Association of Government Employees

(union). The board claims that the court improperly denied its application to vacate the arbitration award because the arbitrators had exceeded their powers or so imperfectly executed them that (1) a mutual, definite and final award on the subject matter was not made and (2) an award was issued that modified the provisions of the agreement. We affirm the judgment of the trial court.[1]

The following factual and procedural history is relevant to our discussion. The union is the exclusive bargaining representative of the custodial and maintenance employees of the board. The board and the union were parties to a collective bargaining agreement covering the period from July 1, 2005, to June 30, 2008. Article XXI, paragraphs five and six, of that agreement provide: "Absences of up to four (4) weeks, to the extent the Board elects to fill in for the absent employee, will be offered to full time bargaining unit members on an overtime basis. If, after four (4) weeks, the employer decides to hire a new bargaining unit employee, once the individual on the extended absence returns to work, the individual hired as a fill-in will be the junior employee for purposes of promotion or layoff. Nothing herein shall prevent the Board from assigning a part time employee to do work at a location that has an absent full time employee."

In August, 2004, the board's director of buildings and grounds issued a directive to lead custodians to use part-time employees to cover the shifts of absent full-time employees. Following the directive, open shifts of absent full-time employees were assigned to part-time employees on a straight time basis. The union filed a

[1] The union requests in its appellate brief, among other things, that we grant it costs and attorney's fees. We decline to review the union's claim because it failed to file a cross appeal. See Practice Book § 61-8; *Housing Authority* v. *Charter Oak Terrace/Rice Heights Health Center, Inc.*, 82 Conn. App. 18, 19 n.1, 842 A.2d 601 (2004).

grievance on October 13, 2004, alleging a violation of article XXI of the collective bargaining agreement. After intial steps in the grievance procedure provided for in the agreement were unsuccessful in resolving the dispute, the union requested arbitration. The arbitrators framed the following issue for arbitration: "Did [the board] violate [a]rticle XXI of the collective bargaining agreement when it assigned part-time employees to perform work at schools which would have been performed by absent full-time employees without first offering that work on an overtime basis to full-time employees? If so, what shall the remedy be?"

A hearing was held on August 31, 2006. On December 28, 2006, the arbitrators issued an award finding that the board had violated article XXI. As a remedy, the award provided that "[t]he [b]oard . . . shall apply the language of [a]rticle XXI pertinent to filling positions on an overtime basis to determine the [moneys] to be given bargaining unit members who were wrongfully denied the right to fill the absences of full-time employees up to a term of four (4) weeks. The period of time for the purpose of damages shall be from the filing of the grievance until a successor contract to the July 1, 2002 to June 30, 2005 contract was signed by the parties. The [moneys] shall be paid by the [b]oard in each instance of wrongful absentee coverage by part-time employees for four (4) hours at the applicable rates . . . as the part-time employees only filled in for four (4) hours for the absent full-time employees."

The board filed in Superior Court an application to vacate the award dated January 26, 2007, pursuant to General Statutes § 52-418.[2] The board alleged that the

[2] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality

award both impermissibly modified the agreement and was executed imperfectly such that it was not mutual, final and definite. The court held a hearing on March 26, 2007, at which the board called Mary Conway, superintendent of the Plainfield school district, as a witness. On April 25, 2007, the court issued a memorandum of decision denying the board's application. The court stated that the board has claimed that it does "not have the information necessary to implement the award. . . . If this information is indeed unavailable, and the superintendent so testified at the hearing, then there may be future disputes about the payments due. This is a far different matter from an arbitration which orders future negotiation. This arbitration award is final." (Citation omitted.) This appeal followed.

Before reaching the claims on appeal, we acknowledge that "the policy behind arbitration compels a deferential standard of review of arbitration awards. [T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes. . . . As a consequence of our approval of arbitral proceedings, our courts generally have deferred to the award that the arbitrator found to be appropriate. . . . The scope of review for arbitration awards is exceedingly narrow. . . . Additionally, every reasonable inference is to be made in favor of the arbitral award and of the arbitrator's decisions. . . .

"Despite the wide berth given to arbitrators and their powers of dispute resolution, courts recognize three

or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

grounds for vacating arbitration awards. . . . As a routine matter, courts review de novo the question of whether any of those exceptions apply to a given award. . . . The first ground for vacating an award is when the arbitrator has ruled on the constitutionality of a statute. . . . The second acknowledged ground is when the award violates clear public policy. . . . Those grounds for vacatur are denominated as common-law grounds and are deemed to be independent sources of the power of judicial review. . . . The third recognized ground for vacating an arbitration award is that the award contravenes one or more of the statutory proscriptions of . . . § 52-418." (Internal quotation marks omitted.) *International Brotherhood of Police Officers*, *Local 361* v. *New Milford*, 81 Conn. App. 726, 729–30, 841 A.2d 706 (2004).

In this case, the board applied to vacate the award pursuant to § 52-418 (a), which provides in relevant part that "[u]pon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made." General Statutes § 52-418 (a) (4).

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted,[3]

[3] A submission is restricted if the agreement conferring the arbitrator's authority over the dispute limits the breadth of issues to be resolved, reserves explicit rights or conditions the award on court review. In the absence of any such restraints, it is unrestricted. *Rocky Hill Teachers' Assn.* v. *Board of Education*, 72 Conn. App. 274, 278 n.6, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002). The board does not claim that the submission was restricted or that the award did not conform to the submission.

will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . . Furthermore, in applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitral] award and of the arbitrators' acts and proceedings." (Citation omitted; internal quotation marks omitted.) *Brantley* v. *New Haven*, 100 Conn. App. 853, 864–65, 920 A.2d 331 (2007); see *Rocky Hill Teachers' Assn.* v. *Board of Education*, 72 Conn. App. 274, 278, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002).

I

The board first claims that the court improperly denied its application to vacate the award because the award was not final and definite. Specifically, the board contends that the award is indefinite because the board does not have the information and records necessary to implement it, thereby rendering "the calculation of the award open to negotiation" and, further, that the time period for the purposes of damages stated in the award cannot be ascertained.[4] We disagree.

[4] The award requires damages to be calculated for the time period between October 31, 2004, and the date when "a successor contract to the July 1, 2002, to June 20, 2005 contract was signed by the parties." The successor contract was signed on two different dates by the parties, April 12 and June 3, 2006, and, by its terms, was retroactive to July 1, 2005. This portion of the board's claim, however, is not properly before us. The court, in its memorandum of decision, did not address any claim of ambiguity as to the damages period, and the board did not file a motion for articulation asking the court to rule on that issue. The board has failed to provide a record that is a proper predicate for appellate review. See Practice Book §§ 60-5 and 61-10; *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, 281 Conn. 66, 82 n.9, 912 A.2d 1008 (2007). We therefore decline to review this portion of the board's claim.

"In assessing whether an arbitrator has exceeded his or her powers, the basic test has become the comparison of the award with the submission to determine whether the award conforms to the submission. . . . Conformity with § 52-418 also requires that the award meet the minimum requirements of being mutual, final and definite. [A]n award must be final as to the matters submitted so that the rights and obligations of the parties may be definitely fixed." (Citations omitted; internal quotation marks omitted.) *Rocky Hill Teachers' Assn.* v. *Board of Education*, supra, 72 Conn. App. 280.

In support of its claim that the award is indefinite, the board cites *State* v. *AFSCME, Council 4, Local 1565*, 49 Conn. App. 33, 713 A.2d 869 (1998), aff'd, 249 Conn. 474, 732 A.2d 762 (1999), and *Rocky Hill Teachers' Assn.* v. *Board of Education*, supra, 72 Conn. App. 274, which hold that when future negotiations are required by an arbitration award, that award is indefinite and fails to conform to the requirements of § 52-418. In *AFSCME, Council 4, Local 1565*, the aggrieved party was a correction officer who wrongly had been dismissed from her job. The arbitration award ordered the grievant to be reinstated at *either* the Niantic correctional facility or at an alternate facility that would be agreeable to all parties. This court concluded that the language of the award was indefinite because it did not specify an exact location for placement and, thus, left the location for the placement "open to negotiation," and, therefore, it "cannot be said to fix definitively the rights and obligations of the parties." *State* v. *AFSCME, Council 4, Local 1565*, supra, 37.

In *Rocky Hill Teachers' Assn.*, the issue was the calculation of employee contributions for health and dental care premiums. In the award, the arbitrator ordered the parties "to negotiate the issue of whether to include the dental costs within the formula to determine teacher contributions toward medical/health premiums. In the

event that said negotiations do not result in an agreement between the parties within thirty (30) days, I order the parties to submit this issue to binding arbitration . . . .'' (Citation omitted; internal quotation marks omitted.) *Rocky Hill Teachers' Assn.* v. *Board of Education*, supra, 72 Conn. App. 277. This court concluded in that case, as in *AFSCME, Council 4, Local 1565*, that because the award similarly required further negotiation, it thereby failed to fix the rights and obligations of the parties and was not final under § 52-418. Id., 280–81.

The cases on which the board relies are distinguishable from the present circumstances. The board concedes that the language of the award in this case does not require the parties to engage in future negotiation, as was the situation in both *AFSCME, Council 4, Local 1565*, and *Rocky Hill Teachers' Assn.* Rather, the board argues that the award is ''open to further negotiation'' because the board does not possess the employment records required to determine payments under the award and because the damages period is unascertainable. In short, it argues that any payments that it would make to the bargaining unit employees pursuant to the award would be highly imprecise. As a result of its inability to calculate damages, the board contends that the award in this matter impermissibly leaves the remedy to the judgment of one of the parties and open to the possibility of further negotiation or litigation. We disagree with the board's equating its case, which *may* involve further negotiation, with those two cases, in which further negotiation was impermissibly required as part and parcel of the awards rendered in those cases.

The circumstances of this case are more akin to those in *State* v. *Connecticut Employees Union Independent, Inc.*, 46 Conn. App. 520, 699 A.2d 307, cert. denied, 243 Conn. 948, 704 A.2d 801 (1997), in which the arbitrator found that the state employer had violated its overtime

equalization obligation under its collective bargaining agreement with the defendant employees union. Id., 521–22. The state applied to vacate the award alleging, inter alia, that "[t]he award orders the state to provide additional overtime opportunities . . . to those employees who were given fewer overtime opportunities . . . but does not identify those employees or a means by which the state can determine who those individuals are." (Internal quotation marks omitted.) Id., 522. In the course of concluding that the award was sufficiently final and definite, and that the trial court improperly had granted the state's application to vacate, this court stated that "the trial court improperly substituted its judgment for that of the arbitrator because of a perceived lack of evidence and the imprecise nature of the award." Id., 525. The decision also noted that an arbitrator is not necessarily required to present a detailed explanation as to how the grievant should be made whole; if he or she provides sufficient guidance for the parties to satisfy the award, it will be considered final and definite. Id., 524–25; see also *State* v. *Connecticut Employees Union Independent, Inc.*, 33 Conn. App. 737, 739, 742, 638 A.2d 619 (1994) (holding that arbitration award stating that "[t]he [s]tate shall . . . make [the grievant] whole for any lost wages and benefits which he incurred as a result of his layoff," although not detailed, provided sufficient guidance for parties to satisfy award).

We conclude that this court's reasoning in *State* v. *Connecticut Employees Union Independent, Inc.*, supra, 46 Conn. App. 520, applies to the present circumstances. The award in the case at hand orders the board to pay full-time employees for missed overtime opportunities during a certain period of time; it thereby fixes the board's obligation in relation to the union and provides the board sufficient guidance in how to fulfill that obligation. The board's suggestion that the award is

somehow indefinite and impermissibly "open to negotiation" because it claims it is unable to calculate damages misses the point. A party's putative inability to implement an award does not necessarily compel the conclusion that the award in question either is indefinite or somehow fails to fix definitively the rights and obligations of the parties. The two issues are not necessarily related. Because, pursuant to § 52-418 (a) (4), this court has the power to order that an award be vacated only when the second of those issues is implicated, the trial court properly denied the board's application to vacate the award.

II

The board next claims that the court improperly denied its application to vacate the award because the arbitrators exceeded their power by issuing an award that modified the provisions of the agreement. Specifically, the board argues that the award was inherently inconsistent with the underlying agreement in that it essentially deleted article XXI, paragraph six, from the agreement. That paragraph states that "[n]othing herein shall prevent the Board from assigning a part time employee to do work at a location that has an absent full time employee." We disagree with the board's assessment of the award.

"An application to vacate or correct an award should be granted where an arbitrator has exceeded his power. In deciding whether an arbitrator has exceeded his power, we need only examine the submission and the award to determine whether the award conforms to the submission. . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so

long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. . . .

"Merely because an arbitral decision is not based on the express terms of a collective bargaining agreement does not mean that it is not properly derived from the agreement. An arbitrator is entitled to take cognizance of contract principles and draw on them for guidance in construing an agreement. . . . Neither a misapplication of principles of contractual interpretation nor an erroneous interpretation of the agreement in question constitutes grounds for vacatur." (Citations omitted; internal quotation marks omitted.) *Local 391, Council 4, AFSCME* v. *Dept. of Correction*, 76 Conn. App. 15, 18–19, 817 A.2d 1279 (2003).

The board argues that the arbitrators exceeded the scope of their powers when they ignored article XXI, paragraph six, of the collective bargaining agreement, and, instead, interpreted it in such a way as to prohibit part-time employees from performing their duties at a location that has an absent full-time employee. The board further argues that the implementation of the award as it stands will be inconsistent with the provisions of article XXI, paragraph six, and, further, will place the board "in the irrational position of being unable to assign custodial work to part-time employees in buildings where they are most needed."

"Arbitration awards, however, are not to be invalidated merely because they rest on an allegedly erroneous interpretation or application of the relevant collective bargaining agreement." *Local 391, Council 4, AFSCME* v. *Dept. of Correction*, supra, 76 Conn. App. 20. Our review of the record reveals that the arbitrators did not ignore article XXI, paragraph six, of the agreement, but rather offered a detailed interpretation

of that paragraph within the context of the entire agreement, the grievance and the bargaining history between the parties as to that article. Specifically, the arbitrators noted that "it is not reasonable or logical to interpret the language of paragraph six of article XXI to take away all rights of the full-time employees to be assigned, during the first four (4) weeks of an absence, to do work of the absent full-time employee. Moreover, the language of paragraph five is specific, as it pertains to the absences of full-time employees and who is to perform their work during the first four (4) weeks of the absence. The language relied on in paragraph six by the board is of an all encompassing general nature. It cannot nullify the aforementioned specific language of paragraph five."

In its memorandum of decision, the court found that the board's "claim that article XXI was deleted and modified or was interpreted in an inherently inconsistent way is no more than a disagreement with the contract interpretation arrived at by the arbitration panel." We agree. As we already have observed, "[n]either a misapplication of principles of contractual interpretation nor an erroneous interpretation of the agreement in question constitutes grounds for vacatur." (Internal quotation marks omitted.) *Local 391, Council 4, AFSCME* v. *Dept. of Correction*, supra, 76 Conn. App. 19; see also *New Haven* v. *AFSCME, Council 15, Local 530*, 106 Conn. App. 691, 700–701, 943 A.2d 494 (2008). The court properly denied the board's application to vacate the award.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER H. ERTEL *v.* ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, ET AL.
(AC 27488)

DiPentima, Gruendel and Robinson, Js.

Syllabus

The plaintiff sought, inter alia, injunctive relief to compel the defendant R, the commissioner of environmental protection, the defendant L, the deputy commissioner of environmental protection, and the defendant T, an employee of the department of environmental protection, to permit construction of a dock on certain of the plaintiff's real property. The department had issued a permit to the plaintiff to extend an existing dock on his property, but when the plaintiff subsequently failed to comply with the terms of the permit and exceeded its scope, the department revoked the permit and ordered the plaintiff to remove the existing structures. After an adjudicator for R issued a final decision and order that affirmed the revocation notice, the plaintiff, without success, appealed to the trial court and to this court, and he thereafter brought a declaratory judgment action seeking a clarification of the adjudicator's final decision. Subsequently, the plaintiff brought the action here, alleging various claims against the defendants with regard to the revocation of the permit, including a claim that the revocation of the permit and the order to remove the existing dock constituted takings of his property without just compensation in violation of his rights under the state and federal constitutions. The trial court rendered judgment dismissing the plaintiff's action, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly took judicial notice of certain findings on which it based it decision to dismiss the action, the plaintiff having waived his claim by failing to object to the request of R and T that that court take judicial notice of the findings made and decisions rendered in the extensive litigation between the parties.
2. In dismissing the plaintiff's takings claim, the trial court did not improperly hold that the plaintiff had no property interest in either the permit that was revoked or the dock that he was ordered to remove; because the plaintiff had not been denied the right to build a dock but simply chose to build a dock that did not conform to the permit, and because he failed to present any authority holding that a person has a property interest in a structure built in violation of a permit, the plaintiff's takings claim could not be maintained, he having failed to demonstrate that a property interest was involved.

Argued January 15—officially released May 27, 2008

Procedural History

Action for an injunction to compel the defendants to permit construction of a dock on certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Gordon*, *J.*, granted the motion to dismiss filed by the defendant David K. Leff; thereafter, the court, *Aurigemma*, *J.*, granted the motion to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*.

Peter H. Ertel, with whom, on the brief, was *John R. Williams*, for the appellant (plaintiff).

Robert J. Deichert, assistant attorney general, with whom, on the brief, was *Richard Blumenthal*, attorney general, for the appellees (defendants).

Opinion

DiPENTIMA, J. The plaintiff, Peter H. Ertel, appeals from the judgment of the trial court dismissing his action against the defendants, Arthur J. Rocque, Jr., commissioner of environmental protection; David K. Leff, deputy commissioner of environmental protection; and Rachel R. Towbin, an employee of the department of environmental protection (department), in their official and individual capacities. The plaintiff claims that the court (1) impermissibly relied on agency determinations in rendering its decision and (2) improperly held that he had no property interest in either the permit the defendants revoked or the dock the defendants ordered him to remove.[1] We affirm the judgment of the trial court.

[1] The plaintiff raised three additional claims on appeal: (1) the court improperly dismissed his selective enforcement claims; (2) the court improperly held that the complaint failed to make the requisite allegations for awarding a nonmonetary prospective injunction; and (3) the court improperly dismissed the claims against Leff. These claims were not briefed adequately because the plaintiff failed to analyze the cases he cited and the facts of the present case. Thus, we decline to review these additional claims.

The following facts, spanning more than twenty-five years, underlie the present action. In 1981, the plaintiff applied to the department for a permit to extend a dock on property that he had purchased a short time earlier. The department issued the requested permit in June, 1982, and required the plaintiff to complete modification of the dock by June, 1985. In August, 1985, counsel for a neighboring landowner notified the department that the plaintiff had failed to comply with the terms of the permit. An employee of the department inspected the plaintiff's dock and found that it did not conform to the permit. The department objected to the change and, in a letter dated December 30, 1985, gave the plaintiff until April 15, 1986, to make changes to the dock in order to avoid suspension or revocation of the permit. In March, 1986, the plaintiff applied for a new permit that contained modified construction plans, but one year later he withdrew the application. The plaintiff submitted an amended application for expanding his dock in November, 1987.

In 1988, after concluding that the plaintiff had violated General Statutes §§ 22a-359 through 22a-363 by, inter alia, continuously exceeding the scope of the permit and knowingly and wilfully failing to remove unauthorized structures in a regulated area, the department revoked his permit and ordered him to remove the existing structures. After a public hearing requested by the plaintiff, an adjudicator for the commissioner issued a final decision and order that affirmed the revocation notice.[2] The plaintiff appealed from the final decision

See *Hartney* v. *Hartney*, 83 Conn. App. 553, 566, 850 A.2d 1098, cert. denied, 271 Conn. 920, 859 A.2d 578 (2004).

[2] Under General Statutes § 22a-6 (e), any person aggrieved by an order of the commissioner of the department may request a hearing before the commissioner, which will be conducted in accordance with the procedures provided by chapter 54 of the General Statutes. Under General Statutes § 22a-2, the commissioner has the authority to designate an agent to exercise his authority for the administration or enforcement of any applicable statute, regulation, permit or order.

to the Superior Court, which dismissed the appeal for lack of subject matter jurisdiction. The Appellate Court affirmed that decision. *Ertel* v. *Carothers*, 34 Conn. App. 18, 639 A.2d 1055 (1994).

After exhausting his appeals, the plaintiff brought a declaratory judgment action in the Superior Court seeking a clarification of the adjudicator's final decision. The court granted the plaintiff's request because it concluded that there might be a conflict between two parts of the final decision. On May 8, 2000, the department issued a clarification ruling in which it concluded that there was no conflict in the decision, and it ordered the plaintiff to comply with the final decision.

In February, 2003, the plaintiff brought the subject action against the defendants in their official and individual capacities, seeking injunctive relief based on violations of his state and federal rights to equal protection, freedom of speech, freedom to petition for the redress of grievances and procedural and substantive due process, and of his right against the taking of his property without just compensation. On August 27, 2003, the court granted the department's motion to dismiss the claims against Leff pursuant to the doctrine of judicial immunity. On January 21, 2005, the court granted the motion to dismiss as to the remaining defendants pursuant to the doctrine of sovereign immunity. This appeal followed.

We begin with the standard of review. "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. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . .

Moreover, [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005).

I

The plaintiff claims that the court improperly took judicial notice of findings on which it granted the motion to dismiss. We disagree.

"A trial court's determination as to whether to take judicial notice is essentially an evidentiary ruling, subject to an abuse of discretion standard of review. . . . Trial courts have broad discretion in determining the relevancy and admissibility of evidence." (Internal quotation marks omitted.) *Simes* v. *Simes*, 95 Conn. App. 39, 51, 895 A.2d 852 (2006). An appellate court "is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly." (Internal quotation marks omitted.) *Daley* v. *McClintock*, 267 Conn. 399, 404, 838 A.2d 972 (2004).

After a careful review of the record, we conclude that the plaintiff waived this claim because he did not object to the defendants' request that the court take judicial notice. On June 14, 2004, Rocque and Towbin filed their motion to dismiss and their memorandum of law in support of the motion, which requested that the court take judicial notice of the findings made and decisions rendered in the extensive litigation between the parties. In their memorandum, Rocque and Towbin used those findings in both the recitation of the facts and in the analysis, and they attached the court and agency decisions to their memorandum as exhibits. The plaintiff filed a memorandum of law in opposition to the motion on July 20, 2004, and did not raise an objection to

the request for judicial notice.[3] Rocque and Towbin filed their reply memorandum on August 30, 2004, more than four months before the court rendered its decision on the motion; in that memorandum, Rocque and Towbin drew attention to the fact that the plaintiff had not objected to their request. In its memorandum of decision on the motion to dismiss, the court noted that the plaintiff had not objected to the request. Moreover, at oral argument before this court, the plaintiff conceded that he had not objected to the request that the trial court take judicial notice of the decisions rendered by the courts. Therefore, given his notice of this evidentiary issue and his failure to object, the plaintiff cannot prevail on this claim.[4]

II

The plaintiff also claims that the court improperly held that he had no property interest in either the permit the defendants revoked or the dock the defendants ordered him to remove. We disagree.

"[T]he doctrine of sovereign immunity is not available to the state as a defense to claims for just compensation arising under article first, § 11, of the Connecticut constitution. . . . To survive a motion to dismiss on the ground of sovereign immunity, [however] a complaint must allege sufficient facts to support a finding of a taking of land in a constitutional sense." (Citations omitted; internal quotation marks omitted.) *Tamm* v. *Burns*, 222 Conn. 280, 283–84, 610 A.2d 590 (1992). "As an

[3] We note that although the memorandum was titled "brief in opposition to motion for summary judgment," the plaintiff discussed the merits of the defendants' motion to dismiss. See *State* v. *Taylor*, 91 Conn. App. 788, 791–92, 882 A.2d 682 (court will look to substance of motion rather than form or label), cert. denied, 276 Conn. 928, 889 A.2d 819 (2005).

[4] Furthermore, we note that "[t]he trial court has the power to take judicial notice of court files of other actions between the same parties." *In re Mark C.*, 28 Conn. App. 247, 253, 610 A.2d 181, cert. denied, 223 Conn. 922, 614 A.2d 823 (1992).

analytic matter, before a court can review a landowner's claim that he has been deprived of his property without just compensation, the court must first define the property interest that has allegedly been taken." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 253, 662 A.2d 1179 (1995).

In his complaint, the plaintiff attempted to assert a takings claim by alleging that "the defendants took [his] property without just compensation . . . ." The court concluded that "the plaintiff cannot have a property right in the dock that he was ordered to remove because the dock that the plaintiff constructed did not at any time conform to the permit."[5] The court then dismissed the claim because "[t]he plaintiff [had] not alleged that the property, minus the nonconforming dock, lack[ed] any economic value, nor [had] he alleged that he cannot apply for a new permit to build a dock that would conform to the current department criteria."

On appeal, the plaintiff has not argued that his dock conformed to the permit. Instead, the plaintiff argues that the right to build a dock is a riparian right; *Orange* v. *Resnick*, 94 Conn. 573, 109 A. 864 (1920); that riparian rights are property; *Port Clinton Associates* v. *Board of Selectmen*, 217 Conn. 588, 587 A.2d 126, cert. denied, 502 U.S. 814, 112 S. Ct. 64, 116 L. Ed. 2d 39 (1991); and that docks are considered realty. *Vallerie* v. *Stonington*, 253 Conn. 371, 751 A.2d 829 (2000). He has not been denied, however, the right to build a dock; on the contrary, he was granted a permit to build a dock. The

[5] The plaintiff did not assert that he had a property interest in the permit for the dock until this appeal, and, thus, we decline to address that claim. See *In re Anna Lee M.*, 104 Conn. App. 121, 124 n.2, 931 A.2d 949 ("[W]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." [Internal quotation marks omitted.]), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007).

plaintiff simply chose to build a dock that did not conform to the permit, and he has not presented any authority that holds that a person has a property interest in a structure that was built in violation of a permit. We conclude that the plaintiff's takings claim cannot be maintained because he has not been able to demonstrate that a property interest was involved. Therefore, the defendants' motion to dismiss on the ground of sovereign immunity was granted properly.

The judgment is affirmed.

In this opinion the other judges concurred.

MONICA ERVIN *v.* PASQUALE AVALLONE
(AC 28515)

Bishop, Beach and Berdon, Js.

Syllabus

The plaintiff, who had sought to recover from the defendant landlord for, inter alia, breach of contract, appealed to this court from the trial court's judgment in favor of the defendant both on the complaint and on his counterclaim for unpaid rent. *Held*:

1. The plaintiff's claim to the contrary notwithstanding, the fact that the defendant lost a summary process action he had brought against her with respect to the same rental property did not preclude the disposition in his favor of his counterclaim for unpaid rent; while the summary process action was defeated as the result of the absence of a smoke detector on the premises at the time the notice to quit was served, the smoke detector was replaced and remained in place during the ten month time period for which the trial court found the plaintiff liable for use and occupancy payments.
2. The trial court's factual findings with respect to both the description of the property rented by the plaintiff and the plaintiff's failure to sustain her burden of proof on her complaint were not clearly erroneous and were supported by the record.

Argued March 17—officially released May 27, 2008

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior

Court in the judicial district of New Britain, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Domnarski*, *J.*; judgment for the defendant on the complaint and on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Monica Ervin, pro se, the appellant (plaintiff).

Ralph S. Keen III, with whom, on the brief, was *Scott H. Matney*, for the appellee (defendant).

Opinion

BEACH, J. The pro se plaintiff, Monica Ervin, appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the defendant, Pasquale Avallone. The court found in favor of the defendant on the plaintiff's complaint and awarded the defendant damages on his counterclaim for the plaintiff's failure to pay rent. On appeal, the plaintiff claims that the court improperly found her liable to the defendant for past due "rent" because (1) the defendant lost his summary process action against the plaintiff concerning the same residential property lease and (2) the court erroneously found that she rented the premises at a different address.[1] We affirm the judgment of the trial court.

[1] In her brief and at oral argument, the plaintiff also argued that she filed several motions at the trial court that were never heard. This claim, however, was not raised as an issue before this court, and the record reveals no action by the trial court on any interlocutory motions. We therefore decline to address this issue because the record before us is inadequate. See *Bebry* v. *Zanauskas*, 81 Conn. App. 586, 594, 841 A.2d 282 (2004). In reaching that conclusion, we are mindful of the plaintiff's pro se status. "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . Nonetheless, [a]lthough we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Citation omitted; internal quotation marks omitted.) *New Haven* v. *Bonner*, 272 Conn. 489, 497–98, 863 A.2d 680 (2005).

We also note that the plaintiff enumerates four issues in her brief, namely, "(1) whether the trial court was correct in dismissing the plaintiff's civil court case; (2) whether the trial court was correct in granting the defendant

The court reasonably could have found the following facts. After receiving a notice to quit possession of 58 Mills Street, Bristol, the plaintiff tenant brought this action against the defendant landlord, alleging, inter alia, breach of contract, invasion of privacy, negligence, harassment and defamation of character. The defendant filed a counterclaim against the plaintiff seeking unpaid rent and payment for use and occupancy. A trial to the court was held on December 20 and 21, 2006, at which the court heard both this case and the summary process action that the defendant had brought against the plaintiff. On January 3, 2007, the court rendered judgment in favor of the defendant as to both the plaintiff's complaint and the defendant's counterclaim, and ordered that the plaintiff pay the defendant $8000 in past due rent. The court noted that it "has carefully reviewed the allegations of the plaintiff's complaint and considered the evidence with regard thereto and assessed the credibility of the witnesses. The court concludes that the plaintiff has not sustained her burden of proof with regard to any of the causes of action alleged in the counts of her complaint." As to the summary process action brought by the defendant, the court ruled in favor of the plaintiff, finding that she was excused from her obligation to pay rent during the time period at issue because the defendant had failed to install smoke detectors at the premises. The plaintiff thereafter appealed from the judgment in this action only.

The plaintiff first challenges the court's conclusion that she owes the defendant rent, despite the fact that the defendant lost a summary process action against

counterplaintiff rent payment due to the fact that the defendant counterplaintiff lost his nonpayment of rent case for January, 2006; (3) whether the trial court was correct in granting rent payments for months [that] the defendant never filed for in the eviction case; and (4) whether the trial court was correct in granting rent payment to the defendant counterplaintiff due to the fact that the plaintiff never rented 60 Mills Street [in Bristol]." We have consolidated the plaintiff's issues on appeal for ease of organization.

her.[2] The court found, however, that the plaintiff resided at the premises in question and did not pay rent during the ten months following the summary process action. Moreover, we fail to see how the disposition of the defendant's summary process action bars success on his counterclaim. The court found, on the basis of the evidence, that the summary process action was defeated by the absence of a smoke detector at the time the notice to quit was served. The smoke detector was replaced, however, and remained in place during the ten month time period for which the court found the plaintiff liable for use and occupancy payments.

The plaintiff also asserts that the court erroneously found that she had rented the premises at a different address. We examine a trial court's factual findings under the clearly erroneous standard of review. See *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 727, 941 A.2d 309 (2008). The record reveals that the plaintiff alleged that she lived in premises at 58 Mills Street. The defendant admitted this allegation in his answer, but in his counterclaim he sought payment for, inter alia, use and occupancy of 60 Mills Street. The record shows that the building was known as 58-60 Mills Street. Although greater precision may be

[2] We note that in its January 3, 2007 judgment, the court characterized the money damages awarded as "past due rent" rather than as payment for use and occupancy. See *Housing Authority* v. *Hird*, 13 Conn. App. 150, 157–58, 535 A.2d 377 ("The statutory obligations of the landlord and tenant continue even when there is no longer a rental agreement between them. Termination of the lease does not terminate the tenancy since, upon service of a notice to quit possession, a tenancy at sufferance is created. . . . Even though a tenant at sufferance is excused from a duty to pay the stipulated rent under the lease, the obligation to pay a fair rental value for the use and occupancy of the dwelling unit remains. . . . Therefore, even if the defendant believed that the lease had ended and that she was relieved from a duty to pay a stipulated rent, her obligation to pay for her use and occupancy of the premises continued." [Citations omitted.]), cert. denied, 209 Conn. 825, 552 A.2d 433 (1988). Because neither party raised on appeal a potential discrepancy between contractual "rent" and the obligation to pay fair rental value, we decline to address that issue here.

required in the summary process context, we find no prejudicial confusion as to this case. The court's factual findings as to the description of the premises were not clearly erroneous and are supported by the record.

The plaintiff additionally argues that the court improperly ruled in the defendant's favor on her complaint against him. After thoroughly examining the record and considering the briefs and oral arguments of the parties, we conclude that the court's findings regarding her failure to sustain her burden of proof were not clearly erroneous. The court's findings are amply supported by the record.

The judgment is affirmed.

In this opinion BISHOP, J., concurred.

BERDON, J., concurring. I would affirm the judgment of the trial court.

MICHAEL J. JARRETT *v.* COMMISSIONER OF CORRECTION
(AC 28340)

Gruendel, Lavine and Pellegrino, Js.

Syllabus

The petitioner, in a second amendment to a third petition, sought a writ of habeas corpus, alleging, inter alia, that counsel who had represented him on his first habeas petition was ineffective in failing to allege that the petitioner's trial counsel was deficient in not having the petitioner's competency evaluated at the time that the petitioner rejected a plea offer from the state. The habeas court rendered judgment denying the petition in part and granting it in part, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus and determined both that the petitioner's trial counsel, who had the petitioner's competency evaluated and monitored the petitioner's behavior throughout his representation, was not deficient in failing to secure a second competency evaluation of the petitioner at the time he rejected

the state's plea offer, and that the petitioner's claim against his habeas counsel, which was grounded in the question of the petitioner's competency and was derivative of the claim involving trial counsel, also failed; there was sufficient evidence for the habeas court to have found that the petitioner rejected the plea offer because he wanted to explain his side of the story to the trial court, not because of any self-defeating attitude or apathy on the part of the petitioner, the petitioner presented no evidence to overcome the presumption of his competency at the time he rejected the plea offer, the habeas court having been free to reject certain testimony concerning the petitioner's incompetence by a psychiatrist who interviewed him twenty years after he rejected the plea offer, and there was substantial evidence in the record to support the habeas court's finding that the petitioner was able to communicate with his trial counsel and to assist in his defense.

Argued March 10—officially released May 27, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *T. Santos*, *J.*; judgment denying the petition in part; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Michael Oh, special public defender, for the appellant (petitioner).

Bruce R. Lockwood, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. This appeal concerns the third petition for a writ of habeas corpus filed by the petitioner, Michael J. Jarrett, and its protracted procedural history. The petitioner appeals from the judgment of the habeas court denying in part and granting in part his petition

for a writ of habeas corpus.[1] On appeal, the petitioner claims that the court improperly found that he did not receive ineffective assistance from counsel with respect to (1) his criminal trial and (2) the trial of his first petition for a writ of habeas corpus (first petition). We affirm the judgment of the habeas court.[2]

The event that eventually led to the petitioner's appeal occurred on September 6, 1983, when the petitioner, who was then in his thirties, stabbed to death his son's teenage baby-sitter with whom he was romantically involved, pursuant to a suicide pact. Although the petitioner inflicted injuries on himself, his suicide attempt obviously failed.[3] See *State* v. *Jarrett*, 218 Conn. 766, 767, 591 A.2d 1225 (1991). The petitioner was charged with murder in violation of General Statutes § 53a-54a (a). *State* v. *Jarrett*, supra, 767. The petitioner "interposed a multifaceted defense of mental disease or defect and elected to be tried to a three judge panel of the Superior Court. The court found him guilty as charged and sentenced him [on January 31, 1986] to a

[1] The court, *T. Santos, J.*, denied the petition as to the allegations of ineffective trial counsel. Judge Santos concluded that the representation of habeas counsel was deficient for failing to file an appeal from the judgment rendered on the first petition for a writ of habeas corpus filed in 1996 and restored the petitioner's appellate rights. The appeal pursuant thereto recently was decided. See *Jarrett* v. *Commissioner of Correction*, 106 Conn. App. 317, 942 A.2d 426 (2008) (affirming judgment of first habeas court, *W. Sullivan, J.*).

[2] The court granted the petition for certification to appeal.

[3] Our Supreme Court found that the panel of three Superior Court judges reasonably could have found that "[b]ecause of a substantial age disparity between the [petitioner] and [the] victim, the victim's mother filed a complaint that led to the [petitioner's] conviction of risk of injury to a child, for which he received a suspended sentence conditioned on his not seeing the victim. Distressed by the efforts to enforce their separation, which the [petitioner] and the victim knowingly tried to circumvent, they entered into a suicide pact. Each of them alluded to their plan of action in conversations with a mutual friend, shortly before the fatal day; the [petitioner] told the friend that he intended to do something that he characterized as dangerous." *State* v. *Jarrett*, 218 Conn. 766, 767–68, 591 A.2d 1225 (1991).

term of imprisonment of fifty years." Id. In July, 1990, the petitioner filed a direct appeal.[4] His conviction was affirmed by our Supreme Court. Id. The petitioner was represented by Carl D. Eisenmann, an assistant public defender, at trial and on direct appeal.

The petitioner retained private counsel, Ernest Diette, to file an amended petition for a writ of habeas corpus in June, 1996. In the first petition, the petitioner alleged in count one that Eisenmann's representation was ineffective because the petitioner was unable to communicate effectively with him and that Eisenmann refused to let him testify. In count two, the petitioner alleged that there was undue delay in filing his appeal due to systemic problems in the office of the public defender. The first habeas court, *W. Sullivan, J.*, denied the first petition, finding that the petitioner had not proven that Eisenmann's representation was ineffective or that the petitioner was prejudiced by the representation.[5] See *Jarrett* v. *Barbieri*, Superior Court, judicial

[4] In his direct appeal, the petitioner claimed that "the state adduced insufficient evidence of his commission of the underlying crime or to rebut his defense of mental disease or defect"; *State* v. *Jarrett*, supra, 218 Conn. 770; and if he were not entitled to an acquittal, he claimed, in the alternative, that he was entitled to a new trial because "the trial court deprived him of his rights under Practice Book § 760 [now § 40-19] and his constitutional rights to due process by relying in part on a statement 'on the issue of guilt' that he had made during his court-ordered examination by the state's psychiatrist, [Donald R.] Grayson." *State* v. *Jarrett*, supra, 773–74.

[5] In his memorandum of decision, Judge Sullivan found the following facts that are relevant to the issues in this appeal. In the criminal case, the "petitioner was offered a plea agreement whereby he would plead guilty to manslaughter, and he would receive a sentence of twenty years incarceration, execution suspended after fifteen years, with the right to argue for less. The petitioner testified that he was not going to plead guilty to something he was not guilty of. The petitioner testified that he believed that if you do something by mutual agreement, such as this suicide pact, then it is not murder. The petitioner testified that he believed that if he and his girlfriend could not live together here, then they would meet in another life. He stated that his girlfriend agreed with this belief 100 percent. The petitioner testified that his attorney brought to him the same aforementioned plea agreement offer at various times. . . . Eisenmann testified that he urged the petitioner to accept the plea agreement offer many times. . . . Eisenmann said the

district of New Haven, Docket No. CV-95-0371173-S (June 25, 1996). That judgment recently was affirmed in *Jarrett* v. *Commissioner of Correction*, 106 Conn. App. 317, 942 A.2d 426 (2008). See footnote 1.

The petitioner filed a third petition for a writ of habeas corpus in December, 2004.[6] In the second amendment to the third petition, filed by counsel, the petitioner alleged that Diette rendered ineffective assistance because he failed to (1) allege that Eisenmann did not question the petitioner's competency at the time he rejected the state's plea offer and (2) file a direct appeal from the denial of the first petition.

The court, *T. Santos*, *J.*, tried the third petition in May, 2006. She consolidated the claims alleged against Eisenmann, finding that they concerned his failure to have the petitioner's competency evaluated when he refused the state's plea offer. The claims against Diette in count one were derivative in that they related to Diette's failure to allege in the first petition that Eisenmann's representation was deficient for failing to have the petitioner's competency reevaluated.

The court found, on the basis of Eisenmann's testimony, that he was appointed as a public defender to represent the petitioner. In accordance with General Statutes § 54-56d,[7] Eisenmann had the petitioner's competency evaluated by Walter A. Borden, a psychiatrist.

plea bargain was a good offer." *Jarrett* v. *Barbieri*, Superior Court, judicial district of New Haven, Docket No. CV-95-0371173-S (June 25, 1996).

[6] The petitioner filed a second petition for a writ of habeas corpus in 2001. See *Jarrett* v. *Commissioner of Correction*, Superior Court, judicial district of New Haven, Docket No. CV-01-0459316 (January 16, 2004). The habeas court, *Corradino*, *J.*, granted the motion to dismiss filed by the respondent, the commissioner of correction, on the basis of the petition's being a successive petition on the issue of ineffective assistance of trial counsel. The petitioner's counsel agreed to the dismissal because the dismissal would not preclude the petitioner from filing another petition alleging that Diette rendered ineffective assistance on the first petition.

[7] General Statutes § 54-56d provides in relevant part: "(a) Competency required. Definition. A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a

In his report dated November 19, 1983, Borden found that the petitioner was competent to stand trial.[8] Borden's report stated, however, that "[t]he only area where there is a question related to his competency is in the area of a self-defeating attitude, which appeared to be a major theme in his life and which might contribute to his sabotaging whatever legal defense he and his counsel pursue. However, at present this does not appear to be the case but [s]hould be considered if at any point during the legal proceedings he appears to be acting inappropriately." Borden later performed a full psychiatric evaluation of the petitioner.

In addition, Eisenmann had the petitioner's competency evaluated by John A. Cegalis, a clinical psychologist, in June, 1984, and by Peter M. Zeman, a psychiatrist, and David F. Berry, a psychologist, whose evaluations were completed in February and June, 1985, respectively. All four of the petitioner's mental health experts found him to be psychotic, having schizophrenic disorder, paranoid type.[9] All four of them opined that the

defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense.

"(b) Presumption of competency. A defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue. The burden of going forward with the evidence shall be on the state if the court raises the issue. The court may call its own witnesses and conduct its own inquiry.

"(c) Request for examination. If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency. . . ."

[8] Borden made the following findings with respect to the petitioner. "[The petitioner], on examination, is a man of above average intelligence. He was able to give an account of understanding of the charges against him as well as a basic understanding of court procedures and roles of participants. He has an appreciation of possible penalties. He can provide counsel with a factual account of the issues involved in the case and he is able to work with counsel in his own defense."

[9] The four mental health experts who testified at the petitioner's criminal trial "described the [petitioner] as suffering from delusional beliefs about 'astroplaning,' reincarnation, and the existence of life on another planet. In

petitioner could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of the law on September 6, 1983. Donald R. Grayson, a psychiatrist, evaluated the petitioner on behalf of the state. He also found the petitioner to be psychotic but concluded that he was capable of conforming his conduct to the requirements of the law.

The court found that prior to the criminal trial, Eisenmann negotiated a plea offer under which the petitioner could enter a plea of nolo contendere or plead guilty to manslaughter under the *Alford* doctrine[10] on the basis of extreme emotional disturbance or on the basis of intending to injure but not to kill. Pursuant to the plea offer, the petitioner's sentence was to be limited to twenty years, and the prosecutor was to recommend fifteen years incarceration. The petitioner would have the right to argue for less and to go before the sentence review board. Eisenmann presented the offer to the petitioner, and the two of them discussed the offer a number of times. The petitioner understood that he was exposed to a sentence of sixty years or a commitment to Whiting Forensic Division of Connecticut Valley Hospital if he went to trial. Eisenmann advised the petitioner to accept the offer. The petitioner did not accept the offer because he wanted to go to trial and to explain why he killed the victim and why he was going to kill himself, too.[11] The petitioner told Eisenmann that he did not want to take legal responsibility for the victim's death because it was his intention to complete the suicide pact, despite the importance of the plea offer. The court also found that after he was sentenced, the

their view, the [petitioner's] psychopathology genuinely led him to believe that, in stabbing the victim, he was not harming her or causing her pain but was instead enabling her to be reunited with him in another place and in another form." *State* v. *Jarrett*, supra, 218 Conn. 772.

[10] See *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[11] Borden testified at the criminal trial that the petitioner was a suicide risk.

petitioner began to read about and to speak with others about reincarnation, leading him to decide that suicide was not the answer.

Walter C. Bansley testified as a criminal defense expert on behalf of the petitioner at trial on the third petition. He also reviewed the transcripts of the criminal trial and the trial of the first petition, Borden's report and the reports of the other mental health professionals. According to Bansley, the standard of care in a case in which an attorney thought that the client could not participate in formulating a defense strategy required the attorney to refer the criminal defendant for a competency evaluation. In Bansley's opinion, when the petitioner refused to accept the plea offer, Eisenmann should have referred the petitioner for another competency evaluation.

The court also heard testimony from Kenneth M. Selig, a psychiatrist and member of the Connecticut bar, who was retained by the petitioner to determine whether there were any psychiatric issues relevant to this matter. In forming his opinion, Selig reviewed the petitioner's mental health evaluations from before and after the petitioner's arrest, and from before and after the criminal trial. He read the transcripts of the criminal trial and the trial of the first petition. Selig interviewed the petitioner in 2002 and one week prior to the habeas trial before Judge Santos. Selig opined that the petitioner was psychotic between 1983 and 1985, at a minimum. He further opined that there was a nexus between the psychosis and the issue of competency at the time the petitioner was presented with the plea offer and that the petitioner was not competent to appreciate the offer. According to Selig, the petitioner was not able to pull himself out of the dominant psychotic thinking in order to evaluate rationally the cost and benefits of

the plea offer and going to trial.[12] The court did not assign much weight to Selig's testimony, however, finding that Selig evaluated the petitioner almost twenty years after the state extended the plea offer and that the petitioner fully appreciated the offer.

The court concluded that Eisenmann thoroughly investigated the criminal case and was prepared to defend the charges against the petitioner on the basis of the petitioner's mental disease or defect. The case need not have been tried, however, as the state made the petitioner a plea offer. Eisenmann conveyed the offer to the petitioner on numerous occasions, emphatically advising him to accept the offer. Eisenmann, however, did not have the power to enter a plea that was inconsistent with the petitioner's wishes. "[T]he constitutional rights of a defendant cannot be waived by his counsel under such circumstances [where the defendant does not want to plead guilty]. . . . [This] would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an opportunity to do under a plea of not guilty." *Brookhart* v. *Janis*, 384 U.S. 1, 7–8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

The petitioner's testimony at the trial on the third petition was consistent with his testimony at trial on the first petition. The petitioner did not want to enter a guilty plea because he wanted to tell his side of the story and to convince the fact finder that he was not guilty of murder.[13] To convince the court that he was

[12] In its memorandum of decision, the court stated that implicit in the petitioner's claim that Eisenmann's assistance was ineffective is the notion that the reasonableness of the petitioner's rejecting the state's plea offer can be measured by the difference between the possible maximum sentence for the murder charge then pending and the sentence offered by the state for a plea of guilty of manslaughter.

[13] The petitioner, in fact, did not testify at the criminal trial on the basis of Eisenmann's advice that he should not testify. Eisenmann testified at the trial in this case that he advised the petitioner that he would come across to the trial court as being too intelligent and derail the foundation of mental

not guilty, the petitioner alleged an affirmative defense that he was not guilty by reason of mental disease or defect. Four expert witnesses, psychologists and psychiatrists, evaluated the petitioner and testified on his behalf at the criminal trial. The state's expert, Grayson, agreed in large part with the petitioner's experts, but he did not agree that the petitioner was not capable of conforming his conduct to the requirements of law.

On the basis of the evidence presented at the habeas trial in this case, the court found that there was no evidence that Eisenmann's assessment and conclusions, which resulted in no further competency evaluations of the petitioner, was deficient performance. To the contrary, the petitioner's preparation for trial, including meetings with mental health experts for purposes of evaluation, underscored that the petitioner was able to work with counsel and was capable of assisting in his defense. Eisenmann never detected a change in the petitioner's demeanor, attitude or line of reasoning from the time he first met him. The court found that there was no evidence that the petitioner did not understand the proceedings or was unable to assist in his defense. The petitioner was clear that he did not want to accept the plea offer because he wanted to go before the panel of three judges and explain the situation.

On the basis of its findings, the court concluded that the petitioner could not prevail on the claims of ineffective assistance of trial and habeas counsel on the issue of a competency evaluation at the time the petitioner rejected the plea offer. This conclusion is supported by the court's finding that Eisenmann reasonably relied on Borden's opinion that the petitioner was competent

disease or defect laid by the four mental health professionals. The court concluded that Eisenmann's advice was not deficient performance of trial counsel. The petitioner has not challenged that conclusion on appeal.

to stand trial, and monitored the petitioner's behavior and observed no changes indicative of a self-defeatist attitude. Eisenmann reasonably believed that the petitioner's rejection of the plea offer did not evidence incompetence because the petitioner believed that he was not guilty and wanted to tell his side of the story. The court also found that the petitioner rejected the plea offer because he wanted to tell his side of the story, not because he did not care about his defense. The petitioner consistently stated that reason from the time he met with Eisenmann until he testified at the trial of his first petition and then in this case. The petitioner therefore failed to demonstrate that Eisenmann's performance was deficient.

As to the claim that Diette provided ineffective habeas assistance for failing to allege that Eisenmann's representation was ineffective for failing to obtain a second competency evaluation, it was derivative of the claim against Eisenmann and, thus, failed, too. See *Denby* v. *Commissioner of Correction*, 66 Conn. App. 809, 812–13, 786 A.2d 442 (2001) ("To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Only if the petitioner succeeds in what he admits is a herculean task will he receive a new trial." [Citations omitted; internal quotation marks omitted.]), cert. denied, 259 Conn. 908, 789 A.2d 994 (2002); but see footnote 1.

"The standard of appellate review of habeas corpus proceedings is well settled. The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations,

are not facts in this sense. . . . Whether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by [an appellate] court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 576, 941 A.2d 248 (2008). The petitioner does not claim that the court's findings are clearly erroneous.

To determine whether the petitioner has demonstrated that counsel's performance was ineffective, we apply the two part test established in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Claims of ineffective assistance during a criminal proceeding "must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 575–76.

The substance of the petitioner's claim on appeal is that Eisenmann failed to recognize the self-defeating attitude that Borden had forewarned. The petitioner does not argue that his failure to accept the plea offer is evidence of incompetence itself but that it is evidence that he did not care about his defense. The shortcoming with that argument is that the court found that the petitioner rejected the plea offer, not because the petitioner did not care about his defense, but because he did not think that he was guilty of murder and wanted

to explain his side of the story to the trial court, which suggests that he cared a good deal about his defense. The court found that Eisenmann was aware of Borden's admonition and monitored the petitioner's behavior throughout his representation. At no time did the petitioner's behavior exhibit self-defeat.

The petitioner also argues that at the time he rejected the plea offer, he did not have the capacity to make reasoned choices due to his apathy and delusional condition. The theme of apathy repeats itself in the petitioner's argument and is heavily reliant on his trial testimony. He testified that the plea offer did not mean anything to him. "I wanted to go to trial. I wanted to be able to have a chance to explain what had happened, why we did what we did. And if I had taken the offer, that wouldn't have happened. And I planned on killing myself at the end, anyway, to join her, so it didn't matter if they gave me five minutes or 500 years." This testimony was sufficient for the habeas court to have found that the petitioner rejected the plea offer because he wanted to explain himself to the trial court. Moreover, the petitioner's statement concerning his desire to join the victim does not reflect apathy but a mission and desire to fulfill his pact with the victim.

In the final analysis, the petitioner presented the court with no persuasive evidence that he was not competent when he rejected the plea offer. Selig had no opinion as to Borden's November 19, 1983 finding that the petitioner was competent to stand trial. Our statutes define incompetency as the inability to understand the proceedings or to assist in one's defense. See *State* v. *Bagley*, 101 Conn. App. 653, 654–55, 922 A.2d 1128 (2007). The court found that the petitioner understood the charges against him, the role of the court, the prosecutor and his counsel, and the risks of being found guilty or being confined to the Whiting Forensic Division of Connecticut Valley Hospital. The court found explicitly

that the petitioner cooperated with counsel and helped to prepare for trial by undergoing numerous psychiatric and psychological evaluations in support of the affirmative defense of mental disease or defect.

Moreover, the petitioner presented no evidence to overcome the presumption of his competency at the time he rejected the plea offer. See General Statutes § 54-56d (b). The respondent, the commissioner of correction, has pointed out that to overcome the presumption of competency, the petitioner was required to demonstrate that there was a reasonable doubt about his competency at trial. See *State* v. *Ross*, 269 Conn. 213, 272, 849 A.2d 648 (2004). A reasonable doubt is established by means of substantial evidence, not mere allegations of incompetence. Id. Although Selig testified that the petitioner was incompetent, as noted, the court did not give much weight to his testimony, given that he interviewed the petitioner twenty years after the fact. The finder of fact is the arbiter of credibility. *Morales* v. *Commissioner of Correction*, 99 Conn. App. 506, 510, 914 A.2d 602, cert. denied, 282 Conn. 906, 920 A.2d 308 (2007). The finder of fact may believe, some, none or all of the testimony of an expert witness. *State* v. *Cuesta*, 68 Conn. App. 470, 484, 791 A.2d 686, cert. denied, 260 Conn. 914, 796 A.2d 559 (2002). Even though a criminal defendant is mentally ill, his illness is not per se evidence of incompetence. *State* v. *Ross*, supra, 273. Even attempted suicide does not establish reasonable doubt as to competence. *Myers* v. *Manson*, 192 Conn. 383, 388, 472 A.2d 759 (1984).

Our Supreme Court's decision in *Ross* is helpful to resolving the issue before us now. That case demonstrates that a competent, but mentally ill, criminal defendant may choose not to follow the advice of counsel and to choose a course others think clearly is not in his best interest. "The defendant's suicide attempt, his attempt to stipulate to the imposition of the death

penalty and his counsel's statements at the hearing on the motion for a competency examination do not compel a different conclusion [that the defendant was unable to assist counsel]." *State* v. *Ross*, supra, 269 Conn. 273. "Similarly, the defendant's past attempts to stipulate to the imposition of the death penalty did not raise a reasonable doubt as to his competency, especially in light of the fact that he was found competent . . . at the time he was pursuing the stipulation." Id. Our Supreme Court concluded with respect to the defendant in *Ross* that he "not only understood the nature of the proceedings but also was able to communicate with and assist his counsel." Id. The lesson is that courts may not construe a defendant's decision to proceed to trial as evidence of incompetence merely because others conclude the decision is not in the defendant's best interest. In this case, the court found that the petitioner was able to communicate with Eisenmann and to assist with the defense. On the basis of our review, we conclude that there is substantial evidence in the record to support those findings and legal conclusions.

For these reasons, the court properly concluded that Eisenmann's representation was not deficient for failing to secure a second competency evaluation of the petitioner. The claim against Diette that is grounded in the question of the petitioner's competence is derivative of the claims against Eisenmann and also fails. See *Lozada* v. *Warden*, 223 Conn. 834, 842, 613 A.2d 818 (1992).

The judgment is affirmed.

In this opinion the other judges concurred.

STATEWIDE GRIEVANCE COMMITTEE *v.* REBECCA L. JOHNSON (AC 28279)

Gruendel, Lavine and Hennessy, Js.

Syllabus

The defendant attorney, who was presented to the court by the plaintiff statewide grievance committee in connection with the defendant's representation of a client in an employment discrimination action, appealed to this court from the judgment of the trial court finding her in violation of the Rules of Professional Conduct and suspending her from the practice of law for eighteen months. *Held*:

1. The defendant's claim to the contrary notwithstanding, the trial court properly conducted the presentment proceeding de novo.
2. The defendant could not prevail on her claim that she was denied due process when she was not able to confront and to cross-examine the complainant at the presentment before the trial court, which admitted a transcript of the complainant's prior testimony from the hearing before the plaintiff's reviewing committee; under the circumstances here, where the defendant had a full and fair opportunity and did cross-examine the complainant at the hearing before the reviewing committee and where the complainant was unavailable at trial, the admission of the complainant's prior testimony did not deprive the defendant of due process.

Argued February 8—officially released May 27, 2008

Procedural History

Presentment by the plaintiff for alleged professional misconduct by the defendant, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Lager*, *J.*; thereafter, the court denied the defendant's motion to dismiss; judgment suspending the defendant from the practice of law for eighteen months, from which the defendant appealed to this court. *Affirmed.*

Rebecca L. Johnson, pro se, the appellant (defendant).

Maureen A. Horgan, assistant bar counsel, for the appellee (plaintiff).

Opinion

HENNESSY, J. The defendant, Rebecca L. Johnson, an attorney licensed to practice law in the state of Connecticut,[1] appeals from the judgment rendered on a presentment in which the trial court adjudged her guilty of professional misconduct in violation of rules 1.4 (a),[2] 1.5 (b) and (c)[3] and 1.15 (b)[4] and suspended her from the practice of law for eighteen months. On appeal, the defendant claims that the court (1) did not conduct the presentment proceeding de novo, and (2) violated her due process rights when she was unable

[1] The defendant is presently suspended from the practice of law.

[2] Rule 1.4 (a) of the Rules of Professional Conduct (2003) provides: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

[3] Rule 1.5 of the Rules of Professional Conduct (2003) provides in relevant part: "(b) When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. This subsection shall not apply to public defenders or in situations where the lawyer will be paid by the court or a state agency.

"(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subsection (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages of the recovery that shall accrue to the lawyer as a fee in the event of settlement, trial or appeal, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

[4] Rule 1.15 (b) of the Rules of Professional Conduct (2003) provides: "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

to confront and to cross-examine the complainant during the presentment. We affirm the judgment of the trial court.

The following facts are relevant to the defendant's appeal. The defendant was duly admitted as a member of the Connecticut bar on or about December 10, 1993. In December, 2001, the complainant, Anthony Amabile, retained the defendant to represent him regarding a claim of employment discrimination against his former employer. The complainant gave the defendant a $750 retainer, and a retainer agreement was signed. The defendant prepared a complaint dated February 19, 2002, and filed it with the commission on human rights and opportunities (commission).Thereafter, the commission forwarded the complaint to the Equal Employment Opportunity Commission (federal agency) for processing. On April 24, 2002, the federal agency contacted the complainant by letter, requesting additional information to process the complaint. The federal agency informed the complainant that the information could be given either through an in-person interview at the federal agency or through a questionnaire, but the information had to be received within thirty days or the complaint would be dismissed. The defendant requested the questionnaire, but the federal agency did not send a complete document. On or about May 30, 2002, the defendant requested the missing pages from the federal agency. On June 24, 2002, the full questionnaire was sent to the defendant via facsimile. In July, 2002, the defendant learned that as a result of a prior presentment, she was being disciplined by the courts and was suspended from the practice of law for one year beginning on September 1, 2002. On February 24, 2003, the federal agency sent notice to the defendant that it had dismissed the complainant's claim because the requested information had never been provided. The dismissal notice advised the complainant that he

had ninety days from that date to file a lawsuit in either state or federal court. No action was filed on the complainant's behalf. He therefore requested a return of the $750 retainer, but no refund was made.

The plaintiff, the statewide grievance committee, presented its case to the court at a hearing on August 4, 2006. The plaintiff called the defendant to testify and also introduced a number of exhibits. The plaintiff filed transcripts of the proceedings before the plaintiff's reviewing committee[5] in the case and a record of past grievances that had been filed against the defendant. The plaintiff rested its case on this evidence. The defendant was allowed a continuance to subpoena witnesses for her defense. When court reconvened in this matter on August 24, 2006, the defendant filed a motion to dismiss on the basis of the alleged denial of her due process rights to a fair trial. This motion was based on her claim that she had been denied the right to cross-examine the complaining witness during the Superior Court presentment proceeding. When asked by the court whether she had the chance to question the complainant at the prior hearing before the reviewing committee, the defendant stated that she had. The court questioned the plaintiff as to the complainant's availability, and the court was informed that the complainant was residing out of state and was unable to make the trip to court. The court denied the motion to dismiss and admitted into evidence the transcript of the complainant's prior testimony and his cross-examination by the defendant.

On November 1, 2006, in a memorandum of decision, the court held that the plaintiff had demonstrated by clear and convincing evidence that the defendant was guilty of professional misconduct. The court suspended the defendant from the practice of law for eighteen

[5] See Practice Book § 2-35.

months to run concurrently with the prior imposed suspension that she was under at that time. It was further ordered that to be readmitted to practice, the defendant must apply for such readmission and show recent participation in a professional ethics course focusing on Connecticut's Rules of Professional Conduct and a course in law office management, both to last a minimum of three hours, and to take and pass the Multistate Professional Responsibility Examination within three years of the application for readmission.

Before addressing the defendant's specific claims, our analysis begins with a review of the legal principles that govern attorney disciplinary proceedings. "An attorney is admitted to the practice of law on the implied condition that the continuation of this right depends on remaining a fit and safe person to exercise it." *Statewide Grievance Committee* v. *Fountain*, 56 Conn. App. 375, 377, 743 A.2d 647 (2000). The Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards in both their personal and professional lives. See Rules of Professional Conduct, preamble. As officers and commissioners of the court, attorneys are in a special relationship with the judiciary and are "subject to the court's discipline." *Statewide Grievance Committee* v. *Fountain*, supra, 377.

It is well established that "[j]udges of the Superior Court possess the inherent authority to regulate attorney conduct and to discipline the members of the bar. . . . It is their unique position as officers and commissioners of the court . . . which casts attorneys in a special relationship with the judiciary and subjects them to its discipline. . . . [T]he judges have empowered the statewide grievance committee to file presentments in Superior Court seeking judicial sanctions against those claimed to be guilty of misconduct. . . .

In carrying out these responsibilities . . . the [statewide grievance committee] is an arm of the court . . . .'' (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 838, 633 A.2d 296 (1993), quoting *Sobocinski* v. *Statewide Grievance Committee*, 215 Conn. 517, 525–26, 576 A.2d 532 (1990). ''A court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession.'' *Statewide Grievance Committee* v. *Fountain*, supra, 56 Conn. App. 378.

Our court recently has clarified the appropriate appellate standard of review for cases involving attorney grievance appeals. In *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007), this court, after thorough analysis, determined that ''the clearly erroneous standard . . . is the preferable standard of review in attorney grievance appeals.'' Id., 613. ''A court reviewing an attorney disciplinary proceeding, therefore, retains its inherent authority over the discipline of its officers in those instances when, despite the evidence in the record, it nevertheless is left with a definite and firm conviction that a mistake has been made.'' Id., 614. With that standard in mind, we turn to the defendant's claims.

I

The defendant claims that the court did not conduct the presentment proceeding de novo. The plaintiff argues that after it initiated the presentment, a de novo evidentiary proceeding was held. We agree with the plaintiff.

The grievance review committee and the courts have their own distinct functions in the grievance process. ''[G]rievance panels and reviewing committees carry

out what are essentially investigative, fact-bound functions that only determine the probability that an act of attorney misconduct has occurred. [T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. . . . For its part, the statewide grievance committee's only function . . . was to initiate the presentment. . . . The ultimate decision as to whether an act of misconduct had occurred reposed solely with the judge, as did the power to administer an appropriate sanction." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Presnick*, 215 Conn. 162, 167, 575 A.2d 210 (1990). We conclude that the trial court conducted a de novo evidentiary proceeding on the presentment in this case.

II

The defendant claims that she was denied due process of law when she was not able to confront and to cross-examine the complainant at the presentment before the court. The plaintiff argues that the court was correct in admitting the transcripts of the reviewing committee hearings into evidence upon the unavailability of the complainant. We agree with the plaintiff.

The following facts are relevant to the defendant's claim. The plaintiff offered the transcripts of the reviewing committee's hearings without objection from the defendant. It was only when the defendant was told that the plaintiff was resting after her testimony that she objected to the offer of the complainant's testimony through the transcripts. The defendant was then given a continuance to subpoena the witnesses she wanted to present for her case-in-chief. On the date that was set for resuming the hearing, the defendant had not subpoenaed the complainant and instead went forward with an oral motion to dismiss on the basis of her claim

that she was denied her right to cross-examine the complainant. At that hearing, counsel for the plaintiff stated to the court that she had spoken to the complainant since the first hearing and that he lived out of state and was not able to make the trip to court. During a colloquy with the court, the defendant twice admitted that she had cross-examined the complainant at the prior reviewing committee hearing. The court made a finding orally that the complainant was unavailable and that there was no evidence before the court that the reliability or veracity of the complainant had been brought into question. After ruling, the court took a brief recess so that the defendant could consider what evidence she wanted to present in her defense. Representing herself, she then presented her case-in-chief to the court.

"We begin our analysis with a review of the legal principles that govern attorney disciplinary proceedings. In part because such actions are adversary proceedings of a quasi-criminal nature . . . attorneys subject to disciplinary proceedings are entitled to due process of law. . . . A license to practice law is a property interest that cannot be suspended without due process. . . . Due process, however, is a flexible concept, and a determination of the particular process that is due depends on the nature of the proceeding and the interests at stake." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Botwick*, 226 Conn. 299, 306–307, 627 A.2d 901 (1993).

Because a grievance hearing is quasi-criminal in nature, we look to criminal law to resolve the defendant's claim. "Under *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has

had a prior opportunity to cross-examine the declarant."[6] *State* v. *Slater*, 285 Conn. 162, 169, 939 A.2d 1105 (2008).

The record clearly shows that the defendant had a full and fair opportunity and did in fact cross-examine the complainant at the reviewing committee hearing. Admission of the complainant's prior testimony did not deprive the defendant of due process.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN ASHLEY FARMER (AC 27895)

Gruendel, Beach and Peters, Js.

Syllabus

Convicted of the crimes of kidnapping in the second degree and assault in the third degree in connection with an incident involving C, the defendant, who had been acquitted of sexual assault in the first degree in connection with the same incident, appealed to this court. The defendant claimed, inter alia, that the trial court misapplied the rule of evidence (§ 6-11 [c]) governing the admission of constancy of accusation testimony when it admitted certain testimony from two witnesses concerning C's description of the injuries inflicted on her by the defendant. *Held*:

1. The nonconstitutional claim by the defendant that, although the constancy of accusation testimony was admissible with respect to the sexual assault charge, the trial court should not have admitted that testimony without informing the jury to disregard it with respect to the kidnapping and assault charges did not warrant appellate review, the defendant not having objected to the admission of the testimony of either of the constancy of accusation witnesses on that basis at trial.
2. The defendant's unpreserved claim that he was entitled to a new trial because of defects in the trial court's jury instructions on constancy of

[6] Under the United States Supreme Court's decision in *Crawford*, a testimonial statement is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (Internal quotation marks omitted.) *Crawford* v. *Washington*, supra, 541 U.S. 51; *State* v. *Slater*, 285 Conn. 162, 170, 939 A.2d 1105 (2008). The complainant's testimony was therefore testimonial.

accusation evidence was unavailing; the defendant, who neither objected to the instructions at trial nor filed a request to charge on the analysis of constancy of accusation testimony, could not on appeal be heard to challenge the validity of the trial court's instructions, his counsel having acknowledged approval of that court's instructions and the Supreme Court previously having determined that arguments about evidence of constancy of accusation have no constitutional implications.

Jury instruction that constancy of accusation evidence may be used to corroborate a complainant's testimony only with respect to a charge of sexual assault, suggested for future cases.

Argued March 25—officially released May 27, 2008

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, kidnapping in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty of the lesser included offenses of kidnapping in the second degree and assault in the third degree, from which the defendant appealed to this court. *Affirmed*.

Glenn W. Falk, special public defender, for the appellant (defendant).

Timothy F. Costello, special deputy assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Brian Preleski*, senior assistant state's attorney, for the appellee (state).

Opinion

PETERS, J. The constancy of accusation doctrine, which is codified in Connecticut Code of Evidence § 6-11 (c), permits the state to corroborate the testimony of a victim of a sexual assault by presenting evidence that the victim reported the fact and the timing of the assault to other persons. *State* v. *Troupe*, 237 Conn. 284, 304–305, 677 A.2d 917 (1996) (en banc). The principal issue in this criminal appeal is whether the trial

court complied with the limitations on such testimony imposed by *Troupe* when it admitted into evidence the testimony of two witnesses to whom the complainant in this case spoke the morning after the alleged assault. We affirm the judgment of the trial court in favor of the state.

In a substitute information filed December 1, 2005, the state charged the defendant, John Ashley Farmer, with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and assault in the second degree in violation of General Statutes § 53a-60 (a) (1). The jury found the defendant not guilty of the offense of sexual assault but found him guilty of the lesser included offenses of kidnapping in the second degree in violation of General Statutes § 53a-94[1] and assault in the third degree in violation of General Statutes § 53a-61 (a) (1).[2] The trial court sentenced the defendant to a term of twenty years of incarceration. He has appealed.

The jury reasonably could have found the following facts. The defendant and the complainant lived together in an apartment in Bristol. Starting in mid-morning on October 19, 2004, they began to drink heavily and continued to do so through the day and evening. After watching a baseball game on television at the home of the defendant's brother, the complainant began to drive both of them home. The defendant insisted that he

[1] General Statutes § 53a-94 provides: "(a) A person is guilty of kidnapping in the second degree when he abducts another person.

"(b) Kidnapping in the second degree is a class B felony for which three years of the sentence imposed may not be suspended or reduced by the court."

[2] General Statutes § 53a-61 provides in relevant part: "(a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . .

"(b) Assault in the third degree is a class A misdemeanor . . . ."

should drive because she was too inebriated to do so. He assaulted her physically to force her to relinquish the driving of the car to him. Instead of driving them home to their apartment, the defendant drove to a desolate dirt road in Burlington where he resumed his physical assault of the complainant, removed her underclothes and engaged in sexual conduct with her. Eventually, the defendant drove the complainant to his mother's house in Bristol. The next morning he allowed her to drive herself home.

When the complainant returned to the apartment, she reported that she had been sexually assaulted both to her daughter and to a friend, Angelo Russell, who was there awaiting transportation to work. She then called the police, whom she accompanied to the dirt road where the defendant had taken her. There they found her ripped underwear on the ground. A subsequent physical examination of the complainant at Bristol Hospital confirmed that she had been beaten.

The defendant did not deny striking the complainant but said that he had done so in self-defense after the complainant had begun hitting him. He acknowledged that he had engaged in sexual conduct with the complainant but alleged that their sexual engagement had been consensual. The jury rejected his first defense but accepted the second one.

The defendant's appeal raises two issues. He maintains that the trial court (1) improperly overruled his objection to the testimony of the two witnesses who testified about the complainant's description of the injuries inflicted on her by the defendant and (2) violated his constitutional rights by instructing the jury that the testimony of these witnesses was probative to corroborate the testimony of the complainant. We disagree.

I

Connecticut Code of Evidence § 6-11 (c) provides that "[a] person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes." The defendant maintains that the trial court in this case misapplied § 6-11 (c) in permitting the state to present evidence by the complainant's daughter and Russell.

Pursuant to *State* v. *Saucier*, 283 Conn. 207, 926 A.2d 633 (2007) (en banc), our review of the defendant's claim that the trial court misapplied the code of evidence involves a two step process of review. We must first decide whether the evidence at issue properly can be characterized as falling within the permissible range of corroborative evidence in prosecutions for sexual assault. Our standard for review of this issue is plenary. If that threshold has been crossed, we then must decide whether the trial court's decision to admit the testimony into evidence, premised on a correct view of the law, was an abuse of discretion. Id., 218.

Under the circumstances of this case, we cannot fault the two evidentiary rulings that the defendant challenges. The defendant virtually concedes that the admission of the disputed evidence to corroborate the testimony of the complainant comported with the constraints on evidence of constancy of accusation in sexual assault cases that our Supreme Court set out in

State v. *Troupe*, supra, 237 Conn. 304–305.[3] This court is obliged to follow the dictates of our Supreme Court. The trial court properly interpreted and applied § 6-11 (c).

The gravamen of the defendant's objection to the testimony of the constancy of accusation witnesses is not that this testimony was improperly admitted with respect to the charge of sexual assault. Indeed, he was acquitted of that charge. He claims instead that the testimony should not have been admitted without informing the jury to disregard it with respect to the charges of kidnapping and assault, of which he was convicted. At trial, however, he did not object to the admission of the testimony of either of the constancy of accusation witnesses on that basis. This nonconstitutional claim does not, therefore, warrant appellate review. Practice Book § 60-5; *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 699, 931 A.2d 348, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007).

II

The defendant's alternate argument in this appeal is that he is entitled to a new trial because of defects in the instructions on constancy of accusation evidence that the court gave the jury. With respect to each of the two constancy of accusation witnesses, the trial court instructed the jury during the trial that their evidence was "admitted solely to corroborate or not corroborate [the complainant's] testimony in court . . . . This evidence of out-of-court statements by [the complainant] of a sexual assault against her by the defendant is not to be considered by you to prove the truth of the matter asserted in those out-of-court statements."

[3] Indeed, as the state notes, the defendant has failed to identify any aspect of the testimony of either of these witnesses that overstepped the boundaries set by *Troupe*.

The trial court reiterated this instruction at the end of the trial.

The defendant did not object to these instructions at any time during the trial. He did not file a request to charge on the analysis of constancy of accusation testimony. Furthermore, after the trial court reviewed with counsel its proposed final instructions regarding the constancy of accusation witnesses, the court asked defense counsel whether the instructions were "[a]ll right, sir?" Defense counsel replied: "Yes, Your Honor."

In light of this record, the defendant cannot now be heard to challenge the validity of the trial court's instructions. Even if we were prepared to overlook established case law that arguments about evidence of constancy of accusation have no constitutional implications, our Supreme Court has held that "unpreserved, waived claims, fail under the third prong of [*State* v.] *Golding*, [213 Conn. 233, 239–40, 567 A.2d 823 (1989)]." *State* v. *Fabricatore*, 281 Conn. 469, 482, 915 A.2d 872 (2007); accord *State* v. *Brewer*, 283 Conn. 352, 357 n.7, 360–61, 927 A.2d 825 (2007). The defendant's claim in this case similarly is unreviewable.

We nonetheless take this opportunity to suggest that, in future cases in which evidence of constancy of accusation is admissible into evidence, the trial court should consider informing the jury expressly that this evidence may corroborate the complainant's testimony *only* with respect to a charge of sexual assault. It may be difficult for a jury to keep in mind that evidence probative of sexual assault is not probative of kidnapping or assault. It would, however, be appropriate to facilitate that difficult task by jury instructions expressly making this distinction.

The judgment is affirmed.

In this opinion the other judges concurred.

ISMET SABANOVIC *v.* NEDZMIJA SABANOVIC

NEDZMIJA HASELJIC *v.* ISMET SABANOVIC
(AC 28105)

DiPentima, Gruendel and Stoughton, Js.

Syllabus

The plaintiff in the first case, I, sought a judgment dissolving his marriage to the defendant, N. Thereafter, N filed an application in the second case for relief from abuse, and the plaintiff filed motions to seal or limit disclosure of documents in both the dissolution and relief from abuse actions relating to allegations by N that I had sexually abused the parties' two minor children. After the trial court entered orders sealing portions of the files in both actions, including certain testimony, transcripts and exhibits, the court, sua sponte, revoked those orders, and I appealed to this court. Because the record before this court did not contain any of the pertinent testimony, transcripts or exhibits and I did not file a motion for articulation of the court's sua sponte revocation orders, this court could not determine whether the trial court abused its discretion in ruling as it did, and I's claims on appeal relating to the trial court's decision vacating its previous orders sealing portions of the files were not reviewable.

Argued March 14—officially released May 27, 2008

Procedural History

Action in the first case for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Copetto*, *J.*; judgment dissolving the marriage and granting certain other relief; application in the second case for, inter alia, relief from abuse, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Turner*, *J.*, granted the application; thereafter, the court, *Hon. Romeo G. Petroni*, judge trial referee, granted the motions of the plaintiff in the first case, defendant in the second case, to seal portions of the files; subsequently, the court, *Hon. Romeo G. Petroni*, judge trial referee, sua sponte, vacated its orders to seal portions of the files, and the

plaintiff in the first case, defendant in the second case appealed to this court. *Affirmed.*

Ian Cole, with whom, on the brief, were *Dominick J. Thomas, Jr.*, and *Gayle C. Carr*, for the appellant (plaintiff in the first case, defendant in the second case).

Patrick D. Skuret, for the appellee (defendant in the first case, plaintiff in the second case).

Opinion

DiPENTIMA, J. The plaintiff in the first case and the defendant in the second case (plaintiff), Ismet Sabanovic, appeals from the trial court's judgments revoking sealing orders as to testimony, transcripts and exhibits in this family matter.[1] Because the record before us does not contain any of the pertinent testimony, transcripts or exhibits, we are unable to consider whether the court abused its discretion. Accordingly, we affirm the judgments of the trial court.

The plaintiff's appeal arises from his attempt to limit disclosure of two files in which the defendant in the first case and the plaintiff in the second case (defendant), Nedzmija Haseljic,[2] alleged sexual misconduct by the plaintiff as to the parties' two minor children.[3] On May 12, 2006, the plaintiff filed in the parties' dissolution

[1] The court's revocation orders are final judgments for purposes of appeal because they "so conclude[d] the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). Regardless of the outcome of the underlying proceedings, the court would have no occasion to revisit the issues addressed by the court's revocation orders, namely, whether the privacy interests of the parties' children override the public's interest in viewing the unsealed materials.

[2] Nedzmija Sabanovic's surname was restored to Haseljic by the judgment of dissolution.

[3] The files are docket number FA-00-0069328-S, wherein the parties' marriage was dissolved on January 17, 2001, and docket number FA-06-4006622-S, wherein the defendant sought relief from abuse under General Statutes § 46b-15. The latter case was dismissed shortly after this appeal was filed.

action a motion for contempt against the defendant for her refusal to allow visitation in violation of a previous order. On June 19, 2006, the court appointed a guardian ad litem, attorney Margarita Hartley Moore, on behalf of the minor children.[4] Thereafter, on June 29, 2006, the defendant, on behalf of herself and the two minor children, filed an application for relief from abuse against the plaintiff. The court held hearings on the parties' pleadings on July 13 and 21, and October 18, 2006. On July 20, 2006, pursuant to Practice Book § 25-59A (c), the plaintiff filed motions to seal or limit disclosure of documents in both the dissolution and the relief from abuse actions. On September 11, 2006, the court entered sealing orders as to "testimony of the parties and health care providers, transcripts of the parties and health care providers and exhibits of health care providers upon filing." On September 18, 2006, sua sponte, the court revoked its sealing orders, stating: "Either party, or this court sua sponte, may reclaim this motion to consider entering a sealing order in the future relative to affidavits, documents, testimony of witnesses filed or lodged with the court pursuant to § 25-59A of the Connecticut Practice Book." This appeal followed.

In this appeal, the plaintiff claims that the court improperly (1) vacated its previous orders sealing portions of the files, including records from the department of children and families and psychological records of the minor children, and (2) implicitly concluded that legitimate privacy concerns did not outweigh the public's interest in viewing those records.

In reviewing a trial court's decision granting or denying a motion to seal, we consider whether the court abused its discretion in making its decision. *Vargas* v.

[4] On appeal, the guardian ad litem has adopted the position of the plaintiff and has elected not to file a separate brief. See Practice Book § 67-13.

Doe, 96 Conn. App. 399, 408–409, 900 A.2d 525, cert. denied, 280 Conn. 923, 908 A.2d 546 (2006). "Inherent . . . in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . A court's discretion must be informed by the policies that the relevant statute is intended to advance. . . . When reviewing a trial court's exercise of the legal discretion vested in it, our review is limited to whether the trial court correctly applied the law and reasonably could have concluded as it did." (Citation omitted; internal quotation marks omitted.) Id., 409.

In filing this appeal, the plaintiff certified that no transcript was necessary. See Practice Book § 63-4. Further, the plaintiff did not file any motion for articulation of the court's sua sponte revocation orders. Without either a transcript or an articulation of the court's discretionary ruling, the record is inadequate for a meaningful review of the issues on appeal. "[W]e do not decide issues of law in a vacuum. In order to review an alleged error of law that has evidentiary implications, we must have before us the evidence that is the factual predicate for the legal issue that the appellant asked us to consider." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 368, 926 A.2d 1024 (2007). The absence of such a record is an insurmountable obstacle to review of the claims of error in the circumstances of this case. See id. The plaintiff, who, as the appellant, has the burden to provide this court with an adequate record, has failed to do so. See Practice Book § 61-10; *Bove* v. *Bove*, 103 Conn. App. 347, 354, 930 A.2d 712 (2007). For this reason, we decline to review the merits of the plaintiff's claims.[5]

The judgments are affirmed.

In this opinion the other judges concurred.

[5] We also note that the underlying files do not, in fact, contain records from the department of children and families or psychological records as exhibits.

WILLIAM GONZALEZ *v.* COMMISSIONER OF CORRECTION
(AC 28002)

Flynn, C. J., and Beach and Borden, Js.

Syllabus

The petitioner, who was convicted of certain criminal charges following a guilty plea under the *Alford* doctrine, sought a writ of habeas corpus, claiming that his counsel who negotiated the *Alford* plea provided ineffective assistance in connection with that plea. The habeas court rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly dismissed the petition; that court properly determined that the petitioner failed to show that his attorney's performance was ineffective, and its findings in connection therewith were supported by the record.

Argued March 26—officially released May 27, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Howard F. Zoarski*, judge trial referee; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert J. McKay, special public defender, for the appellant (petitioner).

Nancy L. Chupak, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Kelly A. Masi*, assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, C. J. The petitioner, William Gonzalez, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The court granted the petition for certification to appeal to this

court. On appeal, the petitioner claims that the court improperly dismissed his petition. We affirm the judgment of the habeas court.

After a comprehensive plea canvass by the sentencing court, the petitioner pleaded guilty under the *Alford* doctrine[1] to one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (4), one count of racketeering in violation of General Statutes § 53-395 and ten counts of sale of narcotics in violation of General Statutes § 21a-277 (a). On August 15, 1995, he received a sentence of ten years imprisonment on the ten counts of sale of narcotics, a concurrent ten years of imprisonment on the count of racketeering and a consecutive eighteen years of imprisonment on the count of assault in the first degree for a total effective sentence of twenty-eight years incarceration. If the petitioner had not accepted a negotiated plea agreement and had gone to trial and received the maximum sentence for each of his crimes, he would have been exposed to a total effective sentence of 190 years, with a sixty year mandatory minimum sentence. The petitioner filed no direct appeal from his judgment of conviction but filed an amended habeas petition alleging ineffective assistance of his counsel, special public defender John Hyde, who negotiated the petitioner's *Alford* plea.

At the habeas hearing, the petitioner admitted his involvement in ten separate sales of narcotics to an undercover police officer.[2] He claimed, however, that he had two female witnesses who would vouch that he

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] The state points out in its appellate brief that these ten counts alone, without Hyde's intervention to reduce them to sale of narcotics by a drug-dependent person, each carried a mandatory minimum sentence of five years imprisonment and a maximum term of twenty years imprisonment, for a total mandatory minimum sentence of fifty years and a total maximum sentence of 100 years imprisonment.

was not involved in the assault. The habeas court did not find this claim credible because these alleged witnesses were never brought to the attention of counsel or the police, nor were they brought before the habeas court to testify.

For a petitioner to prevail on a claim that he was denied the effective assistance of counsel while he entered a guilty plea, he must prove both that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and that he actually was prejudiced in that, but for counsel's ineffective assistance, the petitioner would not have pleaded guilty. See *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 154–57, 662 A.2d 718 (1995); see also *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The petitioner headed a drug selling ring in Rockville, and the assault for which he was convicted occurred when the petitioner, accompanied by at least six confederates, beat an individual who had become indebted to the petitioner. Although all of the petitioner's associates joined him in beating and kicking the victim, once the victim had been knocked off his feet, it was the petitioner who administered a particularly brutal beating using a metal car ramp of the kind used to elevate automobiles. Several of his fellow members of the narcotics ring who were present and a passing motorist gave the police statements describing the petitioner beating the victim over the head with the ramp, shouting: "You die." The victim of this brutal assault suffered a depressed skull fracture, collapsed lung, dislocation of fingers on one hand and numerous lacerations to the face and head.

After a careful review of the record, we conclude that the habeas court properly determined that the petitioner failed to show that his attorney's performance was ineffective. The court made the following findings

of fact, all of which are fully supported by the record. The petitioner's attorney had years of experience negotiating pleas. The evidence against the petitioner was overwhelming on all of the charges to which he pleaded guilty. His attorney made a thorough investigation of the case, visited the crime scene and followed through on all potential witnesses of which he was made aware by the petitioner on his own investigation. The petitioner did not make his counsel aware of these purported female witnesses, nor did he present them to the habeas court. Counsel engaged two experts to assist in negotiating a favorable plea. One of them, Dr. James O'Brien, provided counsel with both information and opinion, which convinced the prosecuting authority to treat the petitioner more favorably as a drug-dependent person.

The petitioner has since developed the habeas equivalent of buyer's remorse regarding a plea he freely accepted, and he now claims that there are witnesses he failed to produce at his habeas trial. This, however, does not alter the fact that he received both a fair and favorable total effective sentence. This is particularly so in light of his exposure to a potential total effective sentence of 190 years for the assault, racketeering and multiple narcotics offenses.

The judgment is affirmed.

In this opinion the other judges concurred.

DONALD MOODY *v.* COMMISSIONER OF CORRECTION
(AC 27967)

Lavine, Robinson and Stoughton, Js.

Syllabus

The petitioner, who, following a second trial, had been convicted of certain crimes in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel had provided

ineffective assistance. The habeas court rendered judgment dismissing the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having raised no issue that was debatable among jurists of reason, that could be resolved differently or that deserved encouragement to proceed further: the decision by the petitioner's trial counsel not to call a certain witness who had testified at the petitioner's first trial was a matter of sound trial strategy within the wide range of acceptable professional assistance; trial counsel's decision not to introduce certain portions of a transcript of a statement by another witness that the trial court had deemed admissible was a matter of reasonable trial strategy in light of counsel's belief that those portions of the statement would have undermined a self-defense claim and shown that the witness was untruthful; trial counsel was not deficient in failing to request an instruction on the claim of defense of others, there having been no evidentiary basis to support such an instruction; and trial counsel was not ineffective in failing to take further measures to ensure an impartial jury in connection with the inadvertent disclosure to an alternate juror of notes by the prosecution made on a transcript, counsel having asked the trial court to excuse the alternate juror, who did not participate in deliberations, and to instruct the jury not to discuss the writings, which the court did, and having filed motions for a mistrial, which the court denied after asking the jurors whether they had seen the notes.

Argued February 20—officially released May 27, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *White, J.*; judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Peter Tsimbidaros, for the appellant (petitioner).

Melissa L. Streeto, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, senior assistant state's attorney, for the appellee (respondent).

Opinion

STOUGHTON, J. The petitioner, Donald Moody, appeals following the denial of his petition for certification to appeal from the judgment dismissing his amended petition for a writ of habeas corpus. He claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly rejected his claim that his trial counsel was ineffective. On the merits, the petitioner argues that his trial counsel, Avery Chapman, rendered ineffective assistance because he improperly failed (1) to present certain available evidence in the petitioner's defense, (2) to request a charge to the jury on the theory of defense of others and (3) to ensure that the jury was impartial. We do not agree with his claims and dismiss the appeal.

The petitioner was twice tried on charges of having committed murder in violation of General Statutes § 53a-54a (a) and assault in the first degree in violation of General Statutes § 53a-59 (a) arising out of a fatal shooting that occurred in New Haven on November 9, 1994. In the first trial, the jury, on October 2, 1999, returned a guilty verdict on a charge of carrying a pistol without a permit, but the members of the jury were unable to agree on the murder and assault charges and a mistrial was declared on those charges. After the second trial, the jury found the petitioner guilty on the murder and assault charges on December 18, 2000. He was subsequently sentenced and thereafter appealed from the judgment. He claimed, inter alia, that the trial court improperly refused to admit the full transcript of a statement made to the police by a defense witness and that the court failed to investigate adequately whether jurors had seen certain notes made by the prosecutor. The judgment was affirmed. *State* v. *Moody*, 77 Conn. App. 197, 822 A.2d 990, cert. denied, 264 Conn. 918, 827 A.2d 707, cert. denied, 540 U.S. 1058, 124 S. Ct. 831, 157 L. Ed. 2d 714 (2003).

The facts giving rise to the petitioner's conviction as set forth in *State* v. *Moody*, supra, 77 Conn. App. 197, are as follows: "On November 9, 1994, the victims, Marquis Clark and Frank Doughty, were walking with a third person near the intersection of George Street and Day Street in New Haven. The [petitioner] was behind the steering wheel of a car stopped at the traffic signal on Day Street. As the victims walked along the sidewalk on Day Street, they and the [petitioner] began shouting at each other. They had just walked past the rear of the [petitioner's] car when the [petitioner] aimed a handgun over his shoulder and fired eight to ten shots at them through the car's rear windshield. Doughty was shot in the thigh, but survived. Clark was shot in the hand and chest, and died of injuries to his heart and left lung. The third person walking with the victims returned the [petitioner's] gunfire, striking the [petitioner] in the left leg. . . . The [petitioner's] theory of defense at trial was that he had acted in self-defense when he shot Clark and Doughty." Id., 199–200. The petitioner called Larry Smith, who was with him in the car at the time of the shooting, as a witness.

In his amended petition for a writ of habeas corpus, the petitioner claimed, among other things, that Chapman, counsel in the second trial, had rendered ineffective assistance in that he had failed (1) to present available evidence in the petitioner's defense, (2) to request a charge to the jury on the theory of defense of others and (3) to ensure that the jury was impartial. After a trial, the habeas court determined that the petitioner had failed to prove either that his trial counsel's performance was deficient, or that he had been prejudiced, and dismissed the petition. Thereafter, the court denied the petition for certification to appeal. This appeal followed.

Our standard of review is well established. When a habeas court has denied a petition for certification to

appeal, the petitioner's first burden is to demonstrate that the court's ruling constituted an abuse of discretion. He may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason, that the court could resolve the issues differently or that the questions are adequate to deserve encouragement to proceed further. If the petitioner surmounts that hurdle, he must then demonstrate that the judgment of the habeas court should be reversed on its merits. *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008).

We examine the underlying claims of ineffective assistance of counsel to determine whether the court abused its discretion in denying certification to appeal. This court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether those facts as found constituted a violation of the constitutional right to effective assistance of counsel is plenary. *J.R.* v. *Commissioner of Correction*, 105 Conn. App. 827, 831, 941 A.2d 348, cert. denied, 286 Conn. 915, 945 A.2d 976 (2008). To prevail on a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Id., 832.

The first component requires that the petitioner show that counsel's performance fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential and indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, that the challenged action might be considered sound trial strategy, and that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id., 832–33. The second component requires that the petitioner show that there is a reasonable probability that, but for

the alleged unprofessional errors of counsel, the result of the criminal trial would have been different. Id., 833.

I

The petitioner first claims that his trial counsel was ineffective because he failed to present certain evidence to the jury. Specifically, the petitioner argues that his counsel improperly failed to have a witness to the shooting, Robert Randall, testify and that he failed to offer into evidence three portions of a transcript of a statement provided by another witness, Smith, after the court had granted permission to admit those portions.

A

The petitioner first argues that Chapman failed to call Randall, a witness who had been called by the state at the first trial. The habeas court found that Chapman had reviewed the transcript of the testimony given by Randall and had concluded that, if offered at the second trial, it might have been harmful to the defense. Randall had been in the area and heard several gunshots fired, but he did not know who had fired the gunshots because he had ducked down in his car to avoid danger. Randall additionally testified that, after the shooting seemed to have ended, he looked up and observed, among other things, one of the three individuals on the sidewalk begin to run. He noted that the petitioner's car began to proceed along the road and testified that the car appeared to be following the pedestrian, and that he thought he had just witnessed a drive-by shooting. We agree with the habeas court that the decision not to call Randall was a matter of sound trial strategy within the wide range of reasonable professional assistance.

B

At the second trial, during cross-examination of the petitioner's witness, Smith, the state asked about inconsistencies between his testimony and a prior police

interview. *State* v. *Moody*, supra, 77 Conn. App. 201. When the petitioner's counsel sought to introduce the entire transcript of the interview, in an attempt to rehabilitate Smith's testimony, the court denied the motion but offered to permit the introduction of three sections.[1] Id., 202. The petitioner's counsel declined the limited offer, insisting that the admission of the entire transcript was necessary, and this court concluded, on direct appeal, that the trial court had not abused its discretion in declining to admit the full transcript. Id., 208.

At the habeas trial, the petitioner claimed that Chapman should have offered those portions of Smith's statement that the trial court had deemed admissible and that the failure to do so amounted to ineffective assistance. Chapman wanted to have the entire transcript admitted but believed that to offer those parts that the trial court offered to admit would undermine the self-defense claim. Those portions in addition would show that Smith was untruthful.[2] The habeas court found that Chapman had a reasonable basis for making the choice that he made and that this was a matter of reasonable trial strategy. We agree.

II

The petitioner next claims that Chapman rendered ineffective assistance in that he failed to request a jury

[1] The text of the three portions of the transcript that the court deemed admissible may be found in *State* v. *Moody*, supra, 77 Conn. App. 202 n.3.

[2] The petitioner's argument on appeal relies primarily on the first portion of the transcript that was deemed admissible. The police had asked Smith whether he knew the petitioner's first name, to which Smith replied that he did not. At trial, it became evident that Smith did know the petitioner's first name at the time of the interview, and the state impeached Smith's testimony on this point. The petitioner, in his appellate brief, argues that the police did not ask Smith about the petitioner's first name, but rather asked if Smith knew the petitioner "by any other name," suggesting that they were asking for an alias. The petitioner, however, selectively quotes the transcript. The transcript records that the full question was: "Do you know the [petitioner] by any other name, *his first name* or street name?"

instruction on the defense of a third person and to take exception to an inadequate instruction on self-defense. The latter part of this claim, although briefed for this appeal in cursory fashion, was not raised in the habeas court, and we will not afford it consideration.

In each of his criminal trials, and in his statement to the police, the petitioner claimed that he acted in self-defense. At the habeas trial, he testified that he shot his weapon in self-defense and also to protect Smith. The court found that Chapman had reviewed the transcript of the testimony of the first trial and the materials obtained through discovery, and had discussed the case with the petitioner. On the basis of his research and review, Chapman had concluded that there was no factual predicate for a claim of defense of others. In addition, the court determined that the petitioner had never claimed at his criminal trial that he was protecting Smith and further found that the petitioner had engaged in conduct that put Smith in danger. The court properly determined that there was no evidentiary basis on which to claim a defense of others instruction, and, therefore, Chapman's performance was not deficient for not requesting it.

III

Finally, the petitioner argues that Chapman rendered ineffective assistance in failing to take measures to ensure an impartial jury and that the trial court, similarly, failed to ensure an impartial jury. This claim was at least partially resolved on direct appeal. The jurors were given a transcript of a taped statement made by the petitioner. This occurred first when the police officer who took the statement testified. It occurred again during cross-examination of the petitioner. The petitioner claimed on appeal that the court failed to investigate adequately whether jurors saw certain notes made

(Emphasis added; internal quotation marks omitted.) *State* v. *Moody*, supra, 77 Conn. App. 203 n.3.

by the prosecution that were inadvertently given to an alternate juror during the cross-examination of the petitioner. When the mistake was discovered, the court questioned the alternate juror, and she stated that she could set aside anything she had read. The court instructed the entire jury not to discuss the markings. Later, after the petitioner had moved for a mistrial, the court asked the jurors whether any other juror had received a transcript with extraneous writings and whether the alternate juror had discussed the writing with any other juror. None of the jurors indicated that they had received a transcript with extraneous markings, and all responded that the alternate juror had not discussed the writings. The petitioner argued that the court improperly failed to ascertain whether any jurors had seen the writings on the transcript when it was first distributed. On direct appeal, this court concluded that the court's question was broad enough to encompass both occasions and that the court did not abuse its discretion by not asking about a specific date. *State* v. *Moody*, supra, 77 Conn. App. 225. We also refused to consider a claim that the court had failed to ask each juror individually whether he or she had seen the transcript with the notes because that claim had not been raised in the trial court. Id.

The petitioner claims that Chapman should have sought permission to question each of the jurors individually and that his failure to do so rendered his assistance ineffective. As the habeas court referenced in its decision, Chapman requested that the court excuse the alternate juror immediately upon learning that she had read the extraneous writing or, in the alternative, that the court instruct the jurors not to discuss the writing. The court agreed with Chapman's second request. After the close of evidence, Chapman orally requested a mistrial on December 15, 2000, on the basis of the alternate

juror's exposure to the extraneous comments. He subsequently filed a motion for a mistrial on December 18, 2000, on the same ground and, additionally, on the ground that it was not clear whether any other juror had received a copy of the transcript containing the extraneous writing. In response, the court asked the jurors whether any of them had seen the extraneous writing or whether they had discussed the writing with the alternate juror, who, by that time, had been dismissed and would not participate in the jury deliberation. Chapman then stated that he did not believe that the canvass was sufficient. The court determined that the canvass was sufficient and denied the motion for a mistrial. See *State* v. *Moody*, supra, 77 Conn. App. 222–23. We agree with the habeas court that Chapman was not ineffective for refraining from pursuing the matter further.

The court concluded that the petitioner had failed to prove either deficient performance or prejudice as a result of any alleged deficiencies and that there were no issues warranting appellate review. We find no abuse in discretion in the court's rulings. None of the issues raised is debatable among jurists of reason, could be resolved differently or is adequate to deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

PETER BREEN *v.* SYNTHES-STRATEC, INC.
(AC 28215)

Flynn, C. J., and Gruendel and Lavine, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries he sustained as a result of an allegedly defective product manufactured and sold by the defendant S Co. The plaintiff, as a result of a broken left femur, had

undergone two surgeries performed by L, an orthopedic surgeon. During each surgery, L implanted a plate that had been manufactured by S Co. Each plate broke approximately six months after the surgery during which it was implanted. The jury returned a verdict in favor of S Co., and the trial court rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly charged the jury on comment (k) to § 402A of the Restatement (Second) of Torts, which provides that a manufacturer of an unavoidably unsafe product should not be held to strict liability for unfortunate consequences attending use of the product, as long as the product is properly prepared and accompanied by proper directions and warnings, and on the learned intermediary doctrine, which is an exception to the general rule that a manufacturer has a duty to warn the ultimate user or consumer of the known dangers of its products and provides that adequate warnings to prescribing physicians obviate the need for manufacturers of prescription products to warn ultimate consumers directly: contrary to the plaintiff's claim regarding the applicability of those doctrines, comment (k) is not limited only to prescription drugs but also is applicable to medical devices such as the plates implanted in the plaintiff's body, and the plaintiff's claim that the plates manufactured by S Co. were not drugs, vaccines or experimental drugs and, therefore, did not fall within the ambit of comment (k) was unavailing, as comment (k) does not include an exhaustive list of the types of products that can be characterized as unavoidably unsafe; moreover, the learned intermediary doctrine properly is applied to cases involving prescription implantable medical devices, and the plaintiff failed to establish his claim that the plates manufactured by S Co., which are surgically implanted by physicians, should not be included in the types of medical devices to which comment (k) and the learned intermediary doctrine apply.

2. The plaintiff could not prevail on his claim that the trial court improperly admitted into evidence certain portions of L's medical records and allowed L to testify from the records on matters that were opinion and unrelated to L's treatment of the plaintiff: in light of the inherent difficulties in distinguishing between opinions and facts in the context of a patient's treatment record, it was not an abuse of discretion for the trial court to determine that the challenged portions of the medical records, which already had been admitted into evidence, concerned L's treatment of the plaintiff and, thus, that court properly characterized them as the facts of treatment; furthermore, L, in his testimony about the statements in the treatment record, did not offer any opinions about certain notations in the records.

3. The plaintiff failed to provide an adequate record for this court to review his claim that the trial court improperly refused to allow him to cross-examine S Co.'s expert witness, Z, using the deposition testimony of L; although the plaintiff stated on the record the portions of L's deposition

testimony that he wanted to utilize in his cross-examination of Z, the plaintiff never asked the trial court to state on the record the basis for its ruling, in which it sustained S Co.'s objection to the proposed questioning, and he did not move for articulation.

Argued January 10—officially released May 27, 2008

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective product manufactured and sold by the defendant, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Waterbury, Complex Litigation Docket, where the court, *Eveleigh*, *J.*, granted the plaintiff's motion to substitute Synthes (U.S.A.) as the defendant; thereafter, the matter was tried to the jury; verdict for the substitute defendant; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Vincent F. Sabatini, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

W. Kennedy Simpson, pro hac vice, with whom was *Daniel J. Foster*, for the appellee (substitute defendant).

Opinion

FLYNN, C. J. In this product liability action, the plaintiff, Peter Breen, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the substitute defendant, Synthes (U.S.A.)[1] On appeal, the plaintiff

[1] The plaintiff's initial complaint named the defendant as "Synthes-Stratec, Inc., a/k/a Synthes USA, Synthes USA Ltd., Synthes North America, Inc., and Sythes-Stratec, Inc. U.S." The plaintiff later filed a motion to substitute the defendant, requesting that "the court substitute the defendants named in this action to the defendant Synthes (U.S.A.)." The motion also indicated that the parties had agreed to the substitution of Synthes (U.S.A.) as the party defendant. At a hearing on January 17, 2006, the defendant stated that it did not have an objection to this substitution, and the court orally granted the motion. We refer in this opinion to Synthes (U.S.A.) as the defendant.

claims that the court improperly (1) instructed the jury on doctrines that were inapplicable to the case, (2) failed to redact portions of the plaintiff's medical records and permitted a witness to testify about those portions of the records, and (3) refused to allow him to use the deposition testimony of a witness during the plaintiff's cross-examination of another defense witness. We affirm the judgment of the trial court.[2]

The jury reasonably could have found the following facts. On April 14, 2002, the plaintiff broke his left femur and, consequently, entered Hartford Hospital to undergo treatment for that injury. On April 15, 2002, Christopher J. Lena, an orthopedic surgeon, performed an open reduction and internal fixation on the plaintiff. During that procedure, Lena reduced the fracture and secured the area with a 281.98 95° dynamic condylar screw plate (first plate) that was manufactured by the defendant. The plaintiff received postoperative treatment from Lena. Approximately six months after the surgery, the first plate broke. The plaintiff underwent another procedure in which Lena removed the first plate. In order to correct a deformity in the plaintiff, Lena needed to implant a 110° plate instead of a similar 95° plate that was used previously, and, therefore, Lena requested that a representative of the defendant provide him with one. The defendant's representative modified another 281.98 95° dynamic condylar screw plate, which also was manufactured by the defendant, by bending it to 110° (second plate), and Lena surgically implanted the second plate. Approximately six months after the second surgery, the second plate broke. The plaintiff subsequently underwent a third procedure to remove

[2] In the event that the plaintiff was awarded a new trial, the defendant presented an adverse ruling of the trial court for our consideration pursuant to Practice Book § 63-4 (a) (1) (B). The defendant claimed that the court improperly prohibited Christopher J. Lena, an orthopedic surgeon, from testifying about expert opinions. Because we affirm the judgment of the trial court, we need not reach this issue. See *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 786 n.2, 807 A.2d 467 (2002).

the second plate, and a different surgeon performed a bone graft and implanted another plate.

Thereafter, the plaintiff brought the underlying product liability action against the defendant pursuant to the Connecticut Product Liability Act (act), General Statutes § 52-572m et seq., alleging that he suffered injuries as a result of the defective first and second plates. In response, the defendant filed an answer and special defenses, two of which alleged that the plaintiff's claims were barred by comment (k) to § 402A of the Restatement (Second) of Torts and by the learned intermediary doctrine. See 2 Restatement (Second), Torts § 402A, comment (k) (1965). The case was tried to the jury and resulted in a defendant's verdict. The plaintiff subsequently filed a motion to set aside the verdict. The court denied the plaintiff's motion and rendered judgment in favor of the defendant in accordance with the jury verdict. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the plaintiff's claim that the court improperly charged the jury on comment (k) to § 402A of the Restatement (Second) of Torts and on the learned intermediary doctrine—instructions requested by the defendant.[3] The crux of the plaintiff's claim is that the court should not have instructed the jury with respect to comment (k) and the learned intermediary doctrine because these doctrines are inapplicable to the type of medical device involved in the present case.[4] We disagree.

[3] We note that the plaintiff has preserved this claim for our review by filing a request to charge, by filing an objection to the defendant's proposed instructions and by taking exceptions to the charge as given, arguing that the instructions on comment (k) and the learned intermediary doctrine should not have been given because they were inapplicable.

[4] Although the plaintiff contends, in his appellate brief, that the court should not have instructed the jury on comment (k) and on the learned

The plaintiff's claim presents a question of law, and, therefore, our review is plenary. See generally *Vitanza* v. *Upjohn Co.*, 257 Conn. 365, 368, 778 A.2d 829 (2001) (applicability of learned intermediary doctrine is question of law).

We commence our review by setting forth certain legal principles relating to product liability law. "Manufacturers in Connecticut are strictly liable for defective products under § 402A of the Restatement (Second) of Torts. See *Giglio* v. *Connecticut Light & Power Co.*, 180 Conn. 230, 233, 429 A.2d 486 (1980) . . . . A product may be defective due to a flaw in the manufacturing process, a design defect or because of inadequate warnings or instructions. . . .

"According to the Restatement (Second) of Torts, certain products, by their very nature, cannot be made safe. See 2 Restatement (Second), supra, § 402A, comment (k). Prescription drugs generally fall within the classification of unavoidably unsafe products." (Citations omitted; internal quotation marks omitted.) *Vitanza* v. *Upjohn Co.*, supra, 257 Conn. 373–75.

"Comment (k) to § 402A of the Restatement (Second) of Torts provides that some products are incapable of

intermediary doctrine, he does not argue that the instructions constituted an inaccurate statement of the law. Specifically, the plaintiff does not claim that the wording or content of the instructions on comment (k) and on the learned intermediary doctrine were in any way improper or inadequate. We therefore do not decide whether the court's instructions on these issues were accurate. See *Kramer* v. *Petisi*, 285 Conn. 674, 680 n.4, 940 A.2d 800 (2008); *Puchalsky* v. *Rappahahn*, 63 Conn. App. 72, 81 n.9, 774 A.2d 1029, cert. denied, 256 Conn. 931, 776 A.2d 1147 (2001).

At oral argument before this court, however, the plaintiff did argue that the court's charge was improper in that it failed to delineate specifically the special defenses, namely, the learned intermediary doctrine and comment (k) to § 402A of the Restatement (Second) of Torts. We decline to consider this argument because "[i]t is well settled that claims on appeal must be adequately briefed . . . and cannot be raised for the first time at oral argument before the reviewing court." *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

being made safe for their intended and ordinary use. Nevertheless, certain unavoidably unsafe products provide such benefits to society that their use is fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. . . . 2 Restatement (Second), supra, § 402A, comment (k). Comment (k) provides that a manufacturer of an unavoidably unsafe product should not . . . be held to strict liability for unfortunate consequences attending their use, merely because [it] has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." (Emphasis in original; internal quotation marks omitted.) *Vitanza* v. *Upjohn Co.*, supra, 257 Conn. 376–77.

"A manufacturer of an unavoidably unsafe product can avoid strict liability if the product is properly prepared, and accompanied by proper directions and warning . . . . 2 Restatement (Second), supra, § 402A, comment (k). Generally, a manufacturer's duty to warn of dangers associated with its products pertains only to known dangers and runs to the ultimate user or consumer of those products. See *Tomer* v. *American Home Products Corp.*, [170 Conn. 681, 689–90, 368 A.2d 35 (1976)]; 2 Restatement (Second), supra, § 388 (c). The learned intermediary doctrine, which is supported by comment (k) to § 402A of the Restatement (Second) of Torts, is an exception to this general rule." (Internal quotation marks omitted.) *Vitanza* v. *Upjohn Co.*, supra, 257 Conn. 375.

"The learned intermediary doctrine provides that adequate warnings to prescribing physicians obviate the need for manufacturers of prescription products to warn ultimate consumers directly. The doctrine is based on the principle that prescribing physicians act as

learned intermediaries between a manufacturer and consumer and, therefore, stand in the best position to evaluate a patient's needs and assess [the] risks and benefits of a particular course of treatment." (Internal quotation marks omitted.) Id., 376.

In his appellate brief to this court, the plaintiff makes numerous arguments to support his claim that comment (k) to § 402A of the Restatement (Second) of Torts is inapplicable under the circumstances of this case. As a threshold matter, we note that the plaintiff does acknowledge that in *Vitanza*, our Supreme Court adopted comment (k) to § 402A of the Restatement (Second) of Torts. The plaintiff contends, however, that the applicability of comment (k) is limited to situations in which the allegedly defective product is a prescription drug, citing *Vitanza*. Although *Vitanza* involved the prescription drug Ansaid, our Supreme Court in *Vitanza* did not limit expressly the applicability of comment (k) to cases involving prescription drugs. We conclude that, contrary to the plaintiff's assertion, *Vitanza* does not stand for the proposition that, under Connecticut law, comment (k) applies only to prescription drugs.

The plaintiff further argues that the plates manufactured by the defendant are not drugs, vaccines or experimental drugs and, therefore, do not fall within the ambit of comment (k) to § 402A of the Restatement (Second) of Torts. To support this argument, the plaintiff refers to the language of comment (k), which lists "drugs," "vaccines" and "experimental drugs" as examples of unavoidably unsafe products. However, our reading of comment (k) reveals that these examples are illustrative but do not comprise an exhaustive list of the types of products that may be characterized as unavoidably unsafe products. Rather, comment (k) provides that "[t]here are some products, which in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are

especially common in the field of drugs. An outstanding example is the vaccine for the . . . treatment of rabies . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, *and the like*, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs . . . .'' (Emphasis added.) 2 Restatement (Second), supra, § 402A, comment (k).

Furthermore, in *Hurley* v. *Heart Physicians, P.C.*, 278 Conn. 305, 317, 898 A.2d 777 (2006), our Supreme Court applied the learned intermediary doctrine, which is supported by comment (k), in the context of prescription implantable medical devices. Our Supreme Court's decision in *Hurley* therefore instructs us that, under Connecticut law, comment (k) is not limited to prescription drugs but also is applicable to medical devices such as the plates implanted in the plaintiff's body. In light of existing case law and the language of comment (k) itself, we conclude that the application of comment (k) is not limited to prescription drugs only.[5]

With respect to the learned intermediary doctrine, the plaintiff contends that there is no binding Connecticut

[5] Many jurisdictions have extended the reach of comment (k) to § 402A of the Restatement (Second) of Torts to include prescription medical devices. See, e.g., *Adams* v. *Synthes Spine Co.*, 298 F.3d 1114, 1117 (9th Cir. 2002) (spinal device); *Phelps* v. *Sherwood Medical Industries*, 836 F.2d 296 (7th Cir. 1987) (heart catheter); *Brooks* v. *Medtronic, Inc.*, 750 F.2d 1227, 1230–31 (4th Cir. 1984) (cardiac pacemaker); *Harwell* v. *American Medical Systems, Inc.*, 803 F. Sup. 1287, 1300 (M.D. Tenn. 1992) (penile prosthesis); *Hufft* v. *Horowitz*, 4 Cal. App. 4th 8, 19, 5 Cal. Rptr. 2d 377 (1992) (penile prosthesis); *Mele* v. *Howmedica, Inc.*, 348 Ill. App. 3d 1, 19–21, 808 N.E.2d 1026 (artificial hip), appeal denied, 211 Ill. 2d 582, 823 N.E.2d 967 (2004); *Perfetti* v. *McGhan Medical*, 99 N.M. 645, 649, 662 P.2d 646 (N.M. App.) (mammary prosthesis), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983); *Tansy* v. *Dacomed Corp.*, 890 P.2d 881, 886 (Okla. 1994) (penile prosthesis); *Creazzo* v. *Medtronic, Inc.*, 903 A.2d 24, 31 (Pa. Super. 2006) (implantable neurological electrical pulse generator).

precedent that mandates the application of the doctrine to prescription medical devices. This argument merits little discussion. In *Hurley* v. *Heart Physicians, P.C.*, supra, 278 Conn. 317, a case involving a pacemaker, our Supreme Court expressed approval of the application of the learned intermediary doctrine to prescription implantable medical devices. In *Hurley*, our Supreme Court noted that *Vitanza* had adopted the "learned intermediary doctrine in the context of prescription drugs" but had not decided "whether the policies behind the rule equally were applicable to prescription medical device cases." Id. The *Hurley* court, however, went on to state that "[n]umerous courts have determined that [the policies behind the rule] are applicable to prescription medical device cases" and that it could see "no principled reason to distinguish between a prescription implantable medical device like a pacemaker and a prescription drug." Id. In *Hurley*, our Supreme Court also noted that the parties had failed to cite any cases for the proposition that the learned intermediary doctrine should not be applied in the context of that case. Id. Likewise, the plaintiff here fails to cite any cases for that proposition. In light of *Hurley*, we therefore conclude that, under Connecticut law, the learned intermediary doctrine properly is applied to cases involving prescription implantable medical devices.[6] See also

[6] As our Supreme Court noted in *Hurley* v. *Heart Physicians, P.C.*, supra, 278 Conn. 317 n.10, numerous jurisdictions have recognized the application of the learned intermediary doctrine to prescription medical devices. See, e.g., *Figueroa* v. *Boston Scientific Corp.*, 254 F. Sup. 2d 361, 370 (S.D.N.Y. 2003) (vaginal sling to combat female urinary stress incontinence); *Skerl* v. *Arrow International, Inc.*, 202 F. Sup. 2d 748, 753–54 (N.D. Ohio 2001) (surgically implanted morphine pump); *Mozes* v. *Medtronic, Inc.*, 14 F. Sup. 2d 1124, 1130 (D. Minn. 1998) (cardiac pacemaker); *Hansen* v. *Baxter Healthcare Corp.*, 309 Ill. App. 3d 869, 881, 723 N.E.2d 302 (1999) (tubing to connect catheter), aff'd, 198 Ill. 2d 420, 764 N.E.2d 35 (2002); *Vaccariello* v. *Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380, 384, 763 N.E.2d 160 (2002) (pedicle screw implanted in spine); *Rosci* v. *Acromed, Inc.*, 447 Pa. Super. 403, 423, 669 A.2d 959 (1995) (bone plates and screws).

Desmarais v. *Dow Corning Corp.*, 712 F. Sup. 13, 17–18 (D. Conn. 1989) (breast implants).

Alternatively, the plaintiff argues that although comment (k) to § 402A of the Restatement (Second) of Torts and the learned intermediary doctrine may be applied to certain medical devices, the plates manufactured by the defendant do not fall within the ambit of these doctrines. Specifically, the plaintiff expressly urges this court to draw a distinction, as a matter of law, between the various classes of medical devices as specified in the Medical Device Amendments of 1976 (amendments), 21 U.S.C. § 360c et seq., to the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. Under the amendments, medical devices intended for human use are classified as class I, II or III devices, depending on the extent of regulatory control necessary to ensure their safety and effectiveness, with class III devices being subject to the highest level of control. The plates manufactured by the defendant, which were surgically implanted into the plaintiff by Lena, are class II devices. In his appellate brief to this court, the plaintiff contends that comment (k) and the learned intermediary doctrine should be applied only to class III devices and not to class II devices.

We decline, at this juncture, to accept the plaintiff's invitation to draw a bright line distinction between class II and class III medical devices in determining the applicability of comment (k) and the learned intermediary doctrine. The plaintiff has failed to provide any persuasive reason why a blanket rule excepting all class II medical devices from the application of these doctrines is appropriate or necessary. Indeed, beyond the plaintiff's mere reference to the portion of the definition of a class III device, which states that it is a device that is "purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of

human health or presents a potential unreasonable risk of illness or injury"; 21 U.S.C. § 360c (a) (1) (C) (i) and (ii) (I); the plaintiff has failed to explicate his argument as to why only class III devices should fall within the ambit of comment (k) and the learned intermediary doctrine. Moreover, the plaintiff has not cited any cases in which such a distinction has been applied, and we decline to draw a distinction here. To the extent that the plaintiff's cryptic argument seeks to draw a distinction on the basis of the life sustaining or life supporting qualities of the devices, we find such a contention untenable because class II devices, by definition, also may include some devices that are "purported or represented to be for a use in supporting or sustaining human life . . . ." 21 U.S.C. § 360c (a) (1) (B).

We conclude that the plaintiff has failed to provide a persuasive reason why the rationale underlying the applicability of comment (k) to § 402A of the Restatement (Second) of Torts and the learned intermediary doctrine to prescription drugs and prescription medical devices, such as pacemakers, should not be applied to the plates manufactured by the defendant, which are surgically implanted by physicians. Accordingly, we conclude that the court properly gave the jury an instruction on these applicable doctrines.

II

The plaintiff next contends that the court abused its discretion when it "allowed into evidence portions of Dr. Lena's medical records and allowed [Lena] to testify from the reports on matters that were opinion . . . ." Specifically, the plaintiff takes issue with Lena's notation in the July 2, 2002 medical record in which he stated that "[the plaintiff] was instructed regarding the conservative nature of treatment for this and the fact that it is a race between his biology and the plate breaking." In a similar vein, the plaintiff also takes issue with

the following statement in the November 4, 2002 record: "It is always a race between biological healing and plate failure since this is a load sharing device. Due to persistent motion at the fracture, the plate has subsequently failed."[7] The plaintiff argues that because Lena was not an expert witness,[8] the court should have redacted these two portions of the medical records and prohibited Lena from testifying about the contested statements.

The following procedural history and facts are necessary to give context to the plaintiff's claim on appeal. On January 3, 2006, and prior to trial, the plaintiff filed a motion in limine, requesting that the court prohibit the defendant from introducing "evidence by way of fact or opinion testimony from Dr. Lena," who was not retained as an expert witness, about, inter alia, "causation."[9] In that motion, the plaintiff, however, did not refer to evidence concerning the "race between biological healing and plate failure," which statements were contained in the medical report.

On January 17, 2006, the court conducted a preliminary hearing on, inter alia, the plaintiff's January 3, 2006 motion in limine and on the parties' stipulation of exhibits as well as the objections raised in connection with the exhibits. Prior to this hearing, the plaintiff and the defendant had marked the medical records prepared by Lena as plaintiff's exhibit two and defendant's exhibit A, respectively. The plaintiff did not object to defendant's exhibit A, and it was marked as a full exhibit.

[7] We note that the November 4, 2002 medical record was authored by James P. Alvarez, a physician's assistant who was supervised by Lena. The medical record indicates that Lena was present at the November 4, 2002 treatment session.

[8] The defendant failed to disclose Lena as an expert witness in accordance with Practice Book § 13-4.

[9] Specifically, the plaintiff, by way of his motion in limine, sought to preclude "evidence by way of fact or opinion testimony from Dr. Lena [who was not retained as an expert witness] that the product in question and the defendant manufacturer meets a 'gold standard,' that the product contains adequate warnings, adequate instructions or that the product may be 'bent' and causation."

The defendant filed a response to the plaintiff's exhibit list, and, with respect to the records prepared by Lena, stated that it did not have any objections on the ground of authenticity but reserved the right to object on relevance grounds. At the January 17, 2006 hearing, the plaintiff stated that after his discussion with the defendant, it was his understanding that the defendant did not have any objections to the medical records being admitted as full exhibits. The defendant, agreeing with the plaintiff, then stated "[j]ust so there isn't any misunderstanding, with regard to [the plaintiff's] exhibits one and two . . . which are the records of . . . Lena, we have no objection to those being admitted." The court recessed to allow the parties to mark the remaining exhibits. The medical records, including the July 2 and November 4, 2002 records, were admitted as full exhibits.

With respect to the plaintiff's January 3, 2006 motion in limine, the court heard arguments from the parties and ruled generally that the "physicians [including Lena] may testify as to their—as treaters to their treatment, but not as to any opinions that they may have rendered outside of that treatment." The defendant then sought clarification from the court as to the permissible scope of Lena's trial testimony. The plaintiff stated that although the court could articulate its ruling, he was going to stand by the court's ruling. The court then replied that "[t]he immediate cause for concern . . . is in terms of what exactly is in the medical records that have been . . . stipulated to." The defendant then directed the court's attention to the July 2 and November 4, 2002 medical records.

With respect to the specific matters addressed in the motion in limine,[10] the court stated, inter alia, that "[t]he court's ruling is that it's in the medical record. So that

[10] The court granted the plaintiff's motion with respect to the preclusion of evidence from Lena about the product being the "gold standard" and whether the product contained "adequate warnings" or "adequate instructions."

the reason the first and maybe the second failed is nonunion. That's in the record. [Lena] can say that. Causation . . . he can say nonunion.[11] It's in the record."

The plaintiff then argued that his motion in limine was directed to any statements of opinion by Lena and that, therefore, the ruling on the motion "would affect the opinions that are in the record and they will be redacted." Again, the plaintiff did not mention specifically the portions of the medical records relating to the race between biological healing and plate failure. In response to the plaintiff's argument, the defendant asserted that the medical records should not be redacted because the parties already had agreed that the records were full exhibits. The court then ruled that "[the record has] been marked. It's in evidence. If it's in the record, it's coming in."

The next day, before the commencement of the evidence, the plaintiff raised an objection to portions of the July 2 and November 4, 2002 records prepared by Lena, on the ground that they were opinions, and sought to have them redacted and to preclude Lena from testifying about those matters. After argument from the parties, the court stated: "The court's ruling will stand on the issue. The court understands the exhibits were marked. The court considers this to be more in the nature of treatment that is in the doctor's record. . . . It's part of his treatment record, and the court does not feel that it is an issue of surprise to the plaintiff. Apparently, it has been in the record for a long time. So, the ruling stands."

Having set forth this procedural background, we now turn to the plaintiff's claim on appeal, in which he challenges the propriety of the court's denial of his request for the redaction of portions of the medical records and

[11] According to Lena, nonunion occurs when a fractured bone fails to heal properly.

the court's allowance of testimony by Lena concerning those portions of the medical records.[12] The plaintiff

[12] In his brief to this court, the plaintiff directs us to the portions of the medical records that he claims should have been redacted, namely, the statements from the July 2 and November 4, 2002 medical records concerning the race between biological healing and plate failure. The plaintiff's brief, however, is devoid of any specific references to the portions of Lena's trial testimony that he challenges on appeal. See Practice Book § 67-4 (c); see also *Cichocki* v. *Quesnel*, 74 Conn. App. 299, 301, 812 A.2d 100 (2002) ("[f]or evidentiary rulings claimed to be improper to be reviewed by this court, they must be set forth in the briefs as required and outlined by the rules of practice" [internal quotation marks omitted]). Rather, the plaintiff makes a general assertion that the court should not have "allowed testimony from [Lena] about these comments." Nevertheless, our careful review of the record reveals that the defendant's counsel questioned Lena on two occasions about the challenged portions of the medical records. We note that the plaintiff objected to the questions, but the grounds he raised during trial are different from the ground he raises on appeal and the ground he had raised at the pretrial hearing on his January 3, 2006 motion in limine.

During the defendant's direct examination of Lena, the following examination occurred:

"[The Defendant's Counsel]: [The July 2, 2002 medical record] says at the end that [the plaintiff] was instructed that it is a race between his biology and the plate breaking. Did you give instructions along those lines to [the plaintiff] at that time?

"[The Witness]: We always instruct patients with—

"[The Plaintiff's Counsel]: Objection, Your Honor, it calls for a yes or no.

"The Court: Sustained.

"[The Defendant's Counsel]: Can you just tell us—

"[The Witness]: Yes.

"[The Defendant's Counsel]:—yes or no whether you did tell [the plaintiff] that at that time?

"[The Witness]: Yes.

* * *

"[The Defendant's Counsel]: Okay. And it's written [in the November 4, 2002 medical record], it is always a race between biological healing and plate failure since this is a load sharing device. Due to persistent motion—

"[The Plaintiff's Counsel]: Your Honor, I'm going to object to the witness testifying about the document.

"The Court: Well, I suppose a question is coming.

"[The Defendant's Counsel]: I have to read it before I can ask the question, Your Honor.

"[The Plaintiff's Counsel]: Well, I guess the question could be, what does it say?

"The Court: I'm going to allow it. Overruled.

"[The Defendant's Counsel]: Due to persistent motion at the fracture the plate has subsequently failed. Was that medical finding for this patient that you wrote . . . written in your chart on that day?

contends that the court abused its discretion in failing to redact the challenged notations in the medical records and in permitting Lena to testify about these notations because the statements had "nothing to do with the care and/or treatment of the plaintiff." The defendant argues that the court properly denied the request to redact the disputed portions of the July 2 and November 4, 2002 medical records because they constituted statements of fact and were related to Lena's treatment of the plaintiff. The defendant contends that the court properly permitted Lena to testify that the contested notations appeared in his treatment record for the plaintiff and also argues that Lena, in his testimony, did not offer opinions about the notations. We agree with the defendant and conclude that the court did not abuse its discretion.[13]

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: Objection, Your Honor, because the document was not written in his chart. This was a document written by a James P. Alvarez . . . who's not here. He didn't write it. Dr. Lena did not write this. And I object.

"The Court: The question was written in this chart. The question was not whether he wrote it.

"[The Plaintiff's Counsel]: This is not his chart. This is a report.

"The Court: Well, can we—

"[The Defendant's Counsel]: Let me see—

"The Court: Can we refer—is it marked as an exhibit? Is this a separate exhibit?

"[The Defendant's Counsel]: Yes, sir, this is a—this is tab—what tab is it, doctor? Twenty?

"[The Witness]: It's twenty.

"[The Defendant's Counsel]: Tab twenty of exhibit A, full exhibit.

"The Court: All right. All right. You may continue.

"[The Defendant's Counsel]: Dr. Lena, is this part of your office record for [the plaintiff]?

"[The Witness]: Yes."

[13] We also reiterate that the medical records in question were admitted as full exhibits, without objection by the plaintiff, as defendant's exhibit A. Additionally, the plaintiff affirmatively offered and marked another set of the medical records prepared by Lena, in their unredacted version, as plaintiff's exhibit two—also a full exhibit. Although the plaintiff initially agreed to the submission of the unredacted records, he later orally requested that the court redact the portion pertaining to the "race between biological healing and plate failure."

"Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *Bunting* v. *Bunting*, 60 Conn. App. 665, 670, 760 A.2d 989 (2000).

As we stated previously, the court, in its January 17, 2006 ruling on the plaintiff's motion in limine, held that the treating physicians, including Lena, could testify as to their treatment of the plaintiff but not as to opinions they rendered outside of that treatment. With respect to the plaintiff's redaction request, the court noted that the contested records already had been marked in evidence as full exhibits. The court then concluded that the challenged portions of the medical records were a part of the plaintiff's treatment record and that the contested statements were in the nature of treatment. In so concluding, the court implicitly recognized that the facts surrounding a patient's treatment inevitably involve statements pertaining to diagnosis, treatment and prognosis. Such facts, memorialized in Lena's treatment record of the plaintiff, are a part of the factual matrix surrounding the plaintiff's medical treatment, including the fracture of the first plate implanted in the plaintiff's body. "The distinction between so-called 'fact' and 'opinion' is not a difference between opposites or contrasting absolutes, but instead a mere difference in degree with no bright line boundary. . . . [I]n a changing world there will constantly be a myriad of new statements to which a judge must apply the distinction. Thus, good sense demands that the trial judge be

accorded a wide range of discretion at least in classifying evidence as 'fact' or 'opinion,' and probably in admitting evidence even where found to constitute opinion." 1 C. McCormick, Evidence (5th Ed. 1999) § 11, pp. 45–46.

In light of the inherent difficulties in distinguishing between opinions and facts in the context of a patient's treatment record, we cannot conclude that the court abused its discretion in determining that the challenged portions of the July 2 and November 4, 2002 medical records concerned Lena's treatment of the plaintiff and, thus, properly were characterized as the facts of treatment. Accordingly, the court properly denied the plaintiff's request to redact the July 2 and November 4, 2002 medical records.[14] Although Lena did testify about the statements in the treatment record, he did not offer any opinions about the notations. The court therefore properly permitted testimony from Lena about how those notations appeared in his treatment record for the plaintiff. Thus, we conclude that the court did not abuse its discretion.

III

The plaintiff last claims that the court improperly refused to allow him to cross-examine the defendant's expert witness, Lyle D. Zardiackas, who has a doctorate in materials science, using the deposition testimony of Lena.[15] We conclude that the record is inadequate for review of the plaintiff's claim.

[14] Furthermore, the evidence of Lena's use of the plates to treat the plaintiff's bone and the record of their surgical implantation was relevant to the application of the learned intermediary doctrine's principle that treating prescribing physicians, as learned intermediaries between the manufacturer and consumer, stand in the best position to evaluate the risks and benefits of a particular course of treatment. In this case, Lena weighed the risks of plate failure against the potential benefits of the use of those very plates to promote healing.

[15] The deposition testimony of Lena was marked for identification at trial.

The following additional facts and procedural history are relevant. Lena, who testified at trial on behalf of the defense, also had given deposition testimony prior to trial. During the plaintiff's cross-examination of Zardiackas, the plaintiff referred to a statement in Lena's deposition testimony. The defendant objected, and a sidebar conference was held. The court sustained the defendant's objection. The plaintiff resumed his cross-examination of Zardiackas and, again, sought to refer to a statement made by Lena at his deposition. The defendant objected, and the court sustained the objection.[16]

After Zardiackas was excused from the witness stand, the jury left the courtroom. At that point, the court indicated that the plaintiff "[wanted] to put a few of the court's rulings and what [he had] proposed to introduce on the record." The plaintiff then quoted Lena's deposition testimony and explained that during cross-examination of Zardiackas, he had sought to ask Zardiackas about two statements made by Lena at Lena's deposition.[17] Several days later and prior to closing arguments, the plaintiff stated: "I'm not sure if I adequately put on the record Your Honor's sustaining the objection to my allowing cross-examination of Dr. Zardiackas based on excerpts from Dr. Lena's deposition. I just wanted to make sure that that's on the record." The plaintiff then stated: "I think that his deposition is for [identification], defendant's [exhibit] F, and what I wanted to do is ask Dr. Zardiackas questions from page,

[16] Neither the ground for the objections, nor the ground for sustaining the objections were stated for the record.

[17] Specifically, the plaintiff's counsel stated: "Just as the offer of proof, I wanted to ask on cross-examination a reference in Dr. Lena's deposition taken on January 11, 2005, on page eighty-nine—pages eighty-nine and ninety.

"The question was: 'But you could not bend it in the operating room.' Answer: 'We don't have the devices available to bend it in the operating room. Quite honesty, I've never tried, I don't think, to bend a plate of this magnitude in the operating room.'

"That's what I wanted to ask the expert witness."

the bottom of eighty-nine, line twenty-four, to the top of ninety through line five, and, just for the record, Your Honor sustained the objection."

On appeal, the plaintiff claims that the court made an improper ruling. Despite the plaintiff's apparent attempts, outside of the jury's presence, to perfect the record for our review, we conclude that the record is inadequate to review the plaintiff's claim. Although the plaintiff stated on the record the portions of Lena's deposition testimony that he had wanted to utilize in his cross-examination of Zardiackas, the plaintiff never asked the court to state on the record the basis of its ruling, in which it had sustained the defendant's objection. Further, the plaintiff failed to put on the record what had transpired during the sidebar conference or even the ground on which the defendant had objected. The plaintiff also did not file a motion for articulation pursuant to Practice Book § 66-5. In the absence of an articulation, we are unable to discern the basis of the court's ruling. Accordingly, we are unable to review the plaintiff's claim. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 388–89, 886 A.2d 391 (2005) ("As is always the case, the [appellant] . . . bear[s] the burden of providing a reviewing court with an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter. . . . In the absence of any such attempts, we decline to review this issue." [Citations omitted; internal quotation marks omitted.]), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).[18]

The judgment is affirmed.

In this opinion the other judges concurred.

[18] We further note that the plaintiff has failed to brief his claim adequately. In his brief, the plaintiff merely refers to Lena's deposition testimony and

STATE OF CONNECTICUT *v.* TALANCE J. STITH (AC 27731)

Bishop, Robinson and Freedman, Js.

Argued February 19—officially released May 27, 2008

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of threatening in the second degree, harassment in the second degree and breach of the peace in the second degree, and substitute information, in the second case, charging the defendant with three counts of the crime of risk of injury to a child and with the crimes of criminal mischief in the third degree, reckless endangerment in the second degree, breach of the peace in the second degree and assault in the third degree, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the cases were consolidated; thereafter, the defendant was presented to the court, *Brown, J.*, on a plea of guilty to one count of risk of injury to a child and threatening in the second degree; subsequently, the court denied the defendant's motion to withdraw the plea; thereafter, the state entered a nolle prosequi as to two counts each of breach of the peace in the second degree and risk of injury to a child, and as to harassment in the second degree, criminal mischief in the third degree, reckless endangerment in the second degree

to excerpts of the trial transcript. The plaintiff's brief is devoid of any meaningful analysis or citation to case law to support his claim that the court's ruling was improper. See *Jellison* v. *O'Connell*, 73 Conn. App. 564, 565–66, 808 A.2d 752 (2002). More importantly, the plaintiff's brief fails to identify the basis of the court's ruling, in which it sustained the defendant's objection. See Practice Book § 67-4 (d) (3) (appellant raising claim of evidentiary error required to include in brief "a verbatim statement of the following: the question or offer of exhibit; the objection and the ground on which it was based; the ground on which the evidence was claimed to be admissible; the answer, if any; and the ruling").

and assault in the third degree; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Martha Brooke Hansen, special public defender, for the appellant (defendant).

Raheem L. Mullins, deputy assistant state's attorney, with whom, on the brief, were *John A. Connelly*, state's attorney, *Julia K. Conlin*, assistant state's attorney, and *Catherine Brannelly Austin*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Talance J. Stith, appeals from the judgment of conviction rendered by the trial court after he entered a guilty plea under the *Alford* doctrine[1] to threatening in the second degree in violation of General Statutes § 53a-62 and risk of injury to a child in violation of General Statutes § 53-21. On appeal, the defendant claims that the court abused its discretion in denying his motion to withdraw the guilty plea. Specifically, the defendant claims that the plea was not knowingly, intelligently and voluntarily made because (1) he was under the influence of medication at the time it was entered, (2) it was not entered with the effective assistance of counsel and (3) the court did not explain the elements of each offense. We affirm the judgment of the trial court.

The following facts are relevant to the defendant's appeal. The defendant was arrested and charged, in separate dockets, with threatening in the second degree in violation of § 53a-62 and risk of injury to a child in

[1] "*North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), holds that a criminal defendant need not admit his guilt but may consent to being punished as if he is guilty to avoid the risk of proceeding at trial." *State* v. *Sutton*, 95 Conn. App. 139, 140 n.1, 895 A.2d 805, cert. denied, 278 Conn. 920, 901 A.2d 45 (2006).

violation of § 53-21. On April 26, 2005, pursuant to a plea agreement with the state, the defendant entered a guilty plea to these charges under the *Alford* doctrine. Under the plea agreement, the defendant was to enter the Daytop facility in New Haven for substance abuse treatment for one year. If the defendant was successful in the program, he would receive a suspended sentence of six years of incarceration with three years of probation. If the defendant was unsuccessful in the program, however, he would receive a sentence of six years to serve.

Prior to accepting the defendant's plea, the court conducted a canvass of the defendant. In response to the court's questions, the defendant specifically stated that he had not had any drugs, alcohol or medication within the previous twenty-four hours that would interfere with his judgment. The defendant indicated that his attorney had explained the nature and elements of the offenses charged, as well as the maximum possible penalty if he was convicted of one or both of the offenses. The defendant further stated that he was satisfied with his attorney's representation of him in the matter. The defendant's attorney, Brian Pear, stated that in his opinion, the defendant was entering his plea knowingly and voluntarily. The court, in accepting the plea, found that it was knowingly and voluntarily made, with the assistance of competent counsel.

At a hearing on May 31, 2005, the state alleged that the defendant had walked away from the Daytop treatment program. The matter was continued to July 12, 2005, at which time Pear explained to the court that there had been a breakdown of his relationship with the defendant. At that time, the defendant indicated that he did not remember agreeing to serve six years in jail and that he was on heavy medication at the time he

entered the plea.[2] The defendant sought to withdraw his plea rather than proceed for sentencing. The matter was continued again and defense counsel was instructed to file a motion to withdraw the plea.

At the subsequent hearing on the motion to withdraw the plea, the defendant testified that on the date that he entered the plea, he had taken the medications Seroquel and Lexapro, which he claimed made him unable to comprehend what was going on around him. He testified that he understood that he had told the court at the time of the plea that he had not taken anything, yet he did not remember saying anything to the court or talking to Pear on that date. At the conclusion of the hearing, the court denied the defendant's motion to withdraw the plea and sentenced the defendant to a total effective term of six years to serve. The defendant then filed this appeal, challenging the denial of his motion to withdraw the plea.

"A . . . plea, once accepted, may be withdrawn only with the permission of the court. . . . The court is required to permit the withdrawal of a guilty plea upon proof of any ground set forth in Practice Book § [39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of

[2] The defendant stated: "At the time when all this happened, I was on heavy medication. I was taking antipsychotics and antidepressants, which make . . . me . . . delusive, and I see shadows and hear voices. I talked to my psychiatrist, and she told me that I need to tell you all what was going on that day.

"The reason why when you—I guess when I was asked if I was on any medications or—or—or any drugs, when I—when I told you no, everything that you asked me, my lawyer told me what to say.

"I wrote Mr. Pear several times, asking him to get my medical records from—from jail and from the program because I'm schizophrenic. I take schizophrenic medication. I hear voices, and I see shadows. This has been going on before I even went to jail; I was taking medications for it.

"I don't remember making a plea for this. I remember coming to court. I don't remember taking no plea for it. I heard something totally different. I didn't know I would be spending six years in jail."

permission to withdraw is reversible only if that discretion has been abused. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty." (Internal quotation marks omitted.) *State* v. *Saunders*, 86 Conn. App. 333, 336, 860 A.2d 1265 (2004). We also note that "[t]his court does not retry facts; it can only determine whether competent evidence supports factual determinations made by the trial court. Evidence is presented before the trier of fact, not before this court. The trier of fact has an opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility that we do not. . . . Where . . . factual determinations rested in large measure on credibility assessments, we accept the reasonable credibility determinations made by the trier of fact." (Citation omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 95 Conn. App. 69, 88, 895 A.2d 834, cert. denied, 280 Conn. 903, 907 A.2d 94 (2006).

The defendant first claims that he was under the influence of medication at the time he entered the plea, and therefore the plea was not knowingly, intelligently and voluntarily made. In reviewing this claim, we note that the court, in denying the motion to withdraw the plea, relied on the defendant's responses to the court's questions during the plea canvass. In particular, the court noted that when the defendant was asked whether he was under the influence of any alcohol, drugs or medication that might affect his good judgment, he responded in the negative. The court also stated that there was "nothing but bare allegations from the defendant with regard to whether he was, in fact, on any type of medication on the date in question. There has been no offer or proffer of medical documentation to suggest that the defendant was, in fact, on any type of medication on April 26, 2005, other than the bare

assertions of the defendant."[3] "It is well established that [a] trial court may properly rely on . . . the responses of the [defendant] at the time [she] responded to the trial court's plea canvass . . . ." (Internal quotation marks omitted.) *State* v. *Monk*, 88 Conn. App. 543, 552, 869 A.2d 1281 (2005); see also *Carey* v. *Commissioner of Correction*, 86 Conn. App. 180, 185–86, 860 A.2d 776 (2004) (upholding habeas court's finding that plea knowingly and voluntarily given when, although petitioner claimed he had taken medication on date he entered plea and that this made him confused, there was no evidence that described medication or its effect on petitioner), cert. denied, 272 Conn. 915, 866 A.2d 1283 (2005). On the basis of our review of the record, we conclude that the court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea on the basis of his assertion that he was under the influence of medication that affected his ability to comprehend the plea process at the time he entered his plea.

The defendant next argues that the plea was not knowing, intelligent and voluntary because it was entered without the effective assistance of counsel.[4] In

[3] We note that even if the court had accepted the defendant's testimony that he was taking Seroquel and Lexapro at the time he entered the plea, there was no offer of proof regarding the effect of such medication on the defendant's ability to comprehend what was going on around him.

[4] "[A] claim of ineffective assistance of counsel is generally made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal. . . . Section 39-27 of the Practice Book, however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea. A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law. . . . Second, there must exist such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance." (Internal quotation marks omitted.) *State* v. *Sutton*, 95 Conn. App. 139, 145, 895 A.2d 805, cert. denied, 278 Conn. 920, 901 A.2d 45 (2006).

support of this argument, the defendant refers to his July 12, 2005 unsworn statement to the court that he had asked Pear several times to get his medical records because he was taking medication for schizophrenia. See footnote 2. He also asserts that Pear did not conduct an investigation into this matter. As noted by counsel for the state, however, the defendant failed to present the medical records that Pear allegedly failed to obtain and presented no evidence concerning Pear's investigation into the matter. All that the court had before it was the "bare allegations from the defendant with regard to whether he was, in fact, on any type of medication on the date in question." On the basis of the lack of evidence concerning this claim, as well as the defendant's statement during the plea canvass that he was satisfied with Pear's representation of him in this matter, we conclude that the defendant has failed to satisfy his burden of proving that the plea was not knowing, intelligent and voluntary because it was entered without the effective assistance of counsel. The court, therefore, did not abuse its discretion in denying the defendant's motion to withdraw the guilty plea on this basis.

The defendant's final claim is that the plea was not knowingly and intelligently made because the court did not explain the elements of each offense. The state counters that the record of the plea canvass establishes that Pear had explained the nature and the elements of the charges to the defendant. We agree.[5]

[5] The transcript of the plea canvass reveals the following:

"The Court: Has your attorney explained to you the nature and elements of both of these offenses? In other words, what the state would have to prove beyond a reasonable doubt to convict you of one or both of these charges if you chose to go to trial.

"[The Defendant]: Yes, he has.

"The Court: And has your attorney also explained to you what the maximum possible penalty would be if you were convicted of one or both of these offenses?

"[The Defendant]: Yes, sir.

"The Court: Is that correct, counsel? Have you explained all these things to your client?

"[O]ur courts have stopped short of adopting a per se rule that notice of the true nature of the charge always requires the court to give a description of every element of the offense charged. . . . Rather, we have held that, [u]nder *Henderson* v. *Morgan*, 426 U.S. 637, 647, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976), even without an express statement by the court of the elements of the crimes charged, it is appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. . . . Thus, unless a record contains some positive suggestion that the defendant's attorney had not informed the defendant of the elements of the crimes to which he was pleading guilty, the normal presumption applies." (Citations omitted; internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 783–84, 894 A.2d 963 (2006). On the basis of our review of the record, specifically, the plea canvass, we conclude that the defendant cannot prevail on his claim that his plea was not knowingly and intelligently made because the court failed to explain the elements of the offenses to him. The court, therefore, did not abuse its discretion in denying the defendant's motion to withdraw the guilty plea on this basis.

The judgment is affirmed.

"[Defense Counsel]: I have.

"The Court: In your opinion, is your client entering his plea knowingly and voluntarily?

"[Defense Counsel]: He is, Your Honor."

CITY OF NEW HAVEN *v.* GOD'S CORNER CHURCH, INC., ET AL.
(AC 28052)

Flynn, C. J., and DiPentima and Robinson, Js.

Syllabus

By statute (§ 52-350d), the Superior Court, for purposes of postjudgment procedures, shall have jurisdiction over all parties of record in an action until satisfaction of the judgment. A postjudgment procedure is defined by statute (§ 52-350a [15]) as any procedure commenced after the rendition of a money judgment, which, in turn, is defined by related statute (§ 52-350a [13]) as a judgment calling in whole or part for the payment of a sum of money. A judgment of foreclosure, including a judgment of foreclosure by sale, is not a money judgment within the meaning of § 52-350a (13) because such a judgment does not call for the payment of a sum of money but rather for the vesting and divesting of title to real property.

The defendant G Co., which had paid the plaintiff city of New Haven a sum of money to redeem certain of G Co.'s real property against which the plaintiff had obtained a judgment of foreclosure by sale in connection with eight municipal tax liens, appealed to this court, challenging the action of the trial court dismissing G Co.'s motion to determine the debt. The trial court having dismissed the motion after the plaintiff filed a satisfaction of the judgment, the plaintiff claimed that that court's jurisdiction over the motion was revoked expressly by § 52-350d. *Held* that because a foreclosure by sale is not a money judgment under § 52-350a (13) and the proceedings following a judgment of foreclosure by sale are not postjudgment proceedings as defined by § 52-350a (15), § 52-350d did not revoke the trial court's jurisdiction to reach the merits of G Co.'s motion to determine the debt; accordingly, the judgment was reversed in part and the matter remanded for further proceedings.

Argued January 7—officially released June 3, 2008

Procedural History

Action to foreclose municipal tax liens on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Doherty, J.*; judgment of foreclosure by sale; thereafter, the court dismissed the named defendant's motion to determine

the debt, and the named defendant appealed to this court. *Reversed in part; further proceedings.*

Max F. Brunswick, for the appellant (named defendant).

Philip G. Kent, with whom was *Karen Baldwin Kravetz*, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendant in this foreclosure action, God's Corner Church, Inc.,[1] appeals from the judgment of the trial court dismissing its motion to determine the debt owed to the plaintiff, the city of New Haven. The defendant claims that the court improperly (1) concluded that it lacked subject matter jurisdiction to address the defendant's motion because the plaintiff had filed a satisfaction of judgment and (2) failed to hold an evidentiary hearing on the defendant's claim that the plaintiff had been unjustly enriched by the defendant's overpayment in redeeming the property. We reverse the judgment of the trial court.

The following procedural history is relevant to our disposition of the defendant's appeal. By amended complaint dated December 20, 2001, the plaintiff sought to foreclose eight municipal tax liens against property owned by the defendant within the city of New Haven at 793-795 Grand Avenue. After a series of delays in the proceedings, the court rendered judgment of foreclosure by sale on November 14, 2005, and set a sale date of February 18, 2006. On February 14, 2006, the defendant filed a motion to extend the sale date and to determine the debt owed to the plaintiff. On February 17, 2006,

[1] The plaintiff named as additional party defendants Jerome R. Goldberg and Ina J. Goldberg as trustees of the Ina J. Goldberg Revocable Trust, the water pollution control authority, the South Central Connecticut Regional Water Authority and the Connecticut Community Investment Corporation. None of those additional parties has joined in this appeal. Accordingly, we refer to God's Corner Church, Inc., as the defendant.

the court denied the defendant's motion as to extending the sale date but deferred ruling on the motion as to the debt, allowing the defendant to reclaim its motion with respect to that issue. After the sale had proceeded as scheduled, the committee filed a motion to approve the sale and the committee's deed, and the defendant reclaimed its motion to determine the debt. Both motions were scheduled for a hearing on March 13, 2006. Prior to the hearing, however, the defendant paid the plaintiff a sum of money to redeem the property, and, on March 9, 2006, the plaintiff filed a satisfaction of the judgment with the court. On March 13, 2006, the court ordered the parties to brief the issue that the defendant raises on appeal, namely, whether the court retained subject matter jurisdiction to address the defendant's motion to determine the debt after the plaintiff had filed the satisfaction of the judgment. On August 25, 2006, the court resolved that question in favor of the plaintiff and dismissed the defendant's motion to determine the debt. This appeal followed.

"A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation

marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 802, 925 A.2d 292 (2007).

"The Superior Court is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all other matters cognizable by any law court of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive jurisdiction in any matter is sufficient to give the Superior Court jurisdiction of that matter. . . . [T]he general rule of jurisdiction . . . is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so . . . . [N]o court is to be ousted of its jurisdiction by implication." (Citation omitted; internal quotation marks omitted.) *Carten* v. *Carten*, 153 Conn. 603, 612–13, 219 A.2d 711 (1966); see also *State* v. *Radzvilowicz*, 47 Conn. App. 1, 36, 703 A.2d 767, cert. denied, 243 Conn. 955, 704 A.2d 806 (1997).

The plaintiff asserts that the court's jurisdiction in this matter is revoked expressly by General Statutes § 52-350d (a). That statute provides in relevant part: "For the purposes of postjudgment procedures, the Superior Court shall have jurisdiction over all parties of record in an action until satisfaction of the judgment . . . ." General Statutes § 52-350d (a). As used in § 52-350d (a), a postjudgment procedure is "any procedure commenced after rendition of a money judgment"; General Statutes § 52-350a (15); and a money judgment "means a judgment, order or decree of the court calling in whole or in part for the payment of a sum of money . . . ." General Statutes § 52-350a (13). The primary issue, therefore, is whether a judgment of foreclosure by sale is a "money judgment" within the meaning of § 52-350a (13). If so, we then must decide whether, after a judgment of foreclosure by sale is satisfied, the statute revokes the court's jurisdiction over the subject matter,

as the plaintiff argues, or instead merely revokes the court's personal jurisdiction over the parties.[2]

"Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 283, 928 A.2d 566 (2007).

The relevant law concerning foreclosure actions is well settled. "[O]rdinarily [a] money judgment is obtained by an action at law . . . . [A]n action is to be deemed legal in nature, rather than equitable, where the only relief sought is the collection of money damages." (Citation omitted; internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 80 Conn. App. 436, 442, 835 A.2d 491 (2003), cert. denied, 268 Conn. 920, 846 A.2d

[2] Because we hold that a judgment of foreclosure by sale is not a money judgment within the meaning of § 52-350d (a), we need not address whether § 52-350d is a limitation on the court's personal or subject matter jurisdiction.

881 (2004). A foreclosure action, however, is an equitable proceeding. *New Haven Savings Bank* v. *LaPlace*, 66 Conn. App. 1, 9, 783 A.2d 1174, cert. denied, 258 Conn. 942, 786 A.2d 426 (2001). "At common law, the term foreclosure meant strict foreclosure. . . . General Statutes § 49-24 appends to that definition the remedy of foreclosure by sale without altering the existing common law definition." (Citations omitted.) *Madison Hills Ltd. Partnership III* v. *Madison Hills, Inc.*, 35 Conn. App. 81, 90–91, 644 A.2d 363, cert. denied, 231 Conn. 913, 648 A.2d 153 (1994). "Generally, foreclosure means to cut off the equity of redemption, the equitable owner's right to redeem the property. . . . The purpose of the judicial sale in a foreclosure action is to convert the property into money and, following the sale, a determination of the rights of the parties in the funds is made, and the money received from the sale takes the place of the property. The vesting of title to a . . . property in the mortgagee [or lienholder] under a foreclosure decree constitutes appropriation of the property to the payment of the . . . debt, and, where the value of the property foreclosed exceeds the amount of the . . . debt, the mortgagee [or lienholder] is entitled to nothing more. . . . Accordingly, when the mortgagee [or lienholder] takes title to the property, the fair market value of which exceeds the amount of the debt, its debt is satisfied by virtue of its ownership of the collateral." (Citation omitted; internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, 278 Conn. 219, 229–30, 896 A.2d 797 (2006).

"[A]t common law, a mortgagee was required to elect between a foreclosure action or an action on the underlying debt. . . . Thus, even if the value of the property that the mortgagee gained was less than the debt owed to her, the entry of judgment precluded any further

common-law proceedings on the note. . . . Consequently, in 1833, the legislature created the remedy of the deficiency judgment in order to make the plaintiff whole when the value of the security did not cover the amount of the debt owed to the plaintiff. . . . In contrast, tax lienors, like judgment and condominium lienors, are not barred, under common law, from obtaining a judgment of strict foreclosure and, thereafter, commencing a separate action to recover the balance of any additional debt owed. Cf. General Statutes § 12-172 ([n]o sale of real estate for taxes or foreclosure of any lien shall divest the estate sold of any existing lien for other taxes)." (Citation omitted; internal quotation marks omitted.) *Winchester* v. *Northwest Associates*, 255 Conn. 379, 388 n.7, 767 A.2d 687 (2001). The fact, however, that a separate proceeding may result in a personal judgment against the debtor for the amount of the debt unsatisfied by the foreclosed property does not convert that portion of the equitable foreclosure proceedings into an action at law. See *Federal Deposit Ins. Corp.* v. *Voll*, 38 Conn. App. 198, 210, 660 A.2d 358, cert. denied, 235 Conn. 903, 665 A.2d 901 (1995).

With these legal principles in mind, we conclude that a judgment of foreclosure does not call in whole or in part for the payment of a sum of money but, rather, it calls for the vesting and divesting of title to real property. Accordingly, a judgment of foreclosure by sale is not a money judgment within the meaning of § 52-350a (13). See *Stein* v. *Hillebrand*, 240 Conn. 35, 44, 688 A.2d 1317 (1997) (mortgagee does not have to obtain "money judgment" but could instead institute foreclosure proceedings on property); see also *Cooke* v. *Cooke*, 99 Conn. App. 347, 352, 913 A.2d 480 (2007) (marital dissolution judgment that did not order party to pay certain sum for child's educational expenses cannot fairly be characterized as money judgment); *Amresco New England II, L.P.* v. *Colossale*, 63 Conn. App. 49, 55, 774 A.2d 1083

(2001) (because foreclosure is peculiarly equitable action, court may entertain such questions as necessary in order that complete justice may be done). Because a judgment of foreclosure by sale is not a money judgment under § 52-350a (13), the proceedings following a judgment of foreclosure by sale are not postjudgment proceedings for purposes of § 52-350a (15). In turn, § 52-350d, which applies only to postjudgment proceedings as defined by § 52-350a (15), does not limit the court's jurisdiction to address a party's claims after a property has been redeemed following a judgment of foreclosure by sale. Thus, we conclude that § 52-350d did not revoke the court's jurisdiction to reach the merits of the defendant's motion to determine the debt, and the court improperly dismissed the defendant's motion on that basis.

Having concluded that the court improperly dismissed the defendant's motion, we next must determine to what relief, if any, the defendant is entitled. The defendant prays for a remand to the trial court for an evidentiary hearing to determine whether the plaintiff should return any part of the amount paid by the defendant to redeem the property. Specifically, the defendant claims that the plaintiff was unjustly enriched because it improperly had demanded and received payment for (1) approximately $22,000 in settlement of a separate dispute between the parties, (2) a "statutory collection fee" that was not submitted to the court or made a part of the judgment and (3) $3117.05 in excess of the attorney's fees awarded by the court. The plaintiff, in response, asserts that it was entitled to demand those sums and that, in any event, the defendant has waived its claim of unjust enrichment by knowingly and voluntarily paying the amount demanded without reserving its rights to dispute the amount demanded.

Before we address the defendant's claim, we note the following additional facts, which are not in dispute.

On November 14, 2005, the court found the amount of the debt to be $94,415.59 and awarded the plaintiff, as part of its judgment of foreclosure by sale, $18,850 in attorney's fees. On March 3, 2006, the plaintiff's attorney issued to the defendant's attorney a payoff letter itemizing the amounts that the plaintiff claimed the defendant owed in order to redeem the property. The total amount in demand, as stated in the payoff letter, was $168,799.69. On March 9, 2006, the defendant paid the full amount of the March 3, 2006 demand.

The parties disagree on whether the defendant, in paying the full amount of the demand, has waived its right to dispute the amount of the debt or whether it has preserved that claim. "Whether a waiver has occurred is a factual question, reviewable under the clearly erroneous standard." (Internal quotation marks omitted.) *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 97 Conn. App. 541, 565, 905 A.2d 1214, cert. denied, 280 Conn. 942, 943, 912 A.2d 479 (2006). The court, however, made no findings with respect to the plaintiff's waiver argument, and it is not clear from the record whether the defendant had made such a waiver.[3] Accordingly, we must remand this case to the trial court for a determination of this threshold issue and, in the event the court finds that no waiver occurred, a decision on the merits of the defendant's claim.

[3] We note that in its order dismissing the defendant's motion to determine the debt, the court stated: "Notwithstanding the defendant's claim to the contrary, the court finds, under the facts of this case, that the defendant was not prevented by mistake, accident or other reasonable cause from raising its claim, as those terms are intended in *A.I. Credit Corp.* v. *M.A. Gronski, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-01-0452088-S (October 3, 2002) (33 Conn. L. Rptr. 216)." We question the propriety of this finding in light of the record, which indicates that the defendant, in fact, had raised its claim on February 14, 2006, prior to redeeming the property on March 9, 2006.

The order dismissing the named defendant's motion to determine the debt is reversed and the case is remanded for further proceedings in accordance with law.

In this opinion the other judges concurred.

BESS GILMORE ET AL. *v.* PUBLIC STORAGE, INC.
(AC 28148)

Gruendel, Robinson and Foti, Js.

Argued March 27—officially released June 3, 2008

Procedural History

Action to recover damages for, inter alia, unfair trade practices, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed; further proceedings.*

Douglas Gilmore, for the appellants (plaintiffs).

James E. Carroll, pro hac vice, with whom were *John J. Bogdanski*, and, on the brief, *Carl Fumarola*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiffs, Bess Gilmore, and her son, Keith Gilmore, appeal from the judgment of the trial court, rendered in favor of the defendant, Public Storage, Inc., on a motion for summary judgment. They make several claims on appeal. The plaintiffs' first claim asserts that the court improperly granted the defendant's motion for summary judgment after a hearing for that motion was scheduled on the short calendar in violation of the rules of practice. Their second and

third claims assert that the court improperly granted the defendant's motion for summary judgment for additional reasons. Their last two claims pertain to the underlying merits of the case. Because we reverse the judgment on the basis of the plaintiffs' first claim, we do not need to address the remaining claims.

The following procedural history is relevant to our disposition of the plaintiffs' appeal. The plaintiffs filed their complaint on February 17, 2004.[1] The record discloses that on August 25, 2006, the defendant filed a motion for summary judgment. On September 5, 2006, the plaintiffs filed a timely request for an extension of time to respond to the motion for summary judgment. In their appellate brief, the plaintiffs argue that their request for an extension of time was granted automatically by the clerk pursuant to Practice Book § 17-45, and, therefore, the motion for summary judgment should not have appeared on the short calendar earlier than thirty days from the filing of the request. The motion for summary judgment, however, was first scheduled on September 11, 2006, but was subsequently marked off by the defendant. The motion was then scheduled for September 25, 2006, and heard before the court. While the defendant appeared before the court on September 25, 2006, the plaintiffs did not due to the illness of the plaintiffs' attorney. As a result, the motion was taken on the papers. On October 5, 2006, the court rendered judgment in favor of the defendant.

Practice Book § 17-45 provides in relevant part: "Any adverse party may, within ten days of the filing of the motion with the court, file a request for extension of

[1] The plaintiffs served a complaint against the defendant seeking damages for the losses they incurred as a result of the defendant's disposal of property the plaintiffs had stored in the defendant's storage facility.

time to respond to the motion. The clerk shall grant such request and cause the motion to appear on the short calendar not less than thirty days from the filing of the request. . . .'' The plaintiffs' request for an extension of time to respond to the motion for summary judgment was filed on September 5, 2006, which was within the time period specified by the rules of practice.[2] Because the plaintiffs' request was filed timely, the clerk automatically granted the request pursuant to Practice Book § 17-45, and the motion for summary judgment should not have appeared on the calendar prior to thirty days after the request had been made. The motion for summary judgment, however, was scheduled on the short calendar for September 25, 2006. September 5 to September 25 is a span of only twenty days, which does not comport with Practice Book § 17-45. The court should have scheduled the motion for summary judgment on the short calendar at least thirty days after the filing of the plaintiffs' request for an extension of time pursuant to Practice Book § 17-45.

The judgment is reversed and the case is remanded for further proceedings in accordance with law.

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[2] Although September 5, 2006, was technically eleven days after the date the defendant filed the motion for summary judgment, August 25, 2006, the plaintiffs' request nevertheless was timely. Practice Book § 7-17 provides in relevant part: ''If the last day for filing any matter in the clerk's office falls on a day on which such office is not open as thus provided . . . then the last day for filing shall be the next business day upon which such office is open. . . .'' August 25, 2006, was a Friday. Ten days from August 25, 2006, was September 4, 2006, which was Labor day, a national holiday on which the court is closed. As a result, the next business day was September 5, 2006, the date on which the plaintiffs filed their request for an extension of time.

STATE OF CONNECTICUT *v.* ROBERT MUCKLE (AC 28108)

STATE OF CONNECTICUT *v.* STANLEY SCOTT (AC 28109)

STATE OF CONNECTICUT *v.* MARYANN SPRAGUE (AC 28110)

Gruendel, Lavine and Stoughton, Js.

Syllabus

Convicted of the crime of disorderly conduct in connection with the defendants' actions during a demonstration at a Planned Parenthood of Connecticut clinic, the defendants in three consolidated cases filed separate appeals to this court. Each defendant claimed that the evidence was insufficient to establish that he or she either obstructed or intended to obstruct pedestrian traffic in violation of statute (§ 53a-182 [a] [5]). *Held* that there was sufficient evidence presented by the state to prove beyond a reasonable doubt that the defendants engaged in conduct in violation of § 53a-182 (a) (5), which provides that a person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly causing a risk thereof, such person obstructs vehicular or pedestrian traffic; the trial court reasonably could have inferred on the basis of the size of the defendants' signs, stroller and baby carriage and their position on a sidewalk adjacent to the clinic that the defendants intended to cause inconvenience, annoyance and alarm or to obstruct the sidewalk, and the court reasonably could have found that the defendants obstructed pedestrian traffic by forcing pedestrians to walk off the sidewalk to get around them.

(*One judge dissenting*)

Argued January 7—officially released June 3, 2008

Procedural History

Three substitute informations charging the defendants in each case with the crime of disorderly conduct, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the cases were consolidated and tried to the court, *Keegan, J.*; judgments of guilty, from which the defendants filed separate appeals to this court, which consolidated the appeals. *Affirmed.*

Roger J. Frechette, for the appellants (defendants).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *John P. Doyle, Jr.*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. Each of the defendants in these consolidated appeals, Robert Muckle, Stanley Scott and Maryann Sprague, was convicted, after a trial to the court, of disorderly conduct in violation of General Statutes § 53a-182 (a) (5) in connection with a demonstration at the Planned Parenthood of Connecticut (Planned Parenthood) facility in New Haven. On appeal, each of the defendants claims that the evidence was insufficient to establish that he or she either obstructed or intended to obstruct pedestrian traffic in violation of the statute. We affirm the judgments of the trial court.

These appeals arise out of events that transpired on July 9, 2005, when the defendants were on the sidewalk adjacent to Edwards Street near its intersection with Whitney Avenue in New Haven. The court found, in its oral decision, that "in the morning hours at or near . . . 345 Whitney Avenue in New Haven, [the defendants] by their physical presence, together with the presence of their numerous bulky signs, the carriages with signs placed on them, the bricks holding the carriage in place, and the location of the parties and the property within close proximity on the seven foot sidewalk, intended to cause inconvenience, annoyance or alarm by getting in the way of or blocking pedestrian traffic on the sidewalk of Edwards Street." The defendants were sentenced on October 3, 2006,[1] and these appeals followed.

[1] All of the defendants were sentenced to ninety days in the custody of the commissioner of correction, execution suspended. Muckle and Sprague were ordered to pay fines of $250 each, and Scott was ordered to pay a fine of $500. Muckle and Sprague each received a conditional discharge, requiring that they have no contact with Planned Parenthood, stay 100 yards away from any Planned Parenthood office in Connecticut, have no contact

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Damato*, 105 Conn. App. 335, 340–41, 937 A.2d 1232, cert. denied, 286 Conn. 920, 949 A.2d 481 (2008). "When there is conflicting evidence . . . it is the exclusive province of the court, as the trier of fact, to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Capp Industries, Inc.* v. *Schoenberg*, 104 Conn. App. 101, 116–17 n.11, 932 A.2d 453, cert. denied, 284 Conn. 941, 937 A.2d 696, 697 (2007). "Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Felder*, 95 Conn. App. 248, 263, 897 A.2d 614, cert. denied, 279 Conn. 905, 901 A.2d 1226 (2006). "On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of

with Planned Parenthood employees or visitors and have no new arrests. Scott received one year of probation subject to standard terms, plus he is to stay 100 yards away from any Planned Parenthood office in Connecticut, have no contact with Planned Parenthood employees or visitors, stay ten feet away from any motor vehicle approaching a Planned Parenthood office, make a $250 charitable contribution to the Crime Victims Compensation Fund within three months of sentencing and perform ten hours of community service each week for one year.

guilty." (Internal quotation marks omitted.) *State* v. *Lopez*, 280 Conn. 779, 809, 911 A.2d 1099 (2007). "In the absence of evidence to the contrary, [an appellate court] will not assume that a finding adverse to an appellant's case could only have been the product of a failure by the court to consider all of the evidence presented." *Capp Industries, Inc.* v. *Schoenberg*, supra, 117 n.11.

Following the presentation of evidence from September 5 through 7, 2006, the court rendered its decision orally on September 26, 2006. The court first recited the evidence that had been presented. The court heard testimony from Brian Donnelly, a New Haven police officer, and the defendants. The state also "introduced seventeen exhibits, including a video [from a stationary camera system employed by Planned Parenthood] that *partially depicted* the events of July 9, 2005,[2] thirteen posters ranging in size from four feet by five feet to two feet by two feet, an umbrella stroller measuring approximately three feet tall by one and one-half feet wide, a baby carriage measuring approximately three and one-half feet tall by two feet wide, and eight bricks, which were contained in the baby carriage. The defendants introduced three exhibits consisting of photographs." (Emphasis added.)

[2] The parties stipulated that the video depicted images captured by a motion detector system mounted on the Planned Parenthood building and that the time the images were captured as shown on the video was accurate as to minutes and seconds, but was "off" by one hour. The video camera does not record continuously, but only when it detects motion. There are therefore spaces over time in the video. In other words, the video contains seven minutes of imagery over the passage of twenty-five minutes of time. Donnelly testified that the camera's view encompassed a small portion of the sidewalk on either side of the driveway. It could not observe the full length of the sidewalk where the defendants had placed their signs, stroller and baby carriage. Notwithstanding that the video does not purport to portray all of the events as to which evidence was produced, the defendants argue that the seven minute video "proves with mathematical certainty that not only [was] there . . . no intent to cause inconvenience, annoyance or alarm, but there [was] absolutely no obstruction of pedestrian traffic."

The court made the following findings of fact, including, most significantly, that Donnelly was a credible witness and that the defendants were not. "[O]n July 9, 2005, in the morning hours at or near . . . 345 Whitney Avenue in New Haven, [the defendants] by their physical presence, together with the presence of their numerous bulky signs, the carriages with signs placed on them, the bricks holding the carriage in place, and the location of the parties and the property within close proximity on the seven foot sidewalk, intended to cause inconvenience, annoyance or alarm by getting in the way of or blocking pedestrian traffic on the sidewalk of Edwards Street.

"And [the court] further finds that by those aforesaid actions, the defendants created a risk of getting in the way of or blocking pedestrian traffic. The court finds that all three defendants were warned several times to move their persons and belongings so as not to impede pedestrian traffic on the sidewalk and that the defendants did not comply. The court further finds that three pedestrians were observed to step off the sidewalk and onto the adjacent grass because of the location of the defendants, their signs and carriages on the sidewalk. Therefore, the court finds that the state has proven beyond a reasonable doubt that each of the defendants is guilty of a violation of . . . General Statutes § 53a-182 (a) (5)."[3]

The substance of the defendants' claims on appeal is that there was insufficient evidence by which the court could have found them guilty of violating § 53a-182 (a) (5) because there was no credible evidence that any one of them obstructed pedestrian traffic and that the video contradicts the court's findings. Moreover,

[3] It does not escape our notice that the defendants failed at trial to move for a judgment of acquittal either after the state's case-in-chief or at the conclusion of evidence.

the defendants argue that there was no pedestrian traffic.[4] On the basis of our review of the testimony, the defendants' exhibits and the video, we conclude that there is evidence in the record to support the court's findings.

The finder of fact must find every element of the statute proven beyond a reasonable doubt to find the defendants guilty of the offense charged, but "each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [fact finder] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all of the evidence proves the defendants guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Martin*, 285 Conn. 135, 147–48, 939 A.2d 524 (2008).

"[I]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 155, 920 A.2d 236 (2007).

[4] The defendants stated the issue in their brief as: "Did the trial court err when it entered its oral judgment that the defendants were guilty beyond a reasonable doubt of violating . . . § 53a-182 (a) (5), which states [that] a person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, such person obstructs pedestrian traffic, but, however, as proven by state's exhibit one, the [video], which proves that there was not only no intention to obstruct pedestrian traffic, but [that] there was *no pedestrian traffic* to be obstructed, as there is not a scintilla of credible evidence that the defendants' obstructed pedestrian traffic?" (Emphasis in original.)

General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (5) obstructs vehicular or pedestrian traffic . . . ." "[T]o support a conviction for disorderly conduct, the defendant's predominant intent must be to cause inconvenience, annoyance or alarm, rather than to exercise his constitutional rights." *State* v. *Indrisano*, 228 Conn. 795, 809, 640 A.2d 986 (1994). "[T]he mens rea language of § 53a-182 (a) can be formulated more precisely as follows: the predominant intent is to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm. In order to sustain a conviction for disorderly conduct, the state must begin by demonstrating that the defendant had such a state of mind." Id., 810–11.

"[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . Furthermore, [i]n [the] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . Indeed, direct evidence of the accused's state of mind is rarely available . . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . [A]ny such inference

cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence." (Internal quotation marks omitted.) *State* v. *Aloi*, 280 Conn. 824, 842–43, 911 A.2d 1086 (2007).

Our review of the evidence discloses that Donnelly testified that on July 9, 2005, he was familiar with Scott and Muckle. When he arrived at the scene in response to a complaint telephoned to the police department, Donnelly observed several protestors on the sidewalk as well as a number of signs. The defendants' signs, posters and placards were placed in evidence. The size of them varied from four feet by five feet to two feet by two feet. The photographic and video evidence demonstrated that the signs, stroller and baby carriage secured by bricks were on the sidewalk on Edwards Street adjacent to the Planned Parenthood building. Donnelly estimated that six times he asked the defendants, individually or as a group, not to block the sidewalk. He also testified that Scott stated that he had "a constitutional right to block the sidewalk and to protest." The court reasonably could have inferred on the basis of the size of the defendants' belongings and their position on the sidewalk that the defendants intended to cause inconvenience, annoyance and alarm or obstructed the sidewalk.[5]

With regard to the obstruction of pedestrian traffic, Donnelly testified that shortly after he arrived, he informed the defendants that they and their signs were obstructing the sidewalk completely, and that at one point, Scott and Sprague were holding signs standing side by side completely blocking the sidewalk. He also testified that several people could not physically pass

[5] The defendants did not file a motion for articulation; see Practice Book § 66-5; asking the court to clarify whether it found that they intended to cause inconvenience, annoyance or alarm and on what basis.

on the sidewalk because of where the defendants were standing. Deborah Camerota, a defense witness, testified that she saw the sidewalk blocked one time. Donnelly's testimony[6] and the photographic and video evidence provided a basis for the court to conclude that pedestrians walked off the sidewalk to get around the signs, stroller and baby carriage on the sidewalk. For these reasons, we conclude that there was sufficient evidence presented by the state to prove beyond a reasonable doubt that the defendants were in violation of § 53a-182 (a) (5).

The judgments are affirmed.

In this opinion GRUENDEL, J., concurred.

STOUGHTON, J., dissenting. In my view, the evidence and the inferences reasonably drawn therefrom do not support a conclusion that the defendants, Robert Muckle, Stanley Scott and Maryann Sprague, actually obstructed pedestrian traffic during their demonstration at the Planned Parenthood of Connecticut (Planned Parenthood) building in New Haven. Therefore, I respectfully dissent.

Officer Brian Donnelly of the New Haven police department testified that he saw three pedestrians approaching toward the area where the protesters were with their props and that these three pedestrians stepped off the sidewalk.[1] He further testified that he observed two of the three stop as they approached the

[6] Donnelly testified that he observed three people walk off the sidewalk onto the grass because they could not physically pass on the sidewalk. The defendants testified that they did not intend to block pedestrian traffic and that they did not block the sidewalk. The court found Donnelly's testimony to be more credible. In their brief, the defendants argue that pedestrian traffic was not blocked because there was no pedestrian traffic. The record does not support this claim.

[1] The state conceded at trial that no pedestrians were prevented from accessing the Planned Parenthood building.

area and step onto the grass adjoining the sidewalk. These two were never identified, and Donnelly did not know where they went. He testified that he thought that they stepped onto the grass because they could not proceed through the protestors along the sidewalk. That was never established, however, and Donnelly also testified that they may have simply stepped off the sidewalk and walked into the Planned Parenthood building. The record reveals that no other evidence regarding these two pedestrians was provided to the court. No evidence was presented indicating, for example, whether the two pedestrians were traveling together. More importantly, the record does not indicate the positioning of the defendants at the time when the two pedestrians stepped off the sidewalk. Thus, it is not clear which, if any, of the defendants were even blocking the sidewalk at the time that these pedestrians departed from it. It also is not clear whether any of the defendants noticed the two pedestrians.

The third and final pedestrian referenced by Donnelly, and relied on by the state, was a woman who was walking a dog. Donnelly testified that she continued along the sidewalk and stepped onto the grass with her dog when she reached the spot where Scott and Sprague were standing with some policemen. This episode is shown in a video from a stationary camera system employed by Planned Parenthood that depicted a portion of the events during the demonstration, which we have reviewed. The video is consistent with Donnelly's testimony of the event. The portion of the sidewalk where the woman with the dog stepped onto the grass was occupied by Donnelly and two other police officers in addition to two of the defendants. To the extent that the sidewalk was blocked, the evidence is insufficient to establish that it was the defendants alone, rather than the defendants and the police officers, who blocked the sidewalk. Additionally, even though this pedestrian

stepped onto the grass with the dog, she was hardly inconvenienced even slightly, let alone obstructed in her progress. No one attempted to stop her, and she proceeded past the defendants without incident. The state had to show that while intending to impede a lawful activity, the defendants obstructed pedestrian traffic. See *State* v. *Scott*, 83 Conn. App. 724, 730, 851 A.2d 353 (2004). One is not obstructed in this sense simply because one is obliged to step around another person who is also on the sidewalk. See *State* v. *Anonymous (1976-9)*, 33 Conn. Sup. 93, 98, 363 A.2d 772 (1976).

Whether the other two pedestrians might have been obstructed cannot be determined from the evidence. Where they were headed was never revealed, Donnelly testified that he did not know where they were headed, and there is no evidence that they actually attempted to walk along the sidewalk.

Deborah Camerota, referred to in the majority opinion, was considered by the state to have been among the protesters.

I would reverse the judgment.

KIM M. WASKO ET AL. *v.* DANIEL T. FARLEY, JR., ET AL.
(AC 28074)

Harper, Lavine and Pellegrino, Js.

Syllabus

The plaintiff W, who had sought to recover damages for personal injuries she sustained in an automobile accident involving the defendant F, appealed to this court from the judgment rendered on a jury verdict in favor of the defendants. *Held*:

1. There was no merit to W's claim that because the trial judge who presided over jury selection was a senior judge at the time, he was required to obtain consent of the parties in order to preside, which he failed to do; at the time of jury selection, the trial judge had not reached the age of

seventy and was not a judge trial referee but rather held the position of senior judge and continued to have the power to preside over jury selection as well as every other power of a Superior Court judge and was, therefore, not required to obtain the parties' consent.

2. W could not prevail on her claim that the trial court improperly compelled her attendance at jury selection in violation of statute (§ 51-240 [a]), the rules of practice (§ 16-6) and the state constitution: § 51-240 (a) and § 16-6 grant parties an affirmative right to examine each prospective juror, the trial court's order in no way hindered that right, those provisions do not limit the trial court's inherent power to compel a party's attendance at jury selection, and W's claim that because her right to examine prospective jurors might have been exercised through counsel, compelling her attendance at jury selection violated her right to have counsel examine each juror was unavailing and not supported by the plain and unambiguous language of the statute and rule of practice; moreover, W having failed to brief her state constitutional claim adequately, this court deemed it abandoned.

3. There was no merit to W's claim that the judge who presided over jury selection should have recused himself from the pretrial proceedings: W did not object to any of the alleged improprieties committed by that judge, who presided over only jury selection, ask that judge to recuse himself on the basis of a lack of impartiality or seek a mistrial, but instead filed a postverdict motion for recusal challenging the judge's impartiality after the jury reached an unfavorable verdict, and she failed to request plain error review of her unpreserved claim; moreover, even if this claim had been properly preserved, it nevertheless would fail, as the allegedly biased comments made during voir dire by the judge in question were not improper and would not lead a reasonable person to question that judge's impartiality.

4. The trial court properly declined W's request that it instruct the jury on damages resulting from costs allegedly incurred by W's dental practice as a result of her injuries, W having brought the action here in her individual capacity and thus not having been entitled to recover damages incurred by a limited liability company of which she was a member and which was not made a party to the action; moreover, W's claim to the contrary notwithstanding, the trial court's jury instruction on mitigation of damages was proper, W not having alleged that there were no facts in evidence that warranted a mitigation instruction and having set forth no legal analysis in support of her claim that the defendants had to plead mitigation of damages as a special defense to be entitled to a jury instruction thereon.

Argued February 4—officially released June 3, 2008

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, and for other relief, brought

to the Superior Court in the judicial district of Litchfield and tried to the jury before *Prescott*, *J.*; thereafter, the action was withdrawn as against the plaintiff Robert Cavoli; verdict for the defendants; subsequently, the court denied the plaintiff's motion for disqualification and rendered judgment in accordance with the verdict, from which the named plaintiff appealed to this court. *Affirmed.*

Eddi Z. Zyko, for the appellant (named plaintiff).

Robert O. Hickey, with whom, on the brief, was *Sarah F. DePanfilis*, for the appellees (defendants).

Opinion

PELLEGRINO, J. In this negligence action, the plaintiff Kim M. Wasko[1] appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendants, Daniel T. Farley, Sr., and Daniel T. Farley, Jr. On appeal, the plaintiff claims that (1) the court failed to comply with General Statutes § 52-434, thereby depriving the court of subject matter jurisdiction, (2) the court required the plaintiff to attend jury selection in violation of General Statutes § 51-240 (a), Practice Book § 16-6 and the constitution of Connecticut, (3) the judge who denied the plaintiff's motion to be excused from jury selection improperly failed to recuse himself and (4) the court improperly charged the jury. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. In December, 2004, the plaintiff commenced this negligence action, which arose out of personal injuries and damages she allegedly sustained as a result of a December 14, 2002 three vehicle accident involving the plaintiff,

[1] In the original complaint, Wasko and her husband, Robert Cavoli, were named as plaintiffs. Before the case was submitted to the jury, Cavoli withdrew all of his claims. All references to the plaintiff, therefore, refer solely to Wasko.

Francis Bement and Daniel T. Farley, Jr. On August 17, 2005, the court, *Brunetti*, *J.*, pretried the case without any resolution. On June 6, 2006, the court, *Gill*, *J.*, pretried the case again without any resolution. Judge Gill then set another pretrial for the following morning and ordered that the plaintiff be present for that proceeding.

On June 7, 2006, Judge Gill pretried the case for a third time, again failing to produce a resolution. Judge Gill then ordered that jury selection proceed. At the start of jury selection, counsel for the plaintiff made an oral motion to excuse the plaintiff from attending jury selection so that she could attend to her dental practice. Judge Gill denied this motion as to the first day of jury selection, stating that there were benefits in having the plaintiff present for jury selection. Jury selection was completed that day. The case thereafter was tried to the jury. The jury returned a verdict in favor of the defendants, and the court, *Prescott*, *J.*, rendered judgment accordingly. Additional facts will be set forth as necessary.

I

The plaintiff's first claim is that the court lacked subject matter jurisdiction to preside over jury selection.[2] It is her claim that at the time Judge Gill participated in jury selection, he was a senior judge and, in that capacity, was required to obtain the consent of the parties in order to preside over jury selection, which

[2] The plaintiff confuses subject matter jurisdiction with the court's authority to act. "Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and [to] determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Internal quotation marks omitted.) *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 336, 857 A.2d 348 (2004); *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999).

consent he failed to obtain. Our plenary review of her claim reveals it to be without merit. See, e.g., *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 8, 905 A.2d 55 (2006).

The plaintiff confuses the powers of a senior judge with those of a judge trial referee. A senior judge is a judge who elects to retire from full-time service prior to reaching the age of seventy.[3] See General Statutes § 51-50i.[4] A senior judge continues to retain all of the powers possessed prior to assuming senior status. See General Statutes § 51-50d.[5] A judge becomes a judge trial referee upon reaching the age of seventy and thereafter has limited authority to act.[6]

At the time of jury selection in the present case, Judge Gill had retired from full-time service but had not attained the age of seventy; he therefore held the position of senior judge. See General Statutes § 51-50i. Senior Judge Gill continued to have the power to preside over jury selection as well as every other power of a Superior Court judge. Accordingly, he did not need to obtain the consent of the parties as the plaintiff has argued. The plaintiff's claim is without merit.

[3] The constitution of Connecticut, article fifth, § 6, does not permit a Superior Court judge to hold office after reaching the age of seventy.

[4] General Statutes § 51-50i (a) provides in relevant part: "Any judge who retires from full-time active service, who has not attained the age of seventy . . . shall be a senior judge of the court of which he is a member during the remainder of the term of office for which he was appointed, and he shall be eligible for reappointment to succeeding terms as such senior judge . . . ."

[5] General Statutes § 51-50d provides in relevant part: "(a) A senior judge shall have all the powers of a judge of the court to which he is designated and assigned."

[6] The powers of a judge trial referee are described in General Statutes §§ 52-434, 52-434c and 52-549z. Under § 52-434, a judge trial referee may conduct jury selection in any criminal case, except class A or B felony or capital felony matters, without the consent of the parties. Other than civil cases referred to a judge trial referee under § 52-549z, there is no specific language in the statutes as to the power of a judge trial referee to conduct jury selection without the consent of the parties in civil jury cases.

II

The plaintiff's second claim is that the court, *Gill*, *J.*, improperly compelled her attendance at jury selection. Specifically, the plaintiff claims that the court's actions violated (1) General Statutes § 51-240 (a) and Practice Book § 16-6, and (2) article first, § 1, of the constitution of Connecticut and article first, § 19, of the constitution of Connecticut, as amended by article four of the amendments.[7] We disagree.

A

The first portion of the plaintiff's claim is that General Statutes § 51-240 (a)[8] and Practice Book § 16-6[9] provide her with a right to have jury selection conducted by counsel and that her compelled attendance at jury selection violates this right. We are not persuaded.

The plaintiff's claim presents a matter of statutory interpretation over which our review is plenary. See, e.g., *Barry* v. *Quality Steel Products, Inc.*, supra, 280 Conn. 8. Our Supreme Court has stated: "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.

[7] The plaintiff's claim is limited to whether the court may compel a party's attendance at jury selection. The plaintiff does not claim that if the court has such a power, the court abused its discretion in exercising that power. Our review, therefore, is limited to whether the court could compel the plaintiff's attendance at jury selection.

[8] General Statutes § 51-240 (a) provides: "In any civil action tried before a jury, either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror in the action, or as to his interest, if any, in the subject matter of the action, or as to his relations with the parties thereto."

[9] Practice Book § 16-6 provides in relevant part: "Each party shall have the right to examine, personally or by counsel, each juror outside the presence of other prospective jurors as to qualifications to sit as a juror in the action, or as to the person's interest, if any, in the subject matter of the action, or as to the person's relations with the parties thereto. . . ."

. . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286–87, 939 A.2d 561 (2008). ''We interpret provisions of the Practice Book according to the same well settled principles of construction that we apply to the General Statutes.'' *Wilson* v. *Troxler*, 91 Conn. App. 864, 871, 883 A.2d 18, cert. denied, 276 Conn. 928, 929, 889 A.2d 819, 820 (2005).

General Statutes § 51-240 (a) provides in relevant part that ''either party shall have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror in the action, or as to his interest, if any, in the subject matter of the action, or as to his relations with the parties thereto.'' Practice Book § 16-6 tracks the operative language of General Statutes § 51-240 (a) word for word.[10] It is undisputed that these

[10] Practice Book § 16-6 replaces ''either'' with ''each'' and replaces the pronoun ''his'' with the gender neutral language ''the person's.''

sections confer on litigants the right to examine each prospective juror. Furthermore, a litigant may exercise this right either personally or through counsel. The plaintiff, however, argues that because this right may be exercised through counsel, compelling her attendance at jury selection violates her right to have counsel examine each juror.

"In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended." *Norwich Land Co.* v. *Public Utilities Commission*, 170 Conn. 1, 4, 363 A.2d 1386 (1975). General Statutes § 51-240 (a) and Practice Book § 16-6 grant parties an affirmative right to examine each prospective juror. The court's order in no way hindered this right. No reasonable reading of these sections can be said to limit a court's inherent power to compel a party's attendance at jury selection.[11] The plaintiff's strained reading of these sections runs counter to their plain and unambiguous text. Accordingly, we reject the plaintiff's interpretation of the statute and rule of practice and conclude that there is no basis in law to justify her claim.

B

The next portion of the plaintiff's claim is that the court violated her fundamental state constitutional rights by compelling her attendance at jury selection.[12] Specifically, the plaintiff claims that the court violated her fundamental rights as set forth in article first, § 1, of the constitution of Connecticut[13] and article first,

[11] We have long recognized that "courts have a necessary inherent power, independent of statutory authorization, to prescribe rules to regulate their proceedings and to facilitate the administration of justice as they deem necessary." *Hamernick* v. *Back*, 64 Conn. App. 160, 167, 779 A.2d 806 (2001); see also *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 390–91, 589 A.2d 363 (1991) (finding party may play significant role at voir dire).

[12] The plaintiff does not raise any federal constitutional claims.

[13] Article first, § 1, of the constitution of Connecticut provides: "All men when they form a social compact, are equal in rights; and no man or set of

§ 19, as amended by article four of the amendments.[14] We decline to review the plaintiff's state constitutional claims because she has not briefed them adequately.

In *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), our Supreme Court set forth six factors that should be considered in examining state constitutional claims. Our Supreme Court repeatedly has emphasized that it "expect[s] counsel to employ [the *Geisler* factors] [i]n order to [allow reviewing courts] to construe the contours of our state constitution and [to] reach reasoned and principled results . . . ." (Internal quotation marks omitted.) *State* v. *Joyce*, 229 Conn. 10, 16 n.7, 639 A.2d 1007 (1994), on appeal after remand, 243 Conn. 282, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). Our Supreme Court has "made clear that [when a party fails to analyze these factors separately and distinctly, appellate courts] are not bound to review the state constitutional claim." Id., 16. In her brief, the plaintiff did not include the *Geisler* factors in her analysis. The plaintiff's claim merely quotes two separate sections of our state constitution and then, without citing any legal precedent from this or any other jurisdiction and without providing any legal analysis as to either constitutional provision, claims that the court's order violated her fundamental rights. The plaintiff has not briefed adequately her state constitutional claim. Absent a proper analysis of the claim under the state constitution, we deem abandoned the plaintiff's claim. See *State* v. *Eady*, 249 Conn. 431, 435 n.6, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999).

men are entitled to exclusive public emoluments or privileges from the community."

[14] Article first, § 19, of the constitution of Connecticut, as amended by article four of the amendments, provides in relevant part: "In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."

III

The plaintiff's next claim is that Judge Gill should have recused himself from the pretrial proceedings. Specifically, she claims that a reasonable person would have questioned Judge Gill's impartiality. We decline to review this unpreserved claim.

The following additional facts are relevant. Before jury selection commenced, Judge Gill expressed to the parties his opinion that this case should settle before trial. During jury selection, Judge Gill made statements in the presence of prospective jurors that "[w]e're not going to be here that long" and that voir dire would take only "[a]bout four or five minutes of your time." The plaintiff did not object to any of these alleged improprieties. The case thereafter proceeded to trial before Judge Prescott. After the jury reached its verdict, the plaintiff filed a postverdict motion seeking the recusal of Judge Gill and the voiding of jury selection. Judge Prescott denied the plaintiff's motion.

"[Canon 3 (c) (1) of the Code of Judicial Conduct][15] requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. The reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Even in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements

[15] Canon 3 (c) (1) (A) of the Code of Judicial Conduct provides in relevant part: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . ."

of a fair exercise of judicial authority." (Citations omitted; internal quotation marks omitted.) *State* v. *Ortiz*, 83 Conn. App. 142, 150, 848 A.2d 1246, cert. denied, 270 Conn. 915, 853 A.2d 530 (2004).

"[A]s a general rule, even in cases alleging judicial bias, this court will not consider the issue on appeal where the party failed to make the proper motion for disqualification at trial. . . . Failure to request recusal or move for a mistrial represents the [parties'] acquiescence to the judge presiding over the trial." (Citation omitted; internal quotation marks omitted.) *Schnabel* v. *Tyler*, 32 Conn. App. 704, 714, 630 A.2d 1361 (1993), aff'd, 230 Conn. 735, 646 A.2d 152 (1994); see also *Statewide Grievance Committee* v. *Friedland*, 222 Conn. 131, 146–47, 609 A.2d 645 (1992). "Our Supreme Court has criticized the practice whereby an attorney, cognizant of circumstances giving rise to an objection before or during trial, waits until after an unfavorable judgment to raise the issue. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." (Internal quotation marks omitted.) *Fiddelman* v. *Redmon*, 31 Conn. App. 201, 213, 623 A.2d 1064, cert. denied, 226 Conn. 915, 628 A.2d 986 (1993); see also *L & R Realty* v. *Connecticut National Bank*, 53 Conn. App. 524, 543, 732 A.2d 181, cert. denied, 250 Conn. 901, 734 A.2d 984 (1999).

Here, the plaintiff did not object to any of Judge Gill's alleged improprieties. She also did not ask Judge Gill to recuse himself on the basis of a lack of impartiality or seek a mistrial. It was only after the jury reached an unfavorable verdict that the plaintiff challenged Judge Gill's impartiality through a postverdict motion for recusal. This wait and see approach is the type of practice our Supreme Court has criticized and renders the plaintiff's claim unpreserved. Furthermore, the plaintiff has

not asked us to review this claim for plain error, and we decline, therefore, to afford it review under that extraordinary standard. See *State* v. *Marsala*, 93 Conn. App. 582, 590, 889 A.2d 943 ("This court often has noted that it is not appropriate to engage in a level of review that is not requested. . . . When the parties have neither briefed nor argued plain error [or review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)], we will not afford such review." [Internal quotation marks omitted.]), cert. denied, 278 Conn. 902, 896 A.2d 105 (2006).

Even if we assume that the plaintiff's claim was preserved properly, Judge Gill's actions do not lead a reasonable person to question his impartiality. Judge Gill presided over only jury selection in this case. Judge Prescott presided over the jury trial. Our review of the record reveals no bias against the plaintiff on the part of Judge Gill, nor does it raise a reasonable question concerning his impartiality. See *State* v. *Webb*, 238 Conn. 389, 464, 680 A.2d 147 (1996), aff'd after remand, 252 Conn. 128, 750 A.2d 448, cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). There is nothing improper if a judge expresses his belief that a matter should settle as an alternative to trial. Moreover, the allegedly biased comments made during voir dire by Judge Gill were not improper and could not lead a reasonable person to question his impartiality. The plaintiff's claim is without merit.

IV

The plaintiff's final claim is that the court, *Prescott*, *J.*, improperly charged the jury. Specifically, she claims that the court (1) failed to charge the jury on damages resulting from additional costs incurred by the plaintiff's dental practice and (2) improperly charged the jury on mitigation of damages. We disagree.

The following additional facts are relevant to our disposition of the plaintiff's claim. The plaintiff claims that as a result of her injuries, she was forced to hire an additional dental assistant to do work that her injuries prevented her from doing. She testified that the dental assistant was paid approximately $22,000 a year and received health insurance and profit sharing benefits, resulting in a total cost to the business of approximately $30,000.

The plaintiff asked that the court charge the jury on damages related to the costs of hiring the additional dental assistant. The court informed the plaintiff that it "did not intend to charge the jury or permit [the plaintiff] to argue to the jury any claim of damages relating to the costs of [her] dental practice in hiring an additional dental assistant." The court stated that because the dental practice is organized as a limited liability company, any additional costs incurred by the business are not personal to the plaintiff and may be recovered only by the business entity. Because the business entity was not a party to the litigation, a charge on costs it incurred was not appropriate. The plaintiff noted her objection to the court's failure to give her requested instruction.

The plaintiff also objected to the court's instructing the jury on mitigation of damages. The plaintiff argued that such an instruction is not permitted because the defendants did not plead mitigation of damages as a special defense. The court found that mitigation does not have to be specially pleaded because it is not listed among the defenses in Practice Book § 10-50 that need to be specially pleaded.[16] Furthermore, the court found

[16] Practice Book § 10-50 provides: "No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus, accord and satisfaction, arbitration and award, coverture, duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was non compos mentis, payment (even though

that evidence was introduced pertaining to mitigation, thereby making such an instruction proper.

A

The plaintiff's first claim is that the court improperly failed to charge the jury on damages incurred by the plaintiff's dental practice due to her limited work capabilities.[17] We disagree.

"It is well established that [a] request to charge which is relevant to the issues of the case and which is an accurate statement of the law must be given. . . . [A] trial court should instruct a jury on [every] issue for which there is any foundation in the evidence, even if weak or incredible. . . . The trial court has a duty not to submit any issue to the jury upon which the evidence would not support a finding. . . . Accordingly, the right to a jury instruction is limited to those theories for which there is any foundation in the evidence. . . . In determining whether any such foundation exists, [w]e must consider the evidence presented at trial in

nonpayment is alleged by the plaintiff), release, the statute of limitations and res judicata must be specially pleaded, while advantage may be taken, under a simple denial, of such matters as the statute of frauds, or title in a third person to what the plaintiff sues upon or alleges to be the plaintiff's own."

[17] In her appellate brief, the plaintiff titles this claim: "The court erred in failing to charge as to [the plaintiff's] loss of earnings and earning capacity." We believe this characterization is misleading. There is no indication in the record before us that the court refused to instruct the jury on the plaintiff's loss of earnings or diminished earning capacity. The court stated that it "did not intend to charge the jury or permit [the plaintiff] to argue to the jury any claim of damages relating to the *costs* of [the plaintiff's] dental practice in hiring an additional dental assistant." (Emphasis added.)

Furthermore, although the plaintiff refers to earnings and earning capacity in the heading of her argument, her argument itself makes clear that she sought to recover damages for the additional costs incurred by her business, rather than for any loss of earnings or diminished earning capacity. Accordingly, our review of this claim is limited to whether the court was required to give an instruction relating to the additional costs incurred by the plaintiff's business.

the light most favorable to supporting the [party's] request to charge. . . . Additionally, [w]hen . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Bonan* v. *Goldring Home Inspections, Inc.*, 68 Conn. App. 862, 867–68, 794 A.2d 997 (2002).

In the present case, we conclude that the court properly declined to instruct the jury on damages resulting from costs borne by the plaintiff's dental practice because the plaintiff, suing in her capacity as an individual, was not entitled to recover damages incurred by a limited liability company of which she is a member.

A limited liability company is a distinct legal entity whose existence is separate from its members. See *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 147, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). A limited liability company has the power to sue or be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action through a suit brought in its name by a member. See General Statutes § 34-187. A member may not sue in an individual capacity to recover for an injury the basis of which is a wrong to the limited liability company. See *Litchfield Asset Management Corp.* v. *Howell*, supra, 147; cf. *Guarnieri* v. *Guarnieri*, 104 Conn. App. 810, 819, 936 A.2d 254 (2007) (corporate shareholder may sue only on behalf of corporation through derivative suit).

The plaintiff brought this action in her individual capacity—the limited liability company was not a party. Damages incurred by the limited liability company, therefore, were not at issue in the case. Accordingly, the court properly declined to instruct the jury on damages

resulting from additional costs incurred by the plaintiff's dental practice.[18]

B

The plaintiff's second claim is that the court improperly instructed the jury on mitigation of damages. Specifically, the plaintiff claims that the defendants did not plead mitigation of damages as a special defense, and, therefore, the court could not give an instruction on the subject. We are not persuaded.

"It has long been a rule of general application that one who has been injured by the negligence of another must use reasonable care to promote recovery and prevent any aggravation or increase of the injuries. . . . When there are facts in evidence that indicate that a plaintiff may have failed to promote his recovery and do what a reasonably prudent person would be expected to do under the same circumstances, the court, when requested to do so, is obliged to charge on the duty to mitigate damages." (Internal quotation marks omitted.) *Futterleib* v. *Mr. Happy's, Inc.*, 16 Conn. App. 497, 501, 548 A.2d 728 (1988).

[18] In her brief, the plaintiff quotes the entire case of *Lashin* v. *Corcoran*, 146 Conn. 512, 152 A.2d 639 (1959), as support for her claim. We find *Lashin*, however, to be inapplicable in this case because of the type of damages the plaintiff seeks to recover. In *Lashin*, the plaintiff sought damages resulting from her lost earning capacity. Id., 513. In the present case, the plaintiff did not seek damages for her lost earning capacity. Her only claim, and the only evidence she presented on the matter, related to the additional costs incurred by the limited liability company of which she is a member.

The plaintiff's brief also includes a lengthy four paragraph quotation from *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 904 A.2d 149 (2006). She has not provided, however, any legal analysis as to why this extensive quotation is relevant to her claim. See, e.g., *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 840–41, 784 A.2d 905 ("[t]he parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited" [internal quotation marks omitted]), cert. denied, 258 Conn. 946, 947, 788 A.2d 95, 96, 97 (2001).

The plaintiff does not allege that there are no facts in evidence that warranted a mitigation instruction. Furthermore, the plaintiff has set forth no legal analysis as to why she believes mitigation must be specially pleaded before a defendant is entitled to a jury instruction on the subject.[19] Accordingly, we conclude that the court's charge on mitigation of damages was proper.[20]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LAMONT G. WHEALTON (AC 26900)

Bishop, McLachlan and Gruendel, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, possession of narcotics with intent to sell within 1500 feet of a public housing project, possession of drug paraphernalia in a drug factory situation and possession of less than four ounces of marijuana, the defendant appealed to this court. He claimed that the trial court improperly denied his motion to suppress evidence that was obtained

[19] The plaintiff's brief, without offering any legal analysis of its own, urges us to adopt in full the reasoning of the Superior Court in *Bates* v. *Rebimbas*, Superior Court, judicial district of Waterbury, Docket No. CV-06-65000640-S, (September 13, 2006) (42 Conn. L. Rptr. 51). We decline this invitation because the plaintiff has failed to demonstrate that the reasoning of *Bates* is applicable to the facts present in this case.

[20] Even if we were to find that the court improperly charged the jury, the plaintiff cannot meet her burden of establishing that any impropriety prejudiced her. Our Supreme Court has often stated that "before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 243, 828 A.2d 64 (2003). In this case, we conclude that even if the court's instructions on damages were improper, any error was harmless. The plaintiff was able to place before the jury her full case regarding the defendants' alleged negligence. When presented with all the evidence, the jury found in favor of the defendants. Accordingly, any error in the court's instructions is rendered harmless by virtue of the jury's verdict.

by the police as a result of warrantless searches of his vehicle and an apartment. The police, who had been conducting surveillance of the defendant on the basis of information from a confidential informant, had stopped the defendant's vehicle after they observed him disobey a traffic signal. Because the defendant was unable to produce his driver's license, the officers called for a tow truck and, pursuant to department policy, prior to having the vehicle towed, conducted an inventory search of the vehicle, where they discovered a plastic bag containing narcotics and a scale. Thereafter, the police obtained consent from A to search an apartment where A and the defendant resided, and they found narcotics at the apartment. *Held*:

1. The defendant could not prevail on his claim that the search of his vehicle was invalid because the police had no cause to inventory the vehicle prior to its being turned over to a private towing company; the trial court credited an officer's testimony that it was standard procedure to conduct an inventory search when a vehicle is going to be impounded, the defendant failed to provide any legal basis for distinguishing between a situation in which the police take a vehicle into police custody or turn it over to a private towing company for impounding, and under the circumstances here, where the defendant did not have a driver's license and, consequently, was unable to drive the vehicle legally and the vehicle was in a high traffic area and needed to be towed, the trial court properly determined that the inventory search was appropriate.
2. The record was inadequate to review the defendant's claim, raised for the first time on appeal, that the search of his apartment was unlawful because he had objected to it, the issue of the defendant's authority to override A's consent not having been raised at the suppression hearing, the trial court having made no finding regarding the defendant's authority over the apartment and there having been no evidence presented concerning the defendant's use of, access to and control over the apartment.

Argued March 24—officially released June 3, 2008

Procedural History

Substitute information charging the defendant with three counts of the crime of possession of narcotics with intent to sell by a person who is not drug-dependent, two counts of the crime of possession of narcotics with intent to sell within 1500 feet of a public housing project, and with the crimes of possession of drug paraphernalia in a drug factory situation and possession of less than four ounces of marijuana, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the court,

Tyma, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Christopher M. Neary, special public defender, for the appellant (defendant).

Timothy J. Sugrue, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Kelley P. Swift*, former assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Lamont G. Whealton, appeals from the judgment of conviction rendered by the trial court following his conditional plea of nolo contendere, under General Statutes § 54-94a,[1] to three counts of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), two counts of possession of narcotics with intent to sell within 1500 feet of a public housing project in violation of General Statutes § 21a-278a (b), one count of possession of drug paraphernalia in a drug factory situation in violation of General Statutes § 21a-277 (c) and one count of possession of less than four ounces of marijuana in violation of General Statutes § 21a-279 (c). On appeal, the defendant

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

claims that the court improperly denied his motion to suppress evidence that was obtained by the police as the result of warrantless searches of his vehicle and an apartment in violation of his rights under the state and federal constitutions. We affirm the judgment of the trial court.

In response to the defendant's written motion to suppress filed May 25, 2004, the court conducted a hearing at which the state presented testimony from Silas Redd, a Stamford police officer. Redd testified as to the following facts. In late November, 2003, Redd received information from a confidential informant that the defendant, an African-American male referred to as "LA," was allegedly selling crack and powder cocaine and heroin, that he resided at 28 Perry Street in Stamford and that he drove a brown colored Cadillac with a dark colored top and Connecticut license plate 687-RWT.

On December 17, 2003, while Redd and other officers conducted surveillance at 28 Perry Street, they observed an African-American male exit the building and enter a vehicle matching the description provided by the informant. While following the defendant and observing that he disobeyed a traffic signal, Officers Felix Martinez and Heather Frank stopped him near a highway exit ramp and asked him for his driver's license. When the defendant was unable to produce his license, he was asked to step out of the vehicle and was informed that he would be given a summons for driving without a license and disobeying a traffic signal. Because the defendant did not have a license and, consequently, was unable legally to drive the vehicle, and the vehicle was stopped in a heavily traveled portion of the road, the officers called a tow truck to remove the vehicle. Pursuant to police department policy, Redd, Martinez and Frank conducted an inventory search of the vehicle prior to having it towed to an impound lot.

During the search, the officers found a dark colored plastic bag containing narcotics and a scale.

At that point, the defendant was placed under arrest and told of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Redd told the defendant that he believed that more drugs were likely at his apartment and asked the defendant for his consent to search it. The defendant did not object and told Redd that he lived at apartment 2H, 28 Perry Street, with Shirley Anthony and their six year old daughter. The officers, now joined by Sergeant James Matheny and Lieutenant John Fontano, proceeded to 28 Perry Street with the defendant in handcuffs. Once at apartment 2H, the officers attempted to open the apartment door with the key given to them by the defendant, but the key did not work. The officers then summoned the building superintendent, who told them that the defendant no longer lived in apartment 2H but that he lived upstairs in apartment 6B with Anthony.

The officers and the defendant proceeded to the sixth floor where the defendant indicated that he did not consent to a search of the sixth floor apartment. After the building superintendent informed the officers that Anthony was on her way home, the officers used the defendant's key to enter the apartment where they conducted a sweep for security reasons because they were unsure if Anthony had already arrived, and they did not want evidence tampered with or destroyed. The officers did not find any contraband as a result of this initial sweep.

Following the sweep, the officers waited for Anthony in the hallway outside the apartment, and the defendant was removed to the police station. Anthony testified that when she arrived, she was pressured into signing a consent to search form. Once they obtained Anthony's

consent, the officers searched the apartment, where they discovered narcotics.

At the suppression hearing, the state argued that the narcotics found in the vehicle were found pursuant to a valid inventory search and that the search of the apartment was conducted with Anthony's consent. Although the defendant's written motion to suppress was not specific, he contended at the hearing that the search of the defendant's vehicle did not permit the officers to inventory the contents of the dark colored bag and that Anthony's consent to search the apartment was not voluntary, rendering both searches unlawful.

In an oral ruling, the court denied the defendant's motion to suppress. As to the vehicle search, the court found that on the basis of the situation at hand, in which the defendant had been operating a vehicle without a license in an area from which the car had to be moved for traffic and safety reasons, it was reasonable for the police to have the vehicle impounded, and the attendant inventory search was lawful. Regarding the apartment, the court discredited Anthony's testimony, finding that her consent to search was voluntary. Accordingly, the court denied the defendant's motion to suppress.[2] The defendant thereafter entered a conditional plea of nolo contendere, and this appeal followed.

"[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine

[2] The court also concluded that the protective sweep of the apartment was not justified, but because the contraband was not discovered at that time, suppression was not warranted. The defendant has not challenged that conclusion on appeal.

whether they are legally and logically correct and whether they find support in the facts set out in the court's [ruling] . . . . Because a trial court's determination of the validity of a . . . search [or seizure] implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . . However, [w]e [will] give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Kimble*, 106 Conn. App. 572, 579, 942 A.2d 527, cert. denied, 287 Conn. 912, 950 A.2d 1289 (2008).

At the outset, we note that the defendant's arguments raised on appeal in support of suppression differ from those he raised before the trial court. In the trial court, the defendant claimed that the vehicle inventory did not permit an officer to look inside the contents of an opaque plastic bag and that the apartment search was unlawful because Anthony's consent had been coerced. On appeal, however, the defendant now claims that the search of the vehicle was not a valid search because the police had no cause to inventory the vehicle prior to its being turned over to a private towing company and that Anthony's consent to search the apartment was invalid in light of the defendant's earlier objection. Because the defendant raises both of these claims for the first time on appeal, he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." Id. We address each claim in turn.

I

The defendant first claims that the search of his vehicle was impermissible. The defendant argues that the officers had no authority to inventory the vehicle because it was not going to be retained by the police but, rather, was placed in the possession of the private towing company. The defendant also contends that the inventory search was unlawful because Redd testified that he had seen the bag on the floor of the car during the initial stop, and, when asked at the suppression hearing, Redd could not recall any of the other items that were found in the car. Because the defendant has failed to establish a clear constitutional violation, his claim regarding the vehicle search fails under the third prong of *Golding*.[3]

An inventory search is "a well-defined exception to the warrant requirement. . . . In the performance of their community caretaking functions, the police are frequently obliged to take automobiles into their custody. . . . A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." (Internal quotation marks omitted.) *State* v. *Vallejo*, 102 Conn. App. 628, 640, 926 A.2d 681, cert. denied, 284 Conn. 912, 931 A.2d 934 (2007).

Here, the court credited Redd's testimony that the officers conducted the inventory search pursuant to standard procedure when the vehicle was going to be

[3] The defendant also claims that the state failed to introduce evidence regarding police procedure for inventory searches. Because this claim is evidentiary in nature, not constitutional, it does not qualify for *Golding* review.

impounded. The defendant has not provided this court with any legal basis for distinguishing between a situation in which the police take a vehicle into police custody or turn it over to a private towing company for impounding. In both cases, the protective reasons for an inventory search pertain. On the basis of our review of the record, which reflects that the defendant did not have a driver's license and consequently was unable legally to drive the vehicle, and that the vehicle was in a high traffic area and needed to be towed, we find no fault with the court's determination that the inventory search was appropriate.

II

The defendant also claims that the search of the apartment was unlawful because he objected to it. The defendant contends that because he had a possessory interest in the apartment, his objection was sufficient to override Anthony's later consent. As noted, because the defendant did not make this argument before the trial court, we review it under *Golding*, and we conclude that it fails to satisfy *Golding*'s first prong.

"It is axiomatic that searches and seizures inside a home without a warrant are presumptively unreasonable. . . . A warrantless search or entry into a house is not unreasonable, however . . . when a person with authority to do so has freely consented. . . . It is the state's burden to prove that the consent was freely and voluntarily given, and that the person who purported to consent had the authority to do so. . . . Such consent may not be established by mere acquiescence to police authority. . . . Whether there was valid consent to search is a factual question that will not be lightly overturned on appeal. . . .

"[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not

limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *United States* v. *Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). Common authority is . . . not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. . . .

"In addition, a warrantless search is valid when it is based on the consent of a third party who the police, at the time of the search, reasonably believe possesses common authority over the premises but who in fact does not have such authority. *Illinois* v. *Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" (Citations omitted; internal quotation marks omitted.) *State* v. *Vazquez*, 87 Conn. App. 792, 802–804, 867 A.2d 15, cert. denied, 273 Conn. 934, 875 A.2d 544 (2005).

"[W]hether the individual providing consent possessed the requisite authority . . . is a question of fact to be determined from the totality of all the circumstances. . . . As a question of fact, it is normally to be decided by the trial court upon the evidence before that

court together with the reasonable inferences to be drawn from that evidence. . . . We may reverse [the trial court's factual] findings on appeal only if they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Azukas*, 278 Conn. 267, 275, 897 A.2d 554 (2006).

Here, the defendant contends that his refusal to consent to the search nullified Anthony's later consent. In support of his claim, the defendant relies on *Georgia* v. *Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006).[4] In *Randolph*, the United States Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." Id., 120. The court distinguished *Randolph* from its previous rulings in *Illinois* v. *Rodriguez*, supra, 497 U.S. 177, and *United States* v. *Matlock*, supra, 415 U.S. 164. In *Rodriguez* and *Matlock*, the police obtained voluntary consent from a co-occupant at the residence and found evidence implicating another resident who was not present at the time the police obtained consent. In *Rodriguez*, the co-occupant, who later objected to the search, was asleep in a bedroom within the residence. *Illinois* v. *Rodriguez*, supra, 180. In *Matlock*, the later objecting co-occupant was located in a nearby police vehicle. *United States* v. *Matlock*, supra, 179 (Douglas, J., dissenting). In *Randolph*, however, the husband and wife co-occupants were both present when the police sought to search

[4] Although the defendant relies on *Randolph*, he provides no analysis whatsoever in this regard other than stating that it controls. The defendant also relies on *State* v. *Brunetti*, 276 Conn. 40, 883 A.2d 1167 (2005). The defendant acknowledges that that case was superseded by *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), but nevertheless invites us to apply the principles set forth in the first case even though they were not espoused in the latter, controlling opinion. We know of no authority, nor does the defendant provide any, for this novel suggestion.

their home. The wife consented and the husband refused to consent. The court held that his objection invalidated the wife's consent. *Georgia* v. *Randolph*, supra, 107. The *Randolph* court acknowledged that it was "drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." Id., 121.

Randolph, like *Rodriguez* and *Matlock*, applied to situations involving co-occupants. In this case, however, the court did not find, and it is not clear from the record, that the defendant was a co-occupant of the apartment with joint access or control for most purposes and, therefore, had common authority to consent or to object to the search. Common authority is not an "enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection." Id., 120–21.

At the suppression hearing, Anthony testified that she is the lessee of the apartment and that the defendant was not on the lease. Although she indicated that the defendant stayed there "off and on," there is no evidence in the record regarding how often and for what periods of time the defendant stayed at the apartment. Anthony stated that the defendant had a key to the apartment because they have a child together and that

he came to the apartment to see the child. She indicated that her mother also had a key to her apartment. There is no evidence in the record indicating that the defendant contributed to the rent, kept possessions there or used that apartment as his address. There also was no evidence presented as to the expectations of Anthony and the defendant regarding whether the defendant had free and unlimited access to the apartment, whether he was permitted to have guests at the apartment and whether he exercised mutual use and had joint access or control of the apartment for most purposes. Because the court was not provided any information in this regard, and the issue of the defendant's authority to override Anthony's consent was not raised at the suppression hearing, the court made no finding regarding the defendant's authority over the apartment. In the absence of that factual finding, this court has no basis for determining whether the defendant had common authority over the apartment, and the record is, therefore, inadequate for our review of his belated claim on appeal that his objection invalidated Anthony's consent.

The judgment is affirmed.

In this opinion the other judges concurred.

CAROL DICERTO *v.* RONALD N. JONES ET AL.
(AC 28623)

Flynn, C. J., and Beach and Borden, Js.

Syllabus

The plaintiff brought this action seeking to partition certain property that she owned jointly with the defendant J. While this action was pending, the property was sold, and the parties received net sale proceeds totaling $192,065.09. Thereafter, the trial court rendered judgment distributing the proceeds of the sale of the property, from which J appealed to this court. *Held*:

1. J could not prevail on his claim that the trial court abused its discretion when it divided the net proceeds equally after reimbursing J for his

initial expenditures of $47,605.48, which was based on his claim that the trial court improperly failed to consider the reductions he had made to the principal balance of the mortgage loan on the property and the improvements he had made to the property without contribution from the plaintiff; although the trial court found that at the time of the purchase of the subject property, the parties intended to keep their finances separate despite their cohabiting relationship, it also found that there was an agreement between the parties during their relationship that J was to pay for various expenses without reimbursement from the plaintiff, and that court's division of the net partition proceeds was consistent with that finding of fact, and its finding regarding the equitable interests of the plaintiff and J was not an abuse of discretion.

2. Contrary to J's claim, the trial court applied the appropriate standard in dividing the net partition proceeds, namely, that partition actions require a balancing of the equities, and that court made no mention of the statute (§ 46b-81) that governs the distribution of assets in a dissolution action, which was not applicable here.

Argued March 26—officially released June 3, 2008

Procedural History

Action for the partition of certain real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the action was withdrawn as against the defendant Emigrant Mortgage Company, Inc.; thereafter, the matter was tried to the court, *Arnold, J.*; judgment distributing the proceeds of the sale of the property, from which the named defendant appealed to this court. *Affirmed.*

Dennis J. Kokenos, for the appellant (named defendant).

Leslie Byelas, with whom, on the brief, was *Sheryle S. Levine*, for the appellee (plaintiff).

Opinion

BEACH, J. In this partition action, the defendant Ronald N. Jones[1] appeals from the judgment of the trial

[1] Emigrant Mortgage Company, Inc., which held the first mortgage on the subject property, was also a named defendant. The action as to Emigrant Mortgage Company, Inc., was withdrawn on August 3, 2006. We therefore refer in this opinion to Jones as the defendant.

court dividing the net partition proceeds between him and the plaintiff, Carol DiCerto. On appeal, the defendant claims that the court (1) abused its discretion by dividing the net partition proceeds equally between him and the plaintiff after reimbursing him for his initial expenditures without reimbursing him for certain other expenses related to the subject property, and (2) when dividing the net partition proceeds, improperly relied on General Statutes § 46b-81, which governs the division of marital property. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the defendant's appeal. The plaintiff met the defendant in 1987 and thereafter began a dating relationship with him in 1997. The parties lived together at the plaintiff's condominium in 1998 and 1999. In July, 1999, the parties purchased a residence located at 780 Hunting Ridge Road in Easton. The parties jointly owned the subject property with rights of survivorship and paid a total purchase price of $866,076. The defendant contributed a net sum of $47,605.48 to the purchase of the subject property; the plaintiff did not contribute any money.

Subsequent to the purchase of the subject property, the defendant paid all financial charges and payments relating to taxes, insurance and the mortgage until the subject property was sold on December 9, 2005. The defendant also paid associated mortgage refinance costs in the amount of $3276 when the original mortgage of $850,000 with Citibank, F.S.B. (Citibank), was replaced with an $820,000 first mortgage to Emigrant Mortgage Company, Inc. (Emigrant). The reduction in the principal of the original mortgage to Citibank from $850,000 to the new principal amount of $820,000 owed to Emigrant was due solely to the mortgage payments from the defendant's funds. All payments for the

monthly mortgage charges to Emigrant were paid by the defendant.

Additionally, the defendant paid for all improvements to the property between the date of purchase and the time of sale. The defendant made expenditures for fixtures, furnishings, appliances, equipment, improvements and landscaping totaling $94,042.15. The defendant also gave the plaintiff $500 per month as an allowance toward household expenses, some of which the plaintiff used to hire a cleaning person and to pay the telephone and cable television bills.

There was no agreement between the parties, either orally or in writing, as to what would occur regarding the defendant's contributions, including his payments for the purchase of the property, mortgage payments, improvements to the property and the expenses of maintaining the property, if the parties later were to separate. There was, however, an agreement and understanding between the parties during their relationship and prior to separation, that the defendant was to pay for these expenses without reimbursement from the plaintiff. The plaintiff had expressed a concern about her inability to afford any of the expenses on her own.

The plaintiff brought this action by way of a one count complaint dated December 3, 2004, alleging that the parties held the subject property as joint tenants with rights of survivorship, and, as such, each has an undivided 50 percent interest therein. The plaintiff sought a partition of the subject property, with a sale of the premises and a division of the proceeds between the parties according to their respective rights. While this action was pending, the parties sold the subject property for $1,090,000. After closing adjustments and closing costs, which included paying off the Emigrant mortgage in the amount of $825,381.39, the parties received net sale proceeds totaling $192,065.09.[2]

[2] The net proceeds from the partition sale were held in escrow.

In its memorandum of decision, the court found that the total amount in escrow, reflecting the net proceeds from the sale of the subject property, was $192,065.09. The court held that the defendant was to be reimbursed for his initial expenditures of $47,605.48 for the purchase of the subject property and awarded half of the remaining proceeds, $72,229.81, to each party. The total awards therefore were $119,835.28 to the defendant and $72,229.81 to the plaintiff. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion when it divided the $192,065.09 in net partition proceeds equally after reimbursing him for his initial expenditures of $47,605.48. Specifically, the defendant claims that the court improperly failed to consider the reductions he made to the principal balance of the loan and the improvements he made to the property without contribution from the plaintiff.[3] We disagree.

We first set forth our standard of review. "A partition action is equitable in nature. Accordingly, [t]he determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the

[3] The defendant also claims that the court used an improper method for dividing the net partition proceeds. Relying on *Vesce* v. *Lee*, 185 Conn. 328, 335, 441 A.2d 556 (1981), *Fernandes* v. *Rodriguez*, 90 Conn. App. 601, 879 A.2d 897, cert. denied, 275 Conn. 927, 883 A.2d 1243 (2005), cert. denied, 547 U.S. 1027, 126 S. Ct. 1585, 164 L. Ed. 2d 312 (2006), and *Herring* v. *Daniels*, 70 Conn. App. 649, 805 A.2d 718 (2002), the defendant argues that the court improperly awarded each party half of the net partition proceeds after reimbursing him only for his initial expenditures. The defendant's argument is unpersuasive because the equities in partition actions are balanced by trial courts on a case-by-case basis. The fact that other trial courts may have ruled differently in the ultimate division of sale proceeds in a partition action does not require, in itself, a similar result in the present case. "[T]he determination of what equity requires is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Segal* v. *Segal*, 86 Conn. App. 617, 630, 863 A.2d 221 (2004).

trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the . . . discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . . General Statutes § 52-502 (b) provides in relevant part that the proceeds of a partition sale shall be distributed by order of court among all persons interested in the property, in proportion to their interests." (Citations omitted; internal quotation marks omitted.) *Segal* v. *Segal*, 86 Conn. App. 617, 630–31, 863 A.2d 221 (2004).

The defendant contends that the court's division of the net partition proceeds was inconsistent with the evidence before it. He argues that the court improperly divided the proceeds on the basis of an expectancy of marriage and improperly failed to reimburse him for the reduction he made to the mortgage principal and for the improvements to the house for which he paid. The improper nature of the division, he contends, is highlighted by the court's finding that at the time of the purchase of the subject property, the parties intended to keep their finances separate.

When balancing the equities to determine the division of the net partition proceeds, the court emphasized the following relevant facts. The parties, at the time of the purchase of the subject real estate, intended to keep their finances separate, despite their cohabiting relationship. As time passed, however, and as their relationship progressed, the defendant expected that the plaintiff would share equally in the subject property. Although there was no agreement between the parties as to what would occur regarding the defendant's contributions, including payments for the purchase of the property, mortgage payments, improvements to the property and expenses of maintaining the property, if

the parties were later to separate, there was agreement between the parties during their relationship and prior to separation that the defendant was to pay for these expenses without reimbursement from the plaintiff. When the plaintiff voiced her concern regarding her ability to assume the financial obligations of the home, the defendant agreed that he would pay the mortgage and the major expenses of maintaining it. The defendant made no claim for reimbursement until the plaintiff brought this action for partition.

We cannot say that the court abused its discretion when it divided the $192,065.09 in net proceeds equally after reimbursing the defendant for his initial expenditures of $47,605.48. "[I]t is not always true that each tenant in common or joint tenant is entitled to equal shares in the real estate. . . . [T]he trial court may distribute the proceeds of the sale in accordance with the equitable interest of each party." (Citations omitted; internal quotation marks omitted.) *Fernandes* v. *Rodriguez*, 90 Conn. App. 601, 610, 879 A.2d 897, cert. denied, 275 Conn. 927, 883 A.2d 1243 (2005), cert. denied, 547 U.S. 1027, 126 S. Ct. 1585, 164 L. Ed. 2d 312 (2006). Although "[c]ohabitation alone does not create any contractual relationship or, unlike marriage, impose other legal duties upon the parties . . . where the parties have established an unmarried, cohabiting relationship, it is the specific conduct of the parties within that relationship that determines their respective rights and obligations . . . ." (Citation omitted; internal quotation marks omitted.) *Herring* v. *Daniels*, 70 Conn. App. 649, 655–56, 805 A.2d 718 (2002). Although the court found, as the defendant observes, that *at the time of the purchase* of the subject property, the parties intended to keep their finances separate despite their cohabiting relationship, it also found that there was an agreement between the parties *during their relationship* that the defendant was to pay for various expenses without

reimbursement from the plaintiff. The court's division of the net partition proceeds is consistent with its findings of fact.

After reviewing the court's memorandum of decision and relevant portions of the record, we conclude that the court did not abuse its discretion in finding the equitable interests of the plaintiff and the defendant as it did. The court thoughtfully and thoroughly considered the pertinent factors, including the credibility of the parties, and reached a determination consistent with the evidence before it.

II

The defendant next claims that the court's division of the net partition proceeds was improper because it relied on § 46b-81[4] in dividing the net partition proceeds. We disagree.

[4] General Statutes § 46b-81 provides: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Section 46b-81 governs the distribution of assets in dissolution actions. See, e.g., *Bender* v. *Bender*, 258 Conn. 733, 741–42, 785 A.2d 197 (2001); see also General Statutes § 46b-81. We agree with the defendant that § 46b-81 is not applicable in the present case. The court, however, made no mention of the statute. Rather, it cited the proper standard in partition cases, namely, that partition actions require a balancing of the equities. See, e.g., *Segal* v. *Segal*, supra, 86 Conn. App. 630–31 (partition action equitable in nature, determination of what equity requires is matter for discretion of trial court). "Judges are presumed to know the law . . . and to apply it correctly." (Internal quotation marks omitted.) *Fenton* v. *Connecticut Hospital Assn. Workers' Compensation Trust*, 58 Conn. App. 45, 54, 752 A.2d 65, cert. denied, 254 Conn. 911, 759 A.2d 504 (2000). The court applied the appropriate standard, and, therefore, the defendant's claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLES SPELLS *v.* COMMISSIONER OF CORRECTION
(AC 28278)

Lavine, Beach and Peters, Js.

Syllabus

The petitioner, who had been convicted of certain crimes in connection with the robbery of a convenience store, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly failed to find that the petitioner's trial counsel was ineffective for failing to seek the recusal of the trial judge, who had physically restrained the petitioner so the judicial marshals could handcuff him after he became physically aggressive when the verdict was announced; the habeas court properly determined that trial counsel's decision not to

seek disqualification of the trial judge, who had a reputation for being a fair jurist and who did not hold the petitioner in contempt after he caused the courtroom disturbance, was a sound trial strategy, and the petitioner failed to demonstrate that a lawyer in his counsel's position would have any reason to doubt the trial court's fairness or that his counsel's performance was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law.

2. The petitioner could not prevail on his claim that the habeas court improperly failed to conclude that his counsel was deficient by not proffering certain hair sample test results as evidence at trial, the petitioner having failed to demonstrate that he was prejudiced by his counsel's failure to submit the test results comparing the hair of an accomplice, B, to the hair from a mask allegedly used by the perpetrators of the robbery; the jury was presented with test results excluding the petitioner as a possible source of the hair on the mask, the absence of the test results concerning B's hair did not impede the petitioner from presenting his theory that there was no scientific evidence linking him or B to the crime, and, in light of the petitioner's detailed confession, B's corroborating statement and other witness statements, the outcome of the trial likely would not have been different had the test results at issue been admitted.

Argued March 13—officially released June 3, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *T. Santos*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James M. Fox, special public defender, for the appellant (petitioner).

Robin S. Schwartz, assistant state's attorney, with whom, on the brief, were *John A. Connelly*, state's attorney, and *John J. Davenport*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Charles Spells, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, he

claims that the court improperly concluded that his trial counsel did not render ineffective assistance by failing (1) to seek the recusal of the trial court and (2) to test certain hair samples in time to offer the results as evidence. We affirm the judgment of the habeas court.

The relevant facts are set forth in this court's decision affirming the petitioner's conviction on direct appeal. See *State* v. *Spells*, 76 Conn. App. 67, 818 A.2d 808, cert. denied, 266 Conn. 901, 832 A.2d 67 (2003). On October 20, 2000, the petitioner and an accomplice, James Butler, held up a convenience store in Waterbury. Both men were armed and wore masks. They took $400 from the cash register, robbed and assaulted a customer and drove away in the vehicle of another customer. Id., 70. The police later found that vehicle in a nearby parking lot. Id. Inside it was a black neoprene mask containing several strands of hair. On October 24, 2000, the police received a telephone call that led them to consider the petitioner a suspect in the case. Id. When questioned by the police, the petitioner confessed to the crime and implicated Butler as his accomplice. Id., 70–71. In his statement, the petitioner provided specific details of the crime, including where the vehicle taken from the store had been abandoned and the fact that the keys had been thrown into a wooded area behind the vehicle. Id., 71. In the petitioner's apartment, the police found several black masks, one of which was identified by a witness as being similar to the mask worn by one of the men who had robbed the convenience store. Id. On October 30, 2000, Butler was arrested. He subsequently confessed to the crime and implicated the petitioner. Id., 71 n.1.

At trial, the petitioner, who was represented by attorney Louis S. Avitabile, asserted that his statement to the police was fabricated and that he was innocent. On May 25, 2001, he was convicted of three counts of

robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4). After the verdict was announced, the petitioner became physically aggressive, pushing over a chair that hit one of the courtroom marshals. When the marshals were unable to subdue the petitioner, Judge O'Keefe, who was presiding, left the bench and held the petitioner down so that the marshals could handcuff him.

On July 30, 2001, as the prosecutor was addressing the court with the state's sentencing recommendations, the petitioner spat on the prosecutor. After the petitioner was removed from the courtroom, the trial court made the following statements. "I feel very badly for the [prosecutor], who is a dedicated, hardworking public servant, just trying to do his job, and he does it well, trying to protect law-abiding citizens from people like [the petitioner]. And to have to put up with this is disturbing." The court sentenced the petitioner to a total effective term of forty-five years in prison. Thereafter, this court affirmed the conviction on appeal. After the Supreme Court denied certification to appeal, the petitioner filed a petition for a writ of habeas corpus, in which he alleged that Avitabile provided ineffective assistance of counsel. An evidentiary hearing was held on May 25, 2006. On October 31, 2006, the habeas court denied the habeas petition in a memorandum of decision, concluding that the petitioner failed to meet his burden of proving that counsel's performance was deficient and that he suffered prejudice. On November 8, 2006, the court granted the petitioner certification to appeal to this court. This appeal followed.

We first set forth the standard of review applicable to our analysis of the petitioner's claims. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas

appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . .

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"The second part of the *Strickland* analysis requires more than a showing that the errors made by counsel

may have had some effect on the outcome of the proceeding. . . . Rather, [the petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

"Because both prongs [of *Strickland*] must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . . Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Citations omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 101 Conn. App. 133, 136–37, 921 A.2d 128, cert. denied, 283 Conn. 905, 927 A.2d 916 (2007).

I

The petitioner first claims that the court improperly failed to find that Avitabile rendered ineffective assistance for failing to seek the recusal of the trial judge. Specifically, the petitioner asserts that recusal of the judge was warranted, pursuant to canon 3 (c) of the Code of Judicial Conduct[1] because a reasonable person

[1] Canon 3 (c) (1) of the Code of Judicial Conduct provides in relevant part: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party . . . ." We reject the petitioner's suggestion that the judge violated this canon. As this court stated in its decision on the petitioner's direct appeal: "We conclude, therefore, that there was no reason for the judge to recuse himself for having made a statement on the record in recognition of the difficult tasks performed by the judicial marshals and the prosecutor in the face of the [petitioner's] disruptive behavior." *State* v. *Spells*, supra, 76 Conn. App. 85.

would question the impartiality of a judge who physically restrained a defendant and made sympathetic remarks to a prosecutor. We do not agree.

At the habeas trial, Avitabile testified that because Judge O'Keefe had a reputation for being fair and had not disciplined the petitioner for the courtroom disturbances, he believed that it would be best for his client not to request a disqualification or recusal. The habeas court concluded that Avitabile had acted reasonably. It stated: "Once the normal decorum surrounding court proceedings was again established, Judge O'Keefe continued to preside over the petitioner's matter in what can only be described as an unbiased manner. . . . The petitioner here has not presented any evidence that shows a reasonable person would call into question Judge O'Keefe's impartiality."

We agree with the court that because Avitabile's representation of the petitioner comported with an objective standard of reasonableness, the petitioner has failed to satisfy the first prong of *Strickland*. To satisfy this prong, the petitioner would have to demonstrate that Avitabile's performance was "not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law . . . ." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 89 Conn. App. 850, 855, 877 A.2d 11, cert. denied, 275 Conn. 905, 882 A.2d 672 (2005). The petitioner has made no such showing.

The petitioner has not demonstrated that a lawyer in Avitabile's position would have any reason to doubt the trial court's fairness. Avitabile testified at the habeas trial that he considered it favorable to the petitioner's interests that the court did not hold the petitioner in contempt after he caused the courtroom disturbance. The court likewise opined: "If anything, the outburst

perversely *benefited* the petitioner."[2] (Emphasis in original.) Additionally, the court described itself as "hard-pressed to see how *any* attorney could render deficient performance by failing to request recusal" in this case, given this court's conclusion on appeal that the judge had no duty to recuse himself. (Emphasis in original.)

We concur with the court's conclusion that Avitabile's decision not to seek disqualification of a judge reputed to be a fair jurist was a sound trial strategy. "To satisfy the first prong of *Strickland*, the petitioner must . . . overcome the presumption that alleged ineffective assistance was not the result of sound trial strategy." (Internal quotation marks omitted.) *Beverly* v. *Commissioner of Correction*, 101 Conn. App. 248, 252, 922 A.2d 178, cert. denied, 283 Conn. 907, 927 A.2d 916 (2007). The petitioner's first claim thus fails under the first prong of *Strickland*.[3]

II

The petitioner additionally claims that the court improperly failed to conclude that Avitabile rendered ineffective assistance by not proffering certain hair sample test results as evidence at trial. According to the petitioner, Avitabile's failure to present these results constituted ineffective assistance because it deprived him of an adequate defense. We do not agree.

The following additional facts are relevant to our resolution of the petitioner's claim. It was Avitabile's

[2] Due to concerns that the jury might have overheard the petitioner's outburst, the state opted to withdraw its part B information. The part B information would have exposed the petitioner to a considerably longer sentence.

[3] The petitioner makes the additional related claim that Avitabile's failure to preserve the issue of the judge's recusal for appellate review amounted to ineffective assistance of counsel. Because we agree with the court that Avitabile's tactics and strategy were consistent with the raised defense of actual innocence, we conclude that the petitioner's claim of ineffective assistance of counsel for failure to preserve appellate issues likewise fails under the first prong of *Strickland*.

trial strategy to cast doubt on the reliability of the petitioner's confession, which he asserted was coerced, by emphasizing the lack of physical evidence tying the petitioner or his alleged accomplice to the crime. To do this, Avitabile planned to use the results of a hair analysis test conducted by the state, which he believed would establish that neither the petitioner nor his alleged accomplice, Butler, was the source of the hair recovered from the mask found in the car.

On the eve of the trial, however, the state informed Avitabile that the hair samples from the mask and from the petitioner had not been sent to the laboratory for analysis. Avitabile immediately requested a continuance so that the analysis could be completed before trial. The court denied the continuance but ordered the state to compare the hair of the petitioner to that found in the mask. The results of that analysis, which were submitted to the jury, excluded the petitioner as a possible source of the mask hair. The results of a subsequent analysis comparing Butler's hair to the hair found in the mask, which were not submitted to the jury, indicated that Butler's hair and the hair found in the mask were dissimilar. *State* v. *Spells*, supra, 76 Conn. App. 74.

The court concluded that the petitioner failed to demonstrate, pursuant to the second prong of *Strickland*, that he was prejudiced by Avitabile's failure to submit the test results comparing Butler's hair to the hair from the mask as evidence at trial. We agree with the court. The petitioner did not show that there was a reasonable probability that, but for Avitabile's failure to present these test results, the outcome of his trial would have been different. The absence of test results did not impede the petitioner from presenting his theory that there was no scientific evidence linking him or Butler to the crime. See *State* v. *Brown*, 242 Conn. 445, 461,

700 A.2d 1089 (1997).[4] Moreover, a different result was not probable in light of the evidence presented by the state. The jury reasonably could have relied on the petitioner's detailed confession, Butler's corroborating statement and other witness statements to find the petitioner guilty beyond a reasonable doubt.

We conclude that the court properly determined that the petitioner failed to demonstrate, pursuant to the second prong of *Strickland*, that he was prejudiced by Avitabile's failure to proffer the test results at issue as evidence at trial. The petitioner's second claim thus fails.

The judgment is affirmed.

In this opinion the other judges concurred.

LEROY HARRIS *v.* COMMISSIONER OF CORRECTION (AC 28382)

Harper, Beach and Borden, Js.

Syllabus

The petitioner brought a fourth petition for a writ of habeas corpus, claiming that the habeas counsel during his first and second petitions provided ineffective assistance. The habeas court rendered judgment dismissing the petition as successive, concluding that the claims presented already had been litigated, and thereafter denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court abused its discretion in denying the petition for certification to appeal and improperly dismissed the fourth habeas petition, the petitioner having been entitled to an evidentiary hearing on his claims that prior habeas counsel rendered ineffective assistance; because the petitioner, in his fourth petition, challenged the effectiveness of his two prior habeas counsel, which was different from the grounds asserted in his prior habeas petitions, the fourth petition was not barred as successive and, that ground not having been raised or litigated in the earlier proceedings, the fourth petition was not barred under the doctrine

[4] Additionally, the petitioner's failure to provide the court with trial transcripts prevented the court from examining the petitioner's claim in light of the evidence actually presented to the jury.

of res judicata, the Supreme Court having limited the application of the doctrine of res judicata in a habeas case to claims that actually have been raised and litigated in an earlier proceeding.

Argued February 13—officially released June 3, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Fuger*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed; further proceedings.*

David J. Reich, for the appellant (petitioner).

John A. East III, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BORDEN, J. The petitioner, Leroy Harris, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly dismissed his habeas petition without holding an evidentiary hearing to determine whether his prior habeas counsel provided ineffective assistance. We agree with the petitioner and reverse the judgment of the habeas court.

The petitioner brought this petition for habeas corpus challenging his conviction of three counts of robbery in the first degree and one count of sexual assault in the first degree. The court dismissed the petition and denied the petition for certification to appeal. This appeal followed.

The following procedural history is undisputed. The petitioner was convicted, following a jury trial, of three counts of robbery in the first degree in violation of General Statutes §§ 53a-134 (a) and 53a-8, and one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a). The petitioner was sentenced to a total effective term of eighty years incarceration. *State* v. *Harris*, 22 Conn. App. 329, 330, 577 A.2d 1077 (1990).

In the petitioner's direct criminal appeal, he claimed that (1) the trial court improperly permitted the introduction into evidence of a certain statement under the *Whelan* doctrine[1] and (2) his conviction should be reversed because of prosecutorial impropriety. This court rejected those claims and affirmed his conviction. See id., 337.

In his first petition for a writ of habeas corpus, filed in 1993, in which he was represented by Paula Mangini Montonye, he claimed that Patricia Buck Wolf, who acted as both his criminal trial and appellate counsel, rendered ineffective assistance. With respect to the trial, the petitioner raised fifteen different claims of ineffectiveness. With respect to the appeal, the petitioner raised two different claims of ineffectiveness. The first habeas court, *Hodgson*, *J.*, determined that with respect to both sets of claims, the petitioner had failed to establish prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court affirmed the judgment. *Harris* v. *Commissioner of Correction*, 40 Conn. App. 250, 671 A.2d 359 (1996).

In his second petition, filed in 2003, in which he was represented by Salvatore Adamo, the petitioner raised three issues regarding his trial: (1) police misconduct,

[1] See *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

(2) prosecutorial impropriety and (3) actual innocence. The second habeas court, *Hon. William L. Hadden, Jr.*, judge trial referee, rejected these claims. This court dismissed the appeal. *Harris* v. *Commissioner of Correction*, 86 Conn. App. 903, 859 A.2d 979 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005).

In his third petition, filed in 2004, in which he was represented by his present counsel, the petitioner raised five claims of ineffective assistance of his criminal trial counsel. The respondent, the commissioner of correction, moved to dismiss the petition on the ground that it presented the same grounds as prior petitions. The third habeas court, *Fuger, J.*, dismissed the petition on the ground that it was premised on the same legal grounds and sought the same relief as the first petition, and was supported by facts and allegations reasonably available at the time of the first petition. This court dismissed the appeal. *Harris* v. *Commissioner of Correction*, 97 Conn. App. 382, 904 A.2d 280, cert. denied, 280 Conn. 928, 909 A.2d 523 (2006).

Thereafter, the petitioner filed his fourth petition for a writ of habeas corpus, which is the subject of this appeal. In this petition, the petitioner challenged the effectiveness of the representation provided by his habeas counsel during his first and second petitions. In the first count of the petition, the petitioner alleged that his habeas counsel during his first habeas petition, Montonye, failed to investigate and to challenge adequately his trial counsel's presentation at trial of the argument that he was misidentified. In the second count, the petitioner alleged that his habeas counsel during his second habeas petition, Adamo, was ineffective for failing to challenge adequately his trial counsel's presentation of an argument of prosecutorial impropriety and also for failing to provide effective assistance regarding the petitioner's actual innocence claim. The

petitioner also realleged that his trial counsel was ineffective for failing to present properly the misidentification issue and the prosecutorial impropriety issue. The respondent, in her return, claimed, inter alia, that the petitioner's various claims had been litigated and decided and were, therefore, barred by the doctrine of res judicata, and that "this is a successive petition and an abuse of the writ. It presents the same grounds as the previous petitions."

The habeas court, *Fuger*, *J.*, began the hearing on the petition by asking: "[W]hy shouldn't I dismiss this on the grounds that it's a successive petition . . . and an abuse of the writ?" Counsel answered that he was "alleging . . . ineffective assistance of previous habeas counsel . . . ." The respondent asserted that there appeared to be no newly discovered evidence raised in the fourth petition. After listening to argument by counsel, the court ruled on the petition orally, stating that it would dismiss this petition. The court further stated: "I'm going to find it to be successive. I'm going to find it to be an abuse of the writ. Everything I've heard goes back to this trial. This is a crime that's alleged to have occurred—that occurred, I should say, twenty-three years ago. The trial, the original trial was seventeen years ago. Since then, there have been two complete habeas trials, both appealed and denied. I've already dismissed it once as a successive petition." Thereafter, the court rendered a written judgment of dismissal "on grounds that the claims presented have already been litigated."

The petitioner requested certification to appeal from the judgment of dismissal, which the court denied. Pursuant to *Simms* v. *Warden*, 229 Conn. 178, 186–89, 640 A.2d 601 (1994), the petitioner challenges both the denial of certification to appeal and the judgment dismissing his petition for a writ of habeas corpus. We conclude that the court abused its discretion by denying

the petition for certification to appeal. Therefore, we address the merits of the petitioner's appeal.

The petitioner claims that the court improperly dismissed his petition for habeas relief without affording him an evidentiary hearing. Specifically, he claims that the court improperly (1) dismissed his petition as a successive petition because it alleged ineffective assistance of habeas counsel and (2) applied the doctrine of res judicata in dismissing the petition. We agree with the petitioner that he is entitled to an evidentiary hearing on his claims that prior habeas counsel rendered ineffective assistance.

Both our Supreme Court and this court have addressed the issues of successive petitions and the doctrine of res judicata in the context of claims of ineffective assistance of prior habeas counsel. In *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), the petitioner sought to have his criminal conviction reversed and a new trial granted on the ground of ineffective assistance of prior habeas counsel. Id., 835. The court, in agreeing that the petitioner could seek to do so by way of habeas corpus, stated: "In this case, the subject of the writ—that is, whether the accused had reasonably competent habeas and trial counsel—are matters that ultimately challenge the underlying conviction. . . .

"To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it

cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Only if the petitioner succeeds in what he admits is a herculean task will he receive a new trial. This new trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement." (Citations omitted; internal quotation marks omitted.) Id., 842–43. Thus, the court by clear implication rejected any claim that the habeas petition, based on a claim of ineffective assistance of prior habeas counsel, could be dismissed as successive.

With respect to the *Lozada* respondent's claim that "res judicata prohibits a second habeas proceeding because the issue of ineffective assistance of trial counsel was already litigated in the first habeas proceeding"; id., 843; our Supreme Court stated: "First, the United States Supreme Court has long held that the strict application of the doctrine of res judicata should not control successive petitions for habeas corpus. . . .

"We agree with the Appellate Court that the second habeas petition is not predicated on the same issues addressed in the first petition. Although the petitioner must, by necessity, repeat his allegations of trial counsel's inadequacy, there may never have been a proper determination of that issue in the first habeas proceeding because of the allegedly incompetent habeas counsel. The claim of ineffective assistance of habeas counsel, when added to the claim of ineffective assistance of trial counsel, results in a different issue.

"Second, the plain language of [Practice Book] § 531 [Practice Book § 25-42 (3)[2] currently includes the applicable language from § 531] would not require dismissal of the second habeas petition. The language of [Practice Book § 25-42 (3)] is clear on its face and prescribes that trial courts may dismiss a second application without a hearing only if that application asserts the same grounds and fails to state new facts or proffer new evidence not reasonably available to the petitioner at the hearing on his previous application. The necessary implication of this prescription is that if different grounds are asserted, a hearing on the second application is indicated. It is also clear that in this context ground must mean a sufficient legal basis for granting the relief sought. . . . In this case, asserting ineffective assistance of appointed habeas counsel is a new ground. [S]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." (Citations omitted; internal quotation marks omitted.) *Lozada* v. *Warden*, supra, 223 Conn. 843–45.

Furthermore, this court has stated: "In our case law, we have recognized only one situation in which a court is not legally required to hear a habeas petition. . . . [I]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing." (Internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, 93 Conn. App. 719, 725–26, 891 A.2d 25, cert. denied, 278 Conn. 902, 896 A.2d 104 (2006). A petitioner is entitled, by statute,

[2] Practice Book § 25-42 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, it if determines that . . .

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition . . . ."

to effective assistance of habeas counsel, and a claim challenging the effectiveness of prior habeas counsel constitutes a new ground for which a petition for habeas relief may be brought. See *Lozada* v. *Warden*, supra, 223 Conn. 842–43. When a petitioner has filed a petition for a writ of habeas corpus based on new grounds, such as the ineffective assistance of prior habeas counsel, there arises "a strong presumption that [the] petitioner . . . is entitled to present evidence in support of his claims." (Internal quotation marks omitted.) *Mitchell* v. *Commissioner of Correction*, supra, 725.

Application of these principles to the facts of this case compels the conclusion that the petitioner was entitled to an evidentiary hearing on his petition. In his first and third petitions, the petitioner challenged the effectiveness of his criminal trial and appellate counsel, and in his second petition he challenged the validity of his conviction on the basis of police misconduct, prosecutorial impropriety and actual innocence. By contrast, in this fourth petition, he challenges for the first time the effectiveness of his two prior habeas counsel in (1) challenging criminal trial counsel's investigation and presentation of the claim of misidentification, (2) challenging criminal trial counsel's presentation of the claims of prosecutorial improprieties and (3) presenting the claim of actual innocence. Because he challenges the effectiveness of his prior habeas counsel, which also challenges the validity of his underlying conviction, the ground he asserts is different from the previous grounds asserted in his prior habeas petitions, the petition is not barred as successive, and the petition is not barred under the doctrine of res judicata.

Following our remand, the petitioner will have the burden to prove his claims pursuant to the principles of *Strickland* v. *Washington*, supra, 466 U.S. 668. As applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the

petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding.[3] Thus, here, the petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that *effective* representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial because of (1) criminal trial counsel's ineffective investigation and presentation of the claim of misidentification or (2) criminal trial counsel's ineffective presentation of the claim of prosecutorial improprieties or (3) actual innocence.

The respondent argues that the doctrine of res judicata bars an evidentiary hearing in this case because (1) the issue of the effectiveness of the petitioner's criminal trial counsel has already been adjudicated, and (2) the petitioner *could have but did not* raise, in his prior third petition, the claim of the effectiveness of his prior first two habeas counsel. See, e.g., *McCue* v. *Birmingham*, 88 Conn. App. 630, 635–36, 870 A.2d 1126 (res judicata, or claim preclusion, bars any claim that could have been raised in prior proceeding), cert. denied, 274 Conn. 905, 876 A.2d 14 (2005). *Lozada* disposes of the respondent's first argument because it makes clear that a claim that prior habeas counsel was ineffective is a ground different from a claim that prior criminal trial counsel was ineffective. The respondent's second argument is disposed of by our Supreme Court's decision in *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 653, 866 A.2d 542 (2005). "Unique policy considerations must be taken into account in applying the doctrine of res judicata to a

[3] Prejudice in this case means that but for habeas counsel's ineffectiveness, there would be a reasonable probability that the habeas court would have found that the petitioner is entitled to a new trial.

constitutional claim raised by a habeas petitioner. . . . Foremost among those considerations is the interest in making certain that no one is deprived of liberty in violation of his or her constitutional rights. . . . With that in mind, we limit the application of the doctrine of res judicata . . . to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) Id., 662, quoting *Thorpe* v. *Commissioner of Correction*, 73 Conn. App. 773, 779 n.7, 809 A.2d 1126 (2002). The petitioner's claims that his prior habeas counsel were ineffective were neither raised nor litigated in any earlier proceedings.

The judgment is reversed and the case is remanded for an evidentiary hearing on the petitioner's petition for a writ of habeas corpus.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL GAY
(AC 27667)

Bishop, Beach and Borden, Js.

Syllabus

Convicted, on pleas of guilty, of the crimes of assault in the second degree with a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor or drugs and assault of a public safety officer, the defendant appealed to this court, challenging the trial court's denial of his motions to withdraw his guilty pleas. The defendant had based his motions to withdraw on claims of ineffective assistance by his trial counsel in conducting a pretrial investigation, in failing to read and analyze transcripts from a hearing concerning his violation of probation and in misleading the defendant as to the ramifications of pleading guilty, with the result, he claimed, that his pleas were not knowing, intelligent and voluntary. *Held*:

1. The trial court's determination that defense counsel's pretrial investigation was adequate was supported by the record, that court having been free to credit certain testimony of counsel in making that determination, and even if counsel did not conduct an adequate investigation, the defendant failed to show that he was prejudiced thereby, he having failed to provide

an evidentiary basis for his assertion that counsel's inadequate investigation was pivotal to his decision to plead guilty.

2. The defendant's claim that his counsel's failure to copy, to review adequately and to analyze the transcripts from his violation of probation hearing rendered her unprepared for trial and constituted ineffective assistance lacked merit, counsel having testified that she reviewed the transcripts and was prepared for trial, and the trial court having been entitled to credit that testimony.

3. The defendant could not prevail on his claim that his guilty pleas were not knowingly made because his counsel, a public defender, led him to believe that by pleading guilty he would gain more time to hire a private attorney and could then use his private attorney to vacate the pleas prior to sentencing; the record showed that the defendant knew what rights he was surrendering by pleading guilty and that he voluntarily chose to do so, and the trial court was free to find credible his counsel's testimony denying the defendant's claim.

Argued March 18—officially released June 3, 2008

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of assault in the first degree, assault in the second degree with a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor or drugs, possession of narcotics and possession of narcotics within 1500 feet of a school or day care center, and substitute information, in the second case, charging the defendant with the crimes of interfering with an officer, assault of a public safety officer, engaging police in pursuit, reckless driving and operating a motor vehicle while his license was under suspension, and with theft or illegal possession of motor vehicle number plates, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the cases were consolidated; thereafter, the defendant was presented to the court, *Holden*, *J.*, on a plea of guilty to assault in the second degree with a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor or drugs and assault of a public safety officer; subsequently, the court denied the defendant's motions to

withdraw his guilty pleas; judgments of guilty, from which the defendant appealed to this court. *Affirmed.*

Michael Zariphes, special public defender, for the appellant (defendant).

John A. East III, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Michael A. DeJoseph*, assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Michael Gay, appeals from the judgments of the trial court, rendered following the denial of his motions to withdraw his guilty pleas, convicting him of the crimes of assault in the second degree with a motor vehicle in violation of General Statutes § 53a-60d, operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a and assault of a public safety officer in violation of General Statutes § 53a-167c. The defendant claims that the court abused its discretion by denying his motions to withdraw his guilty pleas, which were based on alleged ineffective assistance of counsel. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims. On the evening of November 16, 2001, the defendant, who was on probation, was sleeping at his girlfriend's house, when he was awakened by a commotion caused by the victim, his former girlfriend, who had come to the house. Subsequently, while driving the victim home in her car, the defendant lost control of the vehicle. The car suddenly veered to the right, mounted a curb and struck a guardrail, coming to rest approximately 500 feet away. As a result of the accident, both the victim and the defendant required immediate medical care,

and the victim was left paralyzed from the neck down and with one arm amputated.

While at the hospital, the defendant was given a blood test that revealed the presence of cocaine in his system. At his subsequent violation of probation hearing, he admitted that he had smoked marijuana before driving the car. Following the hearing, the court found the defendant in violation of the conditions of his probation and sentenced him to seven years in prison. On appeal, this court affirmed the judgment of the trial court. *State* v. *Gay*, 87 Conn. App. 806, 814, 867 A.2d 26, cert. denied, 273 Conn. 930, 873 A.2d 999 (2005).

On March 21, 2005, while the defendant was free on a $250,000 appellate bond relating to his violation of probation, police officers attempted to stop his vehicle because its rear license plate was partially detached. Instead of stopping, the defendant accelerated, engaging the police in a high speed chase. After overturning the vehicle, the defendant exited it and struck one of the officers at the scene. The charges arising from this incident were consolidated with the charges stemming from the 2001 accident in which the defendant's passenger was seriously injured.[1] Though the defendant was initially represented by private counsel, assistant public defender Elizabeth Reid was later appointed to represent him on April, 19, 2005.

From the inception of his professional relationship with Reid, the defendant repeatedly told her that he intended to hire private counsel. On September 20, 2005,

[1] As a result of the March 21, 2005 incident, the defendant was charged with interfering with an officer in violation of General Statutes § 53a-167a, assault of public safety or emergency medical personnel in violation of § 53a-167c, engaging police in pursuit in violation of General Statutes § 14-223 (b), reckless driving in violation of General Statutes § 14-222, theft or illegal possession of motor vehicle number plates in violation of General Statutes § 14-147a and illegal operation of a motor vehicle while his license was under suspension in violation of General Statutes § 14-215.

Reid was permitted to withdraw from representing the defendant on the basis of representations made by the defendant's father that he had hired a private attorney. Reid was subsequently reappointed on October 20, 2005, when that assertion proved inaccurate. During the pretrial aspect of this matter, the defendant was granted several continuances in conjunction with his representations that he intended to retain private counsel.

Ultimately, Reid secured an offer from the state for a plea bargain through which the defendant would receive a sentence of five years to be served consecutively to the seven years he was already serving for his violation of probation.[2] On January 6, 2006, because the defendant had not yet accepted the state's offer, negotiations continued at the same time as jury selection was scheduled to begin. In conjunction with the plea negotiations, the defendant appeared before the court and was canvassed with respect to the state's offer. Finally, following the court's extensive canvass and numerous conversations with Reid, the defendant decided to accept the state's offer. Accordingly, he entered pleas to the charges of assault in the second degree with a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor or drugs and assault of a public safety officer.

On February 6, 2006, attorney Tina Sypek D'Amato appeared on behalf of the defendant and filed a motion to withdraw his guilty pleas on the basis of his claim that he had been denied the effective assistance of counsel and that the court's plea canvass had been inadequate. Later, on February 17, 2006, the defendant

[2] The plea bargain included a sentence of five years for the assault of a public safety officer and a concurrent five year sentence for the assault in the second degree with a motor vehicle. The state agreed to nolle the other charges, including a charge of assault in the first degree arising from the 2001 accident, which carried a maximum penalty of twenty years in prison.

filed an amended motion to withdraw his guilty pleas in which he detailed the claimed manner in which counsel's assistance had been ineffective and the court's allegedly inadequate plea canvass had rendered his pleas unknowing and involuntary. Following an evidentiary hearing on February 27, 2006, at which both the defendant and Reid testified, the court denied the motion to withdraw. On March 20, 2006, the defendant filed another motion to withdraw his guilty pleas on the basis of ineffective assistance of counsel. In response, the court held another evidentiary hearing on March 27, 2006, at which both the defendant and Reid again testified. Following this hearing, the court denied the second motion to withdraw the guilty pleas. Consequently, the defendant was sentenced in accordance with the terms of the plea agreement. This appeal followed. Additional facts will be provided as necessary.

The defendant claims that the court improperly denied his motions to withdraw his guilty pleas because his appointed counsel provided ineffective assistance, and, consequently, the pleas were not knowing, intelligent and voluntary. The defendant also claims that his conviction after plea is unconstitutional because his counsel conducted an inadequate investigation, failed to review fully the transcripts of a prior hearing and misled the defendant as to the ramifications of pleading guilty. We are unpersuaded.

The following legal principles and standards inform our review of the court's decision. "Before a guilty plea is accepted a defendant may withdraw it as a matter of right. Practice Book [§ 39-26]. After a guilty plea is accepted but before the imposition of sentence the court is obligated to permit withdrawal upon proof of one of the grounds in [Practice Book § 39-27]. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and

provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]." (Citation omitted; internal quotation marks omitted.) *State* v. *Barnwell*, 102 Conn. App. 255, 258–59, 925 A.2d 1106 (2007). "Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused." (Internal quotation marks omitted.) *State* v. *Gundel*, 56 Conn. App. 805, 812, 746 A.2d 204, cert. denied, 253 Conn. 906, 753 A.2d 941 (2000).

"Our case law holds that [a] claim of ineffective assistance of counsel is generally made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal. . . . Section 39-27 [4] of the Practice Book, however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea. A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law . . . . Second, there must exist such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance. . . . In addressing this second prong, the United States Supreme Court held in *Hill* v. *Lockhart*, 474 U.S. 52, [59] 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), that to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . The resolution of this inquiry will largely depend on the likely success of any new defenses or trial tactics that would have been available but for counsel's ineffective assistance." (Citations omitted; internal quotation marks omitted.) *State* v.

Scales, 82 Conn. App. 126, 129–30, 842 A.2d 1158, cert. denied, 269 Conn. 902, 851 A.2d 305 (2004). "A reviewing court can find against the [defendant] on whichever ground is easier." (Internal quotation marks omitted.) *State* v. *Silva*, 65 Conn. App. 234, 259, 783 A.2d 7, cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001).

I

The defendant first claims that the court abused its discretion by denying his motions to withdraw his guilty pleas, which he based on counsel's alleged ineffective assistance in failing to conduct an adequate pretrial investigation. The defendant claims that if counsel had effectively interviewed the victim and had adequately investigated the scene of the accident, he could have proceeded to trial and pursued a causation defense for the charge of assault in the second degree with a motor vehicle. Specifically, the defendant claims that an adequate investigation would have supported his assertion that the victim grabbed the steering wheel and caused the accident. The court noted, however, that the defendant presented no evidence that counsel had failed to investigate in the manner claimed and, furthermore, offered no evidence that even if counsel had spoken directly with the victim, her response would have been sufficiently supportive to encourage him to go to trial.

Additionally, the court found that Reid's investigation was adequate, a conclusion that finds support in the record. Reid testified that she instructed her investigator to talk to the police officers, to review the police and witness reports and to identify potential witnesses. Reid also testified that she reviewed all of the police reports and spoke with the defendant at length about the reports' contents and avenues of possible further investigation. Reid indicated that she sent her social worker to speak to the victim and her mother and, as a result of those interviews, concluded that further

efforts to obtain the victim's testimony would not be beneficial to the defense. Reid testified that she was aware of the defendant's claim that the victim had caused the accident by grabbing the steering wheel and that she spoke with the defendant at length about her concerns regarding this defense. She indicated that she informed the defendant that this defense would be problematic because, to assert it, he would have to testify, thereby subjecting him to cross-examination and impeachment. She also testified that she pointed out to the defendant that his statement to the police immediately after the accident, in which he stated that he did not remember what caused the accident, would need to be explained at trial.

In reaching its conclusion that Reid's investigation was adequate, the court was free to credit Reid's testimony in this regard. Having done so, the court's conclusion that Reid's investigation and advice to the defendant was reasonable finds ample evidence in the record.

Even if the record could support the conclusion that Reid's investigation was faulty, the defendant failed to make any proffer to the court that he was prejudiced by counsel's alleged dereliction. The defendant provided no evidence at the evidentiary hearings that additional investigation of the accident scene would have provided any basis for his claim that the accident was caused by the victim's conduct in the vehicle. Furthermore, although the defendant claimed that Reid's failure to question the victim directly prejudiced his case, the defendant did not bring the victim forward as a witness, he provided no reason for her absence, and no effort was made to present her evidence through other means. Thus, the court was left with no basis for determining that the victim's recitation of the facts of the accident would have been of any assistance to the defendant. In the absence of any evidentiary support, the defendant's

bare assertion that further investigation was pivotal to his decision to plead guilty does not establish prejudice.[3] See *Williams* v. *Commissioner of Correction*, 90 Conn. App. 431, 437, 876 A.2d 1281 (2005). Accordingly the defendant has failed to sustain his burden of proof.

II

The defendant next claims that counsel was ineffective in that her failure to copy, to review adequately and to analyze the transcripts from his violation of probation hearing rendered her unprepared for trial. This claim has no merit.

Reid testified at both evidentiary hearings on the defendant's motions to withdraw that she had access to the transcripts, reviewed them and was prepared for trial. As it was entitled to do, the court plainly credited this testimony. "[T]his court does not retry the case or

[3] The defendant relies on *Dando* v. *Yukins*, 461 F.3d 791 (6th Cir. 2006), for the proposition that mere failure to investigate is sufficient to prove ineffective assistance of counsel without proof of what evidence further investigation would have revealed. We disagree with this analysis. In *Dando*, the defendant originally pleaded no contest on the advice of counsel. Id., 794. On appeal, new counsel filed a motion for the appointment of an expert on battered woman's syndrome to assist with an ineffective assistance of counsel claim on the basis of an unexplored affirmative duress defense. Id., 794–95. In conjunction with that appeal, the defendant submitted three affidavits attesting to a history of physical and sexual abuse. Id., 795. In its decision, the court described the "shocking" details of the abuse the defendant had suffered and expressly found that counsel would not have recommended the no contest plea and likely would have rejected a guilty plea altogether. Id., 801–802. There was no such evidence or findings of prejudice in the case at hand.

The defendant's reliance on *Dando* is further undermined by cases within our jurisdiction that indicate that for a claim of ineffective assistance of counsel to succeed, there must be concrete evidence of prejudice. For example, in *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 662 A.2d 718 (1995), our Supreme Court's conclusion that the petitioner was denied effective assistance of counsel relied on the evaluation and testimony of a psychiatrist, presented at the habeas hearing, that the petitioner suffered from mental illness at the time of the offense. A defendant must present some basis in evidence for a court to find actual prejudice.

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." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007).

III

Finally, the defendant claims that his guilty pleas were not knowingly entered into because Reid led him to believe that by pleading guilty he would gain more time to hire a private attorney and could then use his private attorney to vacate the pleas prior to sentencing. We are not persuaded.

Our review of the transcript of the plea hearing reveals that the defendant knew what rights he was surrendering by pleading guilty and that he voluntarily chose to do so. Finally, the defendant was not a newcomer to the criminal justice system, having been convicted on three previous occasions following guilty pleas. In response to this claim, the court credited Reid's adamant denial that she told the defendant that he could avoid the commencement of trial by initially pleading guilty with the intent of then hiring a private attorney for the purpose of withdrawing the guilty pleas before sentencing. In light of the record, we have no reason to reject the court's determination that Reid's testimony was credible. See id.

The judgments are affirmed.

In this opinion the other judges concurred.

LASER CONTRACTING, LLC *v.* TORRANCE FAMILY LIMITED PARTNERSHIP ET AL.
(AC 28802)

Lavine, Beach and Peters, Js.

Syllabus

The plaintiff contractor sought to recover damages from the defendant partnership, T Co., and the defendant T, a partner in T Co., for, inter alia, breach of contract and unjust enrichment in connection with services the plaintiff rendered in removing a modular home from a certain location and installing it at a new site and in making improvements to the newly installed home. Included among the improvements for which the plaintiff sought compensation were those made in reliance on an assurance by the defendants that they would sell the property to W, the sole member of the plaintiff limited liability company. The defendants, however, subsequently sold the property to a third party. The defendants, by way of special defense, claimed that they had no duty to pay the plaintiff for the services rendered and materials installed because no written contract was provided as required by the Home Improvement Act (§ 20-418 et seq.), which makes a home improvement contract that is not in writing unenforceable in an action for breach of contract or for unjust enrichment. The trial court concluded, however, that the services performed by the plaintiff fell within the statutory (§ 20-419 [4] [A]) exception from the Home Improvement Act for contracts for the construction of a new home. That court rendered judgment in part for the plaintiff on its claims for breach of contract and unjust enrichment, from which the defendants appealed to this court. *Held*:

1. The trial court's finding that the plaintiff's services fell within the scope of the new construction exception to the Home Improvement Act was not clearly erroneous: that court properly found that the relocation of the modular home to a new site constituted new construction, especially in light of the facts that a building permit was granted for a new home construction license at the new site and that, after its purchase and relocation, the modular house was uninhabitable and required extensive work, including among other things electrical, plumbing and heating services; furthermore, the services performed by the plaintiff after the defendants had agreed to sell the property to W were not home improvements separate and distinct from the underlying project of reassembling and preparing the modular home for resale at the new location, and they consistently served the parties' common goal of completing the house for resale.
2. Although the trial court should not have rendered judgment in favor of the plaintiff on both the first and fourth counts of the complaint because the defendants could not be held liable simultaneously for breach of an

express contract and an implied in law contract governing the same general subject matter, that court properly rendered an equitable judgment in favor of the plaintiff on the basis of unjust enrichment and properly concluded that the defendants unjustly enriched themselves by selling the improved property to a third party without fully compensating the plaintiff for the enhancement in the value that was attributable to the services rendered by the plaintiff in reliance on the defendants' assurance to sell the property to W.

3. T Co. could not prevail on its claim that the trial court improperly held it, along with T, liable to the plaintiff for unjust enrichment, the trial court's findings that T, in conducting negotiations with W, was acting as an agent of T Co., that T Co. was identified as the operative party in the documents attendant to the sale of the property to the third party purchaser and that T was the principal partner in T Co. not having been clearly erroneous.

Argued March 13—officially released June 3, 2008

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. D. Michael Hurley*, judge trial referee; judgment in part for the plaintiff, from which the defendants appealed to this court. *Affirmed*.

Brian B. Staines, for the appellants (defendants).

Frank J. Liberty, for the appellee (plaintiff).

Opinion

PETERS, J. With limited exceptions, the Home Improvement Act, General Statutes § 20-418 et seq., makes a home improvement contract that is not in writing unenforceable in an action either for breach of contract or for unjust enrichment. *Barrett Builders* v. *Miller*, 215 Conn. 316, 322, 576 A.2d 455 (1990). The principal issue in this case is whether the services performed by a contractor in installing a modular home at a new site and in making improvements to the newly installed home qualify for the statutory exception for contracts for the construction of a new home. General

Statutes § 20-419 (4) (A). Relying on the fact that the contractor's services preceded the issuance of a certificate of occupancy for the modular home, the trial court held the exception to be applicable and also resolved other remaining issues in favor of the contractor. We affirm the judgment of the trial court.

On June 30, 2003, the plaintiff, Laser Contracting, LLC, filed a multicount complaint against the defendants, Torrance Family Limited Partnership and Jeffrey Torrance, to recover for services rendered in conjunction with the removal of a modular home from East Lyme and its attachment to a new foundation at 120 Rattlesnake Ledge Road, Salem.[1] The defendants filed a general denial and a special defense based on the Home Improvement Act.[2] After a trial to the court, the court rendered judgment on behalf of the plaintiff on its claims of breach of contract and unjust enrichment and awarded damages of $45,398.27 as well as interest in the amount of 10 percent a year pursuant to General Statutes § 37-3a.[3]

The memorandum of decision of the trial court contains the following findings of fact. The defendants hired the plaintiff to prepare a modular home for its removal to a newly poured foundation at 120 Rattlesnake Ledge Road, Salem, and to perform services required to make the home functional at its new location. Subsequently, Scott Weston, the sole member of the plaintiff limited liability company, entered into an agreement to purchase the Salem property from the

[1] The complaint alleged (1) breach of an oral contract, (2) violation of the implied covenant of good faith and fair dealing, (3) violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and (4) unjust enrichment.

[2] Although the defendants also filed a claim for setoff, the trial court found this defense to have been abandoned at trial. The defendants have not contested the court's ruling.

[3] The plaintiff has not appealed from the court's denial of the second and third claims for recovery.

defendants at a price based on the combined costs of the lot, the modular home, the relocation and improvements made prior to purchase. In reliance on this agreement, the plaintiff incurred expenses to make further improvements to the home. The agreement could not, however, be performed as originally drafted because the defendants did not yet own the underlying lot on the stated closing date of November 1, 2002. They did not obtain title to the lot until December 31, 2002. The parties' subsequent negotiations for a formal purchase and sale agreement were unsuccessful, and the defendants sold the property to a third party purchaser. Before doing so, the defendants were required to pay $42,076.94 for the release of mechanic's liens for services performed by the plaintiff. They maintained that they incurred a net loss of $9498 on the sale to the third party.

In light of these findings, the court rejected the defendants' argument that, because no written contract was provided pursuant to the Home Improvement Act, they had no duty to pay the plaintiff for the services rendered and materials installed. Instead, the court concluded that the defendants' offer to sell the property to Weston had induced the plaintiff to perform additional improvements to the property. Without differentiating between the plaintiff's claims for breach of contract and unjust enrichment, the court awarded the plaintiff a total of $45,398.27.[4]

The defendants' appeal raises three principal issues. As a matter of statutory law, they challenge the validity of the court's conclusion that the Home Improvement Act did not bar the plaintiff's recovery. As a matter of substantive law, they contend that the court improperly held them liable both for breach of contract and for

[4] The defendants did not file a motion for articulation asking the court to clarify the basis for the court's monetary award. Practice Book § 66-5.

unjust enrichment. As an evidentiary matter, they contest the propriety of the court's holding both defendants liable to the plaintiff. Although we agree in part with the defendants' second claim, we nonetheless affirm the judgment in favor of the plaintiff.

I

THE HOME IMPROVEMENT ACT

As a general rule, a home improvement contract is not enforceable against a homeowner unless the contract complies with the writing requirements of the Home Improvement Act, General Statutes § 20-429. *Barrett Builders* v. *Miller*, supra, 215 Conn. 322; *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 659, 927 A.2d 333 (2007). In this case, the plaintiff argued, and the trial court found, that the services performed by the plaintiff fell within the statutory exception for contracts for "[t]he construction of a new home . . . ."[5] General Statutes § 20-419 (4) (A). In their appeal, the defendants maintain, as they did at trial, that the exception is inapplicable. We agree with the trial court in ruling to the contrary.

The principal precedent on which the defendants rely is *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 657 A.2d 1087 (1995), in which our Supreme Court held the Home Improvement Act to be applicable to the construction of a swimming pool concurrently with the construction of a new home. *Rizzo Pool Co.* expressly relied on the fact that the pool installation contract was "completely separate and distinct" from the new home construction and involved unrelated contractors. Id., 677. The defendants here claim that, analogous to *Rizzo Pool Co.*,

[5] Because we hold this statutory exception applicable, we need not address the validity of the trial court's alternate holding that the defendants were not "owners" entitled to invoke the provisions of the Home Improvement Act because, at the time of the plaintiff's performance, the defendants had not yet obtained title to the underlying property.

the trial court's finding that described the plaintiff's services as "repairs, alterations and upgrades" denotes the court's implicit determination that the services amounted to home improvements that were separate and distinct from the modular home's original construction.

We must decide two issues: whether the court properly found that relocation of the house to Salem constituted new construction and, if so, whether the services undertaken by the plaintiff after the defendants' agreement to sell the property to Weston qualified as separate and distinct home improvements, as in *Rizzo Pool Co*. Our resolution of these issues requires us to determine whether the court's explicit and implicit findings of fact were clearly erroneous. See Practice Book § 60-5; *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 219–22, 435 A.2d 24 (1980).

The court record and the memorandum of decision establish the factual basis for the court's finding that "the [mobile] home was new to the lot, and work [was required to qualify for] a certificate of occupancy."[6] Prior to any work on the Salem property, the former owner of the lot and the defendants entered into a purchase and sale agreement that included a provision requiring the seller to apply for a building permit. The permit was granted under a *new home* construction license,[7] as opposed to a *home improvement* license. Upon its purchase and relocation,[8] the modular house

[6] A certificate of occupancy was first issued on February 24, 2003, more than nine months after construction work had begun and after the plaintiff had ceased work on the property.

[7] No issue has been raised under the New Home Construction Contractors Act, General Statutes § 20-417a et seq., either in the trial court or in this court.

[8] Though not dispositive of the Home Improvement Act defense, the bill of sale representing the defendants' purchase of the East Lyme structure is more indicative of a sale of a chattel than of a real estate transaction. Under the Uniform Commercial Code, " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." U.C.C. § 2-105 (1) (1998); see also General Statutes § 42a-2-105 (1). Accordingly, other courts have traditionally classi-

was uninhabitable and in need of electrical, plumbing and heating services. A new basement, septic system, well, garage and driveway were constructed where none previously had existed. In sum, the project involved the construction of a new home, albeit with a used part. The trial court therefore properly found that the statutory exception governed the installation of the modular home on the Salem property.

The more difficult question that remains is whether the specific "repairs, alterations and upgrades" to the modular home that the plaintiff performed *after* Weston's agreement to buy the property equally qualify as home improvements under *Rizzo Pool Co*. Our Supreme Court's opinion in *Rizzo Pool Co*. is again illuminating. As previously noted, in that case the pool installation contract involved services that were physically separate and distinct from the new home construction, and performed by separate unrelated contractors. *Rizzo Pool Co*. v. *Del Grosso*, supra, 232 Conn. 677. In addition, the pool contract contained no indication that the pool was to be installed at any particular stage of the new home construction or even that it was to have been installed prior to the completion of the new home. Id., 677–78. By contrast, the record in this case shows that the plaintiff's services after the defendants agreed to sell Weston the property were not separate and distinct from the underlying project of reassembling and preparing a modular home for resale at a new location. At trial, Torrance testified: "[M]y agreement with Mr. Weston had to do with him taking over the project, completing the construction and completing the house." Unlike the situation in *Rizzo Pool Co.*, then, not only was the contractor always the same entity, but the services it

fied modular homes to be "goods" under the Uniform Commercial Code. See *Cates* v. *Morgan Portable Building Corp.*, 591 F.2d 17, 20 (7th Cir. 1979); *Stephenson* v. *Frazier*, 399 N.E.2d 794, 797 (Ind. App. 1980); *Joswick* v. *Chesapeake Mobile Homes, Inc.*, 362 Md. 261, 266–67, 765 A.2d 90 (2001).

performed consistently served the parties' common goal of completing the house for resale. We conclude, therefore, that the trial court's finding that the plaintiff's services fell within the scope of the new construction exception to the Home Improvement Act was not clearly erroneous.

II

BREACH OF CONTRACT AND UNJUST ENRICHMENT

In their alternate arguments for reversal of the judgment of the trial court, the defendants maintain that the trial court improperly rendered judgment in favor of the plaintiff on the plaintiff's claims of breach of contract and unjust enrichment. This argument has two parts. The defendants maintain that (1) they never entered into an enforceable contract with the plaintiff and (2) they cannot be held liable for both breach of contract and unjust enrichment. Although we agree in part with the defendants' second argument, we need not address the merits of their contract claim because the judgment can be sustained on the ground of unjust enrichment.

The defendants maintain that, as a matter of law, it was improper for the trial court to render judgment in favor of the plaintiff both on its claim of breach of contract and on its claim for unjust enrichment. Although the defendants have not brought to our attention any effort on their part at trial to have the plaintiff undertake an election of remedies, they nonetheless are correct that they cannot be held liable simultaneously for breach of an express contract and an implied in law contract governing the same subject matter. *Meaney* v. *Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 517, 735 A.2d 813 (1999); 1 E. Farnsworth, Contracts (2d Ed. 1998) § 2.20, p. 176. The trial court, therefore, should not have rendered judgment in favor of

the plaintiff on both the first and fourth counts of the plaintiff's complaint.

We may, nonetheless, affirm the judgment against the defendants if we conclude that the plaintiff established one of its claims, namely, its claim of unjust enrichment. As recently restated by our Supreme Court, "[u]njust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract. . . . A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy." (Internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006).

Appellate appraisal of a trial court's finding of unjust enrichment is governed by the well established principle that "the determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings for the trial court that are subject only to a limited scope of review on appeal. . . . Those findings must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . This limited scope of review is consistent with the general proposition that equitable determinations that depend on the balancing of many factors are committed to the sound discretion

of the trial court." (Citations omitted.) *Hartford Whalers Hockey Club* v. *Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283, 649 A.2d 518 (1994).

Our review of the record persuades us that, in this case, the court properly rendered an equitable judgment in favor of the plaintiff on the basis of unjust enrichment. The parties do not dispute the court's findings that the individual defendant, who was the senior partner of the defendant partnership, proposed selling the house and the land to Weston at a time when he knew that the partnership did not yet own the real property. In the months subsequent to this proposal, the plaintiff continued to make improvements to the property and was observed to be doing so by the individual defendant. This evidence supported the court's implicit finding that the defendants acquiesced in the performance of the plaintiff's services. Weston's interest in purchasing the property was frustrated by the parties' inability to agree on subsidiary terms of a formal purchase and sale agreement. In light of this record, the trial court properly could conclude that the defendants unjustly enriched themselves by selling the improved property to a third party without fully compensating the plaintiff for the enhancement in the value of the property that was attributable to the valuable services rendered by the plaintiff.

Case law also supports the trial court's findings in this case. In *Wainwright* v. *Talcott*, 60 Conn. 43, 22 A. 484 (1891), our Supreme Court reviewed a complaint in which the plaintiff allegedly had been assured that his family would inherit the defendant's property. Although the defendant had acquiesced in the plaintiff's improvements to the property, he ultimately devised the improved real estate to another party.[9] Id., 49–50. Identifying the principle animating the complaint, our

[9] In his complaint, the plaintiff, William Wainwright, alleged that the defendant, John L. Talcott, had "assured and promised the plaintiff that upon his, John L.Talcott's, death, his interest in said real estate should go to the

Supreme Court stated: "The cause of action in such cases is not the refusal to perform a contract, or keep a promise or engagement upon which another relied, but it is the consequent unjust infliction of loss or injury upon one party, and the consequent benefit and advantage resulting to the other, from the violation or breach of a faith and confidence which, under the circumstances, a court of equity deems to have been rightly reposed in him." Id., 52–53.

More recently, our Supreme Court reviewed a case in which the defendant offered and agreed to sell a residential property to his nephew, the plaintiff, when the defendant reached retirement age. *Misisco* v. *La Maita*, 150 Conn. 680, 681–82, 192 A.2d 891 (1963). Although the nephew made substantial alterations and improvements to the property in reliance on his uncle's assurances, the defendant repudiated the agreement. Id., 682. Our Supreme Court stated: "The cause of action . . . is to recover for the loss which the plaintiff has incurred as a result of making, to the enrichment of the defendant, expenditures for and the improvements to the property in reliance on a course of conduct by the defendant which led the plaintiff to believe that the defendant would sell the property to him. . . . It is an action in quasi contract, i.e. an obligation, arising by law, on which the same remedy is given as would be given if the obligation arose out of contract. . . . Although the right of recovery is based on equitable principles, it is nevertheless an action at law, the purpose of which is to prevent unjust enrichment. . . .

plaintiff's wife and children, and that any improvements made by the plaintiff thereon and expenses incurred therefor, should at the death of said Talcott accrue to the benefit of the plaintiff's wife and children; that in reliance upon said promise and assurance the plaintiff expended large sums of money on the permanent improvement of said real estate; that Talcott knew of this expenditure and knew that it was done in reliance upon his said assurance; that afterwards Talcott, by will, left all of his interest in said real estate to others and has never in any way reimbursed the plaintiff for said expenditures . . . ." *Wainwright* v. *Talcott*, supra, 60 Conn. 49–50.

The only remedy is in an award of money damages." (Citations omitted.) Id., 683–84.[10]

These precedents illuminate the present case and reinforce our conclusion that the trial court properly awarded money damages on the basis of unjust enrichment to the plaintiff, whose self-interested expenditures, made in reliance on the defendants' assurance to sell Weston the property, proved to have benefited the defendants.

As a final matter, the defendants argue on appeal that the court could not have awarded restitution on the basis of unjust enrichment because they were not enriched by the services performed by the plaintiff. They cite the fact that the third party sale resulted in a net loss of $9498 and that this loss was exacerbated by their obligation to pay $42,076.94 toward the payment of mechanic's liens for services performed by the plaintiff.

A trial court's determination of the exact amount of recovery under the unjust enrichment doctrine is a question of fact. *Hartford Whalers Hockey Club* v. *Uniroyal Goodrich Tire Co.*, supra, 231 Conn. 283. To obtain review of the propriety of such an award, a litigant must provide us with a record of the underpinnings of the court's decision. In this case, the court did

[10] This reasoning also was articulated in the Restatement of the Law of Restitution: "A person who has rendered services to another or services which have inured to the benefit of another or who has affixed chattels to the land or chattels of another is entitled to restitution therefor if the services were rendered or the chattels were affixed . . . (b) to obtain the performance of an agreement with the other therefor, not operative as a contract, or voidable as a contract and avoided by the other party after the services were rendered, the one performing the services erroneously believing because of a mistake of fact that the agreement was binding upon the other . . . ." Restatement, Restitution, Quasi Contracts and Constructive Trusts § 40, p. 155 (1937). "A person who has acquired an interest in land or chattels as the result of an agreement with the owner made under a mistake of fact and avoided by the owner is entitled to restitution for the value of services rendered in their preservation or in making appropriate improvements thereon." Id., § 42 (3), p. 167; see also id., § 170 comment (a), p. 689.

not make specific factual findings either with respect to the plaintiff's costs or with respect to the benefits conferred on the defendants. The defendants did not seek an articulation of the basis for the court's award. See Practice Book § 66-5. On this record, we have no basis other than speculation to review the court's determination.[11] Accordingly, we decline to review this claim. See *Newtown Pool Construction, LLC* v. *Errico*, 103 Conn. App. 566, 571, 930 A.2d 50 (2007).

III

LIABILITY OF THE DEFENDANT PARTNERSHIP

The court awarded the plaintiff a remedy both against Torrance and against the Torrance Family Limited Partnership. The partnership maintains that the trial court improperly denied its motion for dismissal on all counts of the plaintiff's complaint for failure to make out a prima facie case. The partnership bases this contention on two arguments. As a matter of pleading, it alleges that it improperly was held liable on the plaintiff's claim of unjust enrichment because the plaintiff's posttrial brief did not expressly refer to the partnership's potential liability.[12] As a matter of proof, it alleges that the record establishes that the plaintiff dealt only with the individual defendant and not with the partnership defendant. We disagree.

The trial court implicitly found that Torrance, in conducting the negotiations with Weston, was acting as an agent of the Torrance Family Limited Partnership. That

[11] Because the court rendered damages of $45,398.27 plus interest, we could conclude that it agreed with the plaintiff's claim that the defendants' recovery from the third party purchaser was enhanced by the value of the improvements to the property that Weston had undertaken.

[12] The defendants also fault the trial court's judgment on the ground that the plaintiff, in its posttrial brief, did not specifically argue its contract and unjust enrichment claims. In the absence of a rule of practice that, as a prerequisite to adjudication, requires a party to articulate every claim from its pleadings in its posttrial brief, this argument lacks merit.

finding was supported by evidence that the checks issued to purchase both the modular home and the lot on which the modular home was placed were drawn on a partnership account. Furthermore, the partnership was identified as the operative party in the documents attendant to the sale of the property to the third party purchaser. Finally, the partnership does not dispute the fact that the individual defendant was its principal partner. Because these findings of fact were not clearly erroneous, the court's decision to hold the partnership liable for unjust enrichment must be sustained.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN A. FANOTTO, JR., ET AL. *v.* INLAND WETLANDS COMMISSION OF THE TOWN OF SEYMOUR
(AC 28405)

Flynn, C. J., and Beach and Hennessy, Js.

Syllabus

The plaintiffs, who owned certain real property in the town of Seymour, applied to the defendant inland wetlands commission for a permit to subdivide their property. The commission denied the plaintiffs' application, and the plaintiffs appealed to the trial court, which, upon determining that there was adequate support for the commission's denial of the application, rendered judgment dismissing the appeal. On the plaintiffs' appeal to this court, *held* that because there was not adequate support for the commission's denial of the plaintiffs' application, the trial court improperly affirmed the commission's decision; the plaintiffs presented credible expert testimony that there would be minimal intrusion into the wetlands, and there was no credible evidence presented to rebut that testimony, the commission having relied on its own knowledge without any claim of expertise, and the opposition to the development having been presented by individuals with no apparent expertise in any field relevant to the specialized determination of adverse wetlands impact.

Argued February 14—officially released June 3, 2008

Procedural History

Appeal from the decision by the defendant denying the plaintiffs' application for an inland wetlands permit, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Hon. George W. Ripley II*, judge trial referee; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed; further proceedings.*

Matthew Ranelli, with whom, on the brief, was *Lewis R. Whitehead*, for the appellants (plaintiffs).

Timothy J. Lee, for the appellee (defendant).

Opinion

HENNESSY, J. The plaintiffs, John A. Fanotto, Jr., and Anna Fanotto, appeal from the judgment of the trial court dismissing their appeal from the denial by the defendant, the inland wetlands commission of the town of Seymour (commission), of their application for a wetlands permit so that they could build a subdivision on their property. The issue presented in this appeal is whether the court properly concluded that the commission had adequate support for the denial of the application to conduct regulated activities on the property when the uncontroverted expert testimony and reports showed that there would be minimal impact to the wetlands. We reverse the judgment of the trial court and remand the case with direction to render judgment sustaining the plaintiff's appeal and ordering the commission to approve the application with reasonable conditions consistent with this opinion.[1]

[1] See *Thorne* v. *Zoning Commission*, 178 Conn. 198, 206, 423 A.2d 861 (1979) (in zoning appeals when as matter of law there was one conclusion zoning authority reasonably could reach, court may direct administrative agency to do or to refrain from doing what conclusion legally requires).

The following facts and procedural history are relevant to the plaintiffs' appeal. The plaintiffs own a 20.37 acre parcel zoned R-18 in Seymour on which they wanted to create a twenty lot subdivision. The parcel includes 5.1 acres of wetlands, 3.6 acres of which are encompassed in 4.1 acres of land proposed for dedication as open space. The plaintiffs submitted the application at issue on March 2, 2004, and the commission deemed it to be a complete application. The commission first heard from the plaintiffs at its March 22, 2004 meeting, at which time " 'a site walk/special meeting/public hearing' " was scheduled for April 10, 2004.[2] Consultant and wetlands scientist Robert Jontos was introduced by the plaintiffs at the March 22, 2004 meeting and was able generally to present the impact the subdivision would have on the wetlands. The commission next heard from the plaintiffs at its April 26, 2004 meeting. The commission unanimously voted to classify the property as having a "possible significant impact on the wetlands and watercourses." The commission then requested the plaintiffs' permission to have various agencies perform soil tests, which the plaintiffs did not oppose. The May 17, 2004 public hearing on the application was not attended by the plaintiffs. Instead,

[2] The commission claims that the public hearing for the plaintiffs' application was not opened until the May 17, 2004 meeting; the record, however, clearly shows that the commission classified this first site walk as a public hearing and published notice of this meeting in the local newspaper as such. See General Statutes § 22a-42a. Pursuant to General Statutes § 8-7d (a), "a hearing . . . held on such petition, application, request or appeal . . . shall commence within sixty-five days after receipt of such petition, application, request or appeal and shall be completed within thirty-five days after such hearing commences . . . ." Under § 22a-42a (c) (1), if the inland wetlands agency fails to act within the time limits under that section or § 8-7d, an applicant may file his or her application with the commissioner of environmental protection, which the plaintiffs did in this case. Failure of the inland wetlands agency to act within the statutory time limitations does not constitute approval of the application. General Statutes § 22a-42a; R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (2d Ed.1999) § 23.4, p. 531.

their counsel sent a letter stating that the plaintiffs were of the opinion that the commission had failed to act on the application in a timely fashion and that the plaintiffs were forwarding the application to the department of environmental protection. Owners of land adjoining the subject property attended the May 17, 2004 public hearing and voiced concern about the application and the impact to the wetlands. The public hearing was continued until May 24, 2004, where more laypersons spoke in opposition to the application. The public hearing was closed, and the commission unanimously denied the application. The reasoning for the denial of the application is encompassed in the minutes of the meeting.[3]

The plaintiffs appealed from the decision of the commission to the Superior Court, arguing that there was no substantial evidence to support the commission's denial of their application, especially in light of the expert testimony. The court found that the commission had "actual knowledge of the area involved" and that the maps included with the application showed that twelve of the twenty lots proposed were affected by the proximity of the wetlands. Overall, the court held that the knowledge gained by the commission through personal observation of the area encompassed by the application was properly considered in reaching the decision that the construction would have an adverse effect on the wetlands. The court also held that no evidence was necessary to make a credibility determination about the expert's testimony, nor was the commission required to believe the expert. Accordingly, the court dismissed the plaintiffs' appeal. The plaintiffs then filed the present appeal after this court granted their petition for certification to appeal.

[3] The return of record is missing the transcripts from the May 17 and 24, 2004 meetings. The record shows that counsel for both parties attempted to locate the tapes of the meeting but were unsuccessful. From our review of the record, the meeting minutes from both of the public hearings are adequate to resolve the legal issue before this court.

We begin by setting forth the applicable standard of review. "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Waterbury* v. *Washington*, 260 Conn. 506, 576, 800 A.2d 1102 (2002). "The court is limited to a review of the evidence and reasoning the agency has placed on the record. Agency decisions must be sustained if the record reveals substantial evidence in support of any reason given." *Bradley* v. *Inland Wetlands Agency*, 28 Conn. App. 48, 52, 609 A.2d 1043 (1992). "In appraising the sufficiency of this record, the court must determine only whether there was substantial evidence which reasonably supported the administrative decision, since [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency." (Internal quotation marks omitted.) *Feinson* v. *Conservation Commission*, 180 Conn. 421, 425, 429 A.2d 910 (1980). The party challenging the agency decision has the burden to show that "substantial evidence does not exist in the record as a whole to support the agency's decision." *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993). The substantial evidence test requires a substantial basis in fact that an actual adverse impact to the wetlands or watercourses will result from the proposed activities and that the defendant's decision must be supported by more than a possibility of that adverse impact. *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 70–80, 848 A.2d 395 (2004).

"Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner

consistent with the requirements of fundamental fairness. From both perspectives, we are compelled to conclude that a lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony, without affording a timely opportunity for rebuttal of its point of view." *Feinson* v. *Conservation Commission*, supra, 180 Conn. 429. "Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence." *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, supra, 269 Conn. 71. "The determination of what constitutes an adverse impact on the wetlands is considered to be a technically complex issue." *Milardo* v. *Inland Wetlands Commission*, 27 Conn. App. 214, 222, 605 A.2d 869 (1992).

With this in mind, we must look to what evidence we may consider. "[T]he general rule is that information may not be considered by board members which has not been presented at the public hearing itself." T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 407. "When an inland wetlands agency grants, denies or limits any permit for a regulated activity, it is required to state upon the record the reasons for its decision. On review, the court determines whether the express reasons given for denial are based upon the agency's regulations and whether they are reasonably supported by evidence in the record. . . . If none of the reasons given by the agency are properly supported by substantial evidence, then the agency's denial of the application will be overturned." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 33:9, pp. 271–72. "Although the commission would have been entitled to deny an application because it did not believe

the expert testimony . . . the commission had the burden of showing evidence in the record to support its decision not to believe the experts—i.e., evidence which undermined either the experts' credibility or their ultimate conclusions." *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 156–57, 653 A.2d 798 (1995). "If an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings." *Feinson* v. *Conservation Commission*, supra, 180 Conn. 428–29.

We begin our analysis by setting forth the information that was presented before the commission. At the March 22, 2004 meeting, the plaintiffs' expert, Jontos, presented the proposed plan by explaining what type of intrusion would be on the wetlands. He explained the proposal to improve the watershed areas in terms of direct and indirect impacts. He stated that direct impacts are actual physical intrusions into the wetlands or watercourses and indirect impacts are discharge, with one example of it being storm water activity. He stated that the direct impacts in the plan were a total of two driveways that would cross an intermittent watercourse to enter three building lots and utilities installed near the driveways. The other direct impact would be from the upgrading of the existing road running through the property. The indirect impacts would be the discharge of storm water in some of the areas, which would be addressed by upgrading and instituting systems to direct the runoff and to "provide for stabilization of this area." He asserted that the improvements to the existing system would have a stabilizing effect as well as promote increased diversity for additional wildlife habitats. The commission voted during this

meeting to have a site walk on April 10, 2004, and invited the public so that it would be a public hearing as well.

From the minutes and transcripts of the April 26, 2004 special meeting and public hearing, it is apparent that a silent walk through occurred on April 24, 2004, with three of the commission members "to review wetland delineation markers on the parcel of land." The plaintiffs submitted an updated environmental report with an expanded wildlife section and added the expert's resume to the record. Upon questioning by the commission, Jontos explained the process of conducting a soil survey, that the soil tests were complete and that the survey that was submitted was "intensive." A member then suggested that other agencies be asked to come and perform surveys on the site, to which the plaintiffs did not object. Jontos still requested that the commission be polled to find out its areas of interest so that he could address its concerns and questions at the next public hearing. The commission did not think that it could give a list, however, until it conferred with other agencies. The chairman of the commission stated that the commission would contact the agencies that it would like to have survey the site.[4] The meeting ended with the plaintiffs' counsel stating that the clock was running on the application and the chairman stating that if the commission did not have all the information at the end of the statutory time period, the commission had the right to reject the application.

In the minutes of the May 17, 2004 public hearing, the commission read the letter from the plaintiffs' counsel into the record. The letter informed the commission that the plaintiffs were not going to attend the meeting because they were of the opinion that the commission

[4] There is no documentation in the record showing that the commission made any contact with any other agency to perform such surveys, and no survey results were presented while the public hearing was open.

had not acted on the application in a timely fashion and that they were taking their application to the department of environmental protection. Owners of adjoining property spoke at this meeting opposing the application. Some property owners without any demonstrated expertise in wetlands wrote letters that are available in the record. One property owner wrote about trees that had been cut down on the property. He also asked whether there was a spring or storm water on the property because water appeared to be draining into the Globe Mill Brook, which runs along the proposed subdivision. Another property owner wrote a letter about how much she enjoyed the Globe Mill Brook and that she thought that the development would ruin it.

According to the minutes of the May 24, 2004 public hearing, more property owners spoke in opposition, but again, none of the speakers was shown to have any expertise. The commission then moved to go into executive session. After that, a regular meeting was called to order, and the plaintiffs' application was rejected without prejudice. The minutes reflect that a commission member "stated that the purpose of the commission is to conserve and maintain the quality of the wetlands and watercourses by preventing and reducing any reduction of their quality. The commission has followed the rule of law by requesting pertinent information from the applicant that is needed by this board to reach a decision on his project. This commission held a special meeting site walk and, because of poor flagging and identification on the wetland borders, held a second silent site walk with two members and the applicant. It was very evident to this board from our previous experience that this site with steep slopes, heavy seepage, watercourses, and breakout soils constituted a definite potential for a significant impact during and after construction of this project. Neighbors' concerns were also weighed in the decision to classify this

application as requiring a public hearing. The applicant did not submit soil tests or maps that were complete or clear to this board and chose not to attend the special public hearing on May 17, 2004, to address the concerns for the commissioners or the public on these matters.''

An extensive review of the record reveals that there was no credible evidence presented during the public hearings to rebut the findings of the plaintiffs' expert. The commentary against the development was set forth by individuals with no apparent expertise in any field relevant to the specialized determination of adverse impacts to wetlands. Cf. *Milardo* v. *Inland Wetlands Commission*, supra, 27 Conn. App. 222. It is evident from the commission's statement regarding the denial of the application that the commission, without any claimed expertise, relied on its knowledge without an opportunity for the plaintiffs to rebut the evidence. The commission never requested information from the plaintiffs that went unanswered, as claimed in the statement. When asked by the plaintiffs' expert for such concerns so that he could prepare a rebuttal, the commission stated that it would need to confer with experts first, but no experts were ever consulted. Although the commission was correct in stating that the plaintiffs did not attend the May 17, 2004 public hearing, there were no outstanding questions from the commission that the plaintiffs had to answer, and they were exercising their statutory right to take the application to the department of environmental protection. The commission's assertion that the plaintiffs did not present complete or clear soil maps was wholly unsupported by the record because there was extensive discussion on the record about the soil maps, and the commission's concerns regarding the maps during the hearings were baseless.[5] Overall, the plaintiffs have shown that no

[5] The record demonstrates that the commission members misplaced the soil maps, then found them. The commission then questioned the plaintiffs on where and with whom the maps were filed. Once the plaintiffs explained

substantial evidence exists in the record to support the commission's decision to deny the application. They have further shown through credible expert testimony that there is minimal intrusion into the wetlands and there are improvements to the stability of the property; therefore, the only reasonable conclusion for the commission to reach would be to grant the application with reasonable conditions.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiffs' appeal and directing the commission to approve the application with reasonable conditions.

In this opinion the other judges concurred.

LUIS ANGEL LEBRON *v.* COMMISSIONER OF CORRECTION
(AC 28029)

Flynn, C. J., and McLachlan and West, Js.

Syllabus

The petitioner, who unsuccessfully had sought certification to appeal from the denial of his amended first petition for a writ of habeas corpus and who, on the filing of a second petition, had entered into a stipulated judgment restoring his rights to petition for certification to appeal from the denial of that amended first petition, appealed to this court on the granting of certification. On appeal, the petitioner challenged the habeas court's denial without a hearing of two pro se motions he had filed following that court's denial of his amended first petition. The stipulated judgment to which the petitioner agreed having restored his rights to petition for certification to appeal from the denial of his amended first petition, and the pro se motions that were the subject of the appeal having been filed after the denial of his amended first petition, the petitioner's challenge to the denial of those motions did not fall within

how the soil maps were properly filed, there was no further comment about it. There was then some discussion about who created the soil maps, but once the plaintiffs informed the commission on the subject, again, there was no further comment. Ultimately, all questions the commission had were answered to members' satisfaction. There was no further discussion.

the scope of the rights restored to him in the stipulated judgment. Accordingly, this court declined to review that challenge.

Argued March 10—officially released June 3, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal; subsequently, the court, pursuant to a stipulation of the parties, restored the petitioner's right to petition for certification to appeal; thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Paul R. Kraus, special public defender, for the appellant (petitioner).

Raheem L. Mullins, deputy assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Paul N. Rotiroti*, assistant state's attorney, for the appellee (respondent).

Opinion

WEST, J. The petitioner, Luis Angel Lebron, appeals following the denial of his first amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly denied his two post-judgment motions without conducting a hearing to inquire into the merits of his claims. We affirm the judgment of the habeas court.

The following factual and procedural history is relevant to our disposition of the petitioner's appeal. On May 13, 1999, pursuant to a plea agreement, and after being properly canvassed, the petitioner pleaded guilty pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 91

S. Ct. 160, 27 L. Ed. 2d 162 (1970),[1] to manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and conspiracy to tamper with a witness in violation of General Statutes §§ 53a-151 and 53a-48. On August 12, 1999, the trial court sentenced the petitioner to thirty years imprisonment. On June 22, 2000, the petitioner filed a pro se petition for a writ of habeas corpus. Subsequently, on September 10, 2002, the petitioner's habeas counsel filed an amended petition for a writ of habeas corpus. The petition alleged three claims of ineffective assistance of trial counsel. The petitioner alleged that trial counsel failed (1) to pursue discovery and to communicate with him concerning it, (2) to challenge the petitioner's arrest and the search of the area in which he was arrested, as well as the arrest warrant itself, and (3) to communicate with him regarding legal standards and evidentiary standards so that the petitioner could make a knowing and voluntary decision as to whether to proceed to trial or plead guilty. On February 20, 2003, the habeas court issued a memorandum of decision denying the amended habeas petition. The petitioner's habeas counsel failed to file a timely petition for certification to appeal from the court's decision.

On February 26, 2003, the petitioner filed a pro se petition for certification to appeal from the court's decision, and the court denied that petition on February 28, 2003. Next, on June 12, 2003, the petitioner filed a pro se letter with the court, which the court construed

[1] "Under *North Carolina* v. *Alford*, [supra], 400 U.S. 25 . . . a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Fowlkes*, 283 Conn. 735, 736 n.1, 930 A.2d 644 (2007).

as a motion for reconsideration of its judgment. Additionally, on July 14, 2003, the petitioner filed a pro se motion for rehearing of the court's denial of his amended habeas petition. On July 18, 2003, the court denied both without a hearing. On September 29, 2003, the petitioner filed with this court a motion for permission to file a late appeal, which this court denied on November 6, 2003.

On July 18, 2006, the petitioner's current counsel filed a second petition for a writ of habeas corpus, alleging ineffective assistance of both trial counsel and prior habeas counsel. Also, on July 18, 2006, the petitioner and the habeas trial prosecutor entered into an agreement to restore the petitioner's appellate rights in the first habeas action.[2] The court rendered a stipulated judgment pursuant to the agreement. As a result, the petitioner filed a second petition for certification to appeal from the judgment in the first habeas action.[3] On August 24, 2006, the court granted this second petition for certification to appeal from the judgment, and this appeal followed on September 8, 2006. The petitioner's attorney filed an appeal form on which he stated that the petitioner was appealing from the denial of the petition for a writ of habeas corpus.

After oral arguments, this court ordered the parties, on March 28, 2008, to submit supplemental briefs on the issue of "whether the claim that the habeas court denied the petitioner's postjudgment motions without

[2] The agreement stated: "IT IS FURTHER STIPULATED AND AGREED that [the petitioner's] right [to] petition the [habeas] court for certification to appeal the [d]ismissal [of his first amended petition for a writ of habeas corpus] be and hereby is restored to him . . . ."

[3] At the time the parties entered into the stipulated judgment, it appears that they were under the assumption that a timely petition for certification to appeal had not been filed after the court denied the petitioner's first habeas petition. The record demonstrates, however, that the petitioner had filed a timely petition for certification to appeal six days after the court issued its memorandum of decision denying his habeas petition.

a hearing is properly before this court, as it appears to fall outside the scope of the stipulated judgment to which the petitioner agreed.'' The respondent, the commissioner of correction, argued that the denial of the two postjudgment motions was outside the scope of the stipulated judgment and therefore not properly before the court. In contrast, the petitioner argued that the issue of the denial of the two postjudgment motions properly was before this court because it was the intention of the parties to the stipulation to include any issues on appeal that could have been raised as of the time of entry of the stipulation.

The petitioner's only claim in this appeal is that the habeas court improperly denied his two postjudgment motions without conducting a hearing to inquire into the merits of his claims. We decline to review this claim, as it falls outside the scope of the stipulated judgment to which the petitioner agreed. Indeed, the stipulated judgment provided that the petitioner's rights were restored with respect to his right to petition the court for certification *to appeal from the habeas court's denial of his amended petition for a writ of habeas corpus*. The pro se motions for reconsideration and for a rehearing were filed three and one-half months and four and one-half months, respectively, after the court rendered judgment denying the petitioner's amended petition for a writ of habeas corpus. Therefore, the pro se, postjudgment motions were not raised in the petitioner's amended petition for a writ of habeas corpus.[4] As such,

[4] See *Brown* v. *Commissioner of Correction*, 104 Conn. App. 144, 149, 931 A.2d 963 ("We are not bound to consider an issue unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . The issue . . . was never raised before the habeas court, and it was not discussed in its memorandum of decision. We therefore decline to review the petitioner's claim . . . because [t]o review the petitioner's [claim] now would amount to an ambuscade of the [habeas court]." [Internal quotation marks omitted.]), cert. denied, 284 Conn. 937, 937 A.2d 693 (2007).

the challenge to the denial of those motions does not fall within the scope of the rights restored to the petitioner in the stipulated judgment, and, consequently, we decline to review the petitioner's claim.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAVIER SANTOS (AC 27920)

Flynn, C. J., and Robinson and McDonald, Js.

Syllabus

The defendant, who had been charged with violation of probation in connection with his arrest on sexual assault charges and his failure to report to his probation officer as directed, appealed to this court from the judgment of the trial court revoking his probation and reinstating six years of the unexecuted portion of his previous sentence for robbery in the first degree. The defendant's trial on the sexual assault charges and his hearing on the violation of probation were held simultaneously. Although a jury found the defendant not guilty of the sexual assault charges using the criminal standard of proof beyond a reasonable doubt, the trial court, by using the lesser standard of proof of a preponderance of the evidence, found that the defendant had violated the conditions of his probation. *Held*:

1. Contrary to the defendant's claims, the trial court's findings that he violated his probation by committing sexual assault in the first and second degrees were not clearly erroneous and were supported by sufficient evidence: there was no support for the defendant's claim that where, as here, a victim resists a sexual assault, the victim is not in a state of fear of physical injury as required under the statute governing sexual assault in the first degree (§ 53a-70 [a]), there being nothing in that statute that requires that a victim's fear be of the type that would make her succumb to the desires of her assailant against her will without fighting back, and § 53a-70 (a) not requiring compulsion by the use of force or the threat of force, and fear of physical injury, but, rather, that a victim engage in sexual intercourse with an assailant due to either

[5] It also should be noted that the petitioner filed a motion for permission to file a late motion for articulation of the habeas court's denial of his two postjudgment motions, which this court denied on the ground that the two postjudgment motions were not raised at the habeas trial.

compulsion by the use of force, or compulsion by the threat of force and fear of physical injury; moreover, there was nothing in the record to support the defendant's claim that the trial court gave too much weight to the testimony of certain constancy of accusation witnesses, and it was within the province of the trial court to find credible the victim's testimony that the sexual encounter was not consensual.

2. The defendant could not prevail on his claim that his right to due process was violated because the revocation of probation hearing and the arrest warrant application did not provide sufficient notice of the specific incidents of his alleged violations of probation for failure to report to his probation officer as directed; the defendant's claim that because the warrant listed only April 18, 2005, as a specific date, he had no notice that any other dates on which he had failed to report could form the basis for a violation of probation was unavailing, the defendant having had sufficient notice, from the allegations of the arrest warrant and the evidence offered at the hearing concerning the many dates on which he failed to report as directed, of the manner in which he was alleged to have violated his probation.

3. The defendant could not prevail on his claim that his right to due process was violated because there was an unreasonable preaccusation delay in charging him with a violation of probation for failing to report as directed several years earlier, he having failed to show how the delay interfered with his defense preparation and that the delay was wholly unjustifiable.

Argued February 5—officially released June 3, 2008

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Britain and tried to the court, *D'Addabbo*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Elio C. Morgan, special public defender, for the appellant (defendant).

Robin S. Schwartz, assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Brian Preleski*, senior assistant state's attorney, for the appellee (state).

Opinion

FLYNN, C. J. The defendant, Javier Santos, appeals from the judgment of the trial court revoking his probation and reinstating six years of the unexecuted portion of his previous sentence. On appeal, the defendant claims that (1) there was insufficient evidence that he violated his probation by committing sexual assault in the first and second degrees and (2) he was denied due process of law because (a) the revocation of probation hearing and the arrest warrant application did not provide sufficient notice of the specific incidents of the alleged violations of probation for failure to report to his probation officer and (b) there was an unreasonable preaccusation delay in charging him with a violation of probation for failing to report. We affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of the defendant's claims on appeal. On August 17, 1995, the defendant was convicted of robbery in the first degree and was sentenced to twelve years imprisonment, execution suspended after five years, and five years probation. The defendant's probation commenced on June 5, 2000, after he was released from prison. On that date, the defendant signed a conditions of probation form, which contained ten standard conditions of probation as well as several court-ordered special conditions. On April 12, 2005, the defendant was arrested and charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), and thereafter the information was amended to include a charge of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3). On May 10, 2005, Jodie Ward, from the office of adult probation, applied for a warrant for the defendant's arrest for violating his probation. Ward averred that the defendant was in violation of two of the standard conditions of his probation, one, that he not violate any criminal

law and, two, that he report to his probation officer as directed.

The defendant's trial on the sexual assault charges and his hearing on the violation of probation were held simultaneously, with additional evidence being allowed on the violation of probation charge after the jury returned its verdict. The jury found the defendant not guilty of the sexual assault charges, using the criminal standard of proof of beyond a reasonable doubt. The court, however, found the defendant to be in violation of the conditions of his probation by using the lesser standard of proof of a preponderance of the evidence. The court revoked the defendant's probation and ordered him to serve six years of the unexecuted portion of his prior sentence. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that there was insufficient evidence that he violated his probation by committing sexual assault in the first and second degrees. Initially, he challenges the court's conclusion that the evidence was sufficient to establish that he committed sexual assault in the first degree. He then challenges the court's conclusion that the evidence was sufficient to establish that he committed sexual assault in the second degree. We do not agree with either challenge.

"[E]vidence is not insufficient [merely] because it is conflicting or inconsistent. [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Gauthier*,

73 Conn. App. 781, 787, 809 A.2d 1132 (2002), cert. denied, 262 Conn. 937, 815 A.2d 137 (2003).

"A challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Hooks*, 80 Conn. App. 75, 80–81, 832 A.2d 690, cert. denied, 267 Conn. 908, 840 A.2d 1171 (2003). "[A] trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation." *State* v. *Davis*, 229 Conn. 285, 302, 641 A.2d 370 (1994). "In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence." (Internal quotation marks omitted.) *State* v. *McElveen*, 69 Conn. App. 202, 205, 797 A.2d 534 (2002).

The following facts, as found by the court, are relevant to our consideration of the defendant's claims. On the evening of March 19, 2004, "[The victim left] Tracy's [bar in Bristol] and [went] to Sabino's parking lot with [her friend]. At that location, the defendant . . . arrive[d]—a person [with whom the victim had] been acquainted . . . for a long period of time, including past experiences of consensual sexual relations. [The victim] approache[d] the defendant. There [was a] discussion concerning a ride home for [her friend]. The

defendant agree[d]. . . . [A]fter dropping off [the friend] the defendant [drove] to his tractor-trailer . . . which he [was] moving . . . to the Friendly's [restaurant] parking lot. They entered the cab of the truck, and [the victim] indicate[d] that she [didn't] feel well; [she then lay] on the sleeping area of the cab. . . .

"[The victim] indicated that she had drank too much. . . . She pass[ed] out, fall[ing] asleep in the cab. . . . [L]ater, [she awoke] with the defendant on top of her, [his] penis in her vagina [and] her shoes and pants removed. She told him to stop [and that] it hurt. He didn't stop. She tried to kick him [and to] push him away, with no result. He pinned her down with his shoulders. She told him she was going to be sick. She was not sure if he ejaculated in her. . . . [A]fter the incident, he gave her a ride home. She was crying." The court also found that the victim went to a hospital, where a rape kit examination was conducted, which revealed that the defendant had ejaculated inside of the victim's vagina.

On the basis of these specific facts, the court found, by a preponderance of the evidence, that the defendant had violated the terms of his probation by committing sexual assault in both the first and second degrees.

A

The defendant claims that there was insufficient evidence to support the court's conclusion that he "violated [his probation] by committing the crime of first degree sexual assault because the facts as found by the court [did] not establish by a preponderance of the evidence that [he] compelled the alleged victim to engage in sexual intercourse by the use or threat of use of force and that the force was . . . such to cause the alleged victim to fear physical injury." The defendant argues that even if the court accepted the victim's version of events that "when the act started . . . she woke

up and resisted . . . [i]n the world of reasonable logic, the strength and will to resist the use of force or the threat of use of force is inconsistent with the state of fear of physical injury that could result from such resistance. The plain language of the statute contemplates a victim that is so overcome by force or the threat thereof that it generates in her such fear of physical injury that [she] succumb[s] to the desires of her assailant against her will.'' This argument is without merit.

Section 53a-70 (a) provides in relevant part: ''A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . .'' The defendant's argument that if a victim resists a sexual assault, the victim, necessarily, is not in a state of fear of physical injury is lacking in support both logically and legally. A clear and simple example of a victim fighting back while in fear of physical injury can be found in cases of self-defense, in which fear for one's own safety relieves criminal responsibility for fighting off one's attacker. Certainly, fear for personal safety and resistance to an attack are both present in such cases. We read nothing in § 53a-70 that would lead us to the conclusion that it requires that a victim's fear be of the type that would make her ''succumb to the desires of her assailant against her will'' without fighting back. The argument merits no further discussion.

The defendant also argues that § 53a-70 requires (1) compulsion by the use of force or the threat of force *and* (2) fear of physical injury. We do not agree. The clear language of § 53a-70 (a) requires that a victim engage in sexual intercourse with an assailant due to

(1) compulsion by the use of force *or* (2) compulsion by the threat of force and fear of physical injury.

In this case, the court found that the victim passed out in the defendant's truck and that she awoke "with the defendant on top of her, [his] penis in her vagina [and] her shoes and pants removed. She told him to stop [and that] it hurt. He didn't stop. She tried to kick him [and to] push him away, with no result. He pinned her down with his shoulders." The court further found, by a preponderance of the evidence, that "the defendant did compel another person to engage in sexual intercourse with him by the use of force against her . . . ." After reviewing the record, we conclude that the trial court's finding that the state had proven, by a preponderance of the evidence, that the defendant had committed sexual assault in the first degree and thereby violated his probation was not clearly erroneous and was supported by the evidence.

B

The defendant claims that when viewing "[t]he evidence . . . as a whole [along with] the reasonable and logical inferences to be drawn from the testimonies and conduct of the parties, it cannot be said that there exists a preponderance of evidence to support a conclusion that the defendant committed second degree sexual assault. It is equally likely that the sexual intercourse was consensual." The defendant also alleges that the court gave too much weight to the constancy of accusation witnesses, stating that he "does not challenge the court's assignment of credibility as to the testimonies of those witnesses but questions the proper weight that should be accorded to them." We are not persuaded.

Section 6-11 (c) of the Connecticut Code of Evidence, provides: "A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided

the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes."

Although the court stated that it "found [the victim's] testimony more credible because of the constancy of accusation witnesses," there is nothing in the record that would lead us to the conclusion that this statement meant anything more than the court found the testimony of these witnesses to be corroborative of the victim's testimony, which lent more credibility to her version of events. In making this statement, the court also explained that it "followed [the] law" related to constancy of accusation witnesses and the use of their testimony. We can discern nothing in the record that would lead us to the conclusion that the court used the testimony of these witnesses for any purpose beyond that which is permitted.

The defendant testified that the sexual encounter between him and the victim was consensual. The victim testified that it was not consensual. The court found the victim to be more credible than the defendant. "The credibility of witnesses is a matter to be resolved solely by the [trier of fact]." (Internal quotation marks omitted.) *State* v. *White*, 229 Conn. 125, 143, 640 A.2d 572 (1994). "[W]e must defer to the [trier's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) Id.

The court specifically found that the victim had passed out in the defendant's truck and that when she awoke, the defendant was on top of her, her shoes and

pants had been removed, and the defendant's penis was inside of her vagina. One manner of violating § 53a-71 (a) (3)[1] is by engaging in sexual intercourse with another person who is unconscious. The court's finding, made after its assessment of the credibility of the witnesses, that the state had proven, by a preponderance of the evidence, that the defendant had committed sexual assault in the second degree and thereby violated his probation was not clearly erroneous and was supported by the evidence.

II

Although the defendant does not dispute that he failed to report to his probation officer as directed, he, nevertheless, claims that his right to due process was violated because (1) the revocation of probation hearing and the arrest warrant application did not provide sufficient notice of the specific incidents of the alleged violations of probation for failure to report and (2) there was an unreasonable preaccusation delay in charging him with a violation of probation for failing to report.[2] We do not agree.

"[T]he due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in

[1] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (3) such other person is physically helpless . . . ." General Statutes § 53a-65 (6) defines "physically helpless" to mean a person who is "unconscious or for any other reason is physically unable to communicate unwillingness to an act."

[2] We note that in response to a specific inquiry by Justice McDonald during oral argument before this court, the defendant's appellate counsel specifically stated that he was not making a *Strickland* argument. See *State* v. *Strickland*, 42 Conn. App. 768, 773–74, 682 A.2d 521 (1996) ("[T]he court may modify or enlarge a defendant's conditions of probation. . . . This power is not given to the office of adult probation." [Citation omitted; internal quotation marks omitted.]), rev'd on other grounds, 243 Conn. 339, 703 A.2d 109 (1997).

the process of revoking the conditional liberty created by probation. . . . In this regard . . . [w]here noncriminal activity forms the basis for the revocation of probation . . . due process mandates that the [probationer] cannot be subject[ed] to a forfeiture of his liberty for those acts unless he is given prior fair warning. . . . [A]ssertions that the defendant lacked prior notice of the conditions underlying the probation revocation [involve a question] of law for which our review is plenary." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruce T.*, 98 Conn. App. 579, 586, 910 A.2d 986 (2006).

A

The defendant claims that his right to due process was violated because the revocation of probation hearing and the arrest warrant application did not provide sufficient notice of the specific incidents of the alleged violations of probation for failure to report. We do not agree.

The following additional facts are relevant to this issue. The conditions of probation form, signed by the defendant, contained ten standard conditions of probation and several court-ordered special conditions. Standard condition number two required that the defendant, during the period of probation, "[r]eport as the [p]robation [o]fficer directs, give immediate notice if arrested and, if incarcerated, report to the [p]robation [o]fficer upon your release." Standard condition number four, required that the defendant "not leave the [s]tate of Connecticut without permission from the [p]robation [o]fficer."

On May 10, 2005, probation officer Ward attested in a warrant application that the defendant, among other things, "violated standard condition of probation [number two]." Ward also averred, in a prior paragraph of the warrant application, that "on April 14, 2005, this

affiant [Ward] instructed [the defendant] to report on [April 18, 2005] but he respectfully declined stating that he would be traveling out of state on business but that he would report on [April 25, 2005]. At this time, [the defendant] was advised that he did not have permission to travel out of state. On [April 25, 2005], [the defendant] failed to report. As of this writing, [the defendant] has failed to make contact with this affiant."

When considering the defendant's violation of probation, the court specifically found that the defendant "was advised of his conditions of probation on four occasions . . . [and] that the defendant was aware of the . . . standard conditions of probation, which include [the requirements] to report . . . as [the] probation officer directs, and to not violate any law of this state . . . ." The court went on to find that "[t]he testimony of the probation officer . . . indicated that the defendant did not show [up] as the probation officer [had] directed. Specific dates reported are January 29, 2001, April 2, 2002, April 23, 2002, August 4, 2002, and November 12, 2002. The court finds the testimony of the probation officer credible. The fact that the defendant appeared on the other dates does not eliminate the basis of a violation of failure to report." After considering those facts, the court then found that "the defendant did violate the terms and conditions of his probation as it relates to failure to report as the probation officer directs." The court, however, made no specific finding on the record concerning the April 18, 2005 date on which the defendant also failed to report.

The defendant does not contest that he failed to report on those specific dates. Rather, he argues that the court improperly, and in violation of his right to due process, allowed Ward to testify concerning the defendant's failure to report on dates between 2000 and 2002. He argues that he vehemently had objected to this testimony because those missed dates were not

listed in the warrant application. He reasons that because the warrant listed only April 18, 2005, as a specific date, he had no notice that any other dates on which he had failed to report could form the basis for a violation of probation. We are not persuaded.

General Statutes § 53a-32 (a) requires that the "court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . ." The defendant was charged with one count of violation of probation on the basis of violating two standard conditions of probation, violating the criminal laws and failing to report as directed. During the violation of probation hearing, the state sought to introduce evidence of the defendant's failure to report on several occasions. When the defendant objected on the ground that the arrest warrant listed April 18, 2005, as the only specific date on which he had failed to report, the court overruled the objection, explaining that paragraph ten of the warrant application provided "sufficient notice to the defendant that the hearing would involve his reporting as directed [to] the probation officer."

Paragraph eight of the arrest warrant application specifically listed April 18, 2005, as a date on which, among other things, the defendant failed to report as directed. Subsequent to the allegations set forth in paragraph eight, however, paragraph ten, in its entirety alleged: "In addition, this affiant [Ward] feels that [p]robable [c]ause exists to believe that the accused has violated: [s]tandard [c]ondition(s) of [p]robation: [number two, which requires the defendant to] [r]eport as the [p]robation [o]fficer directs, give immediate notice if arrested and, if incarcerated, report to the [p]robation [o]fficer immediately upon your release."

On the basis of the allegations contained in paragraph ten of the arrest warrant application, which put the defendant on notice that his failure to report as directed was one of the bases for the violation of probation charge, and the evidence offered at the hearing concerning the many dates on which the defendant failed to report as directed, we conclude that the defendant had sufficient notice of the manner in which he was alleged to have violated his probation.[3]

B

The defendant next claims that his right to due process was violated because there was an unreasonable preaccusation delay in charging him with a violation of probation for failing to report as directed several years earlier. He argues that the delay of two and one-half years to five years prejudiced him "because he was unable to properly prepare his defense." We are not persuaded.

The law is quite clear that "[i]n order to establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant." *State* v. *Morrill*, 197 Conn. 507, 522, 498 A.2d 76 (1985). The record in this case does not demonstrate either of these requirements.

First of all, the defendant does not explain how this delay interfered with his defense preparation. Quite to the contrary, the defendant stated to the court during his allocution that he had no malicious intent in failing to report to his probation officer as directed "on several occasions." In his appellate brief, he also states: "The

[3] We also note that the defendant did not file a request for a bill of particulars.

defendant admits that the alleged incidents occurred." Accordingly, the defendant has never contested that he failed to report as directed either at his violation of probation hearing or on appeal. On the basis of these admissions, we can discern no manner in which this preaccusation delay could have implicated his defense preparation, nor does the defendant explain that to us.

Further, although the defendant argues that "[n]o justification was offered for the delay" by the state, it is the defendant's burden to show that the delay was wholly unjustifiable. This he has not attempted to do. Accordingly, he has failed in his burden of proof.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JASON A. GORISS
(AC 26963)

Bishop, DiPentima and Mihalakos, Js.

Syllabus

Convicted of the crime of risk of injury to a child, the defendant appealed to this court. *Held*:

1. The trial court correctly denied the defendant's motion for a judgment of acquittal notwithstanding the verdict, which was based on his claim that the jury's verdict finding him guilty of the risk of injury charge logically could not be reconciled with the jury's not guilty finding on a charge of sexual assault in the first degree; a conviction of the risk of injury charge required only contact with the intimate parts of the victim rather than penetration, as required for a conviction of sexual assault in the first degree, and, therefore, although certain testimony could have created reasonable doubt in the minds of the jurors as to whether digital penetration of the victim had in fact occurred, leading to the acquittal on the charge of sexual assault in the first degree, the jury, with respect to the risk of injury charge, reasonably could have found from the evidence that the defendant touched the victim's vagina regardless of whether penetration was achieved and its verdict, thus, was not illogical.
2. The trial court properly exercised its discretion in denying the defendant's motion to permit him to testify as a surrebuttal witness to rebut the rebuttal testimony of a police detective, L; the record showed that the

prosecutor cross-examined the defendant about what he had said to L and, specifically, whether the defendant had stated that he might have mistakenly touched the victim's private area, which the defendant denied, and that the defendant's attorney had a full opportunity, during redirect examination, to clarify the defendant's prior testimony but failed to do so, and because the proffered testimony would not have rebutted or refuted evidence elicited by the state on rebuttal from L and was offered merely to rehabilitate or to clarify the defendant's prior testimony, the defendant failed to demonstrate that compelling circumstances existed for the admission of his proffered surrebuttal testimony or that the omission of such evidence raised a doubt as to the propriety of the jury's verdict.

Argued November 26, 2007—officially released June 10, 2008

Procedural History

Substitute information charging the defendant with the crimes of risk of injury to a child and sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict of guilty of risk of injury to a child; thereafter, the court denied the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed*.

Mary Boehlert, special public defender, for the appellant (defendant).

Nancy L. Chupak, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Mary Elizabeth Baran*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Jason A. Goriss, appeals from the judgment of conviction, rendered after a jury trial, of risk of injury to a child in violation of

General Statutes § 53-21 (a) (2).[1] He was acquitted of the charge of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2).[2] On appeal, the defendant claims that the trial court (1) improperly denied his motion for a judgment of acquittal notwithstanding the verdict and (2) improperly denied his motion to allow him to testify as a surrebuttal witness. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On one evening in January, 2004, the victim, T,[3] who was nine years old at the time, was in the apartment of her half-sister, D. Also present in the apartment were D's husband, who is the defendant in this case, and D's two younger children. After watching a scary movie, T had fallen asleep on the couch. Upon awakening, she went into the kitchen, where the defendant was sitting at the computer. She told the defendant she was scared, and he asked her if she wanted to lie down on the sofa with him. While they were lying down on the couch, the defendant started to tickle her and then placed his hand down her pajama bottoms and touched her vagina. T did not tell anyone about the incident for several months because she did not want to go to court and testify.

[1] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[2] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Sometime in April, 2004, T told her eleven year old sister that the defendant had touched her inappropriately, whereupon the eleven year old sister called D and told her what had happened. D then called T's father and also notified the department of children and families (department). The department, in turn, notified the Wallingford police department.

T was examined by Janet Murphy, a nurse practitioner at the Yale-New Haven Hospital child sexual abuse evaluation clinic. When Murphy asked T about where the defendant had touched her, T replied that the defendant had put his finger more inside of her than on the outside of her vagina.

I

The defendant first claims on appeal that the court improperly denied his motion for a judgment of acquittal notwithstanding the verdict because the jury's conclusion was not reasonably and logically reached. Specifically, the defendant contends that in light of the testimony and evidence presented at trial, the guilty verdict on the risk of injury charge was illogical given the not guilty verdict on the charge of sexual assault in the first degree. He contends that digital penetration constitutes sexual intercourse and that because the jury found him not guilty on the charge requiring intercourse, it had to find that there was no digital penetration. Because there was no digital penetration of a child younger than age sixteen, a conviction could not be had under § 53-21 (a) (2). We do not agree.

It is well recognized that in criminal trials before a jury, "[t]he general rule to which we subscribe is that factual [c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it [were] a separate indictment." (Internal quotation marks omitted.) *State* v. *Hinton*, 227 Conn. 301, 313, 630 A.2d 593 (1993). "[A] factually inconsistent verdict will not be

overturned on appeal. On several occasions, this court has refused to reverse a verdict of guilty on one count where that verdict appeared to be inconsistent with a verdict of acquittal on another count. . . . The law permits inconsistent verdicts because of the recognition that jury deliberations necessarily involve negotiation and compromise. . . . [I]nconsistency of the verdicts is immaterial. . . . As Justice Holmes long ago observed in the case of *Dunn* v. *United States*, 284 U.S. 390, 393–94, 52 S. Ct. 189, 76 L. Ed. 356 (1932): The most that can be said in such cases . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity. . . . That the verdict may have been the result of compromise, or a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." (Internal quotation marks omitted.) *State* v. *DeCaro*, 252 Conn. 229, 242–43, 745 A.2d 800 (2000).

The defendant does not appear to claim that the guilty verdict of the jury should be vacated because it was factually inconsistent with its not guilty verdict. Rather, the defendant claims that the jury's verdict, finding him guilty of risk of injury to a child, *logically* cannot be reconciled with the verdict finding him not guilty of sexual assault in the first degree. "While an inconsistent verdict is not objectionable in itself, its inconsistency may be considered insofar as it supports a claim that the jury's conclusion was not reasonably and logically reached." *State* v. *Manning*, 162 Conn. 112, 123, 291 A.2d 750 (1971); see *State* v. *DeCaro*, supra, 252 Conn. 243. "The resolution of a claim of inconsistent verdicts presents a question of law. . . . Our review is therefore

plenary." (Citation omitted.) *State* v. *Flowers*, 85 Conn. App. 681, 694, 858 A.2d 827 (2004), rev'd on other grounds, 278 Conn. 533, 898 A.2d 789 (2006).

The defendant contends that "the effect of the not guilty verdict on the sexual assault in the first degree [charge] logically means the jury found that no molestation occurred. As there [was] no evidence that a sexual touching took place apart from, either before or after, the alleged digital penetration, it is impossible to reasonably or logically find a digital touching but no digital penetration." The defendant's argument lacks a legal and factual basis.

Sexual assault in the first degree under § 53a-70 (a) (2) requires that sexual intercourse occur. Sexual intercourse is defined in General Statutes § 53a-65 (2) and requires penetration of the victim's vagina.[4] Unlike the penetration required for sexual assault in the first degree, mere contact with the intimate parts of the victim is all that is required under § 53-21 (a) (2)—it does not require penetration at all. To reach its verdict, the jury needed to find that the defendant had contact with T's intimate parts. Furthermore, "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . [The jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v.

[4] General Statutes § 53a-65 (2) provides: " 'Sexual intercourse' means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body."

Weisenberg, 79 Conn. App. 657, 663–64, 830 A.2d 795, cert. denied, 266 Conn. 932, 837 A.2d 806 (2003).

Most of the testimony at trial centered around the issue of digital penetration. Murphy testified that during her physical examination of T, she placed her hands on the outside of T's genitalia and that T told her that the defendant had put his finger more inside than where her hands were. Murphy further testified that "it's hard to know exactly what inside to her meant, more inside than where my hands were, but my hands were on the very—my hands were on the verge of the inside. . . . All I know is she meant more inside than where my hands were and . . . the next step would have been inside because [my hands] were on the outside." The testimony of Murphy could have raised a reasonable doubt in the minds of the jurors as to whether digital penetration had in fact occurred, thereby leading to the defendant's acquittal on the charge of sexual assault in the first degree.

Although Murphy's testimony could have created reasonable doubt regarding penetration, her testimony also permitted the jury reasonably to conclude that the defendant touched T's vagina regardless of whether penetration was achieved. As noted, the jury, as the sole finder of fact, is free to believe all, none or some of a witness' testimony. On this basis, the jury's verdict was not illogical.

Furthermore, the jury's verdict could have been based on compromise. See *State* v. *DeCaro*, supra, 252 Conn. 242–43 ("[t]he law permits inconsistent verdicts because of the recognition that jury deliberations necessarily involve negotiation and compromise" [internal quotation marks omitted]). The jury's guilty verdict on one charge and not guilty verdict on another can be interpreted as an act of leniency toward the defendant in regard to the not guilty verdict. We, however, are

not permitted to speculate as to why the jury reached its verdict. The jury had before it facts from which to find that the prohibited contact had occurred. Accordingly, the court correctly denied the defendant's motion for a judgment of acquittal notwithstanding the verdict.

II

The second and final claim by the defendant is that the court abused its discretion when it denied his motion to permit him to testify as a surrebuttal witness. Specifically, the defendant claims that he should have been permitted to rebut the rebuttal testimony of Detective Linda LoPresto. We are not persuaded.

The following additional facts are pertinent to the defendant's claim. The state, as part of its case-in-chief, presented LoPresto as one of its witnesses. She testified that she had interviewed the defendant on April 24, 2004. No further testimony was elicited from LoPresto regarding the substance of the interview. After the state had rested its case, the defendant testified on direct examination that he had never had sexual relations with T. On cross-examination, he was asked if he had told LoPresto that he had laid on the sofa with T, rubbed her back and may have mistakenly touched her private area. He denied ever making such a statement.[5]

On rebuttal, the state again called LoPresto, who testified that when she interviewed the defendant, he

[5] The prosecutor asked the defendant: "Isn't it true, sir, yes or no, that on April 23 of the year 2004 that you said to Detective Linda LoPresto the following: 'You do remember an evening when [T] slept over and she was on the couch, that she woke up scared and that you did comfort her, and then you said that you lied down on the couch with her and you had [T] lie on your stomach, and that you also told Detective LoPresto that you rubbed her back and that [T] might have misconstrued your affection and that you also told the detective that you might have mistakenly touched her private part when you picked her up.' Do you remember, sir, under oath today in this courtroom telling that to Detective Linda LoPresto . . . yes or no?" The defendant responded: "No."

had in fact told her that he laid down on the sofa with the victim and may have touched her private area by mistake.

The defendant thereafter moved for permission to testify as a surrebuttal witness in light of LoPresto's rebuttal testimony. The court, in denying the defendant's motion, stated that the defendant had the opportunity on redirect to give his version of what happened and failed to do so. Furthermore, the court reasoned, no new matter had been raised by the rebuttal witness.

Having reviewed the facts relevant to the defendant's claim, we now set forth our standard of review. "Rebuttal evidence is that which is offered to meet new matters raised in [a defendant's case], to contradict prior testimony and to impeach or rehabilitate witnesses . . . . Surrebuttal evidence is that which is offered to meet evidence raised in rebuttal. [O]nly evidence to explain away new facts brought forward by the proponent in rebuttal . . . is properly admissible [in surrebuttal]. . . . [Our Supreme Court previously has] stated that there is no constitutional right to present surrebuttal evidence. . . . The presentation of surrebuttal evidence is a matter resting squarely within the discretion of the trial court. . . . The defendant must demonstrate some compelling circumstance and the proffered evidence must be of such importance that its omission puts in doubt the achievement of a just result." (Internal quotation marks omitted.) *State* v. *Boykin*, 74 Conn. App. 679, 691–92, 813 A.2d 143, cert. denied, 263 Conn. 901, 819 A.2d 837 (2003).

In the present case, the record reflects that the prosecutor cross-examined the defendant about what he had said to LoPresto and, specifically, whether he had stated that he might have mistakenly touched T's private area when he picked T up. The defendant testified that he did not make such a statement to LoPresto. The defendant's

attorney had a full opportunity, during redirect examination, to clarify the defendant's prior testimony, if he so desired. No such clarification was sought on redirect. The state then called LoPresto as a rebuttal witness. LoPresto testified that the defendant did, in fact, make a statement that he had lain down on the sofa with the victim and may have touched T's private area by mistake. The court permitted the prosecutor to elicit LoPresto's rebuttal testimony to contradict, or to rebut, the defendant's testimony that he did not make such a statement to LoPresto. The defendant thereafter sought surrebuttal to rebut LoPresto's testimony.

Under the principles previously set forth, the defendant was permitted, by means of surrebuttal, only to explain away new facts set forth by the state in its rebuttal. His proffered evidence did not satisfy that standard; he did not seek to contradict or to rebut the statements made by LoPresto but, rather, to clarify his prior testimony in light of LoPresto's testimony. The defendant does not refer to anything in his proffered evidence that would have refuted the facts elicited by the state's rebuttal testimony. Instead, the defendant sought to testify as to what transpired during his interview with LoPresto, a topic that was well covered in his earlier testimony, and, apparently, to strengthen the credibility of that testimony.

"Bolstering of defense evidence is not permitted on surrebuttal." (Internal quotation marks omitted.) Id., 693. The proffered testimony would not have rebutted or refuted evidence elicited by the state on rebuttal. Instead, it appears that the defendant offered his testimony merely to rehabilitate or to clarify his prior testimony because he disagreed with LoPresto's testimony. Likewise, the defendant has not demonstrated that compelling circumstances existed for the admission of his proffered testimony or that the omission of such evidence casts doubt on the propriety of the jury's verdict.

For these reasons, we conclude that the court properly exercised its discretion when it declined to admit such testimony on surrebuttal.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL IACURCI *v.* SCOTT WELLS ET AL.
(AC 28434)

DiPentima, McLachlan and Gruendel, Js.

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises leased to the defendants. The trial court rendered judgment of possession in favor of the plaintiff, from which the defendants appealed to this court. Because, during the pendency of the appeal here, the defendants relinquished possession of the property to the plaintiff and failed to show that the matter being appealed created collateral consequences that were prejudicial to their interests and required review of their otherwise moot appeal, there was no practical relief that this court could afford them, and the appeal was, therefore, dismissed as moot. Although the trial court found the lease to be valid for purposes of summary process, the defendants would not be collaterally estopped from relitigating that issue in a separate pending action they had brought against the plaintiff involving the leased property, the defendants failed to establish their claim that their reputation in the community had been and would be adversely affected by the eviction judgment such that it constituted a collateral consequence that would allow this court to review an otherwise moot appeal, and the defendants failed to show how a gaming license held by the defendant S for his employment as an attorney for a casino would be adversely affected by the summary process judgment.

Argued February 20—officially released June 10, 2008

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Middlesex, Housing Session, and tried to the court, *Harleston, J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Appeal dismissed.*

Christopher R. Perry, for the appellants (defendants).

Michael Iacurci, pro se, the appellee (plaintiff).

Opinion

GRUENDEL, J. This case arises out of a landlord-tenant dispute. The defendants, Scott Wells and Dottie Wells, appeal from the judgment of possession rendered by the trial court in favor of the plaintiff, Michael Iacurci. The defendants claim on appeal that the court (1) lacked jurisdiction to hear the case, (2) improperly found that the lease was valid and (3) improperly found that the certificate of occupancy was valid. We dismiss the appeal as moot.

On October 24, 2005, the defendants entered into a lease with Spencer Classic Homes, LLC, for a property located at 4 Benjamin Lane in East Haddam (leased property). The plaintiff subsequently purchased the property from Spencer Classic Homes, LLC, on February 28, 2006, subject to the defendants' lease. The lease provided: "Beginning on the [c]ommencement [d]ate and continuing thereafter to the end of the term of this lease, [t]enant shall pay rent to [l]andlord in the amount of [z]ero [d]ollars ($0.00) per month . . . ." The lease further provided: "In the event that the [t]enant does not vacate the premises upon the date that the [c]ertificate of [o]ccupancy is issued for # 9 Benjamin Lane, East Haddam, Connecticut, then [t]enant shall pay rent to the [l]andlord in the amount of [t]hree [t]housand [f]ive [h]undred [d]ollars ($3,500.00) per month . . . without demand counterclaim abatement, deduction [or] setoff." Scott Wells testified that he and Dottie Wells had entered into a contract with New House Resource Group, LLC, to purchase 9 Benjamin Lane.[1]

[1] We note that the court was never presented with the purchase and sale contract for 9 Benjamin Lane and heard only oral testimony about the existence of the contract and its purported relationship with the lease.

The certificate of occupancy for 9 Benjamin Lane was issued on March 2, 2006, and the defendants became aware of it sometime in the middle of March. After so learning, the defendants continued to occupy the leased property, and they made no rental payments to the plaintiff. On May 26, 2006, the plaintiff commenced a summary process action against the defendants for nonpayment of rent. On July 14, 2006, the plaintiff filed a motion for use and occupancy payments, which was granted by the court. After a trial to the court, the court found that the defendants had failed to make rental payments, in accordance with the lease, after the certificate of occupancy had issued for 9 Benjamin Lane. The court, therefore, rendered judgment of possession in favor of the plaintiff. This appeal followed. While this appeal was pending, on April 18, 2007, the defendants relinquished possession of the leased property, returning possession to the plaintiff.

Before we can reach the merits of the defendants' appeal, we first must determine whether the case has been rendered moot because the defendants are no longer in possession of the leased property.[2] "Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the

[2] In his brief, the plaintiff contends that this appeal is moot. The defendants counter that even though they no longer retain possession of the leased property, this court still should review the merits of their appeal because the matter creates collateral consequences prejudicial to their interests.

determination of which no practical relief can follow." (Internal quotation marks omitted.) *Wilcox* v. *Ferraina*, 100 Conn. App. 541, 547–48, 920 A.2d 316 (2007). "We have consistently held that an appeal from a summary process judgment becomes moot where, at the time of the appeal, the defendant is no longer in possession of the premises." (Internal quotation marks omitted.) *Cheshire* v. *Lewis*, 75 Conn. App. 892, 893, 817 A.2d 1277, cert. denied, 264 Conn. 905, 826 A.2d 177 (2003). "Our Supreme Court, however, has allowed us to retain jurisdiction where the matter being appealed creates collateral consequences prejudicial to the interests of the appellant, even though developments during the pendency of the appeal would otherwise render it moot." (Internal quotation marks omitted.) *Wilcox* v. *Ferraina*, supra, 548.

"[T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Whe[n] there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Internal quotation marks omitted.) *Smith-Lawler* v. *Lawler*, 97 Conn. App. 376, 380, 904 A.2d 1235 (2006).

The defendants raise three possible adverse collateral consequences that they claim require review of their otherwise moot appeal. First, the defendants point out that they have initiated a separate action that they claim will challenge many of the issues litigated before the

court in the summary process action. They claim that in rendering its judgment of possession of the leased property in favor of the plaintiff, the court necessarily made certain findings and that the defendants will be collaterally estopped from litigating these issues in the separate, pending action. In addition, the defendants claim that there will be prejudicial consequences to their reputation in the community and to Scott Wells' maintenance of his gaming license for employment. We consider each claimed collateral consequence.

I

COLLATERAL ESTOPPEL

The defendants have initiated a separate action involving issues that pertain to both the leased property as well as the property they allegedly contracted to purchase at 9 Benjamin Lane. The plaintiff, along with New House Resource Group, LLC, and Spencer Classic Homes, LLC, are defendants in that pending action. In that action, the defendants in this case are seeking to have their security deposit returned and are claiming violations of certain home improvement contractor statutes, as well as violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. See *Wells* v. *New House Resource Group, LLC*, Superior Court, judicial district of Middlesex, Docket No. CV-06-5000789-S. Additionally, the defendants claim that the amount of rent, if any, due to the plaintiff will also be an issue in the pending action. The defendants argue that in rendering judgment of possession in favor of the plaintiff, the court necessarily had to find that (1) a valid and enforceable lease was entered into by the parties, (2) the relationship between the lease and the purchase and sale contract for 9 Benjamin Lane had no effect on the lease, and (3) a valid and enforceable certificate of occupancy was issued for 9 Benjamin

Lane. The defendants claim that these issues were presented to, and decided by, the court and are key issues that will be litigated in the pending action. Further, they claim that if this appeal is deemed moot, they will be bound by what they believe are incorrect determinations made by the court. The plaintiff agrees that the issues were presented to the court but argues that the court determined only the question of who should be in possession of the property without necessarily determining the validity of the lease or the certificate of occupancy and what relationship, if any, existed between the lease and the alleged purchase and sale contract for 9 Benjamin Lane.[3]

"Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Internal quotation marks omitted.) *Alexandru* v. *Strong*, 81 Conn. App. 68, 76, 837 A.2d 875, cert. denied, 268 Conn. 906, 845 A.2d 406 (2004). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . 1 Restatement (Second), Judgments § 27, comment (d) (1982). An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600–601, 922 A.2d 1073 (2007).

In the present case, in deciding that possession of the leased property should be awarded to the plaintiff,

[3] We note that the defendants did not file a motion for articulation concerning any of the court's findings or conclusions.

the court found the lease to be clear and unambiguous. The court construed various terms of the lease and concluded that the defendants would live rent free at 4 Benjamin Lane until the certificate of occupancy issued for 9 Benjamin Lane. Further, if the defendants remained at 4 Benjamin Lane after the date the certificate of occupancy was issued for 9 Benjamin Lane, the defendants were obligated to pay rent in the amount of $3500 per month. The court found that the defendants neither vacated the property at 4 Benjamin Lane when the certificate of occupancy for 9 Benjamin Lane was issued, nor began paying the monthly rental fee for 4 Benjamin Lane. The court, therefore, found in favor of the plaintiff and granted him possession of the leased property. Because the court construed several provisions of the lease to determine that possession should be awarded to the plaintiff, we agree with the defendants that the court necessarily determined that the lease was valid. We disagree, however, with the defendants' argument that the court also necessarily determined the validity of the certificate of occupancy and the relationship, if any, between the lease and the alleged purchase and sale contract. Indeed, the court so indicated in its memorandum of decision.[4]

Next, we must determine what effect, if any, the court's determination that the lease was valid has on the collateral consequences doctrine. We conclude that although the court found the lease to be valid for purposes of summary process, the defendants will not be collaterally estopped from relitigating that issue in the subsequent, pending action. In *Commissioner of Motor*

[4] In its memorandum of decision, the court stated: "The issues that the defendants have raised regarding agreements with the builder are matters which must be addressed in another court. This is an action for summary process, based on nonpayment of rent at 4 Benjamin Lane." In addition, during the trial, in response to the defendants' presentation of testimony regarding the validity of the certificate of occupancy, the court stated: "I'm not going to decide the validity of the certificate of occupancy in this action."

Vehicles v. *DeMilo & Co.*, 233 Conn. 254, 268–69, 659 A.2d 148 (1995), our Supreme Court adopted § 28 (1) of 1 Restatement (Second), Judgments (1982). Section twenty-eight provides in relevant part: "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (1) [t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action . . . ." "Such cases can arise, for example, because the controversy has become moot . . . . Id., § 28, comment (a)." (Internal quotation marks omitted.) *Commissioner of Motor Vehicles* v. *DeMilo & Co.*, supra, 268. In *Commissioner of Motor Vehicles*, the court concluded that because the defendant's appeal from the judgment was deemed moot, the defendant was unable to obtain review as a matter of law. As such, § 28 (1) applied so as not to bar the defendant from relitigating the factual and legal issues decided in rendering that judgment. Following our Supreme Court's logic in that case, we conclude that if the present appeal is deemed moot, the defendants will not be barred from relitigating the issue of the validity of the lease in a subsequent action, precisely because, as a matter of law, the defendants were unable to obtain review of the judgment. As such, the defendants' argument that if we determine that the appeal is moot they will be collaterally estopped from relitigating the issue of the validity of the lease fails.

II

REPUTATION IN THE COMMUNITY

The defendants claim that their reputation in the community has been and will be adversely affected by the eviction judgment rendered against them. For this proposition, the defendants rely on *State* v. *McElveen*, 261

Conn. 198, 215–16, 802 A.2d 74 (2002), in which our Supreme Court deemed not moot the appeal from the trial court's revocation of the defendant's probation and order that he serve six months in prison even though he had served all of his jail time. The court reasoned that there were collateral consequences that reasonably could ensue as a consequence of a probation revocation, such as a negative impact on a defendant's standing in the community and the ability to secure employment. Here, the defendants have failed to show how a summary process eviction, in and of itself, damages a person's reputation in the community at all, much less that it rises to the level such that we would be inclined to recognize it as a collateral consequence that would allow this court to review an otherwise moot appeal. Contra *Putman* v. *Kennedy*, 279 Conn. 162, 900 A.2d 1256 (2006) (defendant's otherwise moot appeal of expired domestic violence restraining order reviewable because of its reasonably possible negative impact on reputation in community); *Williams* v. *Ragaglia*, 261 Conn. 219, 802 A.2d 778 (2002) (en banc) (foster parent's otherwise moot appeal regarding revocation of foster care license deemed reviewable due in part to possibility that revocation information would be disseminated through government agencies creating reasonable possibility of negative impact on reputation as foster parent); *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 633 A.2d 296 (1993) (attorney's otherwise moot appeal of expired suspension reviewable because of collateral consequences to attorney's reputation). Accordingly, we reject the defendants' argument.

III

DISCLOSURE OF JUDGMENTS

Scott Wells is an attorney for the Mohegan Sun Casino and claims that as an employee, he is required to maintain a gaming industry license. The defendants claim

that his gaming license will be affected adversely by the summary process judgment because he is required to disclose all judgments against him in accordance with certain gaming license requirements. The defendants do not, however, explain how his license adversely will be affected. Without more, we are unable to determine, without speculating, whether there is a reasonable possibility that prejudicial collateral consequences will occur.[5] See *Smith-Lawler* v. *Lawler*, supra, 97 Conn. App. 380. Because this court will not speculate on what is not in the record, we decline to review this claim. See *State* v. *Hermann*, 38 Conn. App. 56, 68, 658 A.2d 148, cert. denied, 235 Conn. 903, 665 A.2d 904 (1995).

We conclude that the defendants have failed to bring to our attention any adverse collateral consequences that will befall them, and, therefore, we cannot afford them any practical relief. The appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

MICHAEL A. SANDERS *v.* JOSE C. DIAS ET AL. (AC 28487)

Flynn, C. J., and Robinson and Pellegrino, Js.

Syllabus

The plaintiff, who owns property in a subdivision adjacent to that of the defendants, brought this action for trespass, seeking, inter alia, to enjoin the defendants from using a portion of the plaintiff's driveway. The defendants and their predecessors in title had used the front portion of the driveway located at the plaintiff's property since 1976. The trial court rendered judgment for the defendants on the complaint and on

[5] The defendants submitted an affidavit to this court in which Scott Wells attested to the fact that as part of maintaining his gaming license, he is required to disclose any and all judgments against him. That attestation is merely a restatement of the argument made in the defendants' brief and does not provide this court any more information than what is already in the record.

their counterclaim in which they pleaded a right-of-way by necessity, concluding that the defendants had an easement by implication over the disputed portion of the plaintiff's driveway. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly found an easement by implication where the defendants in their counterclaim pleaded only a right-of-way by necessity; the allegations of the defendants' pleadings were sufficient to alert the trial court and the plaintiff that they were claiming an easement by implication and, thus, the plaintiff's claim that the trial court rendered judgment for the defendants on the basis of a theory that was not pleaded in the counterclaim lacked merit.

2. The plaintiff could not prevail on his claim that the trial court improperly applied the law regarding easements by implication, specifically, the unity of title doctrine, which the Supreme Court has abandoned: although the Supreme Court eliminated the former requirement that there be unity of ownership to establish an easement by necessity, that court did not make it improper to consider that there once existed unity of title in easement cases and, thus, the trial court acted properly in considering that there once was unity of title with respect to the properties in question here; moreover, although neither the subdivision documents nor the parties' deeds contained any reference to an easement or right-of-way and did not evince an intent by the grantor to establish an easement over a portion of the plaintiff's driveway, the trial court's finding that there existed an easement by implication was not clearly erroneous and was supported by the evidence showing that the easement was reasonably necessary for the fair enjoyment of the defendants' property.

Because the trial court, in recognizing a right-of-way over the plaintiff's driveway, did not define the scope of the easement or the precise location of the ten foot wide easement within the plaintiff's twenty-five foot wide driveway, the matter was remanded for a determination of the precise scope and exact location of the defendant's easement by implication over a portion of the plaintiff's driveway.

Argued March 12—officially released June 10, 2008

Procedural History

Action to enjoin the defendants from using certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *McWeeny*, *J.*; judgment for the defendants on the complaint and

on the counterclaim, from which the plaintiff appealed to this court. *Affirmed; further proceedings.*

William C. Bieluch, Jr., for the appellant (plaintiff).

Joshua A. Winnick, for the appellees (defendants).

Opinion

FLYNN, C. J. The plaintiff, Michael A. Sanders, appeals from the judgment of the trial court in favor of the defendants, Jose C. Dias and Lisa M. Murray, in which the court concluded that the defendants had an easement by implication over a portion of the plaintiff's driveway. On appeal, the plaintiff claims that the court improperly (1) rendered judgment on the basis of a theory that was not pleaded in the defendants' counterclaim, (2) applied the law regarding easements by implication, and (3) granted an overbroad and undefined easement to the defendants. We affirm the judgment of the trial court as to the grant of the easement by implication but remand the case for further proceedings to determine the precise scope and location of that easement.

The court found the following facts, which are not contested. "The lots which the parties own were parts of a subdivision developed by Mario Demelis of Middletown . . . . The subdivision is described in a final subdivision map . . . recorded in the Killingworth land records on April 4, 1972. The subdivision declarations of restrictions and covenants running with the land were filed on August 7, 1975. . . . The subdivision documents and the parties' deeds . . . do not reference an easement or right-of-way in favor of the defendants over the plaintiff's property.

"The defendants' property was developed first by the developer and sold to the defendants' predecessor in

title in 1976. The plaintiff's lot and home [were] subsequently developed and sold to the plaintiff's predecessor in title in 1977. . . . The defendants and their predecessors in title have used the front portion of the driveway located on the plaintiff's property since 1976.

"The subdivision map shows that the driveway for the defendants' lot should be on an area adjacent to lot 10 accessing Quarry Hill Road. The plaintiff's property is essentially situated behind the defendants' lot but with a lengthy [twenty-five] foot wide strip connecting the lot to Quarry Hill Road. The plaintiff's driveway is approximately 600 feet in length. The plaintiff, after purchasing the property in 2003, learned that it appeared that the defendants were encroaching on his property with respect to the use of the portion of his driveway adjacent to Quarry Hill Road. The defendants' driveway encompasses a small portion of the plaintiff's driveway near Quarry Hill Road and then veers off toward the defendants' house." (Citations omitted.)

On May 3, 2005, the plaintiff filed an action for trespass, seeking to enjoin the defendants from continued use of his property. The defendants, in turn, filed a counterclaim seeking a declaratory judgment as to whether they have a right-of-way over the plaintiff's land and the exact location of that right-of-way. After a trial to the court, the court rendered judgment for the defendants on the plaintiff's complaint and for the defendants on their counterclaim, recognizing a right-of-way in favor of the defendants "over the driveway apron located on the plaintiff's property. This right-of-way measures approximately ten feet wide by twenty feet long." This appeal followed.

I

The plaintiff's first claim appears to allege[1] that the court improperly found an easement by implication

[1] The plaintiff's brief at times is confusing. Initially, he argues: "The two types of easements that the defendants appear to have requested from the

where the defendants in their counterclaim pleaded only a right-of-way by necessity. He also argues that the defendant did not plead or prove "the existence of a prescriptive easement and therefore none should [have] been found by the trial court." The plaintiff contends that the defendants are bound by their pleadings and that the court improperly rendered judgment for the defendants on the basis of a theory that was not pleaded in their counterclaim. We conclude that this claim lacks merit.

"Once the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein. . . . A judgment upon an issue not pleaded would not merely be erroneous, but it would be void." (Internal quotation marks omitted.) *Kelley* v. *Tomas*, 66 Conn. App. 146, 160–61, 783 A.2d 1226 (2001).

The plaintiff relies on the case of *O'Brien* v. *Coburn*, 39 Conn. App. 143, 664 A.2d 312 (1995), to support his argument. In *O'Brien*, this court reversed the judgment of the trial court, which had found an easement by implication where the plaintiffs had pleaded the elements necessary for a prescriptive easement and not for an implied easement. Id., 148–49. Explaining the elements necessary to prove a prescriptive easement, we stated: "With regard to a prescriptive easement, General Statutes § 47-37 provides: 'No person may

trial court are an easement by implication and an easement by necessity." He then argues that an "easement by necessity [is] now known as an easement by implication . . . ." Later in his brief, the plaintiff argues that there was no proof of a prescriptive easement, and "therefore none should [have] been found by the trial court." He then discusses the elements of an easement by prescription in an attempt to demonstrate that one could not be proved in this case. Finally, in his reply brief, the plaintiff argues: "In this case, the trial court held that the defendants-appellees had an easement by implication, which the defendants-appellees had not alleged in their counterclaim." He then states that "[t]he argument of an easement by necessity fails in this action." We have done our best to characterize the defendant's claim and arguments accurately.

acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years.' In Connecticut, therefore, a prescriptive easement is established by proving an open, visible, continuous and uninterrupted use for fifteen years made under a claim of right." (Internal quotation marks omitted.) *O'Brien* v. *Coburn*, supra, 148.

We further explained that "[a]n implied easement is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property. . . . In the absence of common ownership . . . an easement by implication may arise based on the actions of adjoining property owners. . . . There are two principal factors to be examined in determining whether an easement by implication has arisen: (1) the intention of the parties; and (2) whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." (Internal quotation marks omitted.) Id.

Although the plaintiff argues the similarity between the present case and the *O'Brien* case, we find the two cases readily distinguishable. In *O'Brien*, the plaintiffs pleaded a cause of action for a prescriptive easement, claiming that they had "used the . . . driveway in an open and visible manner continuously and uninterrupted, for a period greater than fifteen years, and engaged in such use under a claim of right." (Internal quotation marks omitted.) Id., 148–49. We explained that the complaint specifically did not contain the allegations necessary to establish an easement by implication. Id., 149. In contrast, the defendants in the present case specifically pleaded in their special defense that

they have "a right-of-way over the front portion of the plaintiff's driveway." They further pleaded in their counterclaim that in order for them "to use and enjoy their land, it is necessary that the existence and location of their [right-of-way] over the defendant's land and the extent of permissible use be judicially determined."

Additionally, we note that although there exists a similarity between an easement by necessity and an easement by implication; see *Kelley* v. *Tomas*, supra, 66 Conn. App. 169 n.5; these easements are not identical: "The difference between the two types of easements is that an easement by necessity requires the party's parcel to be landlocked, and an easement by implication does not require that the parcel be landlocked." Id., 170 n.5. The defendants, in their counterclaim and special defenses, did not allege that their parcel was landlocked. We conclude that the allegations in the defendants' pleadings were sufficient to alert the court and the plaintiff that the defendants were claiming an easement by implication. Accordingly, we conclude that the plaintiff's first claim is without merit.

II

The plaintiff next claims that the court improperly applied the law regarding easements by implication. Specifically, the plaintiff argues that the court improperly applied the unity of title doctrine in this case, which, he argues, the Supreme Court specifically abandoned in *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, 250 Conn. 135, 144–45, 735 A.2d 798 (1999) (en banc). Without the improper application of this doctrine, the plaintiff argues, the court could not have recognized an easement in favor of the defendants. We do not agree.

Initially, we address the plaintiff's assertion that it became improper for the court to consider prior unity of title in implied easement cases after the Supreme Court's decision in *Bolan*. Although the requirements

to establish an easement by necessity once required a showing of unity of ownership; see *Curtin* v. *Franchetti*, 156 Conn. 387, 389, 242 A.2d 725 (1968); in *Bolan*, our Supreme Court eliminated that requirement. See *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, supra, 250 Conn. 144–45. In abrogating that doctrine, however, the Supreme Court did not make it improper to consider that there once existed unity of title in easement cases. See generally *Kelley* v. *Tomas*, supra, 66 Conn. App. 169–70 n.5. Rather, it simply omitted the *requirement* that there be unity of title to establish an easement. Accordingly, we conclude that the court acted properly in considering that there once was unity of title in this case.

We next must decide the appropriate standard of review for a claim challenging the existence of an easement by implication. The plaintiff, in his main appellate and reply briefs, states that the appropriate standard of review is the clearly erroneous standard. During oral argument before this court, however, he argued that our review is plenary. The defendants, in their appellate brief, also contend that we should employ a plenary standard of review in this case but, during oral argument, asserted that a mixed standard of review is necessary. We acknowledge that case law on this issue is somewhat confusing. In *Utay* v. *G.C.S. Realty, LLC*, 72 Conn. App. 630, 806 A.2d 573 (2002), this court stated: "The finding of an easement by implication is a question of law. . . . Our review is, therefore, plenary." (Citation omitted.) Id., 636. In *Gemmell* v. *Lee*, 59 Conn. App. 572, 757 A.2d 1171, cert. denied, 254 Conn. 951, 762 A.2d 901 (2000), however, we explained that "[w]e determine whether the grantor intended to establish an easement by an examination of the deeds, maps and recorded instruments introduced as evidence. Intent as expressed in deeds and other recorded documents is a matter of law. . . . [Additionally, however] [w]e must

. . . examine the facts found by the court as relevant to the establishment of the particular dimensions of the easement." (Citation omitted; internal quotation marks omitted.) Id., 576. In *Perkins* v. *Fasig*, 57 Conn. App. 71, 78–79, 747 A.2d 54, cert. denied, 253 Conn. 925, 754 A.2d 797 (2000), we explained that "[a]lthough the intent of a grantor to create an easement as expressed in deeds, maps and recorded instruments is a question of law, those documents must be considered in light of the surrounding circumstances to determine the nature and extent of the easement." After reversing the judgment of the trial court, because we concluded as a matter of law that the defendants did have implied easements over the land of the plaintiff, we remanded the case to the trial court for further proceedings to make factual determinations as to the nature and extent of those easements. Id., 79.

Recently, our Supreme Court explained: "Although in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Nevertheless, [t]he determination of the scope of an easement is a question of fact . . . [and the] decision as to what would constitute a reasonable use of a right-of-way is for the trier of fact whose decision may not be overturned unless it is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 699, 923 A.2d 737 (2007).

In the present case, it is undisputed that the deeds contain no mention of an easement or right-of-way, nor do they contain a reference to any document from which an easement might be implied; accordingly, we must look beyond the deeds to determine whether there exists an easement by implication. In considering the

appropriate standard to employ in looking beyond the deeds, we find very instructive the explanation offered by the Supreme Court in *Stankiewicz* v. *Miami Beach Assn., Inc.*, 191 Conn. 165, 464 A.2d 26 (1983), a case in which "[t]he issue presented [was] confined to a claim of an implied easement to roadways based upon a descriptive reference in a deed to a map [that showed those roadways]." Id., 169 n.6. The court distinguished a situation in which an easement can be inferred because of a reference contained in the deed from a situation in which a deed contains nothing from which such an inference could be drawn. The court explained that in "a situation wherein a conveyor, by deed, transfers a portion of his land and the conveyor's prior use of the land conveyed can give rise to an implied easement in the land conveyed in favor of the land retained . . . the issue is usually a question of fact resting upon a number of considerations. See 3 Powell, Real Property § 411." *Stankiewicz* v. *Miami Beach Assn., Inc.*, supra, 169 n.6; see also *D'Amato* v. *Weiss*, 141 Conn. 713, 718, 109 A.2d 586 (1954) ("[T]he conception underlying the creation of an easement by implication is that the parties are presumed to have intended the grant of an easement. . . . This presumption, however, is one of fact, and whether a grant is to be implied in any given case depends upon the intent of the parties as ascertained from the terms of the deed and the facts of the case." [Citation omitted.]). Accordingly, we conclude that the appropriate standard of review as to the factual determination that there exists an easement by implication in the present case is the clearly erroneous standard.

The plaintiff argues that "there was no deed, map or note indicating any intention with respect to creating an easement for access . . . . To the contrary, the proposed building sketch [in the record] indicates that the access to lot no. 11 was to be located at the other side

of the property alongside lot no. 10 on the subdivision map . . . In this case, there are no documents providing for any rights of access and therefore nothing for the court to construe as to the intention of the parties." Although we agree that there are no documents that evince an intent by the grantor to establish an easement over a portion of the plaintiff's driveway, that is not the only manner in which an easement by implication may be established. See *Stankiewicz* v. *Miami Beach Assn., Inc.*, supra, 191 Conn. 169 n.6; *D'Amato* v. *Weiss*, supra, 141 Conn. 718.

"An implied easement is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property. . . . We examine two principal factors in determining whether an easement by implication has arisen. . . . First, we look to the intention of the parties and, second, we consider whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate." (Citations omitted; internal quotation marks omitted.) *Martin Drive Corp.* v. *Thorsen*, 66 Conn. App. 766, 776, 786 A.2d 484 (2001).

The court found that both the plaintiff's and the defendants' lots had been owned and developed by Demelis as part of a subdivision. The defendants' lot was developed first and sold to the defendants' predecessor in title in 1976. The plaintiff's lot was developed and sold to the plaintiff's predecessor in title in 1977. Neither the subdivision documents nor the parties' deeds contain any reference to an easement or right-of-way in favor of the defendants over the plaintiff's property. Although the subdivision map shows the driveway for the defendants' lot on the opposite side of their property, away from the plaintiff's driveway, the driveway

on the map was never constructed by the developer. The court also found that the defendants and their predecessors in title always have used the front portion of the plaintiff's driveway for access to their property. On the basis of these findings, the court concluded that at the time the parcels were severed, "an apparently permanent and obvious servitude (an easement or right-of-way over a small portion of the driveway for lot 12) was imposed in favor of the defendants' predecessors in title."

In evaluating the reasonably necessary factor for an easement by implication, we have explained: "[I]n so far as necessity is significant [for an easement by implication] it is sufficient if the easement is highly convenient and beneficial for the enjoyment of the dominant estate." (Internal quotation marks omitted.) *Gemmell* v. *Lee*, supra, 59 Conn. App. 577. The court, in examining the reasonable necessity element, found that the defendants were credible in their testimony that it would cost more than $22,000 to construct a driveway on their own property and that because of ledge, blasting would have to be done. Although the plaintiff complains on appeal that the court accepted the testimony of the defendants, issues of credibility are for the trier of fact, and we, on appeal, cannot evaluate the credibility of the witnesses. See *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 65, 931 A.2d 237 (2007) ("[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." [Internal quotation marks omitted.]).

After hearing the testimony and reviewing the other evidence, the court found that "based on the significant cost of relocating a driveway to the defendants' home, the risks associated with the blasting near the defendants' home, the limited impact . . . on the plaintiff's

property . . . the grade of the defendants' property, and safety issues associated with the construction of a steep driveway," the easement was "reasonably necessary for the fair enjoyment of the defendants' property." A review of the evidence presented indicates that the court's factual findings have support in the record. Accordingly, they are not clearly erroneous.

III

The plaintiff's final claim is that the court improperly granted an overbroad and undefined easement to the defendants. We agree.

"The determination of the scope of an easement is a question of fact. . . . [W]e have stated that [t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit. . . . The decision as to what would constitute a reasonable use of a right-of-way is for the trier of fact whose decision may not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *First Union National Bank* v. *Eppoliti Realty Co.*, 99 Conn. App. 603, 608, 915 A.2d 338 (2007).

In this case, the court specifically "awarded judgment recognizing a right-of-way over the driveway apron located on the plaintiff's property. This right-of-way measures approximately ten feet wide by twenty feet long." The judgment did not define the scope of the easement or the precise location of the ten foot wide easement within the plaintiff's twenty-five foot wide driveway.

In other cases in which a trial court has failed to determine the precise scope of a remedial order, the Supreme or Appellate Courts have remanded the matter to the trial court for further proceedings to determine the precise remedy. See, e.g., *McBurney* v. *Cirillo*, 276

Conn. 782, 823, 889 A.2d 759 (2006) (remanding for determination of scope of implied easement); *A & M Realty* v. *Dahms*, 217 Conn. 95, 103, 584 A.2d 466 (1991) (affirming judgment but remanding for modification of monetary award); *First Union National Bank* v. *Eppoliti Realty Co.*, supra, 99 Conn. App. 611 (remanding for determination of scope of easement by necessity); *Simone* v. *Miller*, 91 Conn. App. 98, 112, 881 A.2d 397 (2005) (remanding for determination of scope of right-of-way); *Detar* v. *Coast Venture XXVX, Inc.*, 74 Conn. App. 319, 324, 811 A.2d 273 (2002) (remanding with direction to recalculate damages); *Glasson* v. *Portland*, 6 Conn. App. 229, 237, 504 A.2d 550 (1986) (remanding for hearing on nature and scope of injunction). Accordingly, in this case a remand is necessary for the court to determine the precise scope and exact location of the defendants' easement by implication over a portion of the plaintiff's driveway.

The judgment is affirmed as to the grant of the easement by implication and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

ROBERT A. SOKOLOSKI *v.* CAMERON A. MCCORISON ET AL.
(AC 28436)

McLachlan, Lavine and Foti, Js.

Syllabus

The plaintiff brought this quiet title action in connection with a dispute over the location of the boundary between the plaintiff's property and adjacent property owned by the defendants C and A. The trial court rendered judgment for the plaintiff in part, from which C and A appealed to this court. *Held* that the trial court's finding that the plaintiff was the owner in fee simple of the disputed land was not clearly erroneous and was supported by the evidence in the record, which included deeds of conveyance, surveys and testimony from fact and expert witnesses, the

trial court having been free to find credible the testimony of one surveyor as to the location of the disputed boundary and to reject that of a second surveyor placing the boundary in a different location.

Argued March 11—officially released June 10, 2008

Procedural History

Action to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn as against the defendant Connecticut Attorneys Title Insurance Company; thereafter, the matter was tried to the court, *Hon. Richard M. Rittenband*, judge trial referee; judgment for the plaintiff in part, from which the named defendant et al. appealed to this court. *Affirmed.*

Henry C. Ide, for the appellants (named defendant et al.).

Timothy Brignole, with whom, on the brief, was *Juri E. Taalman*, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendants, Cameron A. McCorison and his mother, Andrea McCorisin,[1] appeal from the judgment of the trial court rendered in favor of the plaintiff, Robert A. Sokoloski, in this quiet title action concerning a boundary dispute. On appeal, the defendants claim, alternatively, that the court improperly concluded that the plaintiff (1) was the fee simple owner of the land in dispute, (2) had a right-of-way over the land in dispute by way of adverse possession and (3) had a prescriptive easement over the land in dispute.[2]

[1] Mary Ann Krasnoger and the Connecticut Attorneys Title Insurance Company also were named as defendants. Krasnoger is not a party to this appeal, and the action against the title insurance company was withdrawn before trial. We therefore refer in this opinion to the McCorisons as the defendants

[2] The court rendered judgment in favor of the plaintiff on counts one (adverse possession), two (quiet title) and three (precriptive easement) of his complaint and for Mary Ann Krasnoger, a former owner of the plaintiff's land, on counts four and five.

We conclude that the court properly determined that the plaintiff was the fee simple owner of the land in dispute and, therefore, affirm the judgment of the trial court.[3]

In its detailed memorandum of decision, the court found the following relevant facts, which are not in dispute. In 1953, Thomas Krasnoger, Sr., and his wife, Agnes Krasnoger (Krasnoger parents), owned thirty acres of land from east of North Road in East Granby to the Granby-East Granby town line, known as 56 North Road. On January 9, 1954, the Krasnoger parents subdivided a portion of their land to the south by quitclaiming two parcels of it, one to their son, Thomas Krasnoger, Jr., and one to their son, Frank Krasnoger. Thomas Krasnoger, Jr., received what is now known as 54 North Road,[4] and Frank Krasnoger received what is now known as 52 North Road. The dispute in this case concerns the boundary between 54 North Road and 56 North Road, which arose subsequent to the plaintiff's purchasing 54 North Road from Thomas Krasnoger, Jr., and Mary Ann Krasnoger on September 28, 1993.

The defendants obtained interests in 56 North Road by devise from Agnes Krasnoger. In 2004, Wilson M. Alford, Jr., prepared an A-2 survey (Alford survey) as part of the settlement of the estate of Agnes Krasnoger. After receiving the Alford survey, Cameron McCorison confronted the plaintiff regarding the location of the boundary between 56 North Road and 54 North Road. Steven C. Cotton, Sr., of Henry C. Cotton & Associates, prepared an A-2 survey dated September 17, 2004, revised October 19, 2004 (Cotton survey).

[3] Because we conclude that the court properly determined that the plaintiff was the fee simple owner of the land in dispute, we need not consider the defendants' other claims.

[4] Thomas Krasnoger, Jr., quitclaimed 54 North Road through a straw man to himself and to Mary Ann Krasnoger in 1956. The quitclaim deeds were placed into evidence.

By complaint dated December 9, 2004, the plaintiff alleged six counts to settle the issue of the land in dispute created by the question of the location of the boundary between 54 North Road and 56 North Road. Only count two, alleged pursuant to General Statutes § 47-31, the quiet title statute, is at issue here. In simplest terms, the question is whether the boundary between the two properties extends easterly and perpendicularly from North Road, as the plaintiff claims, or whether the southern boundary of 56 North Road extends southeasterly from North Road forming an obtuse angle, as the defendants claim. The land in dispute lies between the claimed perpendicular boundary and the claimed obtuse boundary. The evidence presented at trial, which was held in July, 2006, consisted of testimony from fact and expert (surveyor) witnesses, deeds of conveyance and surveys concerning the subject properties and other documents.[5]

On the basis of the totality of the evidence, the court found by clear and convincing evidence that the plaintiff is the owner in fee simple of the area marked as "disputed area" in the plaintiff's exhibit four, the Cotton survey. To make that determination, the court found that the boundary between 54 North Road and 56 North Road runs east, perpendicular to North Road, as the plaintiff claimed. The court ordered Cotton to prepare an A-2 survey of 54 North Road in accordance with the court's findings with appropriate language for the

[5] Cotton testified that his firm was asked to examine the land records to ascertain what they indicated and then to perform a boundary survey of the property. Cotton examined deeds in the East Granby land records. No map was filed on the land records when the Krasnoger parents subdivided their land. No maps were filed between 1954 and September, 2004, that identified 52 North Road, 54 North Road and 56 North Road. Cotton found maps of abutting properties that depicted the boundaries of 56 North Road, prior to its subdivision. Cotton used the quitclaim deeds of the Krasnoger parents to Thomas Krasnoger, Jr., and to Frank Krasnoger to establish the boundaries of 54 North Road.

court's signature to be placed on the land records of the town of East Granby. The defendants appealed.

On appeal, the defendants claim that the court improperly found, pursuant to § 47-31,[6] that the plaintiff was the fee simple owner of the land in dispute. In their brief, the defendants do not dispute that the plaintiff is the owner in fee simple of a piece of property in the shape of a parallelogram on North Road with 130 feet of frontage on North Road and running 200 feet to the rear in a generally southeasterly direction. The defendants contend, however, that the court erroneously found that the deeds to 54 North Road described the shape of 54 North Road as being a rectangle.

"[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Remington Investments, Inc.* v. *National Properties, Inc.*, 49 Conn. App. 789, 797, 716 A.2d 141 (1998). "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there *is* evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Emphasis in original; internal quotation marks omitted.) *MacDonald* v. *Pinto*, 62 Conn. App. 317, 320, 771 A.2d 156 (2001).

In support of their claim, the defendants argue that the court improperly relied on the testimony of Mary

[6] General Statutes § 47-31 (a) provides in relevant part: "An action may be brought by any person claiming title to, or any interest in, real . . . property . . . against any person who may claim to own the property . . . in fee . . . adverse to the plaintiff . . . for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. . . ."

Ann Krasnoger, the plaintiff and Cotton as to the location of the boundary between 54 North Road and 56 North Road, which is relevant only to the plaintiff's claim of adverse possession[7] and is not written indicia of title in contravention of § 47-31 (f)[8] and *Clark* v. *Drska*, 1 Conn. App. 481, 473 A.2d 325 (1984).

This court has construed § 47-31 (f) "as requiring a determination of record title before the issue of adverse possession is reached. Such a construction is based on the fact that the statute lists things which fall into the same category, that of written documentation of title. If the words 'sources of title' were broad enough to include facts comprising adverse possession, the words 'determine the construction of the same' would make no sense. It is the written indicia of title to which the statute refers." Id., 488.

The court found that the plaintiff's exhibit three, a mortgage survey prepared for Society for Savings in April, 1956, describes 54 North Road as being rectangular in shape. Although the court found that the Society for Savings survey was only a class D survey, all of the deeds in the chain of title from the Krasnoger parents to the plaintiff describe 54 North Road as being a rectangle, namely, 130 feet along North Road and the easterly boundary and 200 feet on the northerly and southerly boundaries.

The court found the plaintiff's exhibit five to be particularly damaging to the defendants' case. Exhibit five is an application for a building permit dated July 2, 1958, signed by Thomas Krasnoger, Jr., for permission to build a garage. The application states that the side yard

[7] In count one of his complaint, the plaintiff alleged that he had acquired fee ownership of the land in dispute by way of adverse possession.

[8] General Statutes § 47-31 (f) provides: "The court shall hear the several claims and determine the rights of the parties, which derived from deeds, wills or other instruments or sources of title, and may determine the construction of the same, and render judgment determining the questions and disputes and quieting and settling the title to the property."

from the most northerly corner of the garage to the northerly boundary of the property owned by Thomas Krasnoger, Jr., and Mary Ann Krasnoger is fifty feet. Using the scale on the Cotton survey, fifty feet would extend to the boundary line claimed by the plaintiff. Using the same scale to measure the most northernly corner of the garage to the boundary claimed by the defendants would be a distance of five feet. Five feet is less than the setback required by the East Granby zoning code, which went into effect in 1957. The court found most important the belief of Thomas Krasnoger, Jr., expressed in the building application, that the side yard was fifty feet from his property line.

On the basis of our review of the pleadings, the court's memorandum of decision and the evidence presented at trial, we conclude that the court's decision is grounded in written indicia of title. See footnote 5; cf. *Loeb* v. *Al-Mor Corp.*, 42 Conn. Sup. 279, 615 A.2d 182 (1991) (quieting title pursuant to deeds in chains of title and stipulation of parties), aff'd, 224 Conn. 6, 615 A.2d 149 (1992). At trial, the court was presented with two class A-2 surveys, both prepared in 2004. It is significant that the court made a specific and detailed finding of credibility. It found Cotton to be a more credible expert witness than Alford.[9] A reviewing court does not judge

[9] The Alford survey is primarily concerned with the present boundaries of 56 North Road, and Alford did not perform a comprehensive examination of the field, as did Cotton. Alford relied on only one map, that of the adjacent Serafin property. The court also noted that Alford misspelled the plaintiff's name on his survey, contradicted himself and was inarticulate during his testimony.

Moreover, the court found the plaintiff and Cotton to be more credible witnesses than Mary Ann Krasnoger, as her testimony at trial was often at odds with her deposition testimony, in which she admitted that the shape of 54 North Road was a rectangle. The court found a notation on the Cotton survey determinative. The Cotton survey "with the name correctly spelled, dated September 17, 2004, and revised October 19, 2004, to show the disputed area . . . was made on or about the time of the revision . . . ."

The notation states: "In October, 2004, former owner Mary Ann Krasnoger, present owner Robert A. Sokoloski and Stephen S. Cotton, Sr., L.S. met at site to review disputed southerly property line of land now owned by Cameron A.

the credibility determinations of the trier of fact. "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Internal quotation marks omitted.) *McCarthy* v. *Ward Leonard Electric Co.*, 104 Conn. App. 535, 545, 935 A.2d 189 (2007). "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert . . . . The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal quotation marks omitted.) *Chesler* v. *Derby*, 96 Conn. App. 207, 218, 899 A.2d 624, cert. denied, 280 Conn. 909, 907 A.2d 88 (2006).

The judgment is affirmed.

In this opinion the other judges concurred.

RICHARD P. GIANNAMORE *v.*
DONALD E. SHEVCHUK
(AC 28058)

Bishop, Harper and Robinson, Js.

Syllabus

The plaintiff, a self-employed painter, sought to recover damages for malicious prosecution from the defendant public defender in connection with a contract dispute between the parties over certain painting work the plaintiff was to perform at the defendant's house. The plaintiff had instituted the action here after the dismissal of a criminal matter charging the plaintiff with the crime of larceny in the third degree in connection with his retention of certain money paid to him by the defendant for certain work that the plaintiff had failed to complete. After the jury returned a verdict in favor of the plaintiff, the trial court granted the defendant's motion to set aside the verdict and rendered judgment in

McCorison abutting land owned by Robert A. Sokoloski. See line 'A' to 'B' as depicted on this plan. According to Mary Ann Krasnoger, said line is the recognized property line that she and her deceased husband, Thomas Krasnoger, Jr., maintained from January, 1954 to September 1993, and is also the line shown to Robert A. Sokoloski at time of conveyance in September of 1993."

favor of the defendant, from which the plaintiff appealed to this court. *Held*:

1. The trial court improperly granted the defendant's motion to set aside the verdict; that court improperly determined that the plaintiff failed to satisfy his burden of proving that the defendant lacked probable cause to bring his complaint to the police and to initiate criminal proceedings against the plaintiff, as a reasonable person in the position of the defendant would not believe that he had grounds for prosecuting a criminal action, there being ample evidence in the record from which the jury could have found that the defendant was aware that the plaintiff believed that he was entitled to certain additional money paid to him by the defendant and that the plaintiff lacked the intent to deprive the defendant of his money wrongfully.

2. The defendant could not prevail on his claim, raised as an alternate ground for affirming the judgment, that there was insufficient evidence to support the jury's findings that he initiated the criminal proceedings against the plaintiff and acted with malice or an improper purpose other than bringing an offender to justice: the jury's finding that the defendant initiated the criminal proceedings against the plaintiff was supported by ample evidence in the record showing that the defendant contacted the police and a prosecutor seeking the prosecution of the plaintiff, that his persistence was a determinative factor in the decision to commence the prosecution of the plaintiff, that he provided misleading information to the investigating officer and that he failed to make a full and truthful disclosure of the actions of the plaintiff by failing to mention an amendment to the parties' contract, which explained the plaintiff's retention of the defendant's money; moreover, there was sufficient evidence from which the jury could have found that the defendant acted with malice or a purpose other than bringing a criminal offender to justice, as the jury could have found that the defendant improperly used criminal proceedings to recover money from a contractual dispute and not to bring the plaintiff to justice.

Argued January 16—officially released June 10, 2008

Procedural History

Action to recover damages for malicious prosecution, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Gallagher*, *J.*; verdict for the plaintiff; thereafter, the court granted the defendant's motion to set aside the verdict and rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

William S. Palmieri, for the appellant (plaintiff).

Jane G. Beddall, with whom was *Terence A. Zemetis*, for the appellee (defendant).

Opinion

ROBINSON, J. This appeal arises out of a malicious prosecution action brought by the plaintiff, Richard P. Giannamore, against the defendant, Donald E. Shevchuk. On appeal, the plaintiff claims that the trial court improperly set aside the jury's verdict and concluded that he had failed to establish that the defendant acted without probable cause to initiate criminal proceedings against him.[1] Additionally, the defendant claims, as alternate grounds for affirming the judgment of the court, that there was insufficient evidence to support the jury's findings that (1) he initiated the criminal proceedings against the plaintiff and (2) he acted with malice or an improper purpose other than bringing an offender to justice. We agree with the plaintiff and disagree with the defendant. Accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are necessary for our discussion. The plaintiff commenced a five

[1] In his statement of issues, the plaintiff set forth the following claims: (1) whether the jury found that he proved at trial that the defendant committed malicious prosecution; (2) whether the court properly submitted the issue of probable cause to the jury; (3) whether the court erred in finding that probable cause existed to arrest; (4) whether the court abused its discretion in directing the verdict; and (5) whether the court improperly set aside the verdict of the jury. We note that the court, in accordance with its decision on the motion to set aside the jury's verdict, granted the defendant's motion for a directed verdict. We therefore consider these claims together. Furthermore, because the plaintiff's first and second claims are subsumed in the broader question of whether the court improperly set aside the jury's verdict and concluded that he had failed to establish that the defendant acted without probable cause to initiate criminal proceedings against the plaintiff, we do not address them separately. See *State* v. *Olenick*, 98 Conn. App. 638, 640 n.1, 910 A.2d 1002 (2006), cert. denied, 281 Conn. 920, 918 A.2d 273 (2007).

count action against the defendant on March 5, 2001.[2] The operative complaint, dated March 22, 2006, set forth a single count of malicious prosecution. This action originated out of a contract dispute between the plaintiff, a self-employed painter, and the defendant, a public defender in the Bristol courthouse.

On August 22, 1995, the parties entered into two written contracts. The first was for the interior of the defendant's house. The plaintiff was to paint the interior walls, ceilings and trim work in exchange for $5000. The plaintiff acknowledged the receipt of a $3000 deposit with the balance due upon completion. The second contract required the plaintiff to paint the exterior of the house. The plaintiff accepted a $2000 deposit for the exterior contract.

The interior contract required the plaintiff to complete the painting of the interior ten days after all of the interior trim work had been installed by a different contractor. It further stated that the plaintiff was not responsible for time lost because materials had not arrived or been installed. By September 20, 1995, neither the interior nor the exterior painting had been completed. On that date, the parties executed a written amendment to the two August 22, 1995 contracts. The prior contracts remained in effect, but the two deposits were now applied exclusively to the interior painting contract, paying it in full. The plaintiff also acknowledged the receipt of an additional sum of money, approximately $1666. Ultimately, the interior painting

[2] The initial complaint alleged abuse of process, malicious prosecution, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., intentional infliction of emotional distress and negligent infliction of emotional distress. The court granted the defendant's motion to strike the CUTPA and intentional infliction of emotional distress counts. The court subsequently granted the defendant's motion for summary judgment with respect to the abuse of process and negligent infliction of emotional distress counts.

was never completed, and the exterior painting was never commenced.

In November, 1995, the defendant contacted Christopher Bartolotta, a state police trooper, regarding the painting of the house. Bartolotta advised him that his situation should be addressed as a civil matter in the court system. The defendant subsequently spoke with a prosecutor at the Bristol courthouse. The prosecutor advised the defendant to send the plaintiff a letter demanding the return of the money.[3]

On December 27, 1995, the defendant again contacted Bartolotta. Bartolotta took a statement from the defendant, reviewed certain documents and contacted the office of the state's attorney. In his written statement, the defendant alleged that the "total amount [the plaintiff] stole . . . by not doing the agreed work, not showing up and continually asking me for additionally money was $3666.00." As a result of his investigation, Bartolotta prepared an application for an arrest warrant. A prosecutor in the Bristol courthouse, where the defendant worked, reviewed and approved the arrest warrant application. It then was signed by a judge of the Superior Court. Neither the defendant's written statement nor Bartolotta's arrest warrant application mentioned the terms of the amended contract. Furthermore, the arrest warrant indicated that $3666 had been stolen: $2000 from the initial deposit on August 22, 1995, and the $1666 payment made on September 22, 1995.[4]

[3] The defendant testified that he sent the following letter to the plaintiff's address: "[P]lease return to me immediately the $3665 I gave you toward materials and payment for painting the outside of my house. If I do not hear from you within seven days from receipt of this letter, I will report your activity to all appropriate authorities and institute whatever action is appropriate and necessary." The address on the letter matched the plaintiff's address on the contract. The defendant further stated that he telephoned the plaintiff and recorded the text of the letter on the plaintiff's answering machine.

[4] The record reveals that the parties amended the contract on September 20, 1995, and that the plaintiff acknowledged the receipt of $1666 on that

On March 6, 1996, the plaintiff was arrested at his home for committing the crime of larceny in the third degree in violation of General Statutes § 53a-124. Incident to his arrest, the plaintiff was searched and a double edged knife was found on his person. As a result, the plaintiff also was charged with carrying a dangerous weapon in violation of General Statutes § 53-206 (a).

The plaintiff paid attorney John R. Williams $14,000 to represent him with respect to the pending criminal charges. The larceny case eventually was transferred from the Bristol courthouse to Hartford. That case was nolled and dismissed on September 1, 1998.

The plaintiff's malicious prosecution action was tried before the jury. At the conclusion of the plaintiff's case, the defendant moved for a directed verdict. After hearing argument, the court reserved its decision on the defendant's motion. The court submitted interrogatories to the jury as requested by the defendant. The jury returned a verdict in favor of the plaintiff and awarded the plaintiff a total of $39,000 in damages, subject to a setoff of $6665.

Following the jury's verdict, the defendant filed a motion to set aside, a motion for remittitur, a motion for a decision on the motion for a directed verdict and an application for a judicial determination of probable cause. On September 1, 2006, the court issued a memorandum of decision granting the motion to set aside the verdict.[5] The court concluded that "[b]ased on the undisputed facts . . . the plaintiff cannot sustain his burden of proving that the defendant lacked probable cause to bring his complaint to the police." The court reasoned that the plaintiff himself acknowledged that he took money from the defendant and never returned

date, not on September 22, 1995, as indicated in paragraph seven of the arrest warrant application.

[5] We note that the court never considered the defendant's motion for remittitur.

to the house. In the view of the court, these facts supported the defendant's reasonable belief that the plaintiff had taken more than $1000 and wrongfully refused to return it. Because the plaintiff had failed to prove that the defendant lacked probable cause, his claim for malicious prosecution likewise failed. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff claims that the court improperly set aside the jury's verdict[6] and improperly concluded that he had failed to establish that the defendant acted without probable cause to initiate criminal proceedings. Although the plaintiff has briefed these claims separately, in our view, they are intertwined, with the latter being the key issue. Simply put, the dispositive issue is whether the court properly determined that the defendant had probable cause to initiate criminal proceedings.

To facilitate our discussion, it is appropriate to set forth the legal principles regarding the tort of malicious prosecution. "The interest in freedom from unjustifiable litigation is protected by actions for malicious prosecution and abuse of process. . . . In malicious prosecution cases . . . the emphasis is upon the misuse of

[6] "The standard of review governing our review of a trial court's denial of a motion to set aside the verdict is well settled. The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles. . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Embalmers' Supply Co.* v. *Giannitti*, 103 Conn. App. 20, 32–33, 929 A.2d 729, cert. denied, 284 Conn. 931, 934 A.2d 246 (2007); see also *Edmands* v. *CUNO, Inc.*, 277 Conn. 425, 452–53, 892 A.2d 938 (2006).

criminal . . . action as a means for causing harm. . . . The law supports the use of litigation as a social means for resolving disputes, and it encourages honest citizens to bring criminals to justice. Consequently the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subject to liability. *On the other hand, no one should be permitted to subject a fellow citizen to prosecution for an improper purpose and without an honest belief that the accused may be found guilty*." (Emphasis added.) W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 119, pp. 870–71. Indeed, our Supreme Court expressly has recognized that the "law governing malicious prosecution seeks to accommodate two competing and ultimately irreconcilable interests. It acknowledges that a person wrongly charged with criminal conduct has an important stake in his bodily freedom and his reputation, but that the community as a whole has an even more important stake in encouraging private citizens to assist public officers in the enforcement of the criminal law. 1 F. Harper & F. James, Torts (1956) § 4.11." *McHale* v. *W.B.S. Corp.*, 187 Conn. 444, 447–48, 446 A.2d 815 (1982); see generally *Rioux* v. *Barry*, 283 Conn. 338, 343–49, 927 A.2d 304 (2007).

The elements of malicious prosecution are well established. "An action for malicious prosecution against a private person requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." *McHale* v. *W.B.S. Corp.*, supra, 187 Conn. 447; see also 52 Am. Jur. 2d 145, Malicious Prosecution § 8 (2000); D. Wright, J. Fitzgerald & W. Ankerman, Connecticut Law of Torts (3d Ed. 1991) § 161, p. 430. Our

Supreme Court has described these elements of the tort as the " 'stringent requirements' . . . ." *Gallo* v. *Barile*, 284 Conn. 459, 475, 935 A.2d 103 (2007); 52 Am. Jur. 2d 143, supra, § 5 ("Actions for malicious prosecution are not favored by the courts. Thus, a malicious prosecution action is subject to limitations that are more stringent than those surrounding other kinds of actions, and recovery is allowed only if the requirements have been fully complied with.").

The focus of our inquiry is the third element of malicious prosecution; that is, whether the defendant acted without probable cause.[7] "Probable cause has been defined as the knowledge of facts sufficient to justify a reasonable [person] in the belief that he [or she] has reasonable grounds for prosecuting an action. . . . Mere conjecture or suspicion is insufficient. . . . Moreover, belief alone, no matter how sincere it may be, is not enough, since it must be based on circumstances which make it reasonable. . . . Although want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." (Citations omitted; internal quotation marks omitted.) *Mulligan* v. *Rioux*, 229 Conn. 716, 739, 643 A.2d 1226 (1994), on appeal after remand, 38 Conn. App. 546, 662 A.2d 153 (1995). It is well established in our jurisprudence that "[t]he existence of probable cause is an absolute protection against an action for malicious prosecution . . . ." (Internal quotation marks omitted.) *Vandersluis* v. *Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); *Hebrew Home & Hospital* v. *Brewer*, 92 Conn. App. 762, 767, 886 A.2d 1248 (2005).

[7] We recently have described this element as "the gravamen of the tort." *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, 577, 893 A.2d 486, cert. denied, 278 Conn. 912, 899 A.2d 38 (2006); see also *McMahon* v. *Florio*, 147 Conn. 704, 706, 166 A.2d 204 (1960) ("[t]o maintain an action for malicious prosecution, the plaintiff must prove want of probable cause").

Our Supreme Court has instructed that "[w]hether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, but when the facts themselves are disputed, the court may submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law." *DeLaurentis* v. *New Haven*, 220 Conn. 225, 252–53, 597 A.2d 807 (1991); see also *Cosgrove Development Co.* v. *Cafferty*, 179 Conn. 670, 671, 427 A.2d 841 (1980); *Embalmers' Supply Co.* v. *Giannitti*, 103 Conn. App. 20, 35, 929 A.2d 729, cert. denied, 284 Conn. 931, 934 A.2d 246 (2007). In other words, the role of the jury is to find the underlying facts pertaining to the question of the lack of probable cause. The issue of probable cause in a malicious prosecution, however, ultimately presents a question of law that must be determined by the court. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007); *Vandersluis* v. *Weil*, supra, 176 Conn. 356; *McMahon* v. *Florio*, 147 Conn. 704, 707, 166 A.2d 204 (1960) ("[w]hether particular facts constitute probable cause is a question of law"). Accordingly, our review is plenary. *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 94.

The plaintiff testified that on August 22, 1995, he entered into a contract with the defendant and accepted a $3000 deposit to paint the interior of the defendant's home and an additional $2000 deposit to paint the outside of the defendant's home. He further testified that on September 20, 1995, the parties amended their earlier agreement.[8] In the amended agreement the parties agreed that the $5000 that previously had been paid to the plaintiff would be applied fully to the painting of the interior of the home. Furthermore, on that date, the

[8] The plaintiff later testified that the parties had entered into two contracts, one for the interior and one for the exterior. Whether the parties had entered into one contract or two is not a significant factor to our analysis.

plaintiff received additional money from the defendant. The plaintiff explained that he needed the additional money "[b]ecause of the holdups on the job. And if [the defendant] wanted me to keep going, I needed to pay the guy that was with me at the time."[9] On direct examination, the plaintiff stated that he stopped working on the defendant's home in mid-September, 1995.

During cross-examination, the plaintiff acknowledged that he had completed approximately 85 percent of the interior painting of the second floor and had not done any work with respect to the outside of the home. The plaintiff then admitted that he did not return to the defendant's home after September 20, 1995, the date that he signed the amendment to the contract. The plaintiff further stated that from September 20 through 30, 1995, he worked at a different location and never returned to the defendant's home.

During his testimony, the defendant stated that the plaintiff threatened to stop working and place a lien on the house if the defendant did not pay him additional money. He further testified that the parties communicated several times between September 20 and 27, 1995. On October 3, 1995, the defendant inspected the house and determined that no additional work had been done and spoke with the plaintiff. The defendant stated that the plaintiff again requested the rest of the money from the contract to complete the work. The defendant testified that he refused to pay the remainder of the money and told the plaintiff that he would take care of completing the work on the house.

At the outset of our analysis, we point out the interactions of the various standards of review applicable to the plaintiff's claim. The ultimate question before us is

[9] The plaintiff testified that the trim work for the interior of the house was not being installed in a timely manner. As a result, the plaintiff was unable to maintain his schedule.

whether the trial court properly determined, as a matter of law, that the defendant had probable cause to initiate criminal proceedings against the plaintiff. As we previously have explained, we review that conclusion under the plenary standard of review. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94. We are mindful, however, that the facts underlying that conclusion present a question for the jury.[10] See *DeLaurentis* v. *New Haven*, supra, 220 Conn. 252–53. In this instance, the record reveals that the court did not submit interrogatories to the jury regarding predicate facts relating to probable cause. Rather, the court submitted the ultimate legal issue to the jury. Although the court was not bound by the jury's determination that the defendant had no probable cause, the record supports the jury's implicit finding that the defendant and the plaintiff had an ongoing dispute regarding the plaintiff's services and the defendant's payment for them.

Although the parties agree that the defendant paid the plaintiff an additional sum of money on September 20, 1995, there was conflicting testimony as to the purpose of that payment. The plaintiff testified as to the significant delays that disrupted his schedule and resulted in the need for additional money to pay his employee. Additionally, there was testimony that the defendant was told that disputes regarding contractual matters are civil actions, not criminal matters. Both Bartolotta and the defendant testified to that effect. Furthermore, both parties were aware that this matter constituted a contractual dispute over the work done by the plaintiff and the amount of money paid by the defendant. Significantly, the defendant was aware that

[10] In its memorandum of decision, the court stated: "Based on the undisputed facts in this case, the plaintiff cannot sustain his burden of proving that the defendant lacked probable cause to bring his complaint to the police." We disagree that the facts in the present case were undisputed.

the plaintiff required payment of additional money before he would complete the work. Simply put, there was ample evidence in the record from which the jury could find that the defendant was aware that the plaintiff believed that he was entitled to the additional money and therefore lacked the intent to deprive the defendant of his money wrongfully.[11]

Under these facts and circumstances, we conclude, as a matter of law, that a reasonable person in the position of the defendant would not believe that he had grounds for prosecuting a criminal action. We further conclude that the court improperly determined that the plaintiff failed to satisfy the requirement of proving lack of probable cause and improperly set aside the jury's verdict.

II

We now consider the defendant's alternate grounds for affirming the judgment of the court. The defendant claims that there was insufficient evidence to support the jury's findings that (1) he initiated the criminal proceedings against the plaintiff and (2) he acted with malice or an improper purpose other than bringing an offender to justice. We are not persuaded by either of the defendant's claims.

As a preliminary matter, we set forth the applicable standard of review. "An appeal based on the sufficiency of evidence to support a factual finding carries a legal and practical restriction to review. The function of an appellate court is to review, and not to retry, the proceedings of the trial court. . . . Further, we are authorized to reverse or modify the decision of the trial court only if we determine that the factual findings are clearly erroneous in view of the evidence and pleadings in the

[11] "A specific intent to deprive or to misappropriate is an essential element of larceny." (Internal quotation marks omitted.) *State* v. *Sam*, 98 Conn. App. 13, 35, 907 A.2d 99, cert. denied, 280 Conn. 944, 912 A.2d 478 (2006).

whole record, or that its decision is otherwise erroneous in law." (Internal quotation marks omitted.) *Anderson* v. *Whitten*, 100 Conn. App. 730, 739, 918 A.2d 1056 (2007).

We previously have stated: "[I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *Davis* v. *Manchester Health Center, Inc.*, 88 Conn. App. 60, 69–70, 867 A.2d 876, cert. denied, 273 Conn. 936, 875 A.2d 543 (2005). Guided by these principles, we consider each of the defendant's claims in turn.

A

The defendant first claims that there was insufficient evidence to support the jury's finding that he initiated the criminal proceedings against the plaintiff. Specifically, he argues that he did nothing more than supply private assistance to law enforcement officials. We disagree with the defendant.

Our Supreme Court has stated: "The policy of encouraging private citizens to assist in law enforcement is vindicated, in the law of malicious prosecution, by providing a limited immunity in the form of the first element that the plaintiff must prove to maintain his cause of action. A private person can be said to have initiated a criminal proceeding if he has insisted that the plaintiff should be prosecuted, that is, if he has brought pressure

of any kind to bear upon the public officer's decision to commence the prosecution. . . . But a private person has not initiated a criminal proceeding if he has undertaken no more than to provide potentially incriminating information to a public officer. *In such a case, if the defendant has made a full and truthful disclosure and has left the decision to prosecute entirely in the hands of the public officer, he cannot be held liable for malicious prosecution.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *McHale* v. *W.B.S. Corp.*, supra, 187 Conn. 448; *LeFebvre* v. *Zarka*, 106 Conn. App. 30, 36, 940 A.2d 911 (2008).

There was evidence in the record to support the jury's finding that the defendant initiated the criminal proceeding against the plaintiff. "A person is deemed to have initiated a proceeding if his direction or request, or pressure of any kind by him, was the determining factor in the officer's (or prosecutor's) decision to commence the prosecution." (Internal quotation marks omitted.) *Fatone* v. *DeDomenico*, 161 Conn. 576, 577, 290 A.2d 324 (1971). The defendant went to Bartolotta, then the prosecutor and then back to Bartolotta seeking the prosecution of the plaintiff. The jury reasonably could have found that the defendant's persistence was a determinative factor in the decision to commence the prosecution of the plaintiff.

Additionally, the jury reasonably could have found that the defendant failed to make a full and truthful disclosure of the actions of the plaintiff. The defendant failed to mention to Bartolotta the amended contract of September 20, 1995. His written statement indicated that the plaintiff had stolen not only the $1666 from the September 20, 1995 payment, but also the initial $2000 that had been used as a deposit for the exterior in the original contract of August 22, 1995. The defendant failed, however, to inform Bartolotta that the original contract had been amended subsequently and that the

$2000 had been applied to the interior painting, not to the exterior. The defendant also failed to disclose the fact that the delays of the painting were a result of factors outside of the plaintiff's control, namely, the lack of progress with respect to the interior trim work. We agree with the statement of the United States Court of Appeals for the Eighth Circuit: "Where the informant knowingly gives false or misleading information or in any wise directs or counsels officials in such a way so as to actively persuade and induce the officer's decision, then the informant may still be held liable." *White* v. *Chicago*, *Burlington & Quincy Railroad*, 417 F.2d 941, 943 (8th Cir. 1969). There was sufficient evidence in the record for the jury to conclude that the defendant insisted on the prosecution of the plaintiff and provided misleading information to the investigating state trooper. Accordingly, we cannot conclude that the jury's finding was clearly erroneous.

B

The defendant next claims that there was insufficient evidence to support the jury's finding that he acted with malice or an improper purpose other than bringing an offender to justice. Specifically, he argues that there was no evidence in the record that he acted with an improper purpose. We disagree.

Our Supreme Court has stated: "In a malicious prosecution action, the defendant is said to have acted with malice if he [or she] acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . ." (Citation omitted; internal quotation marks omitted.) *Mulligan* v. *Rioux*, supra, 229 Conn. 732; see also 3 Restatement (Second), Torts, Malicious Prosecution § 668, p. 438 (1977). Furthermore, we note that "[m]alice may be inferred from lack of probable cause." *Falls Church Group*, *Ltd.* v. *Tyler*,

Cooper & Alcorn, LLP, supra, 281 Conn. 94. If the evidence supports a finding of a lack of probable cause, then the fact finder reasonably may conclude that the defendant acted with malice. See *Mulligan* v. *Rioux*, supra, 746.

Our review of the record reveals ample evidence from which the jury reasonably could have concluded that the defendant acted with a purpose other than bringing a criminal offender to justice. The use of criminal proceedings to recover a debt, even money lawfully owed to an accuser, is improper and subjects a person to liability for malicious prosecution. See 3 Restatement (Second), supra, § 668, comment (g). The jury was free to find, on the basis of the evidence, that the defendant used criminal proceedings not to bring the plaintiff to justice, but to recover money from a contractual dispute. We cannot conclude that the finding that the defendant acted with malice or an improper purpose other than bringing an offender to justice, was clearly erroneous.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

JOHN P. KENDALL ET AL. *v.* BRUCE D. AMSTER ET AL.
(AC 26191)

Lavine, Robinson and Stoughton, Js.

Syllabus

The defendants C and R Co. appealed to this court from the judgment of the trial court granting a prejudgment remedy in favor of the plaintiffs, K and J. A Massachusetts Superior Court had rendered judgment in favor of K against the defendant B and certain entities controlled by B, including H Co., in connection with the parties' failed business relationship. Subsequently, a receivership order was entered that required B

and H Co. to transfer certain property and income to J, who had been appointed as the receiver. Thereafter, B moved to Connecticut, where he worked for R Co., which had been incorporated by B's son, C, and conducted the same classic automobile restoration business as H Co. Subsequently, the plaintiffs filed the subject application for a prejudgment remedy to secure assets of B, C and R Co. B allegedly had transferred H Co.'s assets to R Co. and had diverted payments from H Co.'s customers. A complaint attached to the prejudgment remedy application alleged claims for, inter alia, common-law fraud and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). *Held*:

1. The trial court properly found that there was probable cause to grant the prejudgment remedy; there was ample evidence for the trial court to conclude that there was probable cause that the defendants violated CUTPA by ignoring the receivership order and transferring assets and good will from H Co. to R Co. and that judgment would be rendered in favor of the plaintiffs with respect to that cause of action.
2. The trial court properly issued a prejudgment remedy attaching $5.6 million of R Co.'s property and assets; there was evidence that the combined total of damages, statutory interest, attorney's fees and costs owed by B and H Co. to K totaled approximately $5.5 million, and the trial court's finding that R Co. was nothing more than a continuation of H Co. and, thus, subject to successor liability was supported by the record, which showed that R Co. was in the same business as H Co., used the same personnel and had the same customers.
3. The plaintiffs could not prevail on their claim that the appeal was moot as to C; although the trial court, by reducing the amount of the attachment as to C by approximately $5 million in response to a motion for articulation, had opened the judgment that was the subject of this appeal and altered that judgment as to a matter at issue on appeal, that court did not entirely afford the relief sought by C on appeal, and the appeal was thus not rendered moot, C not having been granted full relief as to his claim that the attachment was too high and an actual controversy between the parties having remained.
4. There was a reasonable basis in the evidence to support the order of an attachment as to C in the amount of $650,000.

Argued March 17—officially released June 10, 2008

Procedural History

Application for a prejudgment remedy, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hiller*, *J.*, granted the application, and the defendant Colton Amster et al. appealed

to this court; thereafter, the court, *Hiller*, *J.*, issued an articulation of its decision. *Affirmed*.

Thomas C. C. Sargent, with whom was *Daniel Jacobs*, for the appellants (defendant Colton Amster et al.).

Michael P. Shea, with whom were *Thomas J. O'Neil* and, on the brief, *Thomas D. Goldberg*, for the appellees (plaintiffs).

Opinion

ROBINSON, J. The defendants Colton Amster and Red Line Restorations, LLC (Red Line),[1] appeal from the judgment of the trial court granting a prejudgment remedy in favor of the plaintiffs, John P. Kendall and Carl Jenkins.[2] On appeal, the defendants claim that the court improperly (1) found that there was probable cause to grant the prejudgment remedy, and (2) issued a prejudgment remedy attaching $5.6 million of Red Line's property or assets and $650,000 of Amster's property or assets. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. On December 22, 1999, the Massachusetts Superior Court rendered judgment in favor of Kendall and against Bruce D. Amster and certain entities controlled by him. This judgment stemmed from a failed business relationship between Kendall and Bruce Amster. Bruce Amster, through his business, Hyannis Restorations,[3] had purchased and restored vintage automobiles for Kendall. The jury found that Bruce Amster had acted

[1] The defendant Bruce D. Amster is not a party to this appeal. Accordingly, we refer to Colton Amster and Red Line as the defendants.

[2] Kendall is a judgment creditor of Bruce D. Amster and of certain Massachusetts business entities that had been controlled by Bruce Amster. Jenkins is the receiver appointed by the Massachusetts Superior Court.

[3] Bruce Amster was the owner of two companies, Hyannis Restorations International Sales, Inc., and Hyannis Auto Restorations, Inc., which did business as Hyannis Restorations.

in a fraudulent manner with respect to his dealings with Kendall.[4] The total amount of the judgment, including interest and costs, exceeded $5.5 million.

On March 12, 2000, the Massachusetts court entered a receivership order and appointed Jenkins as the receiver. The order required Bruce Amster and Hyannis Restorations to transfer to Jenkins, on a weekly basis, all real and personal property received in the course of their personal or business affairs, including any income, assets, revenues, things of value, classic automobiles, commissions, broker's fees or payment for restoration or automobile dealer work. The order further instructed Bruce Amster and Hyannis Restorations to cooperate with Jenkins and not to take "any action, directly or indirectly to hinder, obstruct, or otherwise interfere with [Jenkins] in the conduct of [his] duties or to interfere in any manner, directly or indirectly, with the custody, possession, management, or control by [Jenkins] of the funds, assets, and premises . . . ."

[4] In its memorandum of decision, the Massachusetts Superior Court stated: "Based upon the jury's findings, as well as the evidence presented by the parties at trial, this court found that [Bruce] Amster and Hyannis Restorations employed and engaged in unfair, deceptive acts when they intentionally, knowingly, willfully and with the intent to defraud Kendall: (a) misrepresented the purchase prices of the automobiles, and converted for their own personal use the difference between what Kendall paid for the automobiles and what was actually paid to the sellers of the automobiles; (b) submitted false credit card statements in order to obtain reimbursement for personal expenses; (c) submitted false or inflated invoices for insurance obtained in connection with the transatlantic shipment of one of the automobiles; (d) submitted false or inflated invoices in order to obtain reimbursement for sales tax and registration fees which had not been paid; and (e) submitted false or inflated invoices in connection with the restoration of certain automobile parts and components. These acts were immoral and unethical and caused substantial injury to Kendall in violation of [Mass. Gen. Laws] c. 93A. Moreover, this court found the conduct of Hyannis Restorations and [Bruce] Amster to be so unscrupulous as to subject them to exemplary damages pursuant to . . . c. 93A, § 9 (3). Further, this court found the conduct of [Bruce] Amster in cheating Kendall was so egregious as to shock the conscience of any reasonable person, thereby warranting treble damages."

On December 5, 2000, the Massachusetts court found Bruce Amster and Hyannis Restoration in contempt for violations of the receivership order. Specifically, the court determined that Amster had set up a "straw corporation," Hyannisport Restorations,[5] to which Bruce Amster had transferred the assets and good will of Hyannis Restorations, engaged in improper financial transactions, including withdrawing and transferring assets, and obstructed Jenkins from performing as the receiver. The "straw man" of Hyannisport Restorations was Bruce Amster's father. The court subsequently modified the receivership order to include Hyannisport Restorations, as well as any other corporate entity controlled by Bruce Amster. The court later found the corporate entities, Bruce Amster and his accountant, to be in wilful contempt.[6]

Following the Massachusetts proceedings, Bruce Amster moved to Connecticut. He and his son, Colton Amster, were employed by Pray Automotive Restoration Corporation (Pray). During this time, Bruce Amster endorsed his paychecks from Pray over to Colton Amster, who cashed them. This income was not reported

[5] A "straw man" or "straw party" is defined as "[a] front; a third party who is put up in name only to take part in a transaction. Nominal party to a transaction . . . . Person who purchases property for another to conceal identity of real purchaser, or to accomplish some purpose otherwise not allowed." (Internal quotation marks omitted.) Black's Law Dictionary (6th Ed. 1990).

[6] Specifically, in a decision dated June 19, 2001, the court stated: "The Amster defendants, led by Bruce D. Amster, have systematically conspired to defraud the judgment creditor Kendall, and have contumaciously flouted the court's injunctive and receivership orders: they have dissipated funds to friends and relatives in violation of this court's orders; they have incorporated a straw company for the purpose of transferring the assets and good will of Hyannis Auto Restorations, Inc.; they opened up a secret bank account and deposited $100,000 to that account, unlawfully circumventing the court's receivership order; and they have willfully withheld documents from the court's receiver. All these acts were designed by Bruce D. Amster to hinder, delay and defeat the judgment creditor from assets he was entitled to lawfully levy upon."

to Jenkins as required by the receivership order. At some point, Colton Amster incorporated Red Line, and Bruce Amster worked there five to six hours per day. The court expressly found that Red Line "is a continuation of the business that Bruce Amster conducted through Hyannis Restorations, which consists in restoring rare, very expensive, vintage automobiles . . . ." The court further found that Bruce Amster diverted his customers from Hyannis Restorations and directed them to Red Line. Several of his former customers tendered payments to Bruce Amster, who then turned them over Colton Amster. The receiver was not made aware of these payments.

On November 22, 2004, the plaintiffs filed an ex parte application for a prejudgment remedy to secure the assets of Bruce Amster, Colton Amster and Red Line.[7] The complaint attached to the application alleged violations of the Uniform Fraudulent Transfer Act, General Statutes § 52-552a et seq., common-law fraud, aiding and abetting common-law fraud and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The court granted the application. The defendants subsequently moved to dissolve or to modify the prejudgment remedy. A hearing on the attachment was held on December 13 and 20, 2004. Following the hearing, the court issued a memorandum of decision and concluded that "there is probable cause that judgment will be rendered in favor of the plaintiffs, and the prejudgment remedy previously granted shall remain in effect." This appeal followed.[8]

Pursuant to a motion for articulation filed by the defendants, the court, on October 27, 2006, modified its previous order. The court declined to articulate its

[7] See General Statutes § 52-278e.

[8] Pursuant to General Statutes § 52-278*l* (a), the granting of a prejudgment remedy is a final judgment for purposes of appeal. See *Marlin Broadcasting, LLC* v. *Law Office of Kent Avery, LLC*, 101 Conn. App. 638, 641 n.1, 922 A.2d 1131 (2007).

order with respect to Bruce Amster or Red Line. With respect to Colton Amster, the court decreased the amount of the prejudgment attachment to $650,000.

As a preliminary matter, it will be helpful to set forth the following legal principles that will aid in the resolution of the defendants' appeal. "In Connecticut, a prejudgment attachment is a provisional remedy afforded to a claimant to secure satisfaction of a judgment in the future." *Shawmut Bank* v. *Brooks Development Corp.*, 46 Conn. App. 399, 410, 699 A.2d 283 (1997). This type of remedy "is unknown to the common law and is founded on and regulated by our statutory law." *Ledgebrook Condominium Assn., Inc.* v. *Lusk Corp.*, 172 Conn. 577, 582, 376 A.2d 60 (1977); see also General Statutes §§ 52-278a to 52-278n. Further, we note that "[t]he adjudication made by the court on [an] application for a prejudgment remedy is not part of the proceedings ultimately to decide the validity and merits of the plaintiff's cause of action. It is independent of and collateral thereto . . . ." (Internal quotation marks omitted.) *Marlin Broadcasting* v. *Law Office of Kent Avery*, 101 Conn. App. 638, 647, 922 A.2d 1131 (2007).

Our Supreme Court recently stated: "A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment . . . to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment . . . . A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff . . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the

evidence. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false. . . . Under this standard, the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits. . . .

"As for our standard of review, we have stated: This court's role on review of the granting of a prejudgment remedy is very circumscribed. . . . In its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error. . . . [W]e have consistently enunciated our standard of review in these matters. In the absence of clear error, this court should not overrule the thoughtful decision of the trial court, which has had an opportunity to assess the legal issues which may be raised and to weigh the credibility of at least some of the witnesses. . . . [On appeal], therefore, we need only decide whether the trial court's conclusions were reasonable under the clear error standard." (Citations omitted; internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 136–38, 943 A.2d 406 (2008); *Benton* v. *Simpson*, 78 Conn. App. 746, 750–52, 829 A.2d 68 (2003); see also *Doe* v. *Rapoport*, 80 Conn. App. 111, 116, 833 A.2d 926 (2003) (appellate court entitled to presume trial court acted properly and considered all evidence). With these principles in mind, we turn to the defendants' specific claims.

I

The defendants first claim that the court improperly found that there was probable cause to grant the prejudgment remedy. Specifically, they argue that the plaintiffs failed to establish the elements of a violation of

the Uniform Fraudulent Transfer Act;[9] that is, that the customer payments endorsed over to Colton Amster were the assets of Bruce Amster, that the transfers were intended to hinder or to delay Kendall, or that the transfers were made without consideration or less than a return of fair value. We are not persuaded that the court's finding of probable cause constituted clear error.

In their appellate brief, the defendants assert that "[r]educed to their most elemental terms, the factual allegations of the complaint sound in fraud under . . . § 52-552e (a) (1)." The defendants' argument, however, fails to account for the CUTPA claim set forth in the plaintiffs' complaint. We note that the court, in denying the defendants' motion to dissolve or to modify the prejudgment remedy, expressly stated that "*the plaintiffs . . . have demonstrated probable cause that judgment will enter against the defendants for violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.*" (Emphasis added.)

Additionally, we note that the plaintiffs alleged, as part of their CUTPA cause of action, that Red Line was created as a successor corporation to the Massachusetts corporate entities that previously had been controlled by Bruce Amster. They further alleged that the "assets and good will" of Hyannis Restorations had been transferred to Red Line to avoid detection by and

[9] General Statutes § 52-552e (a) provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

payment to the plaintiffs. The plaintiffs also maintained that substantial sums of money were withdrawn from the bank accounts of both Colton Amster and Red Line on behalf of Bruce Amster. Such moneys should have been turned over to Jenkins. Finally, as a result of this diversion from Hyannis Restorations to the successor corporation in Connecticut, Jenkins was forced to wind up the affairs of the Massachusetts businesses and to liquidate their assets.

"CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act . . . states merely that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state. . . . The entire act is remedial in character . . . and must be liberally construed in favor of those whom the legislature intended to benefit." (Citations omitted; internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 42, 717 A.2d 77 (1998); see also *Ostrowski* v. *Avery*, 243 Conn. 355, 378–79, 703 A.2d 117 (1997).

Whether a practice is unfair and constitutes a violation of CUTPA is a question of fact. See *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 650, 916 A.2d 827, cert. denied, 282 Conn. 904, 920 A.2d 309, aff'd after remand, 102 Conn. 668, 927 A.2d 920 (2007). Our Supreme Court has explained that "[i]t is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily

having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Citations omitted; internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 19, 938 A.2d 576 (2008). We conclude that there was ample evidence before it for the court to conclude that there was probable cause that the defendants, by way of ignoring the receivership order and transferring assets and good will from Hyannis Restorations to Red Line, have violated CUTPA and that judgment will be rendered in favor of the plaintiffs with respect to that cause of action.

The court found probable cause that the judgment will be rendered in favor of the plaintiffs with respect to the CUTPA claim. The defendants, however, focused their attack on the counts alleging that the Uniform Fraudulent Transfer Act has been violated. We conclude that the court's determination regarding the CUTPA count was proper and that the defendants have failed to demonstrate that it was clear error for the court to

grant the plaintiffs' application for a prejudgment remedy.

II

The defendants next claim that the court improperly issued a prejudgment remedy attaching $5.6 million of Red Line's property or assets and $650,000 of Colton Amster's property or assets. Specifically, they argue that "the magnitude of the prejudgment remedies issued against Colton Amster and Red Line cannot be logically justified by the underlying financial transactions upon which they were based." We conclude that the court's decision was not clear error, and, therefore, we decline to disturb it.

A

We first address the prejudgment remedy as applied to Red Line. In their proposed complaint, the plaintiffs set forth the following allegation: "In further execution of their scheme to defraud [the plaintiffs], Bruce Amster and Colton [Amster] formed Red Line . . . on October 23, 2003. On information and belief, from its inception Red Line's business was identical to the business of Hyannis Restorations and the other corporate entities through which Bruce Amster operated his vintage car business prior to the Receivership Order. Accordingly, all proceeds thereafter received by Red Line were required by law to be turned over to [Jenkins]. However, at no time have any such funds been transferred to [Jenkins]. Instead, payments to Red Line were routinely deposited into an account that Colton [Amster] opened in Red Line's name at the same branch of the . . . [b]ank at which [Colton Amster's] account was held."

After considering the prejudgment remedy application, the court ordered that the property and assets of Red Line be attached and secured in the amount of $5.6 million. After hearing the evidence over the course of

the two day hearing, the court found that neither Bruce Amster nor Colton Amster was credible. It further found that Bruce Amster had diverted customers from his prior Massachusetts business to the new business in Connecticut and that payments were diverted to Colton Amster without notifying Jenkins. The court then made a specific finding regarding Red Line, concluding that it was "a continuation of the business that Bruce Amster conducted through Hyannis Restorations, which consists in restoring rare, very expensive, vintage automobiles, and Bruce Amster has worked at Red Line approximately five to six hours a day." Finally, it noted that although Red Line had a checking account, the company paid its employees' salaries and for its supplies and parts in cash, and that this was indicative of an "attempt at deception . . . ." Further, this practice was identical to what had occurred with Hyannisport Restorations and what the Massachusetts court described as "an illegitimate business practice that . . . was adopted to skim cash out of [the business] to benefit [Bruce Amster]."

"Facts enabling the court to establish the amount of damages involved must be alleged in . . . an affidavit." *Essex Group, Inc.* v. *Ducci Electric Co.*, 181 Conn. 524, 525, 436 A.2d 16 (1980); see also *Mullai* v. *Mullai*, 1 Conn. App. 93, 94, 468 A.2d 1240 (1983) (plaintiff must establish probable amount of damages involved). We have stated that the amount of damages in an application for a prejudgment remedy need not be determined with mathematical precision. *Rafferty* v. *Noto Bros. Construction, LLC*, 68 Conn. App 685, 693, 795 A.2d 1274 (2002). "A fair and reasonable estimate of the likely potential damages is sufficient to support the entry of a prejudgment attachment. . . . Nevertheless, the plaintiff bears the burden of presenting evidence which affords a reasonable basis for measuring [its] loss." (Citation omitted; internal quotation marks omitted.) Id.

The court found that Red Line was a continuation of Hyannis Restorations controlled by Bruce Amster. Red Line was in the same business, restoring rare, expensive, vintage automobiles; used the same personnel, namely, Bruce Amster and Colton Amster; and had the same customers. "*The mere transfer of the assets of one corporation to another corporation or individual generally does not make the latter liable for the debts or liabilities of the first corporation except where* the purchaser expressly or impliedly agrees to assume the obligations, *the purchaser is merely a continuation of the selling corporation . . . or the transaction is entered into fraudulently to escape liability.* . . . Under the continuity of enterprise theory, [successor liability attaches where] the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." (Citations omitted; emphasis added; internal quotation marks omitted.) *Chamlink Corp.* v. *Merritt Extruder Corp.*, 96 Conn. App. 183, 187–88, 899 A.2d 90 (2006).

There was evidence that the combined total of damages, statutory interest, attorney's fees and costs owed by Bruce Amster and Hyannis Restorations to Kendall totaled approximately $5.5 million. On the basis of the finding that Red Line was nothing more than a continuation of Hyannis Restorations, and thus subject to successor liability, we cannot say that it was clear error for the court to order a prejudgment remedy in the form of an attachment in the amount of $5.6 million against Red Line.

B

We next address the prejudgment remedy as applied to Colton Amster. Following the defendants' motion for articulation, the court vacated its earlier decision as to

the amount attached with respect to Colton Amster, approximately $5.6 million, and reduced it to $650,000. We conclude that it was not clear error for the court to order the attachment in that amount.

1

Before reaching the merits of Colton Amster's claim, we must address the argument offered by the plaintiffs. They claim, as an alternate basis for disposing of the appeal as to Colton Amster, that we should dismiss this portion of the appeal for lack of subject matter jurisdiction on the ground that the appeal is moot.[10] Specifically, the plaintiffs contend that because the order that the appeal challenges is no longer in existence, there is no actual controversy and thus the appeal from that order is now moot. Due to the specific facts and circumstances of the present case, we conclude that the claim as to Colton Amster is not moot.

At the outset, we set forth the standard of review applicable to the plaintiffs' claim. We begin with the well settled general rule that "the existence of an actual controversy is an essential requisite to appellate jurisdiction. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Mootness implicates this court's subject matter jurisdiction, raising a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 279, 933 A.2d 256 (2007).

In response to the defendants' motion for articulation, the court altered its prior order with respect to

[10] Because the plaintiffs' argument concerns subject matter jurisdiction, it is a threshold matter requiring resolution. See *Kondrat* v. *Brookfield*, 97 Conn. App. 31, 37, 902 A.2d 718, cert. denied, 280 Conn. 926, 908 A.2d 1087 (2006).

the amount of the attachment as to Colton Amster. As noted, the court initially had authorized an attachment of the property or assets of Bruce Amster, Colton Amster or Red Line in the aggregate amount securing $5.6 million. It subsequently altered those terms, leaving the $5.6 million attachment, unapportioned as to Bruce Amster and Red Line, and authorized an attachment of the property or assets of Colton Amster in the amount of $650,000. Our case law establishes that any substantive modification of a judgment constitutes an opening of the judgment. See *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 705, 894 A.2d 259 (2006). Because the court reduced the amount of the attachment as to Colton Amster by approximately $5 million, we conclude that the original judgment was modified substantively, and, accordingly, the judgment was opened.[11]

We now address the effect of the court's opening of the judgment on the pending appeal. We turn to our Supreme Court's decision in *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 899 A.2d 586 (2006), for guidance. In that case, the court stated: "In considering the effect of the opening of a judgment on a pending appeal . . . the appropriate question is whether the change to the judgment has affected the issue on appeal. If, in opening the judgment, the trial court reverses itself and resolves the matter at issue on appeal in the appellant's favor, it is clear that the appeal is moot as there is no further practical relief that may be afforded. . . . Conversely, if the judgment is opened to address issues entirely unrelated to the appeal, the opening of the judgment has had no effect on the availability of relief. A more difficult question may be presented if the trial court addresses the matter at issue on appeal, but does not entirely afford the

[11] It is clear, however, that the defendants filed their appeal challenging the initial order of attachment. See General Statutes § 52-278*l*.

appellant the relief sought. In such cases, the extent to which the trial court alters the judgment may require either a new appeal or an amended appeal. See Practice Book §§ 61-9 and 63-1 (c) (3). As [t]he determination of whether a claim has become moot is fact sensitive . . . the facts of each case similarly must dictate the appropriate procedure to follow." (Citations omitted; internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, supra, 691–92.

The present case falls within the third scenario. In other words, the court altered its judgment as to a matter at issue on appeal, namely, the amount of the attachment as to Colton Amster, but did not entirely afford the relief sought. Although the better procedure may have been for the defendants to file an amended appeal form; see Practice Book § 61-9; we conclude, under the specific facts and circumstances of this case, that the appeal has not been rendered moot. Colton Amster has not been granted full relief as to his claim that the attachment amount was too high. An actual controversy between the parties remains, and we are not precluded from granting practical relief to Colton Amster. Accordingly, we reject the plaintiffs' argument that this claim is moot, and we proceed to the merits of his claim.

2

We now address the prejudgment remedy as applied to Colton Amster. He argues that the evidence adduced during the prejudgment remedy hearing demonstrates that, at most, his liability would be $322,419 and not the $650,000 as found by the court. We conclude that it was not clear error for the court to issue an attachment in the amount of $650,000 as to Colton Amster.

The court stated that the plaintiffs demonstrated damages as follows. First, Bruce Amster fraudulently turned over his salary from Pray in the amount of $70,000. Neither of the plaintiffs was aware of these

transactions, which were completed with the assistance and knowledge of Colton Amster. Second, prior to the formation of Red Line, Colton Amster assisted Bruce Amster in concealing payments of former customers totaling approximately $251,156. Third, Colton Amster assisted in the concealment of $322,238 in payments to Red Line from former customers of Hyannis Restorations. The total of these transactions is approximately $650,000.

We have reviewed the entire record, including the affidavit of Jenkins that was included with the attachment application. The plaintiffs have provided a reasonable basis that supports an attachment of $650,000, Moreover, this amount finds further support in light of the court's finding of probable cause that the actions of Colton Amster violated CUTPA by assisting the fraudulent concealment of money from the plaintiffs. Given our limited scope of review, and the fact that damages in an application for a prejudgment remedy need not be determined with mathematical precision, we cannot conclude that the decision of the court to order an attachment in the amount of $650,000 as to Colton Amster constituted clear error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SADIKI BLAKE
(AC 27694)

DiPentima, Harper and Dupont, Js.

Syllabus

The defendant appealed to this court from the judgments of the trial court revoking his probation following his arrest on charges of attempt to commit murder, assault in the first degree, burglary in the first degree and criminal possession of a firearm. The state later withdrew the charge of attempt to commit murder, a motion for a judgment of acquittal was

granted as to the charge of criminal possession of a firearm, and a mistrial was declared as to the assault and burglary counts after the jury was unable to reach a unanimous verdict. Subsequent to the finding of violation of probation, the defendant was acquitted of the assault and burglary charges on retrial. Following a hearing on the violation of probation charges, the trial court found that the state had presented reliable and probative evidence and had proven by a preponderance of the evidence that the defendant had violated his probation by committing the crimes of assault in the first degree and burglary in the first degree. *Held*:

1. The defendant could not prevail on his claim that the evidence did not support a finding that he had violated his probation; the defendant's challenge to the credibility of the testimony of G, who unambiguously identified the defendant as the man who had entered her apartment, uninvited and armed with a gun, and attacked another person in the apartment, was within the province of and rejected by the trial court, and that court's statement that it credited the testimony of "all of the state's witnesses" was not an indication that the court had accepted inconsistent testimony, and it was reasonable and logical to interpret the court's words as conveying that it had determined that all of the witnesses presented by the state had testified truthfully and that it had relied on portions of the testimony of each of those witnesses.

2. This court did not reach the merits of the defendant's claim that the trial court violated his right to allocution when it denied his request for a continuance of the dispositional phase of the violation of probation hearing to wait for a final resolution of the criminal charges on retrial, which he claimed denied him meaningful allocution because any incriminating statements made by him expressing remorse or responsibility for the criminal acts that formed the basis for the violation of probation charges could have been used against him on retrial of the assault and burglary charges; the defendant's claim that there were logistical benefits to continuing the proceeding so that he could discuss during allocution the final resolution of the pending criminal charges, not having been raised before the trial court, was not reviewable, and given that the prosecutor had offered, in response to a request by the defendant's attorney, that any incriminating statements made by the defendant would not be used by the state during a retrial of the criminal charges and that the defendant's attorney did not ask the court to address the matter in greater detail or discuss the matter further, the issue pertaining to allocation initially raised by the defendant was timely addressed by the court and resolved in a manner consistent with the wishes of the defendant, who could not now claim that such resolution was prejudicial to him.

(*One judge dissenting*)

Argued November 27, 2007—officially released June 10, 2008

Procedural History

Two informations charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Espinosa*, *J.*; thereafter, the court denied the defendant's motion for a continuance; judgments revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Mary Beattie Schairer, special public defender, for the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *James E. Thomas*, former state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Sadiki Blake, appeals from the judgments of the trial court revoking his probation pursuant to General Statutes § 53a-32. The defendant claims that (1) the evidence did not support the court's finding that he had violated his probation and (2) the court violated his right to allocution.[1] We affirm the judgments of the trial court.

In August, 2001, the defendant was convicted on separate informations of two counts of sale of narcotics.

[1] The defendant also claims that, because he ultimately was acquitted of the crimes that gave rise to the violation of probation charges, he could not be found in violation of his probation. The merit of the defendant's claim was dependent on our Supreme Court's resolution of the issue raised in *State* v. *Durant*, 281 Conn. 548, 916 A.2d 2 (2007), which had not been released at the time that the defendant filed his principal appellate brief but was released thereafter. The defendant acknowledged at the time of argument before this court, and we agree, that *Durant* is dispositive and resolves this claim adversely to him.

The court imposed a total effective sentence of four years imprisonment, execution suspended, and four years of probation. In December, 2004, while the defendant was on probation, he was arrested on charges of attempt to commit murder, assault in the first degree, burglary in the first degree and criminal possession of a firearm. As a result of these charges, the defendant also was charged, in two informations, with violating the terms of his probation. The state later withdrew the charge of attempt to commit murder and, during the criminal trial, the court granted the defendant's motion for a judgment of acquittal with regard to criminal possession of a firearm. The court declared a mistrial as to the assault and burglary counts after the jury was unable to return a unanimous verdict with regard to those counts. The court subsequently held a hearing related to the violation of probation charges.

On the basis of evidence presented during the trial and at the hearing, the court revoked the defendant's probation and committed him to the custody of the commissioner of correction for four years. In its oral ruling, the court found that the state had presented reliable and probative evidence and had proven by a preponderance of the evidence that the defendant had violated his probation by committing the crimes of assault in the first degree and burglary in the first degree. Later, after a new trial, the jury found the defendant not guilty of those crimes. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence did not support the court's finding that he had violated his probation. We disagree.

"A trial court initially makes a factual determination of whether a condition of probation has been violated. In making its factual determination, the trial court is

entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004); *State* v. *Fowler*, 102 Conn. App. 154, 165–66, 926 A.2d 672, cert. denied, 284 Conn. 922, 933 A.2d 725 (2007).

At the end of the adjudicative phase of the violation of probation hearing, the court set forth its findings, in relevant part, as follows: "The court credits the testimony of all the state's witnesses and finds that the evidence adduced at the violation of probation hearing was reliable and probative and established, by a preponderance of the evidence, that the defendant . . . on November 30, 2003, at 55 Oakland Terrace, Hartford, Connecticut, committed the crimes of assault in the first degree and burglary in the first degree and thus violated the first condition of probation, that is, that he not violate any criminal law of this state."

After noting the stipulation of the parties that the defendant was on probation at the time in question and was aware of the terms of his probation, the court stated: "The court finds that the testimony of La-Trice Grant was reliable and probative. The court credits her entire testimony. The court finds that the defendant went to Ms. Grant's third floor apartment at approximately 4:15 a.m. and knowingly and unlawfully entered and remained in her dwelling with the intent to commit a crime therein, that is, to assault Jimmy Ball, and that at that time, he was armed with a deadly and dangerous

instrument, that is, a gun . . . . Entering Ms. Grant's apartment at that time of morning when the defendant reasonably would have known that the occupants would be asleep and that he was armed with a handgun is strong evidence that the defendant intended to commit a crime in the apartment. The defendant entered and remained in Ms. Grant's apartment without permission.

"Once unlawfully in the apartment, the defendant approached Ms. Grant at the door of her bedroom and stated, 'I told you, anyone else but him.' The defendant proceeded to intentionally cause serious physical injury to Jimmy Ball by repeatedly hitting him about four times in the head and face with a gun, a dangerous weapon and dangerous instrument, while . . . Ball was asleep in Ms. Grant's bed. The defendant caused serious physical injury to Mr. Ball as stated by Dr. Manuel Lorenzo, who treated him at St. Francis Hospital and Medical Center, and as reflected in Mr. Ball's medical records . . . .

"The court credits the testimony of Lorenzo regarding the extent of Mr. Ball's injuries. Lorenzo testified that Mr. Ball had, among other injuries, a skull fracture, fracture to his cheekbone and traumatic brain injury. He also testified that without medical intervention, the injuries the defendant inflicted upon Mr. Ball would have caused his death. Accordingly, the court finds that the totality of evidence establishes that the defendant violated the conditions of probation by committing the crimes of assault in the first degree . . . and burglary in the first degree . . . on November 30, 2003, at the third floor apartment of Ms. Grant at 55 Oakland Terrace, Hartford, Connecticut."

A

Grant was the only witness who positively identified the defendant as the perpetrator of the crimes that

occurred in her residence on November 30, 2003.[2] The defendant argues: "[T]he lack of credibility of the sole witness who identified [him] as the assailant was so strong that the court's decision that her testimony was credible was not reasonable or logical and leaves one with the definite and firm conviction that a mistake has been committed and was thus clearly erroneous. Without that testimony, the evidence against the defendant was insufficient as a matter of law." (Internal quotation marks omitted.)

The defendant has set forth numerous reasons as to why the court should not have relied on Grant's testimony. First and foremost, he suggests that Grant intentionally misidentified him as the perpetrator of these crimes. The defendant asserts that Grant's trial testimony with regard to some points differed from that of other witnesses, as well as from her initial statement to the police, thus rendering it unreliable. The defendant also casts doubt on Grant's testimony insofar as it suggested as a motive that there was a "love triangle" between himself, Grant and Ball. The defendant posits that the version of events related by Grant "left a lot of unanswered questions" as to why he would have committed the crimes and what transpired at the scene after the crimes were committed. Finally, the defendant deems it relevant that the court declared a mistrial with regard to these crimes after the jury could not reach a verdict and that, later, a different jury found him not guilty of these crimes. The defendant states that these factors should give this court "reason to pause" and invites us to conclude that they reflect poorly on Grant's credibility as a witness.

We have reviewed Grant's testimony in its entirety. It suffices to observe that Grant unambiguously identified

[2] Ball testified that he remembered waking up in a hospital after the assault but was unable to recall any of the details of the assault itself.

the defendant as the man who entered her apartment, uninvited and armed with a gun, and attacked Ball. Grant testified that, as a result of their prior relationship, she was familiar with the defendant. She testified that she observed the defendant, heard the words he spoke to her and struggled with him in an unsuccessful effort to fend off his violent conduct. There was also evidence that, shortly after the incident, Grant identified the defendant to the police as the perpetrator and that, the following day, she identified him from a photographic array.

Grant's testimony amply supported the court's factual findings. The defendant does not claim that those findings, if reasonable, were insufficient to support the judgments. At trial, the defendant vigorously challenged Grant's credibility and attempted to discredit the state's version of events. Those efforts, reflected in the arguments raised before this court, are properly made before the trier of fact, not this court. It is not the function of this court to reevaluate the cold record of Grant's testimony to determine whether it was *plausible* that Grant was mistaken or, as the defendant asserts, had fabricated her testimony. "As the sole finder of fact in the probation revocation proceeding . . . the court was entitled to arrive at its own conclusion regarding the witnesses' credibility and what weight to afford their testimony." *State* v. *Gauthier*, 73 Conn. App. 781, 787, 809 A.2d 1132 (2002), cert. denied, 262 Conn. 937, 815 A.2d 137 (2003). None of the arguments raised by the defendant cast doubt on the propriety of the court's favorable assessment of Grant's testimony. The defendant's efforts to convince us that the court mistakenly relied on such testimony simply are not persuasive.[3]

[3] Contrary to the defendant's assertion, it is of no consequence to our analysis that one jury could not reach a verdict with regard to the underlying charges and that, later, another jury found him not guilty of these crimes. It suffices to observe that, unlike a criminal prosecution, in a violation of probation proceeding, the state has the burden of proving its case by a fair

B

The defendant also argues that the trial court's statement that it "credits the testimony of all of the state's witnesses" should lead this court to conclude that it mistakenly assessed the evidence. The defendant posits that the court could not reasonably or logically have credited all of the testimony presented by the state because it "conflicted in many respects." The defendant accurately notes, for example, that the state's witnesses differed in their testimony with regard to who was present when the police arrived on the scene, where the victim was located when police arrived, the description of the crime scene, the nature of the relationship between Grant and Ball, whether there had been gunshots at the time of the incident and whether Grant had been "evasive" in her dealings with the police investigating the incident.

As a preliminary matter, we note that in reaching its decision, the court relied almost exclusively on Grant's observations of the defendant's violent criminal conduct in her apartment. The court expressly indicated in its decision that it had relied on Grant's "entire testimony." For these reasons, we question whether the defendant can demonstrate that his claim of error concerning other witnesses, if accurate, was of any consequence to the court's judgments.

Nevertheless, we reject on its merits the premise of the claim raised. The defendant would have us interpret in isolation the court's statement concerning the state's witnesses to mean that the court accepted as fact each and every detail recounted by all of the state's witnesses. In light of its statement concerning Grant's testimony, it is reasonable and logical to interpret the court's words to convey that the court had determined that all

preponderance of the evidence, not beyond a reasonable doubt. *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994).

of the witnesses presented by the state had testified truthfully and that it had relied on portions of the testimony of each of these witnesses. To the extent that they existed, inconsistencies in testimony between and among several witnesses do not necessarily reflect that any witness had testified untruthfully. Inconsistent evidence is not necessarily evidence that has been fabricated. Human experience teaches that different factors, such as varying abilities of witnesses to recall events, might reasonably and logically explain such inconsistencies. Further, it is fair to assume that the court relied on some of this testimony and, consistent with its role as fact finder, resolved any conflicts in the testimony to reach the logical version of events, which was amply supported by the evidence, that it articulated in its decision. "It is the [fact finder's] right to accept some, none or all of the evidence presented. . . . Moreover, [e]vidence is not insufficient . . . because it is conflicting or inconsistent. [The court] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [finder of fact's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Internal quotation marks omitted.) *State* v. *Marcisz*, 99 Conn. App. 31, 36, 913 A.2d 436, cert. denied, 281 Conn. 922, 918 A.2d 273 (2007). We are not persuaded that the court's general assessment of the state's witnesses in any way reflected that a mistake was made.

II

The defendant next claims that the court violated his right to allocution when it denied his request for a continuance of the dispositional phase of the violation of probation hearing. We do not reach the merits of this claim.

The following facts underlie the defendant's claim. On March 22, 2006, immediately after the conclusion

of the adjudicative phase of the hearing, the court took up the issue of the proper disposition of the violation of probation charges. The defendant's attorney informed the court that he "need[ed] time to prepare an argument for sentencing." The court granted a continuance until the following morning. The next day, the defendant's attorney addressed the court as follows: "I would like to formally object to proceeding with sentencing on the violation of probation. . . . As the court is aware, [the defendant], at this stage, in a violation of probation proceeding, has a right of allocution. . . . [T]he criminal charges upon which the violation is based have not been disposed of yet because of a mistrial. He also has an operative right against self-incrimination. To proceed, at this point, would cause or have the effect on [the defendant] of having to elect between those two rights. Frankly, with what is at stake in the two cases, that would, at least by my advice, cause him to waive his right of allocution. But I don't think he should be placed in that position and I, therefore, request that the court, again, consider not proceeding at this time and wait until the criminal charges are, in some manner, disposed of."

The court asked the defendant's attorney to elaborate with regard to his request. The defendant's attorney explained his concern that if, during allocution, the defendant wanted to express some remorse or responsibility for the criminal acts that formed the basis of the violation of probation charges, such statements could be viewed as incriminatory and be used against him during any new trial related to those charges. The court asked the defendant's attorney: "Well, how about if the court orders that whatever [the defendant] says can't be used against him at the trial?" The defendant's attorney responded that he would not feel comfortable advising his client to proceed on that basis "unless the prosecution joins in that."

The court responded: "The court does not feel that [the defendant] cannot speak because of the fact that the case is pending against him. There are many things he can say. And, certainly, if his position is that, I didn't do it, then that's something he should say if he wants to. There are a lot of things he can say without incriminating himself. So, if he doesn't want to speak on his own behalf, that's his right. He has the opportunity to do so." The defendant's attorney responded that the issue was not whether the defendant had an opportunity to address the court, but whether he was "free to fully exercise the right." After the colloquy between the defendant's attorney and the court concluded, the prosecutor stated: "If [the defendant] wants to show remorse by admitting his culpability on the underlying charges, I'll state on the record that I won't use that admission against him at the retrial of the criminal charges."

The defendant's attorney conversed briefly with the defendant, then stated: "[The defendant] has concerns now with the manner in which I'm handling his case. His concerns are that his probation officer should be here to speak to how he was otherwise doing on probation prior to the violation being lodged against him. And he is concerned by the court's findings in terms of there being a violation of probation, particularly with regard to the findings about him being in possession of a . . . gun, in light of the court's earlier granting of the motion [for a] judgment of acquittal [on the possession of a firearm charge]. It's his concern that that demonstrates some bias on the part of the court in terms of further hearing the matter."

The court addressed the defendant. The court stated that, because the violation of probation was based on his substantive offenses, testimony from the defendant's probation officer concerning other matters would be irrelevant. The court informed the defendant

that it was its role to make factual findings concerning his conduct and that he had a right to appeal from the court's decision. Finally, the court stated that the defendant's attorney "[had] done an excellent job" and that "he is certainly capable of proceeding" in this matter.

The following colloquy between the defendant and the court then occurred:

"[The Defendant]: I would like to address the court.

"The Court: All right. You should understand that anything you say can be used against you.

"[The Defendant]: Yeah, I understand that. First of all, I need a continuance for ample time to find better representation. I don't feel my lawyer has my best interest on hand. And, secondly, Your Honor, with all due respect to the court, I want to file an oral motion for you to recuse yourself on the grounds of bias and prejudice. And also I need copies of my transcript from the first day of my probation hearing.

"The Court: All right. Your request for a lawyer is denied. Your request that I recuse myself is denied as having not complied with the proper procedure of the rules. And what was the last one you said?

"[The Defendant]: I also needed a copy of the transcript of the first day of my probation hearing.

"The Court: That will be done for any appeal purposes. If you file an appeal, you'll get a transcript or your lawyer will get a transcript."

The court then invited the defendant's attorney to address the court with regard to sentencing. After the defendant's attorney addressed the court concerning that matter, the court stated to the defendant: "All right. Now . . . then, do you not want to say anything on your own behalf about sentencing?" The defendant

responded, "No." The court, noting that the "defendant [had] exercised his right not to be heard at sentencing," thereafter found that the beneficial aspects of probation were no longer being served, revoked the defendant's probation and imposed sentence.

The defendant reiterates the argument that he initially raised at trial, asserting that he had a right to allocution at the time of sentencing in this case but that the court deprived him of a "meaningful allocution" because "sentencing was held before the disposition of the underlying charges . . . ." The defendant argues that "because [he] was told that anything he said could be used against him, the fear that was instilled in him created an atmosphere that made it impossible for [him] to speak effectively and persuasively." The defendant also asserts, for the first time on appeal, that "[t]here are logistical benefits to deferring allocution until after disposition of the underlying charges." According to the defendant, if the state were to enter a nolle prosequi as to such charges or if he were ultimately acquitted of them, he could discuss such matters during allocution as part of a meaningful plea for mercy.

Absent an appellant's proper resort to an extraordinary means of review, "[this] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . ." Practice Book § 60-5. "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *State* v. *Dalzell*, 282 Conn. 709, 720, 924 A.2d 809 (2007); see also *State* v. *Randolph*, 284 Conn. 328, 374, 933 A.2d 1158 (2007). "[O]ur rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a

path he rejected should now be open to him." (Internal quotation marks omitted.) *State* v. *Cromety*, 102 Conn. App. 425, 431, 925 A.2d 1133, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007).

At trial, the defendant put forth several reasons why the court should not proceed with the dispositional phase of the proceeding on March 23, 2006. To the extent that the defendant argues that there were "logistical benefits" to continuing the proceeding so that he could discuss during allocution the final resolution of the pending charges, he failed to assert such ground at any time before the trial court. Thus, the claim for relief on this ground is unpreserved, and we decline to address it here.

A defendant's right to allocution applies to the dispositional phase of a violation of probation proceeding. *State* v. *Strickland*, 243 Conn. 339, 354, 703 A.2d 109 (1997). At trial, the defendant initially claimed that he could not exercise his right to allocution until the pending charges against him were resolved. Essentially, the defendant claimed that his right to allocution encompassed a right to speak absent any fear that what he said in allocution could be used against him during subsequent proceedings related to the pending charges. In this vein, the defendant's attorney clearly described what was, in his view, a tension that existed between the defendant's right against self-incrimination and his right to allocution. Responding to the distinct claim raised by the defendant and in an attempt to alleviate the concern expressed, the court suggested that it could "order" that any statements made by the defendant during allocution could not be used against him during another trial. In response, the defendant's attorney stated that he would not recommend such a course of action "*unless the prosecution joins in that.*" (Emphasis added.) In response to this assertion, the prosecutor flatly stipulated that, if the defendant wanted to express

remorse or admit culpability with regard to the charges, "I'll state on the record that I won't use that admission against him at the retrial of the criminal charges."

The record reveals that the defendant's attorney expressed a specific concern that the court addressed. The court suggested a way to resolve the issue raised, and the defendant's attorney conveyed that his concern would be allayed if the state agreed not to use any statements made by the defendant during allocution against the defendant in another trial. After the prosecutor met this request, stipulating that any incriminating statements made by the defendant would not be used by the state during another trial, the defendant's attorney did not pursue the matter. The defendant's attorney did not ask the prosecutor to elaborate with regard to his stipulation, did not ask the court to address the matter in any greater detail and did not discuss further the issue of allocution. At no time did the prosecutor withdraw his stipulation, and the defendant never questioned it.[4] Instead, the defendant's attorney and, later, the defendant personally, raised other unrelated reasons why the court should grant a continuance.[5]

[4] In his reply brief, the defendant asserts that neither the court nor the prosecutor had the authority to "grant immunity to the defendant for statements made during his allocution after a violation of probation determination." The defendant further argues that, if such authority existed and was properly exercised, it nevertheless would have applied to admissions only, and not "other statements . . . of a personal nature which might have harmed him in other ways during the retrial." The defendant did not raise these concerns before the court, and, thus, they are not grounds preserved for appeal.

[5] As evidence that the court had infringed on or hampered his right to allocution, the defendant asserts that the court expressly warned him that anything he said could be "used against" him. Although the court did so advise the defendant, the record clearly reflects that the court made this statement when he indicated that he wanted to discuss issues related to his request for a continuance. The court did not make this statement in the context of allocution or when it invited the defendant to speak on his behalf prior to sentencing. Further, neither the defendant nor his attorney objected to the court's admonition or asked the court to explain it. Instead, after this statement was made, the defendant promptly addressed the court with

On this record, we must conclude that the issue pertaining to allocution initially raised by the defendant was timely addressed by the court and resolved in a manner consistent with his wishes. That the defendant ultimately did not exercise his right to allocute does not affect our analysis. Under these circumstances, it would be fundamentally unfair for the defendant to argue on appeal that such resolution of the issue raised was in any way prejudicial to him. Thus, we decline to review this issue in any further detail.

The judgments are affirmed.

In this opinion DiPENTIMA, J., concurred.

DUPONT, J., dissenting in part. I respectfully dissent from part II of the majority decision. Although I agree that the trial court correctly concluded that the defendant, Sadiki Blake, had violated the conditions of his probation, (1) I do not agree that we need not address the merits of his second claim, namely, whether the dispositional phase of his violation of probation hearing should have been continued in order to allow him to meaningfully exercise his right of allocution, and (2) I would address the merits of that claim and hold that because his right of allocution was impaired, he is entitled to another dispositional hearing, although not, as he has argued, before a different court.

The transcript of the sentencing or dispositional phase of the defendant's violation of probation hearing indicates that the defendant wanted "to formally object to proceeding with sentencing . . . ." His counsel stated that the defendant had "a right of allocution"

regard to issues unrelated to allocution, such as asking for a different attorney, for the trial judge to recuse herself and for transcripts of the proceeding. Thus, we are not persuaded by the defendant's assertion that the court's statement in any way was, or reasonably could have been interpreted to be, a limitation of his right to allocution.

and that the underlying charges of which he had been accused had not yet been disposed of because of a mistrial and that he was requesting the court "not [to proceed] at this time and wait until the criminal charges are, in some manner, disposed of." The court stated that "it's obvious here [that] you don't want him to be sentenced today, and that's the bottom line. If he has the right of allocution, if he doesn't want to exercise it, it's his right." Defense counsel responded: "But it's not a question of his ability to speak; it's a question of his ability to speak and be effective in it. . . . [T]he question is whether [the defendant] is fully able to exercise that right." The court stated that all the defendant was entitled to was the opportunity to speak. The state acknowledges in its brief that the defendant "requested a continuance until after the retrial of the underlying case in order to advocate meaningfully in mitigation of sentence, a continuance to find another attorney to represent him, that the court recuse itself on grounds of bias and prejudice and that he needed a transcript of the March 22, 2006 proceedings." The state claims that the defendant is asserting new bases for continuances on appeal that are unpreserved, namely, that at the time the motion was made, there was a possibility that the underlying charges pending against him "would be nolled or that he could be acquitted in the retrial of the underlying criminal charges."

I do not conclude from the colloquy at the dispositional phase of the defendant's revocation of probation hearing or from the defendant's brief that the defendant is making an argument not asserted at that hearing. At the hearing and on appeal, the defendant was, and is, claiming that his right to allocution was impaired and violated because the court refused to delay sentencing for the violation of a condition of his probation until after the disposition of the criminal charges underlying that violation. It is this question that is preserved for

our review, and I think the defendant is entitled to a review of it on the merits. The specific question that we must answer is whether Practice Book § 43-10 (3)[1] and decisions such as *State* v. *Strickland*, 243 Conn. 339, 703 A.2d 109 (1997), in light of the particular facts of this case, required a continuance of the dispositional phase of the defendant's revocation of probation hearing in order to preserve his right to a meaningful allocution.

Because I would review the defendant's claim on its merits, the question becomes what standard of review should be used. The defendant claims our review should be plenary because it is a question of law to be determined by an interpretation of Practice Book § 43-10 (3) and decisional law. The state claims that the standard of review is whether the trial court abused its discretion.

The difficulty involved in a resolution of which standard of review should apply in this case arises because a motion for a continuance traditionally involves the discretion of a trial court that will not ordinarily be disturbed absent a clear abuse of discretion; *State* v. *Fabricatore*, 89 Conn. App. 729, 734–35, 875 A.2d 48 (2005), aff'd, 281 Conn. 469, 915 A.2d 872 (2007); whereas the basis for the particular motion in this case was the exercise of a right, allocution, which is based on the rules of practice, as well as decisional law, a basis that ordinarily requires plenary review. The resolution of the question is further compounded by the fact that allocution is not a discretionary right to be given or withheld by a trial court but one that exists, as of right, tempered only by how and when the allocution is to occur. In this case, regardless of the standard of review applied to the defendant's claim that he was

[1] Practice Book § 43-10 (3) provides: "The judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence."

deprived erroneously of a continuance to assert his nondiscretionary right of allocution, the conclusion would, in my opinion, be the same. The defendant *was* denied a "reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence" as a matter of law under decisional law and Practice Book § 43-10 (3), and the denial was also an abuse of discretion.

The case of *State* v. *Bronson*, 55 Conn. App. 717, 740 A.2d 458 (1999), rev'd, 258 Conn. 42, 779 A.2d 95 (2001), is instructive. In that case, as in the present one, a motion for a continuance was denied. The basis for the motion was the need for a continuance to prepare for a hearing to be held pursuant to a statute, whereas in the present case, the need for the continuance is outlined in a rule of practice. The standard of review used in *Bronson* was abuse of discretion. The Appellate Court's decision that the motion for a continuance was denied properly was overruled by the Supreme Court in *State* v. *Bronson*, 258 Conn. 42, 779 A.2d 95 (2001), but nothing in the Supreme Court's decision casts doubt on the standard of review to be accorded a trial court's action on a motion for a continuance or on the factors involved in determining if discretion was abused. When the denial of the continuance is related to specific language of our rules of practice or a statute, as in *Bronson*, the question of whether there was an abuse of discretion includes whether the court correctly applied the law and reasonably could have concluded as it did. See *State* v. *Bronson*, supra, 739–40. The court's "discretion in granting or denying a request for a continuance should be exercised to accomplish the ends of substantial justice." *State* v. *Hamilton*, 30 Conn. App. 68, 83, 618 A.2d 1372 (1993), aff'd, 228 Conn. 234, 636 A.2d 760 (1994). Factors involved in the ruling on a motion for a continuance include the likely length of the delay, the age and complexity of the case, prior continuances, the

impact of the delay on the participants in the trial, the perceived legitimacy of the reason for the delay, the defendant's responsibility for the timing of the request and the likelihood that a denial would substantially impair the defendant's rights. *State* v. *Bronson*, supra, 723. How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary. See *Wasko* v. *Manella*, 269 Conn. 527, 542–43, 849 A.2d 777 (2004).

The answer to the issue in this case is aided by a brief review of the right of allocution as preserved in decisions and Practice Book § 43-10 (3). *State* v. *Strickland*, supra, 243 Conn. 339, made it clear that in Connecticut, there is a right of allocution during a probation revocation proceeding. The historical underpinnings of the right are that a defendant has a right to make a statement to the court in his behalf and to present information in mitigation of sentence, which right relates back to at least 1689. Id., 343. The right preserves an opportunity to plead for mercy and to enable our system of justice to ensure that sentencing is particularized and reflects individual circumstances. Id. It is the defendant's opportunity to participate meaningfully in sentencing and to present a plea in mitigation of punishment. Id., 345.

Practice Book § 43-10 (3) provides that before imposing sentence, a judicial authority shall allow a defendant a reasonable opportunity to make a "personal statement in his or her own behalf and to present any information in mitigation of the sentence." The words of the rules of practice are interpreted in accordance with the same principles that guide interpretation of our General Statutes. *State* v. *Strickland*, supra, 243 Conn. 347. The right does not involve defense counsel's right to plead for mercy on behalf of his or her client, no matter how artfully. *Green* v. *United States*, 365 U.S. 301, 304–305, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961). A defendant must

personally be allowed the opportunity to address the court, which right is to be liberally construed. Id.

Revocation of probation is a possible continuing consequence of an original conviction in which probation was granted. A violation of probation hearing has two parts. The first concerns whether the defendant has violated his probation and the second, the punishment to be given to the defendant, in the event of a violation. *State* v. *Strickland*, supra, 243 Conn. 339. In this case, the court found that the defendant had violated his probation, a conclusion with which I agree, and revoked the defendant's probation, committing him to the custody of the commissioner of correction for four years, a conclusion with which I do not agree because the defendant was not afforded a continuance in order to assert his right to allocution meaningfully.

In the words of *Strickland*, allocution involves an "opportunity to meaningfully participate" in sentencing, with timing being an important element of the right. Id., 345. The right of the defendant to allocution should provide an opportunity for a defendant to provide significant facts relating to his sentencing. Such facts may include those that might affect punishment or the exercise of mercy. Id. We are not concerned here with whether the defendant had such a right but, rather, with the issue of when the right should be exercised in order to provide the defendant with meaningful participation in his sentencing, as outlined in *Strickland*. Although the fact that the jury eventually did not find the defendant guilty of the underlying charges that led to the hearing on the violation of probation is not necessary to conclude that a condition of probation was or was not violated, the jury's action *is* relevant to consider whether a defendant may be entitled to the mercy of the court when the court is considering the penalty to be imposed during the dispositional phase of a probation revocation hearing. Knowledge of the acquittal that

eventually resulted could affect the decision of a court as to whether to revoke probation, or its decision as to the amount of punishment the defendant should serve for the violation of probation, although it might not change the finding that he violated a condition of probation because of the different standard of proof between a criminal trial and a probation revocation hearing. See *State* v. *Durant*, 94 Conn. App. 219, 892 A.2d 302 (2006), aff'd, 281 Conn. 548, 916 A.2d 2 (2007).

The reason why the punishment to be given the defendant might be affected by the outcome of his future trial on the underlying charges is that the facts and circumstances of the case, including the defendant's motive, as elicited during the trial, could involve the degree of culpability of the defendant and whether the conditions of his probation continued to serve their original purpose. This is information that relates to his "reasonable opportunity to make a personal statement in mitigation of his sentence" as provided by the rules of practice. Allocution not only gives the defendant a right to participate in the sentencing process but the right to participate "meaningfully." *State* v. *Strickland*, supra, 243 Conn. 353. An adjective, such as "meaningful" implies that the important qualities of the noun modified are utilized in determining what "meaningful" means in the particular phrase. See *Household Finance Corp.* v. *Nival*, 37 Conn. Sup. 606, 612, 430 A.2d 1311 (1981). If a word such as "meaningful" has not yet been defined by our Supreme Court in a particular decisional context, we may refer to its dictionary definition. *State* v. *Bronson*, supra, 55 Conn. App. 728. "Meaningful" is defined in Webster's New World Dictionary (2d College Ed.) as "full of meaning, having significance or purpose."

A court is vested with broad discretion during the disposition phase of a revocation hearing. It could require the defendant to serve any or all of his remaining sentence or continue probation or modify or enlarge

its conditions. *State* v. *Strickland*, supra, 243 Conn. 353. I conclude that the denial of a continuance was improper, and another dispositional phase of the defendant's probation revocation hearing is required because the defendant was deprived of a meaningful right to allocution.

The defendant seeks a dispositional phase to be held before a different trial court in the event that he is entitled to another hearing. Although I would grant him a new dispositional hearing for the foregoing reasons, I would not remand his resentencing to a different judge, as he has argued should be done.

Remanding to a different trial court is an extraordinary remedy to be reserved for an extraordinary case. *United States* v. *Li*, 115 F.3d 125, 134 (2d Cir. 1997), citing *Sobel* v. *Yeshiva University*, 839 F.2d 18, 37 (2d Cir. 1988), cert. denied, 490 U.S. 1105, 109 S. Ct. 3154, 104 L. Ed. 2d 1018 (1989). Resentencing before a different judge is appropriate only when the original judge would have "substantial difficulty in putting out of her mind her previously expressed views, or where reassignment is advisable to preserve the appearance of justice." (Internal quotation marks omitted.) *United States* v. *Li*, supra, 134. In this case, reassignment would not be appropriate. The transcript of the hearing is devoid of any special circumstances that suggest that the trial judge would be unable to follow Practice Book § 43-10 (3) or unable to afford the defendant a fair resentencing.[2] We rely on the trial judge to give "careful consideration to any mitigating comments that [the defendant] might offer during her allocution." *United States* v. *Li*, supra, 134.

[2] In *State* v. *Strickland*, supra, 243 Conn. 354, the case was summarily remanded, without discussion, to a trial court other than the court that revoked the defendant's probation with direction to conduct another disposition phase of his probation revocation proceeding. Nothing in the decision itself, however, addresses the special circumstances that required that result.

I would set aside the judgments of revocation of probation and the sentence of the defendant and remand the case to the trial court for another dispositional phase of his probation revocation proceeding in order to afford him a meaningful right of allocution. The judgments that the defendant violated his probation should be affirmed.

ASSELIN AND CONNOLLY, ATTORNEYS, LLC *v.* CATHERINE HEATH
(AC 28459)

Bishop, Beach and Borden, Js.

Syllabus

The plaintiff law firm, which had represented the defendant in a marital dissolution action, sought to confirm an arbitration award issued in its favor in connection with the defendant's failure to pay attorney's fees. Thereafter, the defendant filed a motion to vacate the award, in which she alleged, inter alia, that the enforcement of an arbitration clause in the attorney-client retainer agreement would violate public policy. The trial court granted the plaintiff's application to confirm the award and denied the defendant's motion to vacate it, and the defendant appealed to this court. She claimed that enforcement of arbitration clauses in attorney-client retainer agreements violates the state's public policy concerning the ethical conduct of attorneys in relation to their clients. *Held* that because the defendant's motion to vacate the award on public policy grounds was not filed within thirty days following receipt of notice of the arbitration award as required by statute (§ 52-420 [b]), the motion was untimely, and the trial court lacked subject matter jurisdiction to consider its merits.

Argued March 18—officially released June 10, 2008

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of New London, where the defendant filed a motion to vacate; thereafter, the matter was tried to the court, *Hon. D. Michael Hurley*, judge trial referee; subsequently, the court granted in part the plaintiff's motion to dismiss;

judgment granting the application to confirm and denying the motion to vacate, from which the defendant appealed to this court. *Improper form of judgment; affirmed in part; judgment directed in part.*

Conrad Ost Seifert, with whom, on the brief, was *Gilbert Shasha*, for the appellant (defendant).

Richard E. Joaquin, for the appellee (plaintiff).

Opinion

BEACH, J. The defendant, Catherine Heath, appeals from the judgment of the trial court denying her motion to vacate an arbitration award and granting the application to confirm the award filed by the plaintiff law firm, Asselin & Connolly, Attorneys, LLC. The dispositive issue in this appeal is whether the court had subject matter jurisdiction over the defendant's motion to vacate.[1] Because we answer that question in the negative, we reverse the judgment in part and remand the case to the trial court with direction to dismiss the defendant's motion to vacate for lack of subject matter jurisdiction.

The following facts and procedural history are relevant to the defendant's appeal. In 2001, the defendant hired the plaintiff to represent her in connection with a marriage dissolution action. On November 30, 2001, she signed an attorney-client retainer agreement with the plaintiff that provided that all fee disputes would be settled by binding arbitration.[2] After the defendant

[1] Because we resolve the appeal on the ground of subject matter jurisdiction, we do not reach the merits of the defendant's claims on appeal. See, e.g., *Bailey* v. *Medical Examining Board for State Employee Disability Retirement*, 75 Conn. App. 215, 216 n.4, 815 A.2d 281 (2003).

[2] The agreement's arbitration clause states: "The Client and the Firm agree to submit to binding arbitration all disputes and/or claims either may have against the other including, but not limited to disputes regarding the amount of and/or payment of fees and/or expenses and any claims of legal malpractice. The Client and the Firm further agree to utilize the services of the American Arbitration Association for this purpose, and that the arbitrators' findings and awards must comply with the law of the State of Connecticut."

failed to pay attorney's fees to the plaintiff, the court ordered the parties, on April 19, 2004, to proceed to arbitration. One of the issues before the arbitrator was the defendant's motion to dismiss for lack of subject matter jurisdiction. In her motion, the defendant argued that the arbitration clause was invalid and that the American Arbitration Association's rules were inapplicable to disputes arising out of the attorney-client relationship. On September 17, 2004, an arbitration hearing on the matter was held. The defendant did not attend. On the same day, the arbitrator issued a decision and award, stating in relevant part: "The [defendant's] motion for dismissal [of] the arbitration is denied. . . . Accordingly, I award as follows: The [defendant] shall pay to the [plaintiff] the total sum of $34,239.23."

On April 12, 2005, the plaintiff filed an application to confirm the award. Shortly thereafter, on May 6, 2005, the defendant filed both an objection to the plaintiff's application to confirm the award and a motion to vacate the award. In her motion, the defendant renewed her arguments as to the arbitrability of the dispute. In a later supplemental motion, the defendant further argued that enforcement of the arbitration clause would violate public policy. On June 22, 2006, the plaintiff filed a motion to dismiss the defendant's motion to vacate as, inter alia, untimely pursuant to General Statutes § 52-420 (b).[3]

On December 8, 2006, the court issued a memorandum of decision denying the defendant's motion to vacate and granting the plaintiff's application to confirm the arbitration award. In its decision, the court first addressed the question of subject matter jurisdiction. Specifically, as to the court's ability to review the defendant's claim that the agreement was not arbitrable, it

[3] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

found that it "has jurisdiction to review claims that an arbitration award violates public policy, as the thirty day limitations period of § 52-420 (b) does not apply to the common-law grounds for challenging an arbitration award. Alternatively, the court has jurisdiction under General Statutes § 52-408, which permits a party to challenge a contract's arbitration clause where 'there exists sufficient cause at law or in equity for the avoidance of written contracts generally.'[4] Accordingly, where a party claims that an arbitration clause is void or voidable under § 52-408, the six year statute of limitations governing contract actions under General Statutes § 52-576 applies. In the present case, the parties entered into the attorney-client retainer agreement on November 11, 2001. Therefore, the defendant's challenge to the validity of the arbitration clause is timely." The court then found, on the merits, that the arbitration agreement did not violate public policy. It further noted that as to the defendant's additional argument that she entered into the agreement under " 'coercive circumstances' involving 'duress' . . . the defendant has failed to provide the court with any legal analysis or citation to authority that would support a claim for avoidance of the arbitration clause contained within the retainer agreement. Accordingly, the court finds that any claims

[4] General Statutes § 52-408 provides: "An agreement in any written contract, or in a separate writing executed by the parties to any written contract, to settle by arbitration any controversy thereafter arising out of such contract, or out of the failure or refusal to perform the whole or any part thereof, or a written provision in the articles of association or bylaws of an association or corporation of which both parties are members to arbitrate any controversy which may arise between them in the future, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or an agreement in writing between the parties to a marriage to submit to arbitration any controversy between them with respect to the dissolution of their marriage, except issues related to child support, visitation and custody, shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally."

relating to the avoidance of the written contract have been abandoned." This appeal followed.

The defendant's primary claim on appeal is that enforcement of arbitration clauses in attorney-client retainer agreements violates the state's public policy concerning the ethical conduct of attorneys in relation to their clients. The record reveals, however, that the defendant's motion to vacate the award was not filed within the thirty days following the receipt of notice of the arbitration award, as required by § 52-420 (b). The timeliness of the defendant's motion to vacate implicates the court's subject matter jurisdiction. See, e.g., *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993).

The legal principles concerning subject matter jurisdiction are well settled. Our Supreme Court has "long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286, 939 A.2d 561 (2008).

The legal principles regarding arbitration are also well settled. "[T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes. . . . As a consequence of our approval of

arbitral proceedings, our courts generally have deferred to the award that the arbitrator found to be appropriate. . . . The scope of review for arbitration awards is exceedingly narrow. . . . Additionally, every reasonable inference is to be made in favor of the arbitral award and of the arbitrator's decisions. . . .

"[C]ourts recognize three grounds for vacating arbitration awards. . . . As a routine matter, courts review de novo the question of whether any of those exceptions apply to a given award. . . . The first ground for vacating an award is when the arbitrator has ruled on the constitutionality of a statute. . . . The second acknowledged ground is when the award violates clear public policy. . . . Those grounds for vacatur are denominated as common-law grounds and are deemed to be independent sources of the power of judicial review. . . . The third recognized ground for vacating an arbitration award is that the award contravenes one or more of the statutory proscriptions of [General Statutes] § 52-418."[5] (Internal quotation marks omitted.) *International Brotherhood of Police Officers, Local 361* v. *New Milford*, 81 Conn. App. 726, 729–30, 841 A.2d 706 (2004).

In reaching our conclusion as to the effect of the untimeliness of the defendant's motion to vacate, we

[5] General Statutes § 52-418 (a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

find our Supreme Court's recent decision in *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, supra, 285 Conn. 278, to be controlling. In that case, the plaintiff employer moved to vacate the arbitration award on the ground that it violated the state's public policy encouraging honesty among the state's police forces. Id., 279–80. The plaintiff, however, filed its application to vacate more than thirty days following the issuance of the arbitration award. Id., 280. Our Supreme Court concluded that the trial court did not have subject matter jurisdiction over the matter because "the thirty day filing period set forth by § 52-420 (b) applies to an application to vacate an arbitration award on the ground that it violates public policy." Id., 292.

In reaching its conclusion, the court interpreted the language of § 52-420 (b), which provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion." The court reasoned that the statute's "broad language plainly states that the limitations period applies regardless of the grounds for the motion to vacate. It is neither qualified by, nor limited to, any particular grounds for the application and is not, therefore, ambiguous because, when read in context, [it] is [not] susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) Id., 287. More specifically, the court reasoned that § 52-420 (b) does not limit the thirty day filing period to applications arising out of the grounds for vacatur enumerated in § 52-418, but also applies to common-law grounds, such as a claimed violation of public policy. Id., 287–88. "Indeed, a conclusion that public policy claims are not subject to the thirty day limitations period would undermine the legislature's well established support of arbitration as a mechanism for the inexpensive and expedient resolution of

private disputes." Id., 290; see also *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 271 Conn. 474, 493, 857 A.2d 893 (2004), cert. denied, 544 U.S. 974, 125 S. Ct. 1826, 161 L. Ed. 2d 723 (2005).

In concluding that the present case is controlled by *Bloomfield*, we distinguish the circumstances here from those in *MBNA America Bank, N.A.* v. *Boata*, 283 Conn. 381, 926 A.2d 1035 (2007). In *MBNA America Bank, N.A.*, our Supreme Court held that a defendant's objection to the confirmation of an arbitration award on the ground that there was no existing arbitration agreement between the parties, which objection was filed more than thirty days after the issuance of the award, was not barred by § 52-420 (b) because that ground for vacatur is not enumerated in § 52-418. Id., 395. Our Supreme Court in *Bloomfield*, however, narrowed its holding in *MBNA America Bank, N.A.*, by observing that "[*MBNA America Bank, N.A.*] stands only for the proposition that § 52-420 (b) will not preclude an otherwise untimely objection to the confirmation of an award on the ground that the parties had not conferred upon the arbitrator the legal authority to issue that award in the first place." *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, supra, 285 Conn. 290.

We conclude that there is no question as to whether the parties here agreed to arbitrate and, for that reason, our Supreme Court's decision in *MBNA America Bank, N.A.*, does not apply to the present circumstances. In *MBNA America Bank, N.A.*, the defendant cardholder argued that he never received written notice of an amendment to his agreement with the plaintiff bank providing for binding arbitration. *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 383–84. Because he allegedly never received notice of the amendment, the defendant claimed that he "never agreed under any

contractual relationship to arbitrate his disputes with [the plaintiff] . . . [and] is not bound by the [arbitration] [a]greement presented by the [plaintiff] . . . .'' Id., 384. This court, in *MBNA America Bank, N.A.* v. *Bailey*, 104 Conn. App. 457, 934 A.2d 316 (2007), applied the holding in *MBNA America Bank, N.A.* v. *Boata*, supra, 381, to a case with similar factual circumstances. In *MBNA America Bank, N.A.* v. *Bailey*, supra, 459–60, the defendant cardholder argued that he had never executed an agreement with the plaintiff bank as to arbitration, and, because there was no signed and dated agreement, the arbitrator had no jurisdiction to enter an award in favor of the plaintiff. Here, the record contains a copy of the defendant's signed and dated agreement with the plaintiff.[6] Accordingly, because the agreement in this case itself provided a jurisdictional framework for arbitration, the circumstances of both *MBNA America Bank, N.A.*, cases are different from those of this case. Here, the claimed malady is not that the agreement does not exist but, rather, that it violated public policy.

We also note that the language of § 52-408, which was relied upon in part by the court in its finding that it had jurisdiction over the defendant's claims, does not defeat the agreement to arbitrate in the present circumstances. Section 52-408 provides in relevant part: ''An agreement in any written contract . . . to settle by arbitration any controversy thereafter arising out of

[6] We note that the defendant argued before the court that her agreement with the plaintiff was signed under duress. The court found, however, that her argument on that ground was deemed abandoned due to inadequate briefing. One of the defendant's claims on appeal is that the court's finding in that regard was improper. On the basis of our review of the record, the court's finding was not an abuse of discretion. See *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008). We also note that the defendant's duress claim was raised in a supplemental memorandum of law and not in either the objection to the application to confirm or in the motion to vacate.

such contract . . . or an agreement in writing between the parties to a marriage to submit to arbitration any controversy between them with respect to the dissolution of their marriage, except issues related to child support, visitation and custody, *shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally.*" (Emphasis added.) First, the language of this statute does not, on its face, limit the enforcement of arbitration agreements contained in attorney-client retainer agreements, as it does regarding issues related to child support, visitation and custody. Rather, its language lends support to the state's policy of encouraging the efficient resolution of disputes through arbitration. Second, the defendant's public policy argument does not fall within the category of defenses to written contracts generally, as do the contractual defenses present in both *MBNA America Bank, N.A.*, cases. For that reason, support for the court's jurisdiction in *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 381, was drawn, at least in part, from § 52-408. See *MBNA America Bank, N.A.* v. *Boata*, supra, 393 (our Supreme Court "long has recognized the right of a party to assert common-law contract defenses to attack the validity of an agreement to arbitrate").

As we have already noted, the defendant contends that her attorney-client retainer agreement with the plaintiff is not arbitrable because it violates our state's public policy encouraging ethical relations between attorneys and their clients. It is undisputed, however, that the defendant's objection to the confirmation of the award on that ground, as well as her motion to vacate, were not raised before the court until seven months after the defendant received notice of the issuance of the arbitration award.[7] Our Supreme Court

[7] Procedurally, courts have treated an objection to an application to confirm as the equivalent of a motion to vacate an arbitration award. See, e.g., *MBNA America Bank, N.A.* v. *Boata*, supra, 283 Conn. 385; *Wu* v. *Chang*, 264 Conn. 307, 310 n.4, 823 A.2d 1197 (2003).

unambiguously has stated that "the thirty day filing period set forth by § 52-420 (b) applies to an application to vacate an arbitration award on the ground that it violates public policy." *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, supra, 285 Conn. 292. "If the motion [to vacate] is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the motion." *Middlesex Ins. Co.* v. *Castellano*, supra, 225 Conn. 344. Because the defendant's motion to vacate the arbitration award on the ground of a public policy violation was untimely pursuant to § 52-420 (b), the court lacked subject matter jurisdiction and improperly reached the merits of the defendant's motion to vacate.

The form of the judgment is improper, the judgment is reversed only as to the defendant's motion to vacate and the case is remanded with direction to render judgment dismissing that motion for lack of subject matter jurisdiction. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JANICE MCCARTHY *v.* HARTFORD HOSPITAL ET AL.
(AC 28666)

Bishop, McLachlan and Harper, Js.

Argued March 25—officially released June 10, 2008

Procedural History

Appeal from the decision by the workers' compensation commissioner for the first district awarding the plaintiff disability benefits, brought to the workers' compensation review board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Douglas L. Drayton, for the appellants (defendants).

John J. Quinn, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant Hartford Hospital[1] appeals from the decision of the workers' compensation review board (board) affirming the finding and award of the workers' compensation commissioner (commissioner) in favor of the plaintiff, Janice McCarthy. On appeal, the defendant claims that the board improperly awarded supplemental benefits pursuant to General Statutes § 31-308a[2] in the absence of medical and factual

[1] In addition to Hartford Hospital, Constitution State Service Company, its workers' compensation insurer, also is a defendant. For convenience, we refer in this opinion to Hartford Hospital as the defendant.

[2] General Statutes § 31-308a provides: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

evidence that the plaintiff's injury caused a diminution of her earning capacity. We affirm the decision of the board.

The following procedural and factual history is relevant to the defendant's appeal. On April 1, 1999, while the plaintiff was an employee of the defendant, she fell and sustained injuries while at work. These injuries left her with a 15 percent permanent partial disability of her left foot and a 14 percent permanent partial disability of her left hand, for which she received benefits. At the time she sustained her injuries, the plaintiff was earning $671.31 per week. Due to the lingering effects of her injuries, the plaintiff retired effective July 1, 2003.

After retiring, the plaintiff trained her replacement, working nineteen hours per week and earning $365.79 per week. The training program ended in September, 2003. The plaintiff did not work during the month of October, 2003, but resumed work on November 1, 2003, and worked through May, 2004, at an average weekly wage of $266 per week.

The plaintiff sought benefits pursuant to § 31-308a for the period of July 2, 2003, through April 9, 2004. The defendant opposed her request, contending that there was a significant lapse of time between the plaintiff's retirement and when she began seeking full-time employment again, and that she did not introduce any medical evidence of physical restrictions caused by her permanent injuries. The commissioner concluded that benefits should be paid from July 2 to September 30, 2003, at a weekly rate of $117.93, and from November 1, 2003, through the expiration of the remaining 40.45 weeks of her statutory eligibility at a rate of $231.88 per

"(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

week. The commissioner denied benefits for October, 2003, because the plaintiff did not seek work during that time. The defendant appealed from that decision to the board.

In affirming the commissioner's decision, the board found the following additional facts, which are supported by the plaintiff's testimony at the hearing before the commissioner. At the time of her fall, the plaintiff's job required her to work on bulk mailings, answer many telephone calls and do a significant amount of typing. Following her fall, the plaintiff was advised by her physician to restrict repetitive motions. She had surgery on her foot in the fall of 1999 and a joint replacement on her left thumb in the spring of 2001. Following the surgery on her hand, the plaintiff experienced severe pain when she tried to lift and grasp objects. Consequently, in the fall of 2001, the plaintiff switched jobs, hoping a new job would put less strain on her hand and foot. She was promoted to office manager, a position that required her to set up and break down charts for newly admitted patients. The new building in which she worked did not have an elevator, and her duties required her to travel among three stories, which was difficult. She also had difficulty lifting the charts, handling files and notebooks, removing staples, opening doors, fastening packages with binder clips and unsnapping three ring binders. The plaintiff also required a headset for telephone conversations because her hand would shake when she held the receiver to her ear.

The plaintiff received positive performance appraisals and, consequently, received annual raises. Because her duties caused her physical pain and discomfort, however, and she feared that her job performance would suffer if she continued working, she decided to retire as of July 1, 2003, even though her retirement

benefits were reduced by about 40 percent due to her early retirement.

After retiring, the plaintiff trained her replacement, working nineteen hours per week, which was the limit she was allowed to work following her retirement. She earned $365.79 per week, which represented an hourly rate greater than what she was earning when she sustained her injuries. In September, 2003, the training program ended. The plaintiff took the month of October, 2003, off, awaiting the return of another hospital employee whom she would be assisting in a new role on a per diem basis. In that position, in which she also worked nineteen hours per week, the plaintiff received lesser compensation of $14 per hour, or $266 per week. The plaintiff discovered that this position required much more work than she had expected, and she experienced physical difficulties due to her hand. In April or May, 2004, the plaintiff learned that her coworker was pregnant, and, therefore, the plaintiff's responsibilities would be increased. As a result, the plaintiff left that position.

Because the hospital did not have any other per diem positions available, the plaintiff sought employment elsewhere. She was eventually hired by the town of Wethersfield for a nineteen hour per week position that paid $15 per hour. That position, however, required more physical exertion than the plaintiff had anticipated, and, consequently, she lasted only one-half day. The plaintiff then took a position at Financial Careers, Inc., working twelve hours per week at a rate of $10 per hour. She tried to find supplemental employment during that time but was unsuccessful. She worked there until May, 2005, when she was laid off. The plaintiff then found another job as a receptionist, earning $13 per hour and approximately $500 per week. At the time of the hearing before the commissioner, the plaintiff was still experiencing pain in her left hand and

tenderness in her left ankle, but she thought she would be able to continue working in her current position as long as she used a telephone headset. In its decision, the board rejected the defendant's claim that § 31-308a requires a specific medical assessment to demonstrate that an individual with a documented permanent partial disability has a reduced earning capacity and concluded that there was sufficient evidence to support the plaintiff's claim that her injuries caused a diminution of her earning capacity. The board affirmed the commissioner's award and this appeal followed.

The standard of review in workers' compensation appeals is well settled. "[W]hen a decision of a commissioner is appealed to the review [board], the review [board] is obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts. . . . It is the power and the duty of the commissioner, as the trier of fact, to determine the facts. . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . We will not change the finding of the commissioner unless the record discloses that the finding includes facts found without evidence or fails to include material facts which are admitted or undisputed. . . . Similarly, [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Internal quotation marks omitted.) *Samaoya* v. *Gallagher*, 102 Conn. App. 670, 673–74, 926 A.2d 1052 (2007).

Once a specific indemnity award has been exhausted, § 31-308a permits the commissioner to award benefits to a claimant whose earning capacity has been affected

adversely by a work-related injury. "In determining the duration and amount of such award, the commissioner is required to consider the nature and extent of the injury, the training, education and experience of the employee [and] the availability of work for persons with such physical condition and at the employee's age . . . ." (Internal quotation marks omitted.) *Bowman* v. *Jack's Auto Sales*, 54 Conn. App. 289, 295, 734 A.2d 1036 (1999).

The defendant's claim that the plaintiff was required to present medical testimony that her injuries affected her earning capacity in order to receive benefits under § 31-308a is not supported by the statute or decisional law. Because the plaintiff had received permanent partial disability ratings from a medical professional prior to seeking benefits under § 31-308a, the permanent value of her disability had already been established, and her claim that the injuries she sustained affected her earning capacity was amply supported by the evidence presented to and credited by the commissioner. Accordingly, the board properly affirmed the commissioner's award.

The decision of the workers' compensation review board is affirmed.

VICTOR FROMM *v.* SHERRILL FROMM
(AC 28437)

Gruendel, Beach and Peters, Js.

Syllabus

The plaintiff, whose marriage to the defendant had been dissolved, appealed to this court from the judgment of the trial court denying his motion to preclude receipt of alimony or support by the defendant. Following the dissolution of the parties' marriage, the defendant, who had primary physical custody of the parties' minor child, moved with the child to Florida without providing the plaintiff with a current address or phone number, in violation of the dissolution judgment, and the plaintiff did

not hear from the defendant for more than ten years. After the child became eighteen years old, the defendant filed a petition with the bureau of child support enforcement seeking arrearage payments for alimony and child support. Thereafter, in response to a notice of wage withholding provided by the bureau, the plaintiff filed the motion to preclude further receipt of alimony or support, which the trial court denied. *Held* that the trial court improperly denied the plaintiff's motion to preclude receipt of alimony or support by the defendant and determined that the plaintiff could not assert the doctrines of laches and equitable estoppel as defenses to the wage withholding order: the statute (§ 52-362 [d]) governing income withholding expressly permits an obligor subject to a wage withholding order to file defenses thereto and the defenses of laches, equitable estoppel and waiver regularly are raised by parties, such as the plaintiff here, contesting the recoupment of alimony and support arrearages; moreover, given the facts that more than a decade had passed without the defendant making any contact whatsoever with the plaintiff, that the defendant never filed a motion concerning the plaintiff's failure to pay alimony and child support, that the plaintiff could obtain neither an address nor a telephone number for the defendant, and that the defendant's family members failed to provide any information to the plaintiff, all of which demonstrated a concerted effort by the defendant to make any contact by the plaintiff with either herself or the child impossible, the defendant's delay in filing her claim was both inexcusable and prejudicial to the plaintiff, and the defendant was thus guilty of laches as a matter of law.

Argued March 25—officially released June 10, 2008

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New London at Norwich and tried to the court, *Hurley*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Randolph*, *J.*, denied the plaintiff's motion to preclude receipt of alimony or support, and the plaintiff appealed to this court. *Reversed; judgment directed.*

Carolyn M. Futtner, with whom, on the brief, was *Michael J. Auger*, for the appellant (plaintiff).

Opinion

GRUENDEL, J. The plaintiff, Victor Fromm, appeals from the judgment of the trial court denying his motion

to preclude receipt of alimony or support by the defendant, Sherrill Fromm. The plaintiff claims that the court improperly concluded that he could not assert the doctrines of laches and equitable estoppel as defenses to a wage withholding order. We reverse the judgment of the trial court.

The record discloses the following undisputed facts. The parties married in 1978. On December 23, 1987, their daughter, Caitlin, was born. Following the subsequent breakdown of their marriage, a judgment of dissolution entered on November 5, 1993. The various orders entered by the court required, inter alia, that (1) the parties shall have joint legal custody of Caitlin with primary physical custody with the defendant, (2) the plaintiff shall pay support for Caitlin in the amount of $164 per week, (3) the plaintiff shall have reasonable rights of visitation including every Wednesday from 5:30 p.m. to 8:30 p.m. and every other weekend from 5 p.m. on Friday to 8 p.m. on Sunday, (4) the plaintiff shall be entitled to reasonable telephone contact with Caitlin, including at least one telephone call per week "and [the] defendant shall not interfere with same" and (5) the plaintiff shall pay the defendant certain alimony. The court further ordered that "[t]he parties shall exchange current addresses and phone numbers at all times. If either party is to move beyond the borders of the state of Connecticut they shall provide [sixty] days advance notice to the other. Neither party shall move until such notice period has expired."[1]

[1] The parties subsequently entered into an agreement regarding the judgment of dissolution. By agreement dated November 28, 1994, the parties modified the child support obligation from $164 to $135 per week, effective "when [the] defendant moves out of state." That agreement also provided that the parties "shall divide transportation expenses for the minor [child's] visitation with the plaintiff" and required that "if [Caitlin] visits [the plaintiff] in Connecticut one parent shall accompany [her] on any flight." Notably, the agreement stated that "[e]xcept as modified herein, the original order of [November] 5, 1993, is affirmed."

In the fall of 1994, the defendant moved to Florida without providing any notice to the plaintiff. As he testified: "I went to have my visitation on Wednesday night in October, 1994, and the house that she was living in was vacant. There was no furniture, no nothing. I was stunned. I then drove across town to Colchester to where [the defendant's] mother lived. At her mother's house, there was a moving van, and this house was being emptied. I said, 'where is [the defendant] and my daughter?' and they indicated she is in Florida. I said, 'I want to see them.' [They told me that they] will contact you." The plaintiff called the police, and an officer was dispatched to the residence. Nevertheless, the defendant's parents refused to provide the plaintiff with an address or telephone number.

After months passed without any contact from the defendant, the plaintiff's attorney spoke with the attorney that had represented the defendant in the dissolution proceeding, and a visit in Florida was arranged. The plaintiff traveled to Florida in February, 1995. Upon arriving at the location provided by the attorney, the plaintiff learned that that property was the home of the defendant's mother, who informed the plaintiff that Caitlin and the defendant were not there. Days later, they at last appeared, and the plaintiff spent two days with his daughter.

During his visit, neither the defendant nor her parents provided the plaintiff with her current address or telephone number. The plaintiff returned to Florida approximately three months later in hopes of visiting Caitlin and learning of her whereabouts. As the plaintiff explained, "I just went to the address I had back in February." He briefly spoke with the defendant's mother, repeatedly asking where he could find Caitlin or the defendant. Her mother responded that "she will contact you" and ordered him off her property. The

plaintiff never saw his daughter during that visit. The plaintiff never heard from the defendant.

The plaintiff contacted other family members of the defendant in search of any lead. At one point, he spoke with the defendant's brother, who promised to help the plaintiff. Despite that assurance, he never heard from the defendant's brother again. The plaintiff likewise contacted dozens of the defendant's friends without any success.

On October 4, 1995, the plaintiff filed a motion for modification of custody and visitation, alleging that the defendant had failed to comply with the dissolution orders concerning his visitation and telephone contact with Caitlin. The record indicates that this motion never was acted on by the court. The plaintiff explained his failure to pursue the motion or other legal options as follows: "[A]fter the divorce, I had lost my house, lost my family. I was trying to reorganize my life. I was penniless. I just couldn't mentally go anymore because every time I would try to find her or get her or do it, it was just another roadblock, and I just couldn't go on and on. I just couldn't do it anymore. I would end up in an institution."

In April, 1997, the plaintiff moved from New Britain to West Hartford. He took great pains to assure that no correspondence was lost as a result of that move. As he testified: "I went to the post office, and I filed a change of address or some sort of thing [so] that they would pay special attention, and you have to come back within twelve months; that if there is a letter or any contact, they would forward it again. I did that for three years running." Despite those efforts, no correspondence came. At the October 30, 2006 hearing, the plaintiff testified that the last contact he had with the defendant and Caitlin was during his February, 1995 visit.

On December 23, 2005, Caitlin became eighteen years old. Less than one month later, on January 17, 2006, the defendant filed a petition with the bureau of child support enforcement (bureau) seeking arrearage payments for alimony and child support. The bureau provided notice to the plaintiff of the issuance of a wage withholding order soon thereafter. As the court noted, "[w]hen he received notice from the bureau, the plaintiff had not heard from the defendant in over ten years. He had no address or telephone number for her. The defendant has filed no motion in the Superior Court alleging the plaintiff's wilful failure to pay alimony and child support."

Pursuant to General Statutes § 52-362 (c) (1), the notice from the bureau informed the plaintiff that he could request a hearing before the court to contest the claimed delinquency or request a modification of the support order. Accordingly, on March 7, 2006, the plaintiff filed both a motion to vacate the wage execution and a motion to modify alimony and support. The latter motion contested the claimed delinquency, alleging that "[i]n approximately 1993, the defendant secreted the whereabouts of herself and Caitlin from the plaintiff. The plaintiff only recently learned that the defendant had 'resurfaced' when he was recently served with documentation from support enforcement services. The defendant failed to provide the plaintiff with her address and situation in contravention of the decree of dissolution." He therefore sought either a reduction or elimination of any arrearage on alimony and support due.

By certified letter dated April 27, 2006, counsel for the plaintiff notified the defendant that, pursuant to Practice Book § 13-26, he sought to depose her on May 9, 2006. The defendant signed the certified mail receipt but did not appear for the deposition. Counsel for the plaintiff again contacted the defendant by certified letter dated May 15, 2006, in which he explained that "[a]

deposition was scheduled for May 9, 2006, but you did not appear. I have submitted a new deposition notice. I ask that you contact me to discuss scheduling for any reason this date does not work." Although the defendant again signed the accompanying certified mail receipt, she failed to appear for the May 31, 2006 deposition.

On October 4, 2006, the plaintiff filed a motion to preclude further receipt of alimony or support. It stated: "The [p]laintiff hereby moves that the court enter an order precluding the defendant from receiving or collecting alimony and/or child support based on one or more of the following grounds: 1. The defendant is guilty of laches; 2. The defendant is equitably estopped from pursuing claims of past due support and alimony; [and] 3. The defendant has waived her rights to pursue past due alimony and/or support." The plaintiff subsequently filed an order for hearing and notice, which the court granted. State Marshal Joshua C. Martin left a true and attested copy of the plaintiff's motion to preclude further receipt of alimony or support and order for hearing and notice at the defendant's place of abode on September 28, 2006.

On October 30, 2006, the court held a hearing on the plaintiff's motion to modify alimony and support and his motion to preclude further receipt thereof. The defendant did not appear at that hearing. The court heard testimony from the plaintiff, and the notice from the bureau was introduced into evidence. In its memorandum of decision, the court reasoned: "The defendant has filed no properly docketed motions for contempt or modification in the Superior Court seeking alimony, child support and arrearages thereon. The plaintiff asserts the defenses of laches and equitable estoppel in order to terminate alimony and child support payments. In this case, the moving party may not assert laches and equitable estoppel as affirmative grounds

for a modification. Laches and equitable estoppel are special defenses, not affirmative causes of action."[2] It therefore denied the plaintiff's motion to modify alimony and support and his motion to preclude further receipt thereof. From that judgment, the plaintiff has appealed.[3]

On appeal, the plaintiff contends that the court improperly concluded that he could not assert the doctrines of laches and equitable estoppel as defenses to the wage withholding order. As that issue of first impression presents a question of law, our review is plenary. See *BRJM, LLC* v. *Output Systems, Inc.*, 100 Conn. App. 143, 152, 917 A.2d 605, cert. denied, 282 Conn. 917, 925 A.2d 1099 (2007). Under that standard, "[w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 217, 764 A.2d 739 (2001).

The starting point in our analysis is § 52-362 (d), which expressly permits an obligor subject to a wage withholding order to file defenses thereto. Section 52-362 (d) provides in relevant part: "An obligor may claim a defense based upon mistake of fact, may claim an exemption . . . with respect to the withholding order, *or may file by motion a modification or defense to the support order being enforced by the withholding, by delivering a signed claim form, or other written notice*

[2] The court made no mention of § 52-362 in its memorandum of decision.

[3] The defendant did not file a brief in this appeal or appear at oral argument. Pursuant to Practice Book § 85-1, this court directed the plaintiff's counsel to notify the office of the attorney general of the pendency of the appeal, as it is responsible for representing the bureau and support enforcement services pursuant to General Statutes §§ 46b-231 (t) and 17b-179. Counsel for the plaintiff subsequently filed a copy of that notice with this court. We note that the office of the attorney general has not moved to intervene in the present appeal.

or motion, with the address of the obligor thereon, indicating the nature of the claim or grounds of the motion, to the clerk of the Superior Court or the assistant clerk of the Family Support Magistrate Division . . . .'' (Emphasis added.)

In response to the notice of wage withholding provided by the bureau, the plaintiff filed, inter alia, a motion to preclude further receipt of alimony or support. That motion asserted the defenses of laches, equitable estoppel and waiver. Those are well established special defenses; *Cleary* v. *Zoning Board*, 153 Conn. 513, 518, 218 A.2d 523 (1966); that routinely are raised in our courts. See, e.g., *Kosnik* v. *Barton*, 93 Conn. App. 244, 246 n.2, 888 A.2d 1107 (2006); *Traggis* v. *Shawmut Bank Connecticut, N.A.*, 72 Conn. App. 251, 261–64, 805 A.2d 105, cert. denied, 262 Conn. 903, 810 A.2d 270 (2002); *Teris* v. *Shearson Hayden Stone, Inc.*, 5 Conn. App. 691, 695, 501 A.2d 1228 (1985). Our decisional law further indicates that the defenses of laches, equitable estoppel and waiver regularly are raised by parties, such as the plaintiff in the present case, contesting the recoupment of alimony and support arrearages. See *Papcun* v. *Papcun*, 181 Conn. 618, 620–22, 436 A.2d 282 (1980); *Bozzi* v. *Bozzi*, 177 Conn. 232, 239–43, 413 A.2d 834 (1979); *Riscica* v. *Riscica*, 101 Conn. App. 199, 204–208, 921 A.2d 633 (2007); *Kalinowski* v. *Kropelnicki*, 92 Conn. App. 344, 351–54, 885 A.2d 194 (2005); *Sablosky* v. *Sablosky*, 72 Conn. App. 408, 412–15, 805 A.2d 745 (2002); *Burrier* v. *Burrier*, 59 Conn. App. 593, 595–96, 758 A.2d 373 (2000); *Emerick* v. *Emerick*, 28 Conn. App. 794, 802–804, 613 A.2d 1351, cert. denied, 224 Conn. 915, 617 A.2d 171 (1992); *Brock* v. *Cavanaugh*, 1 Conn. App. 138, 140–42, 468 A.2d 1242 (1984). In light of that precedent and the express mandate of § 52-362 (d), we conclude that the court improperly held that the plaintiff could not assert the doctrines of laches

and equitable estoppel as defenses to the wage withholding order.

That determination does not end our inquiry. The plaintiff maintains that the record discloses that the defendant was guilty of laches. "A conclusion that a party has not been guilty of laches is one of fact for the trier and not one that can be made by [an appellate court], unless the subordinate facts found make such a conclusion inevitable as a matter of law." *Bozzi* v. *Bozzi*, supra, 177 Conn. 240. The subordinate facts found by the trial court indicate to us that, as a matter of law, the doctrine of laches applies in the present case.[4]

"The defense of laches, if proven, bars a [party] from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the [opposing party]. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the [opposing party]." (Internal quotation marks omitted.) *Treglia* v. *Zanesky*, 67 Conn. App. 447, 459, 788 A.2d 1263 (2001), cert. denied, 259 Conn. 926, 793 A.2d 252 (2002). The doctrine "functions in part as a kind of 'flexible' statute of limitations, barring long-delayed claims where no statute of limitations was available for that purpose." 1 D. Dobbs, Law of Remedies (2d Ed. 1993) § 2.4 (4), p.104; see also *Dunham* v. *Dunham*, 204 Conn. 303, 326–27, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996). "The mere lapse of time does not constitute laches . . . unless it results in prejudice to the [opposing party] . . . as where, for example, the [opposing party] is led to change his position with respect to the matter in

[4] Because we conclude that the subordinate facts found by the court compel the conclusion that, as a matter of law, the defendant is guilty of laches, we need not address the alternate defenses of equitable estoppel and waiver raised by the plaintiff.

question." (Citations omitted; internal quotation marks omitted.) *Emerick* v. *Emerick*, supra, 28 Conn. App. 804.

Here, the court found that more than a decade passed without the defendant making any contact whatsoever with the plaintiff. The court also found that at no time did the defendant file any "motion in the Superior Court alleging the plaintiff's wilful failure to pay alimony and child support." Significantly, the court found that, despite his efforts, the plaintiff could not obtain either an address or telephone number for the defendant. In that vein, the court found that "the defendant's mother refused to disclose the defendant's address, and the defendant's brother would not provide it to the plaintiff. The plaintiff contacted dozens of [the defendant's] friends to determine the defendant's permanent address . . . but none were willing or able to help him." Those findings are amply supported by the record, which demonstrates a concerted effort on the part of the defendant to make any contact by the plaintiff with either herself or Caitlin impossible. From those findings, we conclude that the defendant's delay in filing her claim was both inexcusable and prejudicial to the plaintiff.

In so concluding, we are mindful that the judgment of dissolution ordered the defendant to provide the plaintiff with her current address and telephone number "at all times." Year after year, her failure to comply with that order rendered the plaintiff unable to make alimony and support payments. The defendant has offered no explanation for her refusal to comply with that critical court order, as she failed to appear for two depositions, the hearing before the trial court and oral argument before this court.

The present case is distinguishable from *Bozzi* v. *Bozzi*, supra, 177 Conn. 232. In *Bozzi*, the plaintiff mother, following her divorce from the defendant

father, moved to the Netherlands with their two children without informing him or the trial court. Eight years later, she sought to have the defendant found in contempt for his failure to comply with the support order entered at the time of their divorce. In rejecting his defense of laches, the Supreme Court stated that "the sole prejudice claimed by the defendant was that he had been deprived of the love and companionship of his children for eight years and that he and his children were entitled to each other's love and companionship." Id., 240. The Supreme Court noted the trial court's finding that "the very last communication between the parties indicated that the defendant would meet his obligation by sending money or by establishing a trust fund for the children and that he would see to their education, none of which was done" and emphasized that "the lack of any communication between the parties for about eight years . . . might have been significant in supporting a claim of laches if there were any evidence that the defendant had changed his position in reliance upon an abandonment by the plaintiff of her claim against him." Id. Unlike *Bozzi*, the claimed prejudice in the present case is the fact that the defendant deliberately made it impossible for the plaintiff to comply with his alimony and support obligations. She also made no "motion in the Superior Court alleging the plaintiff's wilful failure to pay alimony and child support." The record supports the plaintiff's contention that he changed his position regarding his obligations as a result of her conduct.

Likewise, the present case is patently distinguishable from *Brock* v. *Cavanaugh*, supra, 1 Conn. App. 138, in which the defendant father pleaded laches as a defense to his failure to make support payments over a period of six years. The defendant in *Brock* premised that defense on the plaintiff's failure to inform him of her new marital status, name or location for that period.

At the same time, "[h]er whereabouts and status were known to her cousin in Connecticut, an attorney, who represented her in the divorce proceedings." Id., 139. As a result, this court concluded that, in light of "the fact that the defendant made only a limited attempt to locate the plaintiff or his daughter in Florida while he knew that a relative of hers resided in Connecticut, we cannot say that the court erred in concluding that the plaintiff was not guilty of laches." Id., 141. By contrast, the court here found that the plaintiff made considerable effort to contact dozens of friends and family members of the defendant with no success and made repeated trips to Florida in the aim of obtaining her address or telephone number. As the court found, the plaintiff had no means of contacting her despite those efforts.

In light of the foregoing, we conclude as a matter of law that the defendant is guilty of laches in the present case. Her delay of more than one decade in filing her claim for arrearages, during which the plaintiff had no means of contacting her, was inexcusable and prejudiced the plaintiff. As a result, the plaintiff's motion to preclude receipt of further alimony or support should have been granted.

The judgment is reversed and the case is remanded with direction to grant the motion to preclude further alimony or support and render judgment accordingly.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PHILIP MITCHELL (AC 27074)

Bishop, Gruendel and Beach, Js.

Syllabus

Convicted of the crime of assault in the third degree, the defendant appealed to this court. He claimed that the trial court improperly denied his motion to suppress statements that he gave to the police prior to being

informed of his *Miranda* rights. Following a complaint of an assault, the state police had stopped a vehicle matching the description of the alleged perpetrator's vehicle, removed its three occupants, one of whom was the defendant, and handcuffed them. While awaiting local police for a possible identification, a state trooper individually questioned the suspects, who had not been informed of their *Miranda* rights, as to where they were going, what they were doing and whether they were aware of anything that had happened that evening for which they would be stopped by police. *Held*:

1. The trial court improperly denied the defendant's motion to suppress his pre-*Miranda* statements: because the defendant was in custody at the time the statements were made and the trooper's questioning of the defendant amounted to an interrogation, the questions, which attempted to confirm whether the trooper had the right suspects, having been reasonably likely to elicit an incriminating response, *Miranda* warnings were required and the defendant thus was subjected to an improper custodial interrogation; moreover, although the defendant's responses to the officer's questions appeared relatively benign, the improper admission of the statements was not harmless beyond a reasonable doubt given the court's charge that the jury could use the statements as consciousness of guilt evidence.

2. The trial court did not abuse its discretion in denying the defendant's motion to suppress the victim's identification of the defendant as the perpetrator during a show-up, in which the victim was brought to the place where the vehicle was stopped and each suspect was led individually into the spotlight of a cruiser where the victim was standing: because the show-up occurred while it was still dark, the spotlight was appropriate, the police presence was not overwhelming, the crime involved an unprovoked violent attack for which the police were justified in taking immediate action, and the witness, who was in close proximity to the defendant during the assault, was injured and needed medical treatment, making it reasonable that she identify the suspects without delay; moreover, even if the show-up was unnecessarily suggestive, the trial court properly determined that the identification was nevertheless reliable under the totality of the circumstances, including the timing of the identification, the opportunity the victim had to see the defendant during the attack, her description of the vehicle and her certainty in identifying the defendant.

3. The defendant could not prevail on his claim that the trial court improperly declined to sanction the state for the failure of a police officer to produce field notes he took during his initial investigation; in light of the facts that there was no evidence that the officer's notes were signed or otherwise adopted by the officer or the victim, that the officer testified that the police report reflected his notes in their entirety, that the state was unaware of the notes prior to trial and that the officer made a good faith effort to find the notes upon the court's request, the trial court

did not abuse its discretion in declining to sanction the state for the missing notes or in failing to give the jury a supplemental charge regarding the notes.

Argued February 15—officially released June 10, 2008

Procedural History

Substitute information charging the defendant with the crimes of robbery in the second degree, conspiracy to commit larceny in the second degree, unlawful restraint in the first degree, assault in the third degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Marano*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty of assault in the third degree, from which the defendant appealed to this court. *Reversed; new trial.*

Charles F. Willson, special public defender, for the appellant (defendant).

James M. Ralls, senior assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Nicholas J. Bove*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Philip Mitchell, appeals from the judgment of conviction, rendered after a jury trial, of assault in the third degree in violation of General Statutes § 53a-61. On appeal, the defendant claims that the trial court (1) improperly denied his motions to suppress a statement he made to the police prior to being told of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and the victim's identification of the defendant, and (2) abused its discretion in refusing to sanction the state

for failing to produce an officer's investigative notes. We reverse the judgment of the trial court.

The jury reasonably could have found the following facts. At approximately 4:30 in the morning on August 20, 2004, the victim was driving on Connecticut Avenue in Bridgeport looking to purchase marijuana. She asked two young women for marijuana, and they told her to follow them. The women turned and walked along Fifth Street, and the victim followed and parked her car. The women went across the street and returned with two men, one of whom was the defendant. The defendant told the victim to turn off her car's engine. Once she did so, all four people attacked her by punching her head, hitting her face, pulling her hair and trying to pull her through the car window. The victim screamed, pulled back, honked her car's horn and held onto the steering wheel so that she would not be pulled from the car. The victim testified that the defendant was "right in [her] face" during this attack, told her to "shut the fuck up or I'm going to blow your head off" and acted as though he had a gun. Eventually, the attackers opened the car's passenger door, and the defendant dragged the victim out of her car by the wrists. One of the women took $20 from the victim's pocket while the defendant continued to drag the victim. The victim hooked her foot around a metal fence post and when the defendant let go of her, she stood up. The defendant then kicked her in the stomach and she fell back down. When she got up again, the defendant tried to kick her a second time, but she managed to escape by running away.

The victim ran back to Connecticut Avenue and, seeing a taxicab, explained to the driver that she had just been robbed and asked him to call the police. She also pointed out her attackers as they were getting into a car. The taxicab driver made a U-turn and followed

the car. He also called the police department and reported the license plate number of the car.

State police Trooper Christopher Kick was on duty that morning when he was notified of an assault in Bridgeport and provided with a description of a four door, blue vehicle with the license plate number 254-RPY driving on Interstate 95. Upon seeing the car, Kick followed it until he was joined by two other state police troopers, at which point he stopped the vehicle. All three troopers approached the car with weapons drawn, removed the three occupants from the vehicle, placed them on the ground and handcuffed them.[1]

Meanwhile, the victim was met by Officer Barry Jones of the Bridgeport police department. After she told him about the assault and described the four assailants, she was transported to the site where the suspects had been apprehended. As each suspect was brought in front of the cruiser in which the victim was sitting, she positively identified each as one of the assailants. Subsequently, the victim was taken to the police station where she provided a written statement after which she was taken to a hospital to be treated for her injuries.

The jury found the defendant guilty of assault in the third degree but not guilty of robbery in the second degree, conspiracy to commit larceny in the second degree, unlawful restraint in the first degree and threatening in the second degree. The court imposed a sentence of eight months incarceration.[2] This appeal followed.

[1] Though the victim testified that she was attacked by four people, only three suspects were apprehended in the vehicle.

[2] During the sentencing hearing, the defendant's attorney stated that the defendant was then serving an eight year term of incarceration that had been imposed on November 1, 2004. The court imposed the sentence in this matter to run consecutively to the eight year sentence. Accordingly, it appears that the sentence imposed in this matter has not yet expired. Even if the sentence had expired, we note that, "[i]t is well established that since collateral legal disabilities are imposed as a matter of law because of a criminal conviction, a case will not be declared moot even where the sen-

I

The defendant first claims that the court improperly denied his motions to suppress his pre-*Miranda* statement and the victim's identification of him. We address each claim in turn.

A

The defendant claims that his pre-*Miranda* statement was the result of a custodial interrogation and should have been excluded from evidence. In addition, he argues that the state cannot demonstrate that the court's error in admitting this statement was harmless because the court highlighted the statement to the jury by giving a consciousness of guilt charge. We agree with the defendant.

The following additional facts and procedural history are relevant to our resolution of the defendant's claim. On March 30, 2005, at the pretrial hearing on the defendant's motion to suppress, the state called Trooper Kick to testify. Kick testified that he received word in the early morning hours of August 20, 2004, of an assault that had occurred in Bridgeport and that he had received a description of the alleged perpetrator's vehicle as blue, bearing the license plate number 254-RPY and traveling in the direction of Interstate 95. Kick positioned his vehicle on the highway near the Fairfield rest area, and when he observed a vehicle that matched the description, he drove out to prevent it from exiting the highway. When two other state police cruisers arrived, Kick activated his lights and siren and stopped the car, boxing it in with the police cruisers. The troopers approached the vehicle with guns drawn and ordered the defendant and the other suspects to exit the vehicle and to lie on the ground. The troopers then

tence has been fully served." *Barlow* v. *Lopes*, 201 Conn. 103, 112, 513 A.2d 132 (1986).

searched the suspects for weapons, placed them in handcuffs and separated them. While awaiting the Bridgeport police for a possible identification, Kick testified that he individually questioned the suspects as to where they were going and what they were doing to confirm whether he had stopped the right vehicle and whether the suspects were the individuals who had been involved in the assault. As Kick moved from suspect to suspect, he ensured that a trooper remained with each individual because "[i]f you leave them in handcuffs, they could run." Kick testified that he asked the defendant "if anything had happened that possibl[y] [came] to mind this evening on why you would have been stopped." Kick testified that in response, the defendant "basically came up with nothing. . . . [He] basically replied that he had just taken a ride, he wasn't paying attention, doesn't know where they'd been." Prior to and during this encounter, the suspects were not informed of their rights pursuant to *Miranda*.

After the pretrial hearing, the court issued a memorandum of decision on March 31, 2005, denying the motion to suppress. The court concluded that the state had conceded that the defendant was in police custody while being questioned by Kick. The court found, however, that Kick's questions did not amount to an interrogation, and, therefore, *Miranda* warnings were unnecessary. Accordingly, the court found that the defendant's statements were admissible. The court opined that "Kick's questions, 'What is going on?' [and] 'Why were you stopped?' " were asked at the threshold of the encounter and were arguably aimed at determining the nature of the situation confronting the police at that time. There is no suggestion that Kick's queries were probing, accusatory or likely to elicit an incriminatory response. The court stated: "The fact that Kick asked questions about 'what was going on' without the

intent of eliciting a confession or inculpatory information, but simply to investigate the situation before him, was not an interrogation." (Citations omitted.)

The defendant claims that the court improperly admitted his statement, as it was the result of a custodial interrogation, and that the admission of this evidence was not harmless beyond a reasonable doubt. Because the court found that the state conceded that the defendant was in custody and that conclusion is supported by the record, our inquiry is limited to whether there was an interrogation.[3]

Our Supreme Court has held that "[t]wo threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation." (Internal quotation marks omitted.) *State* v. *Atkinson*,

[3] On appeal, the state appears not to agree that it conceded the issue of custody at the pretrial hearing. To the contrary, it argues that the "investigative detention" of the defendant did not amount to custody, and, therefore, the police were not required to give *Miranda* warnings before questioning him. We disagree. Whether the court properly determined that the state had conceded custody, the predicate facts all support the legal conclusion that the defendant was in custody when questioned by Kick. The record reveals that the defendant's vehicle had been stopped and boxed in on the side of the highway by three police cruisers using sirens and lights, the defendant was ordered from the vehicle to the ground at gunpoint, handcuffed and searched, and then separated from the other suspects and paired with a trooper to prevent him from running away.

On these facts, any reasonable person would have believed that the defendant's freedom of movement was restrained to the degree associated with a formal arrest. *State* v. *Britton*, 283 Conn. 598, 604–605, 929 A.2d 312 (2007); see also *State* v. *Hasfal*, 106 Conn. App. 199, 206–207, 941 A.2d 387 (2008) (explaining that while the oft-used "free to leave" test is appropriate for custody determinations involving a police station, evaluating whether the restraints amounted to those associated with a formal arrest is more appropriate for other settings). See also *State* v. *Pinder*, 250 Conn. 385, 409–12, 736 A.2d 857 (1999) (although court's function is to determine predicate facts relative to custody, because ultimate question of whether defendant is in custody is legal one, review of court's determination regarding custody is plenary).

235 Conn. 748, 757, 670 A.2d 276 (1996). It is the defendant who bears the burden of proving a custodial interrogation. *State* v. *Doyle*, 104 Conn. App. 4, 11, 931 A.2d 393, cert. denied, 284 Conn. 935, 935 A.2d 152 (2007).

"The trial court's essentially factual determination of whether the police officer's conduct constituted interrogation is reversed only if it is clearly erroneous. . . . When a factual issue implicates a constitutional claim, however, we review the record carefully to ensure that its determination was supported by substantial evidence. . . . Nonetheless, [w]e [will] give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *State* v. *Walters*, 94 Conn. App. 297, 302–303, 891 A.2d 1003, cert. denied, 278 Conn. 908, 899 A.2d 36 (2006), citing *State* v. *Evans*, 203 Conn. 212, 227, 523 A.2d 1306 (1987).[4]

[4] Although the ultimate determination of custodial interrogation, as a mixed question of fact and law, is subject to de novo review; *State* v. *Canales*, 281 Conn. 572, 585, 916 A.2d 767 (2007); the trial court has the responsibility to determine the predicate facts regarding custody, and the issue of whether specific questioning constitutes an interrogation is one of fact. Therefore, we assess the facts found by the court relative to custody to determine whether the court's factual findings are clearly erroneous, but we accord plenary review to the court's conclusion as to whether these facts warrant a finding of custody. *State* v. *Pinder*, 250 Conn. 385, 409–12, 736 A.2d 857 (1999); see also *State* v. *Canales*, supra, 584–85; *State* v. *Turner*, 267 Conn. 414, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004). As to the issue of interrogation, however, because this is a question of fact, we review the record to determine whether the predicate facts as well as the court's factual conclusion in this regard are clearly erroneous. *State* v. *Evans*, supra, 203 Conn. 227; *State* v. *Walters*, supra, 94 Conn. App. 302–303.

Although there has been some discussion about whether a plenary standard of review should be applicable to the issue of interrogation; see *State* v. *Walters*, supra, 94 Conn. App. 302 n.4 (questioning whether rationale for providing plenary review of custody determinations, as determined in *State* v. *Pinder*, supra, 250 Conn. 409–12, might also apply to determinations of interrogation); we continue to analyze the issue of interrogation under the clearly erroneous standard of review. See *State* v. *Evans*, supra, 203 Conn. 227 (opining that "[s]ince the determination as to whether a particular

"[T]he term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (Emphasis in original; internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 588, 916 A.2d 767 (2007), quoting *Rhode Island* v. *Innis*, 446 U.S. 291, 301–302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

"Every question posed to a defendant in custody is not equivalent to an interrogation. . . . Ordinarily, the routine gathering of background, biographical data will not constitute interrogation. . . . Furthermore, questions that are asked after an event or occurrence that would naturally tend to evoke such an inquiry do not constitute interrogation. These questions, unlike the sort of interrogation that prompted the implementation of the *Miranda* safeguards, are characterized by brevity, neutrality and an absence of intent to elicit a confession or admission. Most, moreover, are typically spontaneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Dixon*, 25 Conn. App. 3, 8, 592 A.2d 406 (1991). Even express questioning of the defendant may not constitute interrogation if the questions are normally attendant to arrest and custody and are not reasonably likely to elicit an incriminating

question constituted interrogation is essentially factual, we apply the clearly erroneous standard").

response. *State* v. *Kirby*, 280 Conn. 361, 398–99, 908 A.2d 506 (2006); see also *State* v. *Evans*, supra, 203 Conn. 225–27 (no interrogation when routine booking questions unrelated to crime and objectively neutral).

Here, Kick testified that he questioned each suspect separately and methodically, ensuring that no suspect was ever left without a police officer. He agreed that his intention in questioning the defendant and the other suspects was to "verify that these were or were not the people that were involved in a possible assault." Contrary to the court's recitation of Kick's questions, the record does not support the view that the officer merely asked, "What is going on? Why were you stopped?" at the threshold of the investigation. See, e.g., *Hairston* v. *United States*, 500 A.2d 994, 997 (D.C. App. 1985) (warnings not required when officer, who was greeted at scene by suspect stating that he shot victim, asked, " 'what happened?' "); *People* v. *Quicke*, 71 Cal. 2d 502, 514, 455 P.2d 787, 78 Cal. Rptr. 683 (1969) (no interrogation when officer came upon suspect lying on top of dead body, handcuffed suspect and asked " 'what had happened' "); *State* v. *Dixon*, supra, 25 Conn. App. 9 (no interrogation when suspect attempted to flee officer and upon apprehension was asked, " 'What are you doing here?' "). Instead, here the officer was admittedly seeking an explanation from the defendant for the recent assault. As noted, Kick testified at the pretrial hearing that he asked the defendant "if anything had happened that possibl[y] [came] to mind this evening on why you would have been stopped."[5] This question is much less vague and open-ended than the court's stated version of the question. The court's conclusion that Kick merely asked, "What is going on?" is a palpably more benign question, which an officer might well ask when coming upon a scene and

[5] Kick's testimony regarding his questioning of the defendant was undisputed.

attempting to make an initial assessment of the circumstances confronting him or her. In this instance, as noted by Kick, he was not trying to assess the situation at hand; rather, he was attempting to confirm whether he had the right suspects. It is manifest that an officer may not ask a person in custody questions that the officer knows are reasonably likely to elicit an incriminating response. Thus, the court's finding that Kick's questioning did not amount to an interrogation was unsupported by the record and clearly erroneous.

As a consequence, we determine that Kick's questioning of the defendant constituted a custodial interrogation.

Because the defendant's response to the interrogation was not expressly inculpatory, our determination that the defendant was subjected to an improper custodial interrogation would have little consequence unless its admission was harmful. The defendant claims that the admission of his statement was not harmless error because the court compounded the admission by charging the jury on consciousness of guilt. In response, the state argues that the defendant's statement was not facially inculpatory and that any evidence of guilt inferred from it was merely cumulative because the jury could have found the defendant's statement as evidence of consciousness of guilt only if it had already determined that he was guilty. We agree with the defendant.

"The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . In order to assess the harmfulness of the error, the test is whether there is a reasonable possibility that the improperly admitted evidence contributed to the conviction. . . . The harmfulness of an error depends upon its impact on the trier and the result. . . .

[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. [Our Supreme] court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . The proper standard [therefore] is whether any reasonable jury would have found the defendant guilty if the improperly admitted evidence had been excluded." (Citations omitted; internal quotation marks omitted.) *State* v. *Zubrowski*, 101 Conn. App. 379, 385, 921 A.2d 667, cert. granted on other grounds, 283 Conn. 912, 928 A.2d 539 (2007). As this evidentiary impropriety poses a question of constitutional proportion, it is the state's burden to prove that the error was harmless beyond a reasonable doubt. *State* v. *Randolph*, 284 Conn. 328, 377, 933 A.2d 1158 (2007).

Although the defendant's statement that he was just driving around, was not paying attention and did not remember where he had been appears relatively benign, the court's use of it as consciousness of guilt evidence cast the statement in a light unfavorable to the defendant. If our analysis of the statement's impact on the verdict was limited to Kick's testimony, we could have found that the improper admission of this facially innocuous statement was harmless. Given the court's charge, however, that the jury could consider the statement as consciousness of guilt, we conclude that the state has not met its burden of proving that the improper admission was harmless beyond a reasonable doubt.

Over the defendant's objection, the court charged the jury that "it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged offense, which may fairly have been influenced by the criminal act, that is, that conduct or statements show a consciousness of guilt. . . .

"Whenever a person is on trial for a criminal offense, it is proper to show that person's conduct, as well as any declarations made by him subsequent to the alleged criminal offense which may fairly have been influenced by that act. The manner in which the defendant conducted himself when asked by others, in respect to the subject of this case, may be shown. If he should make false statements as to his whereabouts at the time of the offense, these might tend to show a guilty connection by the defendant with the crime charged." Our review of the record reveals that the defendant's response to Kick's questioning was the only statement in evidence to which the court's charge could apply.

The state argues that the court's charge was harmless because it was merely cumulative. More specifically, the state claims that the court's charge could not have affected the jury's verdict because, for the jury to use the statement against the defendant, the jurors had to already believe that the defendant was involved in the crime. This argument is disingenuous. Although the charging conference took place off the record, it is apparent from the defendant's objection that the state asked the court to give a consciousness of guilt charge.[6] The fact that the state actively sought this charge undermines its argument on appeal that the charge has no bearing on the issue of harm. To have construed the defendant's statement as consciousness of guilt, the jury needed to first conclude, merely, that his statement as to his whereabouts was false. The jury did not, as

[6] After the jury was charged, counsel for the defendant took exception to the consciousness of guilt charge. Counsel stated, "I know we had some discussions outside of the presence of the court, off the record, and I'd like to bring back up one of my—one of our discussions, and one of those was specifically the consciousness of guilt charge that the state had presented. . . . I had objected to that, both the inclusion of that, as well as flight. I had objected, and I believe Your Honor had made a decision on it in chambers. I would just ask . . . that that be put on the record."

the state argued, need to first conclude that the defendant was criminally liable. Subscribing to the state's argument in this regard would render a consciousness of guilt charge meaningless.

Although the court did not specifically reference any evidence in conjunction with the consciousness of guilt charge on false statements, the defendant's statement is the only statement in the record to which the charge could apply. As a result, the court's charge not only accentuated the improperly admitted statement, but it also pointed to the defendant's potential involvement. This emphasis makes it impossible for us to conclude that the improper admission was harmless beyond a reasonable doubt.

Finally, the state did not claim that the evidence was so overwhelming that the court's jury charge on consciousness of guilt was harmless. As the state has failed to establish harmless error beyond a reasonable doubt, we reverse the defendant's conviction of assault in the third degree.

B

Our conclusion that this judgment must be reversed leads us to discuss claims that are likely to recur on retrial. See *Allison* v. *Manetta*, 284 Conn. 389, 402, 933 A.2d 1197 (2007). The defendant next claims that the court should have granted his motion to suppress the identification made by the victim. The defendant specifically argues that the show-up was unnecessarily suggestive and that there were no exigencies to justify observation of him in handcuffs, under a spotlight and posing as if he was being booked. The defendant claims, therefore, that the identification was unreliable and should not have been admitted.

The defendant moved to suppress the victim's identification on March 30, 2005. At the pretrial hearing on

the motion, both the victim and Jones testified.[7] The victim testified that during the show-up, the police informed her that a vehicle fitting her description had been stopped and that the suspects were being detained for her identification. When she arrived, each suspect was led individually into the spotlight of the cruiser where she was sitting. The victim testified that when she identified the defendant, she had no doubt that he was one of the people who had attacked her.

Jones, who drove the victim to identify the suspects, corroborated the victim's testimony. He testified that he told the victim that the police had detained the suspects and that they were being held until she identified them. After taking the victim to the highway, Jones testified that each handcuffed suspect was escorted out individually by an officer and shown to the victim from the front and side. Jones testified that he did not take any notes during the identification in part because the victim identified each suspect as one of the people who had attacked her.

At the conclusion of the pretrial hearing on the motion to suppress identification, the court denied the motion, finding that the identification of the defendant by the witness was sufficiently reliable to be admitted.[8] While acknowledging that show-ups are inherently and significantly suggestive, the court determined that the one-to-one identification procedure in this case did not result in a substantial likelihood of misidentification.

[7] The victim's testimony about the incident and the statements the defendant made to her during the assault are essentially identical to her testimony at trial. Therefore, we will not repeat it here.

[8] Although the record contains neither a memorandum of decision nor a signed transcript of the court's ruling; see Practice Book § 64-1; we note that the appendix to the defendant's brief contains an unsigned transcript of the court's denial of the motion to suppress the identification. Because that transcript contains a sufficiently detailed and concise statement of the court's findings, we conclude that the record is adequate for our review. See *Carrasquillo* v. *Carlson*, 90 Conn. App. 705, 708 n.2, 880 A.2d 904 (2005).

Consequently, defense counsel made a motion for articulation as to which factors of reliability sustained the court's decision. The court responded that in looking at the totality of the circumstances, factors such as "[t]he timing of the identification, the victim's opportunity to view the defendant, the vehicle identification [and] her certainty in her testimony suggest that her identification was reliable."

First, we set forth the standard of review. "[B]ecause the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable. . . . [T]he required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances. . . . To prevail on his claim, the defendant has the burden of showing that the trial court's determinations of suggestiveness and reliability both were incorrect. . . .

"Furthermore, [w]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error. . . .

"Previously, we have stated that [a]n identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification. . . . We have recognized that generally a one-to-one confrontation between a [witness] and the suspect presented to him for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty. . . . We also have recognized, however, that the existence of exigencies may preclude such a procedure from being unnecessarily suggestive. . . . In the past, when we have been faced with the question of whether an exigency existed, we have considered such factors as whether the defendant was in custody, the availability of the victim, the practicality of alternate procedures and the need of police to determine quickly if they are on the wrong trail. . . . We also have considered whether the identification procedure provided the victim with an opportunity to identify his assailant while his memory of the incident was still fresh." (Citations omitted; internal quotation marks omitted.) *State* v. *St. John*, 282 Conn. 260, 276–78, 919 A.2d 452 (2007).

We conclude that the court properly admitted the identification. The facts of this case strongly resemble those in *State* v. *St. John*, supra, 282 Conn. 260. In *St. John*, the defendant appeared individually, was handcuffed, was accompanied by officers and five or six police cars and was illuminated by a spotlight. Id., 275. Our Supreme Court concluded that the spotlight was necessary because it was still dark at the time of the show-up, the police presence was not overwhelming, there was no evidence that the police told the witnesses that the suspect was in fact the person who committed the crime, immediate action was necessary given the violent nature of the crime, and it was important for the witnesses to observe the defendant while their memories were still fresh. Id., 278–79. The same analysis

is applicable here. In this case, because the show-up occurred while it was still dark, the spotlight was appropriate, there was no greater police presence than in *St. John*, the crime involved an unprovoked violent attack for which the police were justified in taking immediate action, and the witness, who was in close proximity to the defendant during the assault, was injured and needed medical treatment, making it reasonable that she identify the suspects without delay.

Even if we were to accept the defendant's claim that the show-up was unnecessarily suggestive, we still would agree with the court's conclusion that the identification was reliable. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . . To determine whether an identification that resulted from an unnecessarily suggestive procedure is reliable, the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [victim] to view the criminal at the time of the crime, the [victim's] degree of attention, the accuracy of [the victim's] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification]." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 553, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). Thus, the court found that the timing of the identification, the opportunity the victim had to see the defendant during the attack, her description of the vehicle and her certainty in identifying him, when taken in totality, rendered the identification reliable. We agree and conclude that the denial of the motion to suppress was sufficiently grounded in the record and that the court did not abuse its discretion in determining that the identification was reliable.

II

Finally, the defendant claims that the court abused its discretion by declining to sanction the state for Jones'

failure to produce field notes he took during his initial investigation. Specifically, the defendant argues that the court should have precluded Jones' testimony or, in the alternative, charged the jury to draw a negative inference against the state. As we conclude that the state was not required to provide the defendant with Jones' notes, the court properly declined to sanction the state.

The following additional facts are relevant to the defendant's claim. During the pretrial hearing on the motion to suppress the identification, Jones stated that he took notes, including a brief description of the suspects, during his initial interview with the defendant. Jones explained that he did not bring the notes to court, but he believed he still had them. He stated that the police report incorporated all of his notes regarding the victim's description of the suspects.

After Jones' testimony, the defendant moved orally for a copy of the notes. The state responded that it had never heard of the notes and had never received a motion requesting them. The court took a recess for Jones to obtain his notes. He stated, however, that he was unable to find them and believed they might be at his home. After being instructed by the court to look for the notes at his home, Jones returned and reported that he was unable to locate them. Finally, he testified that although the police report contained information that was not in his notes, everything in his notes was captured by the report.

In reply to the defendant's request for sanctions, the court stated that it did not find any wrongdoing on the part of the state and left it expressly to the defendant to raise the issue of remedies in the future as appropriate. At trial, the defendant was permitted to cross-examine Jones about the notes and their disappearance. The defendant moved to strike Jones' testimony about the victim's description of the defendant and asked for

a jury charge against the state. The court denied the motion and the requested charge. Furthermore, the court observed that the notes did not qualify as statements under Practice Book §§ 40-14 and 40-15 and therefore did not appear to be discoverable by right.

The heart of the defendant's argument is that the notes were discoverable. Practice Book § 40-11 enumerates the information and materials that are discoverable by a defendant as of right.[9] There is no evidence that

[9] Practice Book § 40-11 provides: "(a) Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority the prosecuting authority, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing the existence of and allow the defendant in accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on any of the following items:

"(1) Exculpatory information or materials;

"(2) Any books, tangible objects, papers, photographs, or documents within the possession, custody or control of any governmental agency, which the prosecuting authority intends to offer in evidence in chief at trial or which are material to the preparation of the defense or which were obtained from or purportedly belong to the defendant;

"(3) Copies of the defendant's prior criminal record, if any, which are within the possession, custody, or control of the prosecuting authority, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting authority;

"(4) Any reports or statements of experts made in connection with the offense charged including results of physical and mental examinations and of scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial;

"(5) Any warrant executed for the arrest of the defendant for the offense charged, and any search and seizure warrants issued in connection with the investigation of the offense charged;

"(6) (i) Any written, recorded or oral statements made by the defendant or a codefendant, before or after arrest to any law enforcement officer or to a person acting under the direction of or in cooperation with a law enforcement officer concerning the offense charged; or

"(ii) Any relevant statements of coconspirators which the prosecuting authority intends to offer in evidence at any trial or hearing.

"(b) In addition to the foregoing, the defendant shall be entitled to disclosure of exculpatory materials in accordance with any applicable constitutional and statutory provisions."

the notes were exculpatory; therefore Practice Book § 40-11 (a) (1) does not apply. Arguably, the notes fall under Practice Book § 40-11 (a) (6) (i), which requires the prosecution to disclose "[a]ny written, recorded or oral statements made by the defendant or a codefendant, before or after arrest to any law enforcement officer or to a person acting under the direction of or in cooperation with a law enforcement officer concerning the offense charged . . . ." Practice Book § 40-15 defines a statement as either "(1) A written statement made by a person and signed or otherwise adopted or approved by such person; or (2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a person and recorded contemporaneously with the making of such oral statement."

"[A] police officer's interview notes may be subject to disclosure for use by the defendant in cross-examining the witness, if the officer's notes meet either of [Practice Book] § 749's [now Practice Book § 40-15's] alternate definitions of a statement. The notes may also be discoverable following the officer's own testimony if they are signed or otherwise adopted." (Internal quotation marks omitted.) *State* v. *Belle*, 215 Conn. 257, 266, 576 A.2d 139 (1990); see also *State* v. *Reddick*, 36 Conn. App. 774, 784 n.7, 654 A.2d 761 ("field notes are not statements unless they are signed or otherwise adopted"), cert. denied, 232 Conn. 922, 656 A.2d 671 (1995). In this case, there is no evidence that Jones' notes were signed or otherwise adopted by Jones or the victim. Jones testified that the police report reflected his notes in their entirety. The state was unaware of the notes prior to trial, and Jones made a good faith effort to find the notes upon the court's request. On the basis of the record, we conclude that the court did not abuse its discretion in declining to

sanction the state for the missing notes or in not giving the jury a supplemental charge regarding the notes.

The judgment is reversed and the case is remanded for a new trial in accordance with law.

In this opinion the other judges concurred.

TOBIAS C. ANDERSON *v.* GORDON, MUIR AND FOLEY, LLP, ET AL.
(AC 27984)

Bishop, DiPentima and Harper, Js.

Syllabus

On the appeal to this court by the plaintiff challenging the action of the trial court rendering summary judgment in favor of the defendants G Co., P and W on counts one through sixteen and nineteen through twenty-four of a forty-four count complaint in which the plaintiff had sought to recover damages from them and another defendant, S, for, inter alia, theft in connection with the alleged mishandling of trial materials that had been acquired by S while he was representing the plaintiff in a habeas matter, *held* that the trial court properly granted the motion for summary judgment with respect to counts one through sixteen and nineteen through twenty-four, the plaintiff not having persuaded this court that the trial court's legal conclusions were either legally or logically incorrect or were not supported by the material facts set forth in that court's memoranda of decision; furthermore, there was no merit to the plaintiff's argument that the trial court's finding of a genuine issue of fact as to the existence and terms of a contract between the plaintiff and S was inconsistent with its legal conclusion that the other defendants' possession of the trial materials was not unauthorized, wrongful, in breach of contract or otherwise improper, the plaintiff having provided no authority in support of his proposition that an agent is bound by and liable for his principal's independent actions and thus that any breach by S of his contract with the plaintiff had to be imputed to the other defendants as S's agents.

Argued January 18—officially released June 17, 2008

Procedural History

Action to recover damages for, inter alia, theft, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Stengel*,

J., granted in part the defendants' motion to strike; thereafter, the court, *Keller*, *J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Tobias C. Anderson, pro se, the appellant (plaintiff).

Louis B. Blumenfeld, with whom was *Lorinda S. Coon*, for the appellees (named defendant et al.).

Opinion

DiPENTIMA, J. The plaintiff, Tobias C. Anderson, appeals from the judgment of the trial court rendered following the granting of a motion for summary judgment in favor of the defendants Gordon, Muir & Foley, LLP (law firm), Peter Schwartz and R. Bradley Wolfe.[1] The plaintiff claims that summary judgment was improper because the defendants failed to meet their burden of proving that they were entitled to judgment as a matter of law. We affirm the judgment of the trial court.

The following facts and procedural history relevant to our disposition of the plaintiff's claim are not in dispute. In August, 1996, the plaintiff retained attorney Jon L. Schoenhorn[2] to represent him in connection with a petition for a writ of habeas corpus that the plaintiff previously had filed pro se.[3] In furtherance of his representation of the plaintiff, Schoenhorn acquired approximately thirteen boxes that contained materials from

[1] Schwartz and Wolfe, during the relevant time period, were partners of the law firm.

[2] Schoenhorn is also a defendant in this action. He is not a party to this appeal, however, because there has been no final judgment as to all counts against him in the complaint. See Practice Book §§ 61-1 and 61-3. Accordingly, references to the defendants in this appeal do not include Schoenhorn.

[3] The plaintiff was charged with and convicted of various crimes in the late 1980s. At the time of oral argument on this appeal, he remained in the custody of the commissioner of correction.

the trials and other proceedings that had resulted in the plaintiff's incarceration. Sometime thereafter, the attorney-client relationship deteriorated, and on November 27, 2000, the habeas court granted Schoenhorn permission to withdraw as the plaintiff's counsel.

By letter dated April 1, 2001, the plaintiff informed Schoenhorn that "[s]omeone from and/or associated with the public defender's office [would] pick up [the boxes in Schoenhorn's possession]." Schoenhorn responded by letter dated April 3, 2001, that he would "turn over the files to anyone from the public defender's office who contacts [him] on [the plaintiff's] behalf . . . ." On May 17, 2001, attorney Ellin A. M. Grenger left a message for Schoenhorn indicating that her employer, Scott W. Sawyer of the Sawyer Law Firm, LLC, had been appointed as the plaintiff's special public defender for his habeas petition. Grenger also requested that Schoenhorn send her an unspecified transcript but did not request that Schoenhorn send her the entire set of boxes in his possession. Schoenhorn, however, received no confirmation of Sawyer's appointment as the plaintiff's new attorney in the habeas matter.

In the meantime, Schoenhorn was served with a complaint that the plaintiff had filed against him, alleging that he had committed malpractice in connection with his representation of the plaintiff from August, 1996, to November, 2000.[4] In early June, 2001, Schoenhorn retained the defendants to represent him in the malpractice action and transferred possession of the boxes to the defendants, as his agents and counsel, for their use in defending the plaintiff's lawsuit and for safekeeping until the boxes were transferred to the plaintiff's new counsel in the habeas proceeding.

[4] The malpractice complaint also named as a defendant one of Schoenhorn's associates, Jeanne M. Zulick. Zulick is not a party to this appeal or to the present action.

On July 18, 2001, Grenger informed Schoenhorn and Schwartz, during a telephone conversation, that Sawyer might decline his appointment as the plaintiff's special public defender. At that time, Grenger requested that the defendants retain custody of the boxes until further notice. On approximately August 15, 2001, Schwartz received a letter from Sheila Butch, requesting that Schwartz send her certain cassette tapes that were contained in the boxes.[5] On September 12, 2001, Schwartz responded to Butch by telephone and explained that he could not release the cassette tapes to her without either a written authorization by the plaintiff or a court order. Schwartz never received any such authorization or order.

In early October, 2001, Schoenhorn received a letter from the public defender's office confirming Sawyer's appointment as the plaintiff's counsel in the habeas matter and requesting the transfer of the boxes to Sawyer. Less than one week later, Schoenhorn instructed the defendants to transfer the boxes and their contents to Sawyer. Before transferring the boxes to Sawyer, the defendants, through a copying service, TMG, Inc., made copies of the voluminous written documents in the boxes. The defendants retained the copies and transferred most of the boxes with the original documents to Sawyer on October 23, 2001. One remaining box with some of the plaintiff's personal items, which inadvertently had been left out of the initial delivery, was given to Sawyer on November 9, 2001.

On July 31, 2003, the plaintiff filed the forty-four count complaint underlying this appeal, alleging that Schoenhorn and the defendants committed acts of theft, larceny, conversion, negligence, breach of contract, tortious

[5] The plaintiff asserts that the cassette tapes were recordings of certain police interrogations of him. The plaintiff hired Butch to create a transcription of the cassette tapes for him.

interference with business expectancy, civil conspiracy and deprivation of the plaintiff's civil rights under 42 U.S.C. §§ 1983 and 1985 (3), all in connection with the defendants' possession of the boxes between May 17 and November 9, 2001. On November 15, 2005, the defendants and Schoenhorn filed a revised motion for summary judgment as to all remaining counts of the complaint.[6] By memorandum of decision on May 12, 2006, the court, *Keller*, *J.*, granted the motion for summary judgment on counts eleven through sixteen, counts twenty-five through thirty, counts thirty-two through thirty-six and counts thirty-nine through forty-four. On June 1, 2006, the defendants and Schoenhorn filed a motion to reargue the motion for summary judgment as to counts one through ten, counts nineteen through twenty-four and count thirty-one. On June 7, 2006, the court granted the motion as to all remaining counts except count thirty-one and scheduled a hearing for reargument on July 17, 2006. By memorandum of decision on July 25, 2006, the court granted the motion for summary judgment as to counts one through ten and nineteen through twenty-four, leaving count thirty-one as the sole remaining count of the complaint. The

[6] On January 7, 2004, the court, *Stengel*, *J.*, struck the plaintiff's claims under 42 U.S.C. §§ 1983 and 1985, specifically, counts seventeen and eighteen against Schwartz and counts thirty-seven and thirty-eight against Schoenhorn. On April 8, 2004, Schoenhorn and the defendants filed their original motion for summary judgment as to counts one through sixteen and counts nineteen through thirty-six. The revised motion for summary judgment, filed on November 15, 2005, added the remaining counts not included in the April 8, 2004 motion, counts thirty-nine through forty-four.

We note that the plaintiff declined to replead the stricken counts, and there is no indication from the record that the court thereafter rendered judgment in favor of Schwartz and Schoenhorn as to those counts. See Practice Book § 10-44. Nevertheless, because the court disposed of the remaining counts against Schwartz by way of a motion for summary judgment and the plaintiff has elected not to replead counts seventeen and eighteen, the plaintiff's appeal is from a final judgment as to Schwartz. See *Jones* v. *H.N.S. Management. Co.*, 92 Conn. App. 223, 224 n.1, 883 A.2d 831 (2005), citing *Yancey* v. *Connecticut Life & Casualty Ins. Co.*, 68 Conn. App. 556, 557 n.1, 791 A.2d 719 (2002).

plaintiff now appeals from the judgment rendered in favor of the defendants on counts one through sixteen and counts nineteen through twenty-four of the complaint.[7]

The plaintiff claims on appeal that the court's May 12 and July 25, 2006 decisions granting the motion for summary judgment in favor of the defendants were improper. Specifically, the plaintiff argues that the court improperly concluded that (1) the defendants were entitled to summary judgment as to the counts of conversion and civil conspiracy to commit conversion notwithstanding that the plaintiff did not expressly authorize the defendants to obtain possession of the boxes, (2) Schoenhorn was authorized under the Rules of Professional Conduct to transfer the boxes to the defendants, as his agents and counsel, notwithstanding the confidential nature of their contents, (3) the plaintiff failed to provide an evidentiary foundation in support of his claim that no such authority existed and (4) proof of conversion is a necessary predicate to the plaintiff's claims of larceny and statutory theft. The plaintiff further argues that the court's denial of summary judgment as to count thirty-one, on the ground that there remained a factual dispute as to the existence and terms of a contract between the plaintiff and Schoenhorn, is inconsistent with the granting of the motion for summary judgment as to all other counts. We are not persuaded by the plaintiff's arguments.

The standard of review governing the plaintiff's claim is well settled. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted

[7] Because no final judgment has been rendered as to Schoenhorn; see footnote 2; we do not address the counts in the complaint directed toward him, namely, counts twenty-five through forty-four. Further, the plaintiff raises no claim on appeal that the court improperly struck counts seventeen and eighteen. See footnote 6.

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." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198, 931 A.2d 916 (2007). "The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008). "A material fact is a fact that will make a difference in the result of the case." (Internal quotation marks omitted.) *McKinney* v. *Chapman*, 103 Conn. App. 446, 450, 929 A.2d 355, cert. denied, 284 Conn. 928, 934 A.2d 243 (2007).

"[T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine

issue as to any material fact." (Internal quotation marks omitted.) Id., 451. "As required by Practice Book § 17-46, [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto." (Internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 97 Conn. App. 527, 538–39, 906 A.2d 14 (2006).

"On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 199.

In support of their motion for summary judgment, the defendants and Schoenhorn submitted affidavits, with attached exhibits, from Schoenhorn, Schwartz, Wolfe, Grenger and Christine L. Chipman, an attorney employed by the law firm. In response, the plaintiff submitted his affidavit with attached exhibits. Our review of the record, including the affidavits submitted by the parties and responses to interrogatories and to requests for admissions, reveals that none of the material facts in this case is in dispute. The plaintiff's arguments focus instead on the legal conclusions drawn by the court. In its May 12 and July 25, 2006 memoranda of decision, the court separately addressed each of the forty-four counts of the plaintiff's complaint. The plaintiff has not persuaded us that the court's legal conclusions are either legally and logically incorrect or are

not supported by the material facts as set forth in its May 12 and July 25, 2006 memoranda of decision.

In addition, we find no merit in the plaintiff's argument that the court's finding of a genuine issue as to the existence and terms of a contract between the plaintiff and Schoenhorn was inconsistent with its legal conclusion that the defendants' possession of the boxes was not unauthorized, wrongful, in breach of contract or otherwise improper. In other words, the plaintiff contends that if Schoenhorn breached an implied contract with him, that breach necessarily must be imputed to Schoenhorn's agents, the defendants. "[I]t is a general rule of agency law that the [principal] in an agency relationship is bound by, and liable for, the acts in which his agent engages with authority from the principal, and within the scope of the agent's employment." (Internal quotation marks omitted.) See *Hudson United Bank* v. *Cinnamon Ridge Corp.*, 81 Conn. App. 557, 572–73, 845 A.2d 417 (2004). The plaintiff cites no authority, however, and we are aware of none, in support of his proposition that an agent is bound by, and liable for, a principal's independent actions. Accordingly, we conclude that the court properly granted the defendants' motion for summary judgment with respect to counts one through sixteen and counts nineteen through twenty-four.

The judgment is affirmed.

In this opinion the other judges concurred.

KENNETH MARSHALL, JR. *v.* BRENDA J. SAWICKI (AC 28330)

Lavine, Robinson and Stoughton, Js.

Syllabus

The plaintiff, who had entered into a contract with the defendant business broker in connection with the plaintiff's decision to sell his catering business, sought to recover damages from the defendant for breach of

fiduciary duty. The trial court rendered judgment for the plaintiff on the complaint and on the defendant's counterclaim, from which the defendant appealed to this court. She claimed that the trial court improperly found that she had engaged in self-dealing to acquire an interest in the plaintiff's business in breach of her fiduciary duty to the plaintiff and that the trial court improperly determined that the burden of proof had shifted to her to show fair dealing and that she failed to meet that burden. Because the trial court did not set forth adequately the factual and legal basis on which it determined that the defendant had breached her fiduciary duty and it was unclear whether that court found specifically that the defendant acquired any interest in the plaintiff's business, and because the defendant did not seek an articulation of the trial court's decision, this court could not engage in meaningful review of the defendant's claim, as it could not be determined what evidence the trial court relied on to find that the burden of proof had shifted to the defendant to show fair dealing or the evidentiary basis from which the trial court concluded that the defendant failed to meet that burden.

Argued February 20—officially released June 17, 2008

Procedural History

Action to recover damages for breach of fiduciary duties owed to the plaintiff in connection with the sale of a certain business, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Hon. David W. Skolnick*, judge trial referee; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendant appealed to this court. *Affirmed.*

Oliver B. Dickins, for the appellant (defendant).

William H. Cashman, for the appellee (plaintiff).

Opinion

ROBINSON, J. The defendant, Brenda J. Sawicki, appeals from the judgment of the trial court, rendered in favor of the plaintiff, Kenneth Marshall, Jr. The defendant claims that the court erroneously found that she had acquired an interest in the plaintiff's business in

breach of the fiduciary duty she owed to him.[1] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the defendant's appeal. The plaintiff and the defendant's husband are first cousins. When it became apparent that the plaintiff's drug dependency rendered him unable to operate his catering business, Family Styles Professional Catering, LLC, his mother contacted the defendant, a business broker and consultant, to discuss selling the business. The parties entered into a contract in June, 2003, titled "Exclusive Right to Represent Seller Contract," to be in effect for six months from June 3 to December 3, 2003. Under the contract, the defendant, in her role as a broker, would produce a buyer for the business for a fee of 5 percent of the purchase price or exchange value. In October, 2003, a buyer, Ray Osland, offered to buy the business for $90,000 and agreed to pay $10,000 as a down payment. The defendant transferred by check approximately $3500 of that $10,000 to the plaintiff. The plaintiff entered a rehabilitation facility on December 1, 2003, two days prior to the expiration of the parties' contract, and remained in that program until September 5, 2004.

[1] The defendant presents three issues on appeal: "(1) Did the defendant . . . perform her contractual obligation under her listing contract with the plaintiff? (2) Does the burden of proof doctrine of *Dunham* v. *Dunham*, 204 Conn. 303, 322–23, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996), relating [to] the fairness of transactions between a fiduciary and his client, also apply to the question of whether such a transaction occurred? [and] (3) Was the trial court's finding that the defendant became a purchaser of the plaintiff's business and no longer a mere sales agent based on contract proposals, which were not signed or adopted by the defendant, clearly erroneous." (Internal quotation marks omitted.)

After considering the entire record, the parties' appellate briefs and arguments, it appears that the only issue in this case is whether the court found that the defendant acquired an interest in the plaintiff's business, thereby shifting the burden of proof to her to show fair dealing by clear and convincing evidence.

The parties disagree on the events that followed Osland's payment of the $10,000 deposit. The plaintiff maintains that on December 1, 2003, Osland purchased a 50 percent interest in the business and that the defendant obtained the remaining interest. The defendant asserts that she applied approximately $6500 of Osland's deposit toward the payment of the business' outstanding bills to maintain the business pending its sale and at the direction of the plaintiff's mother. She further maintains that the closing with Osland never occurred because Osland discovered that the equipment had been sold, the ovens did not work and the business did not pass health inspections. The defendant's belief was that after Osland refused to proceed with the closing, the plaintiff and Osland agreed to work together to market and to sell the business to someone else. Thus, she never acquired any interest in the business. What the parties do agree on is that in April, 2004, Osland sold Family Styles Professional Catering, LLC, renamed Celebrations Catering, LLC, to Lunch Depot, LLC, for $25,000. The parties also do not dispute that the defendant never received any compensation under the contract. Neither the plaintiff nor the defendant were able to provide an explanation for how or why Osland became the sole owner of the business or how the plaintiff lost all of his interest in the business.

In September, 2004, the plaintiff brought this action against the defendant for breach of fiduciary duty. The defendant counterclaimed that the plaintiff had breached their contract because he had not notified her of an earlier offer to purchase or that the equipment had been sold. At trial, the plaintiff offered into evidence (1) the defendant's business card, (2) an early offer from his friend to buy the business, (3) a purchase and sale agreement between the plaintiff and the defendant as the sellers and Osland as the buyer, signed by the

plaintiff as the purchaser and as the seller, (4) a purchase and sale agreement between the plaintiff as the seller and the defendant as the buyer, signed by the plaintiff as the seller, (5) bank and utility statements relating to the business, (6) an e-mail from the business' landlord providing an extension to the notice to quit the premises, (7) the parties' contract and (8) the business' profit and loss statements for 2001 and 2002. The defendant offered into evidence (1) a document giving the plaintiff's mother power of attorney, signed by the plaintiff, (2) a bank statement and (3) a bill of sale of the business to Lunch Depot, LLC, signed by Osland. After a two day trial, the court rendered judgment in favor of the plaintiff and awarded him $79,293.57 in damages and costs. This appeal followed. Additional facts will be set forth where necessary.

As a preliminary matter, we set forth our standard of review. On appeal, the defendant claims that the court erroneously determined that she had engaged in self-dealing to acquire an interest in the plaintiff's business in breach of her fiduciary duty to him. This claim is subject to the clearly erroneous standard of review. See *Spector* v. *Konover*, 57 Conn. App. 121, 126, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000). "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. . . . In determining whether the court's decision was clearly erroneous, we must examine the court's decision in the context of the heightened standard of proof imposed on a fiduciary." (Citations omitted; internal quotation marks omitted.) Id., 126–27.

"A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill

or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. . . . Proof of a fiduciary relationship therefore imposes a twofold burden upon the fiduciary. Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Citations omitted; internal quotation marks omitted.) *Dunham* v. *Dunham*, 204 Conn. 303, 322–23, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996); see also *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 455–57, 844 A.2d 836 (2004).[2]

In the present case, the defendant seems to argue that because the court erroneously found that she had

[2] Our Supreme Court stated in *Cadle Co.* that "[a]lthough not always expressly stated, the basis upon which the aforementioned burden shifting and enhanced burden of proof rests is, essentially, that undue influence will not be presumed . . . however . . . where a fiduciary relation exists between the parties to a transaction or contract, and where one has a dominant or controlling force or influence over the other. . . . [*I*]*f the superior party obtains a possible benefit*, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract. . . . Therefore, it is only when the confidential relationship is shown together with suspicious circumstances, or where there is a transaction, contract, or transfer between persons in a confidential or fiduciary relationship, and where the dominant party is the beneficiary of the transaction, contract, or transfer, that the burden shifts to the fiduciary to prove fair dealing. . . . [W]hen a breach of fiduciary duty is alleged, and the allegations concern fraud, self-dealing or a conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 456–57.

acquired an interest in the plaintiff's business, it improperly determined that the burden of proof had shifted to her to show fair dealing and that she failed to meet that burden of proof. To support her argument, she relies on *Ramin* v. *Ramin*, 281 Conn. 324, 349, 915 A.2d 790 (2007),[3] and *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 455–57, to assert that *Dunham* requires the plaintiff to show a tainted transaction before the burden shifts to the fiduciary to show fair dealing by clear and convincing evidence. The defendant, however, has failed to provide this court with an adequate record to review her claim.

"[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 defendant's claims] would be entirely speculative." *Cianbro Corp.* v. *National Eastern Corp.*, 102 Conn. App. 61, 72, 924 A.2d 160 (2007). In this case, the court did not set forth adequately the factual and legal basis on which it determined that the defendant breached her fiduciary duty.

In its memorandum of decision, the court determined that a fiduciary relationship existed between the parties and that the defendant had failed to sustain her burden of proving fair dealing. The court observed that "any interest the plaintiff had in this business had evaporated" by the time Osland sold the business to the Lunch Depot, LLC, but did not find any facts in relation to that transaction. More importantly, it was unclear whether the court found specifically that the defendant

[3] "[O]nce it has been shown that a fiduciary has engaged in self-dealing, he has the burden to establish the fairness of the transaction by clear and convincing evidence . . . ." (Citation omitted.) *Ramin* v. *Ramin*, supra, 281 Conn. 349–50.

acquired any interest in the plaintiff's business. With respect to the purchase and sales agreement between the plaintiff and the defendant, the court stated: "It can be seen that the defendant is now a purchaser of the plaintiff's business and no longer a mere sales agent. This agreement, however, contains the plaintiff's signature but no signature of the defendant. As such, the court cannot find that [the document] constitutes a binding agreement to purchase." Similarly, after discussing the sales agreement between the plaintiff and the defendant as the sellers and Osland as the buyer, the court observed: "It would appear, therefore, that under the defendant's direction, the plaintiff now had a minority ownership interest in his business. Once again, however, this sales agreement bears only the signature of the plaintiff, who signed both as the purchaser and as the seller." Thus, the court did not articulate in its memorandum of decision the evidentiary basis from which it arrived at its findings and conclusions.

"It is well established that [i]t is the appellant's burden to provide an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli*, *Inc.*, 265 Conn. 210, 232, 828 A.2d 64 (2003). In the present case, we cannot determine what evidence the court relied on to determine that the burden of proof had shifted to the defendant to show fair dealing or the evidentiary basis from which it concluded that the defendant failed to meet her burden. Without further articulation, we cannot engage in meaningful review of the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

SOMERS WEST TOWNE HOUSES, INC. *v.* LAS PROPERTIES LIMITED PARTNERSHIP
(AC 28669)

DiPentima, Beach and West, Js.

Syllabus

The plaintiff condominium association sought to foreclose a statutory lien for unpaid common charges on a condominium unit owned by the defendant partnership after the defendant refused to pay its unit's budgetary assessments. The defendant, by way of counterclaim, challenged the legality of the vote ratifying the proposed budget for the condominium community of twelve units, which resulted in the imposition of the charges at issue here. The budget had been ratified by a vote of five in favor and six opposed. The defendant's sole general partner, S, had not attended the meeting at which the ratification vote was taken. The trial court granted the plaintiff's motions for summary judgment on the complaint and on the counterclaim filed by the defendant and rendered judgment thereon, from which the defendant appealed to this court. *Held*:

1. The defendant could not prevail on its claim that the trial court improperly decided an issue of material fact and made an incorrect conclusion thereon when it interpreted the applicable provision (§ 47-245 [c]) of the Common Interest Ownership Act (§ 47-200 et seq.) and concluded that the budget had been ratified pursuant to § 47-245 (c), which provides that unless "at that meeting" a majority of "all unit owners" rejects a budget proposal, the budget is ratified, whether or not a quorum is present; because the meaning of a statute is a question of law, the trial court properly engaged in the act of construing the meaning of § 47-245 (c), and that court properly concluded that the statute clearly provides that a majority of all unit owners is necessary to reject a budget proposal, which did not occur here.
2. The trial court properly determined that only S was authorized to cast a vote as the owner of the defendant's unit and did not decide an issue of material fact in making that determination, which involved questions of law concerning the construction of a statute and the interpretation of the plaintiff's bylaws; because the plaintiff's records demonstrated that the defendant owned its unit as a partnership, not as a group of individuals, because the plaintiff's bylaws provided that the vote of a partnership may be cast by any general partner of the owning partnership in the absence of an express notice of the designation of a specific person by the owning partnership, an alleged co-owner of the defendant's unit properly was denied the right to vote on behalf of that unit, as the record showed that S was not present at the meeting and no notice was

given of the designation of a specific person entitled to vote on behalf of the defendant partnership.

Argued March 27—officially released June 17, 2008

Procedural History

Action to foreclose a statutory lien for unpaid common charges on a condominium unit owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the defendant filed a counterclaim; thereafter, the court, *Sferrazza, J.*, granted the plaintiff's motions for summary judgment on the complaint and on the counterclaim and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed.*

James W. Sherman, with whom was *Bruce D. Tyler*, for the appellant (defendant).

Patricia A. Ayars, for the appellee (plaintiff).

Opinion

WEST, J. The defendant, LAS Properties Limited Partnership, appeals from the summary judgment rendered by the trial court in favor of the plaintiff, Somers West Towne Houses, Inc. On appeal, the defendant claims that the court improperly decided two genuine issues of material fact and made incorrect conclusions thereon. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of the defendant's appeal. The plaintiff is a common interest community owners association, which consists of twelve units. Unit ten in this community is owned by the defendant. Lucille Sherman is the sole general partner of the defendant. On August 30, 2004, a unit owners' meeting was held regarding the ratification of a proposed budget for the community. Sherman did not attend the meeting. The other eleven unit owners attended the meeting and voted on the

ratification of the budget proposal. The budget was ratified by a vote of five for ratification and six against it.[1] Thereafter, the defendant refused to pay its unit's budgetary assessments, and, as a consequence, the plaintiff brought a foreclosure action against the defendant in January, 2005. In February, 2005, the defendant filed a counterclaim against the plaintiff. The gravamen of the counterclaim is premised on the illegality of the ratification vote. In March, 2006, the court rendered summary judgment in favor of the plaintiff on its complaint as to the liability of the defendant. On January 18, 2007, the plaintiff filed a motion for summary judgment on the counterclaim and submitted documents and affidavits in support of the same. Although the defendant filed a memorandum of law in opposition to the motion for summary judgment, it did not submit any documents or affidavits in support thereof. On March 8, 2007, the court granted the plaintiff's motion for summary judgment, rendered judgment in favor of the plaintiff on the counterclaim and issued a memorandum of decision. This appeal followed. Additional facts will be set forth as necessary.

We first set forth the legal principles that guide our review. "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 moving for

[1] The minutes of the August 30, 2004 meeting provide in relevant part: "According to our Association bylaws, seven out of twelve owners have to oppose a decision by the Association Executive Board that requires a vote. The situations to which this voting rule applies are ratifications to the bylaws and an increase of common expenses by more than 15 percent of current amount due." In the present case, because only six owners voted to oppose the budget proposal, the budget proposal was ratified.

summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 26–27, 930 A.2d 682 (2007).

I

The defendant first claims that the court improperly decided an issue of material fact and made an incorrect conclusion thereon. Specifically, the defendant asserts that the court improperly engaged in interpreting the meaning of General Statutes § 47-245 (c) and subsequently concluded improperly that the budget was ratified pursuant to that statute.

First, the defendant argues that by interpreting the meaning of § 47-245 (c), the court improperly decided an issue of fact. We do not agree. "Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Trumbull* v. *Palmer*, 104 Conn. App. 498, 507, 934 A.2d 323 (2007), cert. denied, 286 Conn. 905, 944 A.2d 981 (2008). Because the meaning of a statute is a question of law, the court properly engaged in the act of construing the meaning of the statute at issue in the present case.

Second, the defendant argues that the court improperly concluded that the budget was ratified pursuant to § 47-245 (c) of the Common Interest Ownership Act, General Statutes § 47-200 et seq. In its memorandum of decision, the court noted that the statute provides that "unless 'a majority of *all* unit owners' rejects a budget proposal, 'the budget is ratified, whether or not a quorum is present' . . . ." (Emphasis in original.) The court then concluded that "in order to defeat ratification in the present situation, at least seven of the twelve unit owners would have had to oppose the proposal. Because only six nay votes were cast, the budget was deemed ratified under . . . § 47-245 (c)."

In its brief, the defendant argues that the court improperly omitted the words "at that meeting" when citing the statute in support of the conclusion that the budget had been ratified. The defendant argued, therefore, that the court incorrectly concluded that a majority of *all* unit owners was needed to reject the budget proposal. Instead, the defendant argued, only a majority of the unit owners *present at the meeting* was needed to reject the budget proposal. We disagree.

Section 47-245 (c) provides in relevant part: "Unless at that meeting a majority of all unit owners, or any larger vote specified in the declaration, reject the budget, the budget is ratified, whether or not a quorum is present. . . ."[2] It is clear from the wording of the statute

[2] General Statutes § 47-245 (c) provides: "Within thirty days after adoption of any proposed budget for the common interest community, the executive board shall provide a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than thirty days after mailing of the summary. Unless at that meeting a majority of all unit owners, or any larger vote specified in the declaration, reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board."

that "at that meeting" is not modifying "all unit owners." "[A]t that meeting" refers to the meeting mentioned in the first sentence of § 47-245 (c). See footnote 2. Therefore "at that meeting" describes simply where the vote on the proposed budget is to take place. The statute clearly provides that a majority of *all unit owners* is necessary to reject a budget proposal. As a result, we conclude that the court interpreted the statute correctly and properly concluded that a majority of all unit owners was necessary to reject the proposed budget.

II

The defendant next claims that the court improperly decided another issue of material fact and made an incorrect conclusion thereon. Specifically, the defendant asserts that the court decided the issue of whether the general partner of the defendant was the only individual with the authority to vote as the sole owner of unit ten and concluded improperly that, in fact, the general partner was the only individual with the authority to vote as the owner of unit ten.

First, the defendant argues that the court's concluding that the general partner of the defendant was the only individual with the authority to vote as the sole owner of unit ten constituted the court's finding a material fact. We do not agree. The court came to this conclusion in several steps. First, the court stated that "[t]he act defines . . . a 'unit owner' as 'a declarant or other person who owns a unit.' General Statutes § 47-202 (32). A partnership is a 'person' under this definition. General Statutes § 47-202 (22)." Next, the court cited the defendant's bylaws in stating that "[t]he bylaws of the plaintiff specify that if a partnership owns a unit, any vote on behalf of the partnership 'may be cast by any *general* partner of the owning partnership in the absence of express notice of the designation of a specific person by the owning partnership . . . .' " (Emphasis in original.)

Finally, the court concluded that Sherman, the sole general partner of the defendant, failed to attend the August 30, 2004 meeting and that in addition, "[n]o notice of a designated person entitled to vote on behalf of the partnership instead of the general partner was given, express or otherwise."[3]

The court came to this conclusion by construing a statute, interpreting the plaintiff's bylaws and drawing a conclusion on the basis of uncontested facts. The court, therefore, did not decide an issue of material fact. As noted previously, construing a statute is a question of law. See part I. Additionally, interpreting the bylaws of the plaintiff is also a matter of law. See *Weldy* v. *Northbrook Condominium Assn., Inc.*, 279 Conn. 728, 736, 904 A.2d 188 (2006) ("an examination of the relevant condominium documents . . . presents a question of law that we review *de novo*" [emphasis in original]). Finally, drawing the factual conclusion that Sherman was the only person with the authority to vote, in the absence of any contested issue of material fact, is proper pursuant to the standard for rendering judgment on a motion for summary judgment. See Practice Book § 17-49.

Next, the defendant claims that the court improperly concluded that only the general partner of the defendant was authorized to cast a vote as the owner of unit ten. Again, we disagree.

The following additional facts are relevant to the defendant's claim. Thomas Sherman, a resident of unit ten, was present at the August 30, 2004 meeting. He stated, at the meeting, that he did not know who owned unit ten and did not know if he was authorized to vote on behalf of the owner of unit ten. Additionally, he had no document authorizing him to vote on behalf of the

[3] The defendant presented no evidence to demonstrate that any individual, other than Sherman, was authorized to vote on behalf of the defendant.

owner of unit ten. After the records of the plaintiff were examined and it was determined that unit ten was owned by the defendant, the president presiding at the meeting, Frank LoBianco, determined that Thomas Sherman was not qualified to vote on behalf of unit ten. The eleven unit owners present then voted on the proposed budget. Six owners voted to oppose it, while five owners voted to accept it. Therefore, the proposed budget was adopted because a majority of all unit owners, namely, seven, did not vote to reject the budget.

The defendant argues that Lucille Sherman, the general partner, was not the only person who was authorized to vote on behalf of unit ten. In fact, it argues that a co-owner, such as Thomas Sherman, was authorized to cast a vote pursuant to a valid proxy. The defendant cites several authorities for this proposition. For instance, it cites article four of the certificate of incorporation of the plaintiff, which provides in relevant part: "If a unit is owned by more than one person, such persons shall agree among themselves how a vote for such unit's membership is to be cast. . . . A vote by a co-owner for the entire unit's membership interest shall be deemed to be pursuant to a valid proxy, unless another co-owner of the same unit objects at the time the vote is cast, in which case such membership's vote shall not be counted." The defendant also cites § 3-110 (a) of the Uniform Common Interest Ownership Act, Public Acts 1983, No. 83-474, and § 3.8 of the plaintiff's bylaws. All of these provisions make the same assertion as article four of the plaintiff's certificate of incorporation cited previously, namely, that when a unit is owned by more than one person, a vote by a co-owner shall be deemed to be pursuant to a valid proxy.

Section 47-202 (32) provides in relevant part: " 'Unit owner' means a declarant or other person who owns a unit . . . ." Section 47-202 (22) provides: " 'Person'

means an individual, corporation, limited liability company, business trust, estate, trust, *partnership*, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity." (Emphasis added.) The records of the plaintiff demonstrate that the defendant owned unit ten, as a partnership, not as a group of specified individuals. Therefore, the bylaws of the plaintiff determine the voting rights of a partnership owning a condominium as part of the plaintiff's association.[4] Section 3.8 (c) of the plaintiff's bylaws is the applicable provision. It provides in relevant part: "The vote of a partnership may be cast by any general partner of the owning partnership in the absence of express notice of the designation of a specific person by the owning partnership. The moderator of the meeting may require reasonable evidence that a person voting on behalf of a corporation, partnership or business trust owner is qualified so to vote." In the present case, the general partner, Lucille Sherman, was not present at the August 30, 2004 meeting, and no notice was given of the designation of a specific person entitled to vote on behalf of the partnership. Therefore, Thomas Sherman properly was denied the right to vote on behalf of unit ten, and the proposed assessments were accepted properly. As a result, we conclude that the court properly concluded that the general partner of the defendant was the only individual with the authority to vote as the sole owner of unit ten.

The judgment is affirmed.

In this opinion the other judges concurred.

[4] Although the defendant cites several different authorities to support its argument that the general partner was not the only individual authorized to vote on behalf of unit ten, all of the authorities it cites refer to the voting rights of multiple unit owners. In the present case, the only evidence presented indicated that the defendant's unit had only one owner—the partnership, itself. The defendant presented no evidence to suggest that the defendant partnership had multiple owners. Therefore, the authorities to which the defendant cited do not apply to the present situation.

STATE OF CONNECTICUT *v.* LEON TELFORD (AC 27162)

Bishop, Harper and Peters, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, sexual assault in the third degree and risk of injury to a child in connection with the sexual abuse of a twelve year old girl, the defendant appealed to this court, challenging the admission of a redacted videotape and transcript of an interview of the complainant by a clinical social worker. *Held*:

1. The defendant could not prevail on his claim that the medical care exception to the rule against hearsay did not authorize admission of the videotape into evidence because the state did not establish that the complainant understood that her statements to the social worker were part of the process of medical diagnosis or treatment; although the medical treatment exception to the hearsay rule requires that the challenged statements be both pertinent to treatment and motivated by a desire for treatment, that requirement may be satisfied inferentially, and, in this case, the complainant's testimony permitted an inference that she understood that her statements to the social worker were made for the purpose of treatment.
2. The defendant's claim that the trial court misapplied the medical treatment exception in admitting the redacted videotape and transcript into evidence because the interview had been conducted for a forensic rather than for a medical purpose was unavailing; the jury reasonably could have found from the evidence presented that the clinic proceedings in this case were conducted for a legitimate medical purpose.
3. The defendant could not prevail on his claim that the redacted videotape and transcript were inadmissible at trial because this evidence unfairly bolstered the complainant's testimony; the defendant did not claim that the videotape evidence was irrelevant and provided no authority to support his contention that relevant evidence is inadmissible simply because it is corroborative.

Argued March 11—officially released June 17, 2008

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the first degree, sexual assault in the third degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict and judgment of guilty of one

count each of sexual assault in the first degree, sexual assault in the third degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

William B. Westcott, special public defender, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Roger S. Dobris*, senior assistant state's attorney, for the appellee (state).

Opinion

PETERS, J. In this criminal appeal from a conviction of sexual assault and risk of injury to a child, the defendant contests the admission into evidence of the redacted videotape and transcript of a diagnostic interview of the minor complainant, a twelve year old girl. The interview in question was conducted by a licensed clinical social worker at the Yale Sexual Abuse Clinic at Yale-New Haven Hospital. We conclude that this evidence properly was admitted under the medical exception to the rule against hearsay and affirm the judgment of the trial court.

In a nine count information filed on February 25, 2004, the state charged the defendant, Leon Telford, with three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), three counts of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (B) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). These charges related to three alleged incidents involving the defendant's conduct with respect to the twelve year old complainant. After a jury trial, the defendant was found guilty only of the charges arising out of one of the three alleged incidents. The trial court sentenced him to a total effective term

of fifteen years, followed by five years of special parole. The defendant has appealed.

The jury reasonably could have found the following facts regarding the incident of sexual abuse for which it found the defendant guilty. On January 8, 2004, the complainant, who was living in New Haven with her aunt, who is her legal guardian, went to visit her mother and siblings at a different address in the city. The defendant, who was living there with her mother, kissed the complainant and abused her sexually by inappropriately touching her breasts and putting his fingers inside her genitalia. Although the complainant protested orally, she did not immediately report the defendant's conduct to anyone else.

Several weeks later, on January 26, 2004, the complainant told an adult volunteer in her after-school program that she had been sexually abused. The school notified the complainant's aunt as well as her mother and the defendant. The defendant and the complainant's mother both responded by accusing the complainant of lying. The school also notified the police department.

On the following day, the complainant was examined by a pediatrician. Although the pediatrician did not find any physical confirmation of an inappropriate sexual encounter, she promptly reported the alleged sexual abuse to an investigator for the department of children and families (department). The department investigator then herself interviewed the complainant, recommended therapy or counseling at the Clifford Beers Clinic and referred the complainant for further evaluation by the Yale Sexual Abuse Clinic.[1]

[1] As authorized by the department pursuant to General Statutes § 17a-106a, the Yale clinic provides a multidisciplinary team response to allegations of sexual abuse. The statute provides in relevant part: "(a) The Commissioner of Children and Families, may as department head of the lead agency, and the appropriate state's attorney establish multidisciplinary teams for the purpose of reviewing particular cases or particular types of cases or to coordinate the prevention, intervention and treatment in each judicial district

At the Yale Sexual Abuse Clinic, which is located in the primary care center of Yale-New Haven Hospital, a licensed clinical social worker conducted a videotaped diagnostic interview of the complainant on January 30, 2004. The social worker subsequently discussed this interview with the clinic's pediatric nurse practitioner. Approximately one month later, the nurse practitioner herself interviewed the complainant at the clinic and conducted a physical examination.

At the defendant's trial, the jury heard testimony describing the complainant's allegations of sexual abuse from the complainant herself and from the after-school volunteer, the pediatrician, the department investigator, the social worker and the nurse practitioner. No issue has been raised on appeal about the admissibility of this evidence.[2]

The evidence that is in dispute is the redacted videotape and transcript of the social worker's interview of the complainant at the Yale Sexual Abuse Clinic.[3] At trial, the defendant objected to their admission on two

to review selected cases of child abuse or neglect. The purpose of such multidisciplinary teams is to advance and coordinate the prompt investigation of suspected cases of child abuse or neglect, to reduce the trauma of any child victim and to ensure the protection and treatment of the child. . . ." General Statutes § 17a-106a.

[2] In sexual assault cases, under the doctrine of "constancy of accusation," a complainant's out-of-court statements to third party witnesses are admissible to a limited extent to corroborate the complainant's testimony. See *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996) (en banc). Statements about the identity of the defendant are admissible under *Troupe*. Id.; see also C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 6.37.2, pp. 388–89 (highlighting potential for prejudice inherent in constancy of accusation doctrine).

In accordance with *Troupe*, the trial court gave the jury a "constancy of accusation" witness instruction to inform the jury that the testimony of the after-school volunteer and the department investigator was admissible solely to corroborate the complainant's testimony and not for substantive purposes. See *State* v. *Troupe*, supra, 237 Conn. 304.

[3] The trial court, having reviewed the evidence, redacted the videotape and transcript during trial.

grounds: (1) the inapplicability of the medical treatment exception to the hearsay rule and (2) the improper bolstering of the complainant's credibility. The defendant renews these objections in his appeal to this court.

I

THE MEDICAL TREATMENT EXCEPTION

The defendant maintains, for two reasons, that the medical treatment exception to the rule against hearsay did not justify admitting into evidence the redacted videotape and transcript of the interview of the complainant by the clinical social worker at the Yale clinic. He claims that (1) the record does not establish that the complainant understood her statements in this interview to be part of a process for obtaining medical treatment and (2) because a pediatrician already had examined the complainant, the record demonstrates that the interview was conducted not for diagnostic or treatment purposes, but rather to develop expert testimony to be used at trial. We disagree.

Our Supreme Court recently enunciated a two part standard of review for claims of evidentiary error. In *State* v. *Saucier*, 283 Conn. 207, 926 A.2d 633 (2007) (en banc), the court stated: "To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court . . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citations omitted.) Id., 218.

Pursuant to *Saucier*, we first must decide whether the trial court properly interpreted § 8-3 (5) of the Connecticut Code of Evidence (2000), which describes the medical treatment exception to the hearsay rule. This section provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) . . . A statement made for purposes of obtaining medical treatment or advice pertaining thereto and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical treatment or advice."

The legal principles relating to the medical treatment exception are well settled. Admissibility of out-of-court statements made by a patient to a medical care provider depends on whether the statements were made for the purposes of obtaining medical diagnosis or treatment; *State* v. *Kelly*, 256 Conn. 23, 44, 770 A.2d 908 (2001); and on whether the declarant's statements reasonably were related to achieving those ends. *State* v. *DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994). The term "medical" encompasses psychological as well as somatic illnesses and conditions. *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988).

In sexual abuse cases, statements made by the complainant about the identity of the person causing the injury may be found relevant to proper diagnosis and treatment. *State* v. *Kelly*, supra, 256 Conn. 45; see also C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 8.20.4, pp. 522–23. Furthermore, statements made by a sexual assault complainant to a social worker may fall within the exception if the social worker is found to have been acting within the chain of medical care. *State* v. *Cruz*, 260 Conn. 1, 10, 792 A.2d 823 (2002).

The defendant does not take issue with any of these established principles governing the admissibility of evidence under the medical care exception. He argues instead that, under the circumstances of this case, admission of the videotape was an improper application of these principles. Our review of these claims is plenary.[4] *State* v. *Saucier*, supra, 283 Conn. 218.

A

The defendant first claims that the medical care exception did not authorize admission of the videotape into evidence because the state did not establish that the complainant understood that her statements to the clinical social worker at the Yale Sexual Abuse Clinic were part of a process for her medical diagnosis or treatment. In his view, a predicate for the applicability of the hearsay exception is evidence that the declarant subjectively understood that she was describing what had happened to her so that she would obtain treatment. The state argues, in response, that such a subjective understanding need not be proven if the objective circumstances of the interview would support an inference that a juvenile declarant knew of its medical purpose.[5] We agree with the state.

Although "[t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment"; *State* v. *Dollinger*, 20 Conn. App. 530, 535, 568

[4] We apply the abuse of discretion standard of review to the defendant's bolstering claim in part II.

[5] The state also contends that the defendant did not preserve this claim at trial because he did not raise this specific ground in his challenge to the admissibility of the evidence in the trial court. The trial transcript reveals, however, that the defendant objected to the hearsay evidence on the ground that the declarant's statements to the social worker were not made "for the purpose of . . . a person seeking medical treatment." The claim merits review because the question of whether the complainant was seeking treatment falls within the scope of his objection at trial.

A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990); in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially. For instance, in *State* v. *Maldonado*, 13 Conn. App. 368, 372, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988), a Spanish speaking hospital security guard who was assisting an examining physician in taking the medical history of a three year old sexual abuse victim was permitted to testify about the victim's nonverbal assertions that indicated that her father had sexually abused her. We reasoned that the child's representations were reliable in light of her awareness that the security guard was questioning her on behalf of the examining physician and that she had a condition that necessitated medical treatment. Id. Similarly, in *State* v. *Dollinger*, supra, 536, a case involving a two year old victim, we observed: "Even if [the victim] was too young to formulate consciously the motive of advancing her own health by being truthful with the doctor, the facts and circumstances here are consistent with that purpose. [The victim's] complaint of pain, coupled with the physical manifestations of injury could have led the doctor, an expert in child sexual abuse, to conclude that the child was aware of her discomfort and her need for medical attention."[6]

[6] We note that because of the difficulty of determining whether a child subjectively understood the purpose of his or her statements, some jurisdictions have declined to apply the medical treatment exception in cases involving young children. See, e.g., *Webb* v. *Lewis*, 44 F.3d 1387, 1390–91 (9th Cir. 1994), cert. denied, 514 U.S. 1128, 115 S. Ct. 2002, 131 L. Ed. 2d 1003 (1995); *United States* v. *White*, 11 F.3d 1446, 1450 (8th Cir. 1993) (insufficient evidence to establish that child-complainant understood social worker was conducting interview in order for social worker or another to provide medical diagnosis or treatment); *Ring* v. *Erickson*, 983 F.2d 818, 820 (8th Cir. 1993) (no evidence that child knew she was talking to physician); *State* v. *Wade*, 136 N.H. 750, 756, 622 A.2d 832 (1993) (state failed to establish that child understood medical purpose of examination). Other jurisdictions, however, have looked to objective record evidence to determine whether the child declarant had the proper treatment motive. See, e.g., *United States* v. *Renville*, 779 F.2d 430, 438–39 (8th Cir. 1985) (physician explained purpose of examination to eleven year old complainant); *State* v. *Dever*, 64 Ohio St.

In this case, the complainant's testimony permitted an inference that she understood that her statements to the social worker were made for the purpose of treatment. Prior to the state's proffer of the redacted videotape and transcript into evidence, the complainant had testified that the defendant had touched her breasts and inside her genitalia and that this conduct had caused her to feel "upset," "mad" and "scared." In addition, when later shown an exhibit of a female body diagram, the complainant testified that she had first seen the diagram at Yale-New Haven Hospital, where she had talked to a woman about the sexual abuse. Given this testimony, and in light of our precedents, the trial court properly ruled that the complainant's statements were admissible under the medical treatment exception to the rule against hearsay.[7]

B

In the alternative, the defendant claims that the court misapplied the medical treatment exception in admitting the redacted videotape and transcript into evidence because the interview had been conducted for a forensic rather than for a medical purpose. Relying on the fact that the pediatrician's examination of the complainant had disclosed no physical evidence that she had been sexually abused, the defendant opines that there was no necessity for further examination of the complainant's mental or physical health. From this hypothesis, the defendant infers that the clinical social worker

3d 401, 410, 596 N.E.2d 436 (1992) ("[o]nce the child is at the doctor's office, the probability of understanding the significance of the visit is heightened and the motivation for diagnosis and treatment will normally be present"), cert. denied, 507 U.S. 919, 113 S. Ct. 1279, 122 L. Ed. 2d 672 (1993).

[7] In overruling the defendant's objection to the admission of this evidence, the trial court stated that "under these circumstances, where the statement is made by the declarant . . . in a hospital, in a clinic, to a person who is part of a . . . medical services team . . . the person seeking medical treatment, i.e., the young girl is likely to want to tell the truth." The court also observed that the complainant "was plainly in a position where she was seeking medical treatment."

at the Yale Sexual Abuse Clinic was motivated to interview the complainant not by concerns about the victim's mental or physical health but by a desire to educate a nurse who was her colleague at the clinic so that the nurse subsequently would be able to present expert testimony at the defendant's trial.[8] We disagree.

As an initial matter, it is questionable whether the defendant adequately preserved this claim for appellate review. At trial, the defendant objected to the admission of the videotape and the transcript on the ground that the pediatrician's prior medical examination and the social worker's admission that she was not herself a medical treatment provider demonstrated the inapplicability of the medical exception to the hearsay rule. This objection was at best tangential to his present claim that the videotape served no medical purpose but was produced to assist a nurse at the clinic in obtaining information for her own subsequent interview of the complainant and for her subsequent testimony as an expert witness at trial. See *Daley* v. *McClintock*, 267 Conn. 399, 404–405, 838 A.2d 972 (2004). The defendant does not argue that this claim is of constitutional magnitude and therefore merits *Golding* review; see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); or that it is eligible for plain error review. See Practice Book § 60-5; *Sorrentino* v. *All Seasons Services, Inc.*, 245 Conn. 756, 768, 717 A.2d 150 (1998).

Even if we were to reach the merits of the defendant's claim, he could not prevail. Having rejected the defendant's contention that a physician's physical examination of the complainant is dispositive of the complainant's need for further medical counseling, we have established that a fact finder reasonably could have found that the clinic proceedings in this case were conducted for a medically legitimate purpose. Our

[8] It is undisputed that the state qualified the nurse as an expert witness.

Supreme Court came to a similar conclusion in *State* v. *Arroyo*, 284 Conn. 597, 632–33, 935 A.2d 975 (2007). On this record, the fact that another medical professional interviewer subsequently had access to the videotape and transcript of the complainant's interview is irrelevant to the admissibility of this documentary evidence at trial. *State* v. *Cruz*, supra, 260 Conn. 10. As a matter of law, it follows that the trial court's evidentiary ruling was proper.

II

BOLSTERING

The defendant's final claim on appeal is that the redacted videotape and transcript were inadmissible at trial because this evidence unfairly bolstered the complainant's testimony.[9] Because he raised this claim at trial, it is properly before us for review. We agree, however, with the state that it has no merit.

To prevail on this claim, the defendant must establish that the trial court's admission of the contested evidence was an abuse of the court's exercise of its discretion. *State* v. *Saucier*, supra, 283 Conn. 218. "[T]he trial court has broad discretion in ruling on the admissibility

[9] The defendant's argument highlights the potential for undue prejudice arising from repeated iteration of the details of a sexual assault, which was the same concern animating our Supreme Court's decision in *State* v. *Troupe*, 237 Conn. 284, 677 A.2d 917 (1996) (en banc). In *Troupe*, the court narrowed the constancy of accusation exception to the hearsay rule, declaring that "a person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator." Id., 304. The *Troupe* court also made clear, however, that its ruling "does not affect those cases in which the details of a sexual assault complaint are otherwise admissible"; id., 304 n.19; including the medical treatment exception to the rule against hearsay. *State* v. *Williams*, 65 Conn. App. 449, 461, 783 A.2d 53, cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001).

. . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . This deferential standard is applicable to evidentiary questions involving hearsay, generally . . . and to questions relating to prior consistent statements, specifically." (Citations omitted; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 801–802, 709 A.2d 522 (1998).

Emphasizing that his conviction was based entirely on the credibility of the complainant's testimony about a single incident, the defendant urges us to take a critical view of the state's use of the medical evidence adduced in the complainant's videotaped interview. In his view, the videotape was both prejudicial and nonessential, because it simply corroborated the complainant's testimony at trial.

The state emphasizes, however, that the defendant has not argued that the videotape evidence should have been excluded because it was irrelevant. As the state persuasively argues, viewing the videotape permitted the jury to scrutinize the complainant's version of events at a point in time much closer to the events themselves than her trial testimony.

Furthermore, the defendant has not cited any authority in support of his contention that relevant evidence is inadmissible simply because it is corroborative. His argument perhaps can be read as an implied criticism of the doctrine of constancy of accusation as articulated in *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996) (en banc), but he has not raised that issue in this appeal. Without a plausible claim that the trial court's evidentiary ruling deviated from the strictures set out

in *Troupe*, the defendant has not established an abuse of discretion in the court's admission of the transcript and the videotape into evidence in this case.

The judgment is affirmed.

In this opinion the other judges concurred.

RUI M. NASCIMENTO *v.* CONNECTICUT LIFE AND CASUALTY INSURANCE COMPANY (AC 28856)

Flynn, C. J., and McLachlan and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries under the uninsured motorists provision of his automobile insurance policy with the defendant insurance company. The plaintiff had been injured when his vehicle was struck on the driver's side by a stolen vehicle that the police were pursuing and that was driven by an uninsured motorist. The trial court rendered judgment in favor of the plaintiff, finding that he was 25 percent comparatively negligent. On the plaintiff's appeal to this court, *held*:

1. Contrary to the plaintiff's claim, the trial court's factual findings were not clearly erroneous and were supported by the evidence in the record, which included the plaintiff's testimony, the exhibits and a police report of the accident scene.
2. The plaintiff could not prevail on his claim that the trial court improperly concluded that he violated the statute (§ 14-283 [e]) that requires the operator of a motor vehicle in the immediate vicinity of an approaching emergency vehicle to drive to a position parallel to the right curb of the roadway and to stop and remain there until the emergency vehicle has passed; although there was no finding regarding the distance between the police vehicles and the plaintiff's vehicle at the moment the accident occurred, the trial court's findings supported the conclusion that the plaintiff was within the immediate vicinity of the police vehicles and was thus required to comply with the provisions of § 14-283 (e), and the plaintiff's claim that he did not violate § 14-283 (e) because it was more practical to grant the right-of-way by turning left was unavailing, the trial court having implicitly rejected that claim and it not being within the province of this court to retry the facts or to pass on the credibility of the witnesses.
3. The trial court's finding that the plaintiff was 25 percent comparatively negligent was not clearly erroneous; that court reasonably could have

concluded that the plaintiff's conduct was a proximate cause of the accident on the basis of the evidence presented, which showed that the plaintiff saw the approaching police vehicles prior to attempting to turn left and that, rather than stop his vehicle or move to the right side of the road, he continued to turn left and was struck by the vehicle that the police were pursuing.

Argued March 28—officially released June 17, 2008

Procedural History

Action to recover uninsured motorists benefits due under a policy of automobile insurance issued by the defendant, brought to the Superior Court in the judicial district of New Britain and tried to the court, *R. Robinson*, *J.*; thereafter, the court, *Pittman*, *J.*, granted the parties' motion for judgment and rendered judgment for the plaintiff, from which the plaintiff appealed to this court. *Affirmed.*

Peter M. Appleton, for the appellant (plaintiff).

Edward W. Gasser, with whom, on the brief, was *Kirby G. Huget*, for the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Rui M. Nascimento, appeals from the judgment of the trial court, rendered after a trial to the court, finding him 25 percent comparatively negligent for damages sustained in an automobile accident. On appeal, the plaintiff claims that (1) the court's findings of fact were contrary to the evidence presented at trial, (2) the court improperly concluded that he violated General Statutes § 14-283 (e) and (3) the evidence presented at trial did not support the court's finding of comparative negligence. We affirm the judgment of the trial court.

The following facts are necessary for the resolution of the plaintiff's appeal. In the early morning of June 2, 2002, the plaintiff was driving his automobile on South Main Street in West Hartford. He was intending to turn

left onto New Britain Avenue when he noticed police cars approaching from about one quarter of a mile behind him with their lights flashing. The plaintiff, having the traffic signal in his favor, attempted to turn left rather than immediately driving to the right side of the road. As he was turning, the plaintiff's automobile was struck on the driver's side by a stolen vehicle that the police were pursuing. The stolen vehicle was driven by an uninsured motorist, Thomas J. Homar. As a result of the collision, the plaintiff's automobile was pushed into a telephone pole and damaged. The plaintiff suffered injuries to his upper back and lower neck that required medical treatment.

The plaintiff thereafter filed a complaint against the defendant, Connecticut Life & Casualty Insurance Company, seeking to recover damages under the terms of his automobile insurance policy. The defendant pleaded comparative negligence as a special defense. Prior to trial, the parties stipulated to the maximum value of the plaintiff's personal injuries, medical bills and lost wages from his regular employment and that Homar was uninsured at the time of the accident. The parties agreed to a trial to the court and limited the issues to the plaintiff's comparative negligence and whether he could recover lost profits from a business venture he had started prior to the accident. The matter subsequently was tried to the court on May 31, 2006.

In its memorandum of decision, the court found the plaintiff to be 25 percent comparatively negligent.[1] The court also found that the plaintiff was not entitled to recover lost profits from his business venture. The plaintiff challenged the court's determination of comparative negligence but has not challenged the court's

[1] The court issued its memorandum of decision on September 26, 2006. On November 6, 2006, the court issued a corrected memorandum of decision. All references to the court's memorandum of decision refer to the November 6, 2006 corrected memorandum of decision.

denial of lost profits. Additional facts will be set forth as necessary.

I

The plaintiff first claims that several of the court's findings of fact were contrary to the evidence. His claim rests exclusively with portions of the following excerpt from the court's memorandum of decision: "On June 2, 2002, at around 5 a.m., the plaintiff was driving his motor vehicle from his home and on his way to work in West Hartford. The plaintiff drove his vehicle down South Main Street in West Hartford. When he approached the exit ramp for Interstate 84 he could see police cars coming over the highway overpass. The police cars were about one quarter of a mile from where the plaintiff was located. The plaintiff continued to drive and was in the left lane, intending to turn left onto New Britain Avenue. The traffic signal was in the plaintiff's favor. The plaintiff had not made it to the intersection when he noticed that the police cars were now close to him. Upon seeing the lights of the approaching police cars, the plaintiff did not immediately pull over to the right but instead attempted to execute his left turn and was struck on the driver's side of his car by a stolen car that was being pursued by the police." The plaintiff argues that segments of this excerpt are not supported by the evidence and, in fact, are contrary to the evidence. We disagree.

The standard of review that governs a trial court's findings of fact is well established. "Questions of fact are subject to 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. . . . Because it is the trial court's function to weigh

the evidence . . . [the reviewing court] gives great deference to its findings." (Internal quotation marks omitted.) *Reiner*, *Reiner & Bendett*, *P.C.* v. *Cadle Co.*, 278 Conn. 92, 107, 897 A.2d 58 (2006).

Upon review of the record and after considering the evidence, including reasonable inferences that may be drawn therefrom, we conclude that the court's findings are supported by facts appearing in the record. The plaintiff's testimony, coupled with the exhibits introduced at trial, including the police report of the accident, provide a factual basis for the court's findings. We cannot say that these findings are clearly erroneous. Accordingly, this claim fails.

II

The plaintiff next claims that the court misapplied § 14-283 (e) in finding him comparatively negligent.[2] Specifically, he claims that (1) he was not in the "immediate vicinity" of the police vehicles as required by § 14-283 (e) and (2) he was not required to comply with § 14-283 (e) because it was more practical to grant the right-of-way to the police vehicles by turning left. We disagree.

"The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law and our review, therefore, is plenary." (Internal quotation marks omitted.) *Russell* v. *Russell*,

[2] General Statutes § 14-283 (e) provides: "Upon the immediate approach of an emergency vehicle making use of such an audible warning signal device and such visible flashing or revolving lights or of any state or local police vehicle properly and lawfully making use of an audible warning signal device only, the operator of every other vehicle in the immediate vicinity shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the emergency vehicle has passed, except when otherwise directed by a state or local police officer or firefighter."

91 Conn. App. 619, 629, 882 A.2d 98, cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005).

The plaintiff argues that § 14-283 (e) is inapplicable in the present case because that section requires only vehicles in the "immediate vicinity" of emergency vehicles that are making an immediate approach to comply with its directives. He invites us to conclude that the court's findings do not permit the inference that he was in the immediate vicinity of the police vehicles. We disagree.

The court found that the plaintiff saw the police vehicles when they were one quarter of a mile behind him. The police vehicles were approaching his position with their lights flashing.[3] Although there is no finding regarding the distance between the police vehicles and the plaintiff's vehicle at the moment the accident occurred, the court's findings support the conclusion that the plaintiff was within the immediate vicinity of the police vehicles. Accordingly, he was required to comply with the provisions of § 14-283 (e).

The plaintiff next argues that he did not violate § 14-283 (e) because the obligation to drive to the right to grant the right-of-way to an emergency vehicle is not absolute when it may be more practical to grant the right-of-way by turning left. See *Fasanelli* v. *Terzo*, 150 Conn. 349, 189 A.2d 500 (1963); see also *State* v. *Cordova*, 38 Conn. Sup. 377, 383, 448 A.2d 848 (1982) (*Hennessy*, *J.*) (interpreting *Fasanelli*). The plaintiff's argument is premised on a factual finding that it was more practical to grant the right-of-way by turning left. The court, however, after hearing the evidence and

[3] The court did not make a finding that the police were using an audible warning device as required by § 14-283 (e). See *Fasanelli* v. *Terzo*, 150 Conn. 349, 357, 189 A.2d 500 (1963) (finding provisions of § 14-283 not triggered by use of emergency lights without use of audible warning device). Whether the court was required to make such a finding prior to finding a violation of § 14-283 has not been raised as an issue on appeal.

having the opportunity to view the witnesses, made no such finding. The court, in fact, implicitly rejected the plaintiff's argument that it was more practical to grant the right-of-way by turning left by finding that he violated § 14-283 (e). As an appellate court, we cannot retry the facts or pass on the credibility of the witnesses. *Palmieri* v. *Cirino*, 90 Conn. App. 841, 846, 880 A.2d 172, cert. denied, 276 Conn. 927, 889 A.2d 817 (2005). Accordingly, we cannot say that the court's finding was clearly erroneous. See *Reiner*, *Reiner & Bendett*, *P.C.* v. *Cadle Co.*, supra, 278 Conn. 107.

III

The plaintiff's final claim is that the court improperly found him to be 25 percent comparatively negligent. Specifically, the plaintiff claims that "[t]here was no legal basis for the court to have found that [he] was in any way responsible for this accident, as his conduct was not the proximate cause of the accident." We disagree.

"The question of proximate cause generally belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores*, *Inc.*, 234 Conn. 597, 611, 662 A.2d 753 (1995). Accordingly, we will reverse the judgment of the court only if proximate cause is absent as a matter of law.

In the present case, the court could have concluded that the plaintiff's conduct was a proximate cause of the accident and, therefore, that he was 25 percent comparatively negligent. The evidence showed that the plaintiff saw the approaching police vehicles prior to

attempting to turn left. Rather than stop his vehicle or move to the right side of the road, he continued to turn left and was struck by Homar's vehicle. This evidence provided a basis for the court to conclude that the plaintiff's behavior was a substantial factor is bringing about his injuries. See *DeOliveira* v. *PMG Land Associates, L.P.*, 105 Conn. App. 369, 377–78, 939 A.2d 2 (2008). Accordingly, we cannot say that the court's finding of 25 percent comparative negligence was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

LUCIANO SPROVIERO ET AL. *v.* J.M. SCOTT ASSOCIATES, INC.
(AC 28135)

Gruendel, Lavine and Pellegrino, Js.

Syllabus

The plaintiff tenants sought to recover damages for, inter alia, breach of a commercial lease with the defendant landlord, J Co. In a counterclaim, J Co. claimed that the tenants had breached the lease agreement by their failure to maintain the septic system as required under the lease and sought to recover for damage caused by the failure of the septic system. The trial court rendered judgment in favor of the tenants on the complaint in part and on J Co.'s counterclaim, from which J Co. appealed to this court. *Held*:

1. J Co. could not prevail on its claim that the trial court improperly concluded that the tenants were not liable for the costs that J Co. incurred in repairing and maintaining the septic system; J Co. having served the tenants with a notice to quit in a prior summary process action, in which the tenants had prevailed, the tenants' fixed tenancy was converted to a tenancy at sufferance, and the tenants temporarily were relieved of their obligation under the lease to maintain the septic system, and because the lease was thus not in effect during the pendency of this litigation, J Co. was not entitled to reimbursement of costs it incurred in maintaining the septic system.
2. J Co. could not prevail on its claim that because the tenants had prevailed in the summary process action, their lease obligations, including their obligation to maintain the septic system, were revived retroactively when their tenancy at sufferance was converted back to a leasehold

estate; although, after a judgment is rendered in favor of a tenant in a summary process action, the parties' lease is restored to its former status, such restoration does not occur retroactively, use and occupancy payments having encompassed the fair rental value of the premises, including the value of obligations previously borne by the tenant, and the tenants here fulfilled their financial obligations by making the use and occupancy payments requested by J Co., including an increase in use and occupancy payments during the period of their tenancy at sufferance.

3. J Co.'s claim that the trial court improperly found that the tenants were not liable for nuisance was unavailing; although the tenants were statutorily (§ 47a-11) obligated not to conduct themselves in such a manner as to constitute a nuisance, the trial court's findings of fact, which did not show that the tenants had behaved in such a manner, were not clearly erroneous and were supported by the evidence in the record showing that the tenants were not at fault for certain sewage breakouts that occurred during their tenancy at sufferance.

4. The trial court's finding that the tenants did not breach the lease during the time that it was in effect was not clearly erroneous and was supported by the evidence showing that the tenants had had the septic system pumped regularly, that no sewage breakouts had occurred while the tenants were obligated to maintain it and that the breakouts had occurred only during the tenancy at sufferance; moreover, that court's finding that neighboring tenants were at fault for the sewage breakouts was not clearly erroneous and, pursuant to language in the lease, obligated those tenants to maintain the septic system.

Argued March 10—officially released June 17, 2008

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Joseph T. Gormley, Jr.*, judge trial referee; judgment for the plaintiffs on the complaint in part and on the counterclaim, from which the defendant appealed to this court; thereafter, the court, *Hon. Joseph T. Gormley, Jr.*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Bruce L. Elstein, for the appellant (defendant).

James Ryan Mulvey, with whom was *David F. Bennett*, for the appellees (plaintiffs).

PELLEGRINO, J. The present case arises from a lease dispute between the tenant plaintiffs, Luciano Sproviero and Anthony Bernardo, and the landlord defendant, J.M. Scott Associates, Inc. The defendant appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the plaintiffs. The defendant claims that the court improperly concluded that the plaintiffs (1) were not liable for costs incurred by the defendant in repairing and maintaining the property's septic system, (2) were not liable in nuisance and (3) did not breach the lease. We affirm the judgment of the trial court.

The facts and procedural history of this case have turned an ordinary lease dispute into a tangled web of litigation. We delve into this matter by first setting forth the facts as found by the court in its memorandum of decision. The parties entered into a twenty year lease, commencing September 1, 1979, for 1440 square feet of commercial property to be used by the plaintiffs for operating a Laundromat and dry cleaning business. The rent was payable monthly at the rate of $360 and was to remain unchanged throughout the term of the lease, except to account for increases in insurance and taxes. The plaintiffs had an option to renew the lease for an additional twenty years, at a mutually agreed on rental rate, by notifying the defendant in writing two years prior to the expiration of the original lease.

Attached to and made part of the lease was a document dated August 1, 1979, entitled "Conditions to Lease." The conditions provided, among other things, that "[t]he septic tank and system is to be maintained by the lessee, and the septic tank is to be cleaned out not less than twice a year by him and once a year by Mr. Ed of Ed's Beauty Salon next door." Mr. Ed never

cleaned the septic tank and ceased being a tenant around 1990.

The parties entered into a supplemental agreement dated July 10, 1986. By this agreement, the defendant granted the plaintiffs the right to expand the septic system in exchange for their promise to maintain the entire system and perform all routine maintenance. "Routine maintenance" is not defined in the agreement. The agreement, however, does provide that the plaintiffs "shall not be responsible for any damages or problems caused by the increased use or misuse of said septic system by other tenants . . . ." The plaintiffs spent $40,000 of their money to expand the septic system and thereafter maintained it in compliance with their lease obligations through December 13, 1999.

On August 18, 1997, the plaintiffs timely notified the defendant of their intent to exercise their option to renew the lease and asked that the parties meet to agree on a new rental rate. The defendant contacted the plaintiff by letter dated December 23, 1998, and acknowledged the plaintiffs' desire to renew the lease, but stated that the plaintiffs must agree to certain additional terms before it would agree to renew the lease. The plaintiffs did not agree to those terms. On June 23, 1999, the defendant sent another letter to the plaintiffs, stating that it was willing to enter into a *new* lease. This letter contained six conditions that the defendant required the plaintiffs to agree to before it would enter into a new lease. None of the conditions was in the original lease or the renewal clause of the original lease. The letter also stated that the rate for the new lease would be $5 per square foot plus taxes, insurance and maintenance. The plaintiffs again did not agree to any of the new conditions set forth by the defendant. On August 31, 1999, the lease expired.

Around September 1, 1999, Bernardo was contacted by telephone by the defendant and informed that the

new rent would be $583 per month plus taxes, insurance and maintenance, for a total monthly rate of $806. The plaintiffs paid this monthly rate from September, 1999, through July, 2002.

By letter dated July 12, 2002, the defendant notified the plaintiffs of an increase in their total monthly rent. The letter stated that their present monthly rent was $583 plus taxes, insurance and maintenance. Increases for cost of living, insurance, taxes and maintenance raised the total monthly rent to $940.[1] From July 12, 2002, the plaintiffs have continued to pay $940 monthly.

The facts of this case resulted in two separate legal actions. The first was a summary process action[2] (summary process action) begun by the defendant on December 13, 1999, when it served a notice to quit possession on the plaintiffs, demanding that the plaintiffs vacate the premises by December 31, 1999. The notice stated that any payments tendered after December 31, 1999, would be accepted for use and occupancy only and not

[1] The propriety of the cost of living and other rent increases were not challenged at trial.

[2] "Summary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination." (Citations omitted; internal quotation marks omitted.) *Young* v. *Young*, 249 Conn. 482, 487, 733 A.2d 835 (1999).

"[Summary process] is preceded by giving the statutorily required notice to quit possession to the tenant. . . . Service of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease. The lease is neither voided nor rescinded until the landlord performs this act and, upon service of a notice to quit possession, a [leasehold] is converted to a tenancy at sufferance." *Housing Authority* v. *Hird*, 13 Conn. App. 150, 155, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988).

The defendant's notice to quit possession gave four reasons for the eviction: (1) lapse of time; (2) by reason of expressed stipulation in the rental agreement or lease; (3) violation of the rental agreement or lease; and (4) nuisance as defined in General Statutes § 47a-32.

for rent. The defendant thereafter filed a three count summary process complaint, with a return date of May 31, 2000. An answer to the complaint was not filed until February 12, 2003.[3]

Meanwhile, the plaintiffs filed their complaint (plaintiffs' action), with a return date of March 7, 2000, alleging that (1) the defendant's failure to renew the lease was a breach of contract and (2) the defendant breached the lease by permitting other tenants to use the septic system. On November 10, 2004, the defendant amended its answer to set forth a two count counterclaim. The counterclaim sought legal and equitable relief for (1) the plaintiffs' breach of lease by their failure to maintain the septic system and (2) damage caused by the septic system's failure.

The court found that the facts supporting the defendant's counterclaim arose between August, 1999, and November, 2004. Specifically, water began surfacing at some point in 2000. The plaintiffs fixed this problem, which was caused by a toilet that was left running when another tenant of the defendant vacated the premises. In 2003, another breakout occurred, and the plaintiffs called their engineer, Dudley Ashwood, who had designed the 1986 addition to the septic system. Ashwood inspected the septic system on February 6, March 5 and April 16, 2003, and observed no active leaching system failure. He did find that the plaintiffs substantially reduced their water usage between 1997 and 2002. The plaintiffs resisted making any substantial repairs to the septic system during this period because the defendant was trying to evict them.

[3] Although summary process is designed to secure a prompt hearing; see footnote 2; no reason was given for the lengthy delay in this case. The court made reference to this fact, stating that it "is not unmindful of the fact that the word 'summary' may not exactly describe the path or speed of this process."

In January, 2004, counsel for the defendant notified the plaintiffs that they had failed to maintain the septic system, that the system was failing and that breakouts were occurring. On April 12, 2004, the Pomperaug district department of health (department) cited the defendant for the sewage overflow that was occurring at its property. The department did not cite the plaintiffs. Between 2004 and 2006, the defendant spent $125,000 in pumping the septic tanks to prevent breakouts. The cost of replacing the entire septic system would have been approximately $30,000.

The summary process action and the plaintiffs' action were consolidated for trial and, subsequently, tried to the court on August 30, 2006. In the summary process action, the court found in favor of the plaintiffs on all counts, concluding that the lease was renewed and that they were not breaching its provisions. Neither party appealed from that judgment, and, accordingly, it is not part of this appeal.

In the plaintiffs' action, the court likewise found that the lease was renewed. The court found that the defendant's actions in contacting the plaintiffs and informing them of a rent increase was a proposal for a new rent, as contemplated by the option to renew, which the plaintiffs accepted by paying. The parties, therefore, had an enforceable twenty year lease, commencing September 1, 1999, under the same terms as the original lease except for the rent. The court concluded that the defendant's failure to recognize the renewed lease was a breach of contract. Accordingly, the court rendered judgment for the plaintiffs as to their breach of contract claim.

In the breach of lease claim, the court found that the proof presented at trial did not establish by a preponderance of the evidence that the defendant breached the

lease by permitting other tenants to use the septic system. The court accordingly rendered judgment in favor of the defendant as to that claim.

Turning to the defendant's counterclaim, the court found that the defendant had not sustained its burden of proof on either count. Specifically, the court found that the evidence did not show that the plaintiffs failed to maintain the septic system in accordance with the lease. Moreover, the court found that other parties were responsible for the septic system's failure and that other parties failed to maintain the septic system. The plaintiffs, therefore, were not liable for damages caused by the system's failure. Accordingly, the court rendered judgment in favor of the plaintiffs on the defendant's counterclaim.

The defendant has appealed from the court's judgment on its counterclaim. It is helpful at the outset, however, to note what is not at issue in this appeal. There is no challenge to any aspect of the court's ruling pertaining to the summary process action. Similarly, there is no challenge to the court's finding that the plaintiffs exercised their option to renew the lease. The defendant, in fact, concedes that the parties have a valid twenty year lease that commenced September 1, 1999, under the same terms as the original lease except for the rent. Accordingly, we need not review any of these issues. We now address the defendant's claims.[4]

[4] The defendant raises two claims that require little discussion. First, it claims that the court improperly found that it was required to repair the septic system. The court, however, made no such finding. In its memorandum of decision, the court questioned why the defendant chose to pump the septic system repeatedly at a total cost of $125,000, when repairing the system would cost only $30,000. Because there is no finding that the defendant was required to repair the system, the defendant's claim fails.

Next, the defendant claims that the court improperly concluded that the defendant had a duty to mitigate damages. The court made no such ruling. The duty to mitigate damages arises only when a party is entitled to an award of damages. See, e.g., *Ann Howard's Apricots Restaurant, Inc.* v. *Commission on Human Rights & Opportunities*, 237 Conn. 209, 229, 676 A.2d 844 (1996) ("in the contracts and torts contexts . . . the party receiving

I

The defendant's first claim is that the court improperly concluded that the plaintiffs were not liable for costs it incurred in repairing and maintaining the septic system. The defendant argues that under the terms of the lease, which the court found to be renewed, the maintenance of the septic system was the plaintiffs' responsibility, and, accordingly, they must reimburse the defendant for the costs it incurred in pumping the septic system between 2004 and 2005. We disagree.

The defendant's claim is for damages, which we generally review under the abuse of discretion standard. When, however, a damages award is challenged on the basis of a question of law, our review is plenary. *Motherway* v. *Geary*, 82 Conn. App. 722, 726, 846 A.2d 909 (2004).

A

The defendant's first argument is that the lease was in effect during the pendency of this action. We find, however, that the lease was not in effect while this litigation was pending.

Our law makes clear that after a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance. *Housing Authority* v. *Hird*, 13 Conn. App. 150, 155, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988). A tenant at sufferance is released from his obligations under a lease. *Feneck* v. *Nowakowski*, 146 Conn. 434, 436, 151 A.2d 891 (1959); *Welk* v. *Bidwell*, 136 Conn. 603, 609, 73 A.2d 295 (1950) (tenant at sufferance has no duty to

a damage award has a duty to make reasonable efforts to mitigate damages"). The court ruled in favor of the plaintiffs on the defendant's counterclaim, thereby ruling that the defendant was not entitled to an award of damages. The court accordingly made no finding that the defendant had a duty to mitigate damages, and this claim fails.

pay rent). His only obligations are to pay the reasonable rental value of the property which he occupied in the form of use and occupancy payments;[5] *Welk* v. *Bidwell*, supra, 609; and to fulfill all statutory obligations. *Housing Authority* v. *Hird*, supra, 157 ("[t]he statutory obligations of the landlord and tenant continue even when there is no longer a rental agreement between them").

In the present case, the defendant served the plaintiffs with notice to quit possession on December 13, 1999. Upon service of the notice to quit possession, the plaintiffs' fixed tenancy was converted to a tenancy at sufferance, and the plaintiffs temporarily were relieved of their obligation to maintain the septic system. Accordingly, the lease was not in effect during the pendency of this litigation, and the defendant is not entitled to reimbursement of costs it incurred in maintaining the septic system.

B

The defendant also argues that because the plaintiffs prevailed in the summary process action, their lease obligations were revived retroactively when their tenancy at sufferance was converted back to a leasehold estate. We disagree.

This court previously has stated that an original lease can be "revived," "restored" and returned to its original "status quo" by a judgment rendered in favor of a tenant in a summary process action. *Housing Authority* v. *Hird*, supra, 13 Conn. App. 157. In such an instance, a tenant's judgment "effectively erase[s] the court slate clean as though the eviction predicated on the . . . notice to quit possession had never been commenced. The plaintiff and the defendant [are] back to square

[5] The defendant does not claim that the plaintiffs failed to make use and occupancy payments.

one, and the continuation of their [original lease is] restored." (Internal quotation marks omitted.) Id.

The defendant reads the quoted language from *Hird* as holding that lease obligations that were extinguished during the tenancy at sufferance are revived retroactively to the date the notice to quit was served if the landlord loses the summary process action.[6] The defendant argues that if the parties go back to square one as if the notice to quit possession had never been served, the plaintiffs would have been obligated to maintain the septic system and, therefore, would have incurred the costs that the defendant incurred in maintaining it.[7] Accordingly, the defendant claims that it is entitled to reimbursement for the cost of maintaining the septic system while the plaintiffs were tenants at sufferance. We do not agree.

Although the *Hird* court stated that the parties go back to square one as if the summary process action had never been commenced, *Hird* does not stand for the proposition that a lease can be revived retroactively. The language the defendant cites ignores the court's use of phrases such as "[the tenant's judgment] 'revived' the original lease arrangement"; id., 155; and "continuation of their lease . . . was restored." Id., 157. Such phrases connote the prospective application of a lease's provisions, rather than indicating retroactive revival.

[6] This issue typically does not arise because of the speed in which a summary process action is decided. See footnote 2. In the present case, the summary process action began in December, 1999, and was decided in September, 2006.

[7] The defendant also asserts an alternative theory for concluding that the court improperly failed to find the plaintiffs liable. He claims that the plaintiffs were holdover tenants at will and, therefore, were obligated to maintain the septic system under the terms of the original lease. This claim has no merit and can summarily be disposed of. Upon the service of the December 13, 1999 notice to quit possession, the plaintiffs became tenants at sufferance. See *Housing Authority* v. *Hird*, supra, 13 Conn. App. 155. Accordingly, the plaintiffs were not tenants at will.

Furthermore, retroactive revival is unnecessary in light of a tenant at sufferance's obligation to make use and occupancy payments during his tenancy. Use and occupancy payments encompass a fair rental value of the property, which necessarily accounts for obligations that are assumed by a landlord in renting the property, such as septic system maintenance. See *Welk* v. *Bidwell*, supra, 136 Conn. 609. Although, in many instances, use and occupancy payments are equal to the parties' previously agreed upon rent, a landlord may be entitled to a larger use and occupancy payment when it is forced to assume obligations that were once the responsibility of a tenant under a lease. See, e.g., *Young* v. *Vlahos*, 103 Conn. App. 470, 481, 929 A.2d 362 (2007) (finding tenant at sufferance liable for sewer and water charges incurred during the tenancy at sufferance), cert. denied, 285 Conn. 913, 943 A.2d 474 (2008). A revived lease, therefore, does not need to apply retroactively because the landlord is compensated for assuming a tenant's obligations through use and occupancy payments.

In the present case, the plaintiffs paid $806 in monthly rent for September, October, November and December, 1999. On December 13, 1999, the defendant served the plaintiffs with the notice to quit possession. The notice stated that any payments tendered by the plaintiffs after December 31, 1999, would be accepted as use and occupancy payments only and not as rent. Accordingly, payments made by the plaintiffs beginning January, 2000, were contemplated by the defendant as being use and occupancy payments and not rent. The plaintiffs thereafter continued to pay $806 per month as use and occupancy payments as directed by the defendant.

On July 12, 2002, the defendant notified the plaintiffs that their "rent" was increasing to $940 per month. Although the defendant characterizes this as a "rent" increase, it is better designated as an increase in the

use and occupancy payments because, as the defendant recognized in its notice to quit possession, the plaintiffs were not obligated to pay rent during their tenancy at sufferance. The plaintiffs acquiesced to this increase, thereby avoiding the need for a judicial determination of the fair rental value of the property. See General Statutes § 47a-26b. The defendant, therefore, received an agreed upon compensation for the plaintiffs' use and occupancy of the premises during their tenancy at sufferance.

If the defendant believed $940 per month did not represent the fair rental value of the property, it could have sought an increase in the plaintiffs' use and occupancy payment. The plaintiffs, in fact, agreed without complaint to the first increase to $940 per month. The defendant, however, is not entitled to reimbursement for the costs it incurred in maintaining the septic system during the plaintiffs' tenancy at sufferance, as the plaintiffs fulfilled their financial obligations by making the requested use and occupancy payments. Accordingly, the defendant's claim fails.

II

The defendant next claims that the court improperly concluded that the plaintiffs were not liable for nuisance. Specifically, the defendant claims that the court failed to find that the plaintiffs had a statutory obligation under General Statutes § 47a-11[8] to prevent sewage

[8] General Statutes § 47a-11 provides in relevant part: "A tenant shall: (a) Comply with all obligations primarily imposed upon tenants by applicable provisions of any building, housing or fire code materially affecting health and safety . . . (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15 . . . ."

General Statutes § 47a-32 defines nuisance as including, but not limited to, "any conduct which interferes substantially with the comfort or safety of other tenants or occupants of the same or adjacent buildings or structures."

General Statutes § 47a-15 defines serious nuisance, in relevant part, as "substantial and wilful destruction of part of the dwelling unit or premises

breakouts during their tenancy at sufferance, which they failed to do, and are now liable for the costs the defendant incurred in pumping the septic system to prevent such breakouts. We disagree.

"Although the existence of a nuisance generally is a question of fact, for which we invoke a clearly erroneous standard of review . . . where the court makes legal conclusions or we are presented with questions of mixed law and fact, we employ a plenary standard of review . . . ." (Citation omitted.) *Kinsale* v. *Tombari*, 95 Conn. App. 472, 479, 897 A.2d 646 (2006).

Although we agree with the defendant that the plaintiffs statutorily were obligated not to conduct themselves in such a manner as to constitute a nuisance; see *Rivera* v. *Santiago*, 4 Conn. App. 608, 610, 495 A.2d 1122 (1985); we cannot say that the court's findings of fact show that the plaintiffs behaved in such a manner or that any of these findings are clearly erroneous in light of the evidence presented at trial. The record supports the court's finding that the plaintiffs were not at fault for the sewage breakouts. At least two other tenants ran pipes from their buildings into the septic tanks and other tenants failed to pump the septic system as required. In addition, there is no evidence showing that the breakouts were caused by the plaintiffs. In fact, the evidence showed that the breakouts first began in 2000 and that the plaintiffs substantially reduced their water usage between 1997 and 2002. Moreover, the defendant has not shown how the plaintiffs, as tenants at sufferance, were obligated to prevent breakouts from occurring when the defendant was responsible for maintaining the septic system. See part I.

[or] conduct which presents an immediate and serious danger to the safety of other tenants or the landlord . . . ."

On the basis of the evidence presented at trial, we cannot say that the court's findings are clearly erroneous. Similarly, we cannot say that these findings evidence a violation of any statute. Accordingly, the defendant's claim fails.

III

The defendant's next claim is that the court improperly found that the plaintiffs did not breach their lease. Specifically, the defendant claims that the court improperly found that (1) the lease obligated parties other than the plaintiffs to maintain the septic system, (2) the sewage breakouts were caused, in part, by other parties and (3) the plaintiffs maintained the septic system as required by the lease. We disagree.

It is helpful at the outset to clarify the scope of the defendant's claim. The defendant's claim arises from the lease and, therefore, concerns only the time period when the lease was in effect. As discussed in part I, the lease was ineffectual during the plaintiffs' tenancy at sufferance, and, accordingly, the plaintiffs had no leasehold obligations until the lease was revived. Because the defendant's claim is based on acts that occurred while the plaintiffs were still obligated under the lease, it is limited to the lease period from September 1, 1979, through December 13, 1999.

We now set forth the applicable standard of review. The defendant's claim presents a question of contract interpretation because "a lease is a contract, and, therefore, it is subject to the same rules of construction as other contracts. . . . The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over

which our review is plenary]." (Citation omitted, internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007).

"Whether there was a breach of contract is ordinarily a question of fact. . . . We review the court's findings of fact under the clearly erroneous standard. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . 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.) *Czaplicki* v. *Ogren*, 87 Conn. App. 779, 785, 868 A.2d 61 (2005).

The first portion of the defendant's claim is that the court improperly interpreted the lease to find that other parties were obligated to maintain the septic system. We disagree. The relevant conditions to the original lease provided that "[t]he septic tank and system is to be maintained by the lessee, and the septic tank is to be cleaned out not less than twice a year by him and once a year by Mr. Ed of Ed's Beauty Salon next door." The parties altered this clause by mutual agreement in 1986. Under the supplemental agreement, the plaintiffs agreed "to maintain the entire system in good repair at [their] own expense and to perform all routine maintenance as may be suggested by the engineer . . . ." The agreement further provided that the plaintiffs "shall not be responsible for any damages or problems caused by the increased use or misuse of said septic system by other tenants; and, in the event that such increased use or misuse shall be caused by other tenants, then such

tenant or tenants will be responsible for the same." On the basis of this definitive language, we conclude, as did the trial court, that other parties were obligated to maintain the septic system. Specifically, prior to the supplemental agreement, the plaintiffs were required to perform two of the three septic tank cleanings each year. After the supplemental agreement, other parties were obligated to maintain the septic system if another tenant increased his use or misused the septic system.

Next, the defendant claims that the court improperly found that other parties were at fault for the sewage breakouts. On the basis of the evidence, we cannot say that the court's finding is clearly erroneous. The evidence showed that at least two other tenants ran pipes to the septic tank and that other parties discharged into the septic system. This evidence supports the court's finding that other parties were at fault for the sewage breakouts.

Finally, the defendant claims that the court's finding that the plaintiffs were not in breach of their lease by failing to maintain the septic system was clearly erroneous. We disagree. Evidence showed that the plaintiffs had the septic system pumped regularly and that no breakouts occurred while the plaintiffs were obligated to maintain it. Breakouts occurred only while the plaintiffs were tenants at sufferance. The fact that no breakouts occurred during the plaintiffs' leasehold supports the court's finding that they had not breached the lease. Accordingly, we cannot say that the court's finding that the plaintiffs did not breach the lease was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

MISTY WILLIAMS *v.* FREEDOM OF INFORMATION COMMISSION (AC 28254)

DiPentima, Robinson and Borden, Js.

Syllabus

The plaintiff, who had filed eight letters of complaint with the defendant freedom of information commission in connection with her request for and receipt of certain documents from the town of Branford, appealed to the trial court from the decisions of the defendant dismissing her complaints. The plaintiff had alleged in her complaints that certain documents were improperly certified and that she was overcharged for the copies of the records that she had received. The trial court rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Held*:

1. The trial court, in evaluating the defendant's conclusions concerning the meaning of the statutory (§ 1-212 [e]) terms "certifying" and "page," employed an improper standard of review when it considered the meaning of those terms to be factual questions subject to the deferential scope of review, namely, whether they were supported by substantial evidence in the record: because those terms, as used in the freedom of information act (§ 1-200 et seq.), presented questions of statutory interpretation, no deference was due the agency's determinations of their meanings, which had not been subjected to judicial scrutiny or time tested by the agency consistently over a long period of time, and, therefore, the plenary standard of review applied; nevertheless, even though the court used an improper standard to review those issues, its ultimate conclusion as to the meaning of the terms was correct.
2. The trial court properly determined that the town, which certified that the copies provided to the plaintiff were true copies of the originals, met its statutory obligation of providing certified copies of the relevant documents to the plaintiff, and there was no support for the plaintiff's claim that the freedom of information act required the town to attest that the copy was a "complete copy," that the certification be issued by the person who maintains the record or an authorized representative, that the raised seal of the certifier had to be affixed on each page of each document and that the certification had to be truthful.
3. The trial court properly determined that, pursuant to § 1-212 (e), "page" meant one side of a piece of paper, and, therefore, the fee charged for a copy of a page refers to the fee that may be charged for the copy of each side of a piece of paper, the plaintiff having failed to establish her claim that she was improperly charged for each side of the numerous pieces of paper constituting the certified records of the town, rather than for each sheet of paper supplied to her, despite the fact that

information was recorded on both sides thereof; although the overarching purpose of the freedom of information act is to facilitate public access to government records by making such records available at a reasonably low cost, the legislature, by shifting some of the financial burden onto the requestor through the fee schedule provisions, has also manifested a concern not to overburden agencies with the expense of complying with the act.

Argued February 21—officially released June 17, 2008

Procedural History

Appeal from the decisions by the defendant determining, inter alia, that the town of Branford had complied with the plaintiff's requests for certain records, brought to the Superior Court in the judicial district of New Britain, where the court, *Levine, J.*, granted the motion to intervene as a plaintiff filed by Dawn Massey; subsequently, the matter was tried to the court, *Hon. Howard T. Owens, Jr.*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed and the intervening plaintiff cross appealed to this court. *Affirmed.*

Misty Williams, pro se, the appellant-appellee (plaintiff).

Dawn Massey, pro se, the appellee-appellant (intervening plaintiff).

Tracie C. Brown, principal attorney, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Opinion

BORDEN, J. The plaintiff, Misty Williams,[1] appeals from the judgment of the trial court dismissing her

[1] The plaintiff is joined in this appeal by the intervening plaintiff, Dawn Massey. Massey also filed and briefed a cross appeal, in which she raised and argued the same claims as the plaintiff. Our decision on the plaintiff's appeal disposes of the intervening plaintiff's cross appeal as well.

administrative appeal from the decision of the defendant, the freedom of information commission (commission). The commission dismissed her complaints regarding records that she had requested from the town of Branford, pursuant to the freedom of information act (act), General Statutes § 1-200 et seq. The plaintiff claims that the court improperly (1) reviewed the commission's determination of legal issues pursuant to the substantial evidence standard and (2) interpreted the meaning of the terms "certifying" and "page," as used in the act.[2] Although we agree that the court employed an improper standard of review to evaluate the commission's legal conclusions regarding the meaning of these statutory terms, we nonetheless affirm the judgment of the trial court.

The plaintiff appealed to the trial court from eight final decisions of the commission. The court dismissed the appeal, and this appeal followed.

The relevant procedural and factual history is as follows. The plaintiff, on behalf of the intervening plaintiff, Dawn Massey, requested various town documents from the town of Branford. Dissatisfied with the number and quality of the documents that she received from the town, the plaintiff filed eight letters of complaint with the commission, each of which contained multiple complaints. These letters were filed between September 9 and November 9, 2004. Many of the complaints alleged that certain documents were improperly certified, pursuant to General Statutes § 1-212,[3] for various reasons.

[2] Additionally, the plaintiff raises a third claim, in which she asserts that the court did not adequately review the evidence in the record before determining the statutory meaning of "certifying" and "page." At oral argument in this court, the plaintiff clarified that this claim was raised in the alternative to her first claim, i.e., that we needed to reach this claim only if we concluded that the court had employed a proper scope of review to the meaning of those terms. In light of our resolution of the plaintiff's first claim, therefore, we do not reach this third claim.

[3] General Statutes § 1-212 provides in relevant part: "(a) Any person applying in writing shall receive, promptly upon request, a plain or certified

In her letter dated September 29, 2004, the plaintiff asserted that she was overcharged, also pursuant to § 1-212, for the copies of the town records that she had received. Among the arguments the plaintiff asserted was that § 1-212 allows the town to charge at most fifty cents for each sheet of paper of copied records it provides, regardless of whether information is copied on one or both sides of the sheet of paper. In other words, the plaintiff asserted that the term "page," as used in the statute, refers to both sides of a sheet of paper. The commission grouped the eight letters of complaint and accorded them three separate hearings. The commission produced eight final decisions, disposing of each of the plaintiff's letters individually. The commission addressed the plaintiff's September 29, 2004 letter, regarding charges for copies of records, in *Williams* v. *Clyne*, FIC 2004-445 (September 14, 2005). In its final decision, the commission determined that the term "page," as used in the statute, means one side of a piece of paper. Thus, the commission concluded that the town did not violate the act in this regard. The commission also addressed all of the plaintiff's various complaints, asserted in four of the eight letters, regarding the proper certification of documents in the same final decision. The commission concluded that "[t]he word 'certifying' is not defined in the . . . [a]ct, and the requirements for 'certifying any copy' or 'certifying to any fact' are not contained in the . . . [a]ct. . . . It is concluded that § 1-212 (e) . . . only establishes a fee for certifying any copy of a public record, or certifying to any fact appearing in a public record, and does

copy of any public record. The fee for any copy provided in accordance with the . . . [a]ct . . . (2) [b]y all other public agencies . . . shall not exceed fifty cents per page. . . .

"(e) Except as otherwise provided by law, the fee for any person who has the custody of any public records or files for certifying any copy of such records or files, or certifying to any fact appearing therefrom, shall be for the first page of such certificate, or copy and certificate, one dollar; and for each additional page, fifty cents. . . ."

not set forth requirements for the form or content of such certifications."

The plaintiff appealed to the trial court from each of the commission's eight final decisions. The plaintiff claimed, among other things, that the commission, in its final decisions, improperly determined that the term "certifying" had no statutory meaning and misinterpreted the term "page" to mean one side of a sheet of paper. The court, apparently viewing the questions of the meaning of "certifying" and "page," as used in the act, as factual questions, concluded that the commission's determinations in those regards were supported by substantial evidence. Accordingly, the court dismissed the plaintiff's appeal.

I

We first address the plaintiff's claim that the court employed an improper standard of review when evaluating the commission's conclusions concerning the meaning of the statutory terms "certifying" and "page." The plaintiff argues that the issue of the statutory meanings of those terms are questions of statutory interpretation and, therefore, should have been accorded plenary review. We agree.

We first note that our reading of the court's memorandum of decision leads us to conclude that, as the plaintiff contends, it considered the meaning of the statutory terms "certifying" and "page" to be factual questions subject to a deferential scope of review, namely, whether they were supported by substantial evidence in the record. Indeed, the commission does not suggest otherwise; in fact, it contends that because the terms are ambiguous, they present questions of fact and, therefore, must be sustained as supported by substantial evidence.[4]

[4] In this regard, the commission has conflated the judicial determination of the meaning of contract language with the judicial determination of the meaning of statutory language. It is true, of course, that the meaning of

Although the court applied an improper standard of review to these two issues, we nonetheless address them on their merits. The parties have had full opportunity to brief them, they present questions of law without the need for further fact-finding, and the court's ultimate conclusions were correct. Thus, we affirm the trial court's judgment for reasons other than those on which it relied. See *State* v. *Vines*, 71 Conn. App. 359, 367, 801 A.2d 918, cert. denied, 261 Conn. 939, 808 A.2d 1134 (2002).

We next consider whether the commission's determinations of the meaning of these two statutory terms should be afforded any deference. We conclude that they should not.

Our Supreme Court has recently clarified the question of "the proper standard to apply in determining when agency deference is appropriate . . . . As we frequently have stated, [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . *Connecticut Light & Power Co.* v. *Texas-Ohio Power, Inc.*, 243 Conn. 635, 642, 708 A.2d 202 (1998); [see also] *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 137, 778 A.2d 7 (2001). We have determined, therefore, that the traditional deference accorded to an agency's interpretation

ambiguous contract language presents a question of fact for the trier. *Kremenitzer* v. *Kremenitzer*, 81 Conn. App. 135, 140–41, 838 A.2d 1026 (2004). It is equally true, however, that the meaning of statutory language, whether ambiguous or not, presents a question of law for the court. See *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 163–64, 931 A.2d 890 (2007).

of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . *Connecticut Assn. of Not-for-Profit Providers for the Aging* v. *Dept. of Social Services*, 244 Conn. 378, 390, 709 A.2d 1116 (1998); accord *Office of Consumer Counsel* v. *Dept. of Public Utility Control*, 252 Conn. 115, 121, 742 A.2d 1257 (2000) (government agency's reasonable, time-tested interpretation should be accorded great weight by the courts); *State Medical Society* v. *Board of Examiners in Podiatry*, 208 Conn. 709, 719, 546 A.2d 830 (1988) (deference to . . . time-tested agency interpretation of a statute, but only when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable). Consequently, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. Cf. *Connecticut Assn. of Not-for-Profit Providers for the Aging* v. *Dept. of Social Services*, supra, 390 n.18 (finding no deference warranted to agency interpretation when agency had failed to make public declaration of interpretation and had applied interpretation for only four years). . . . *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 261–63, 788 A.2d 60 (2002)." (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 163–64, 931 A.2d 890 (2007).[5]

[5] Although the court in *Longley* did not refer to *Starr* v. *Commissioner of Environmental Protection*, 226 Conn. 358, 376, 627 A.2d 1296 (1993), in which our Supreme Court had suggested that a court, "faced with two equally plausible interpretations of the statutory language" governing an administrative agency's power, should give deference to the agency's interpretation, we regard this principle of deference as implicitly overruled by the more comprehensive and nuanced standard articulated in *Longley*.

In the present case, the meaning of the terms "certifying" and "page," as used in the act, present questions of statutory interpretation for the court. Furthermore, no deference is due the agency's determination of their meanings. Although, as both the plaintiff and the commission agree, both those terms may be regarded as ambiguous, those determinations by the commission have not been subjected to judicial scrutiny and have not been time tested by the agency consistently over a long period of time.[6]

We therefore proceed to the familiar judicial task of statutory interpretation of the terms, in a plenary fashion. See *Chambers* v. *Electric Boat Corp.*, 283 Conn. 840, 844–45, 930 A.2d 653 (2007). This process involves the determination of the meaning of the statutory language as applied to the facts of the case, which also involves the question of whether the language so applies. *Genesky* v. *East Lyme*, 275 Conn. 246, 277, 881 A.2d 114 (2005) (*Borden*, *J.*, concurring).

II

We next address the meaning of the term "certifying" as used in the act. The plaintiff contends that properly certified copies under the act must have the following

[6] In this regard, we reject the plaintiff's contention that both the commission and the court were required to give deference to a certain prior advisory opinion issued by the commission, in which the commission opined: "[T]he certification required by [General Statutes] § 1-15 [now § 1-212] must state, at a minimum, that the certified copy is a true copy of a public record maintained or kept on file by the public agency, whether that record is an original or a copy. If the public record is itself a copy, the certification must clearly state that the certified copy is a true copy of a copy of a document maintained or kept on file by the public agency. The certification must make clear that the copy is not a copy of an original document. . . . On the other hand, if a document requested to be certified is a copy of an original, the certification must clearly state that fact." Opinions, Conn. Freedom of Information Commission No. 76 (July 12, 1989).

There is no evidence in this record that this opinion has ever been publicly articulated or that it has been consistently applied over a long period of time.

characteristics: the certification must attest that it is a true and complete copy of the record on file; the certification must be issued by the person who maintains the record or his or her authorized representative; the certifier must sign the record; the raised seal of the certifier must appear on each page of the record; and the "certification shall be truthful." We disagree that the act mandates such a comprehensive set of requirements.

The present case does not require us to arrive at a global meaning of the term "certifying." Rather, this case requires us to determine only whether, under the facts of this case, the town met its statutory obligation of providing certified copies of the relevant documents to the plaintiff. We conclude that the town did.

The following facts are relevant to this question. As noted previously, the plaintiff filed eight letters of complaint with the commission between September and November, 2004. Of those eight letters, four included complaints about the adequacy of the way in which the records the plaintiff received from the town were certified. The commission, as part of its final decision in *Williams* v. *Clyne*, supra, FIC 2004-445, summarized the plaintiff's complaints regarding certification as follows: "The [plaintiff and the intervening plaintiff] also maintain that the certifications by the [town] of the records they received were improper. The [plaintiff and the intervening plaintiff] assert that the certifications were improper because the [town] did not affix a raised seal on the copies, because the certifications are sometimes attached to the copies, rather than written directly on the copies, because the certifications did not state how many pages were contained in the copy or number the pages of the copies, and because the certifications did not describe, or did not accurately describe, the records certified beyond stating that they were true copies of the originals." The commission concluded

that § 1-212 "only establishes a fee for certifying any copy of a public record, or certifying to any fact appearing in a public record, and does not set forth requirements for the form or content of such certifications." After examining all of the documents supplied by the town to the plaintiff and the intervenor, the commission also made the factual determination that "the [town] certified that the copies provided to the [plaintiff and the intervening plaintiff] were true copies of the originals."

We begin with the language of the statute. The act itself contains no specific definition of the term "certifying" as used therein. Unlike some other statutes; see, e.g., General Statutes §§ 7-23 (certification by town clerk) and 7-36 (certification by registrar of vital statistics);[7] which we will discuss, the act does not prescribe any particular form or content of a certification of records. Nonetheless, the act does refer to "any certified record" in a way that strongly suggests its general meaning as used therein. General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to . . . receive a copy of such records in accordance with section 1-212. . . . *Any*

[7] General Statutes § 7-23 provides in relevant part: "No copy of [a] record certified by the town clerk or assistant town clerk of any town shall be deemed valid in law unless the seal of such town is affixed thereto; and the town clerk of each town . . . shall affix the seal of such town to all certified copies of the record . . . ."

General Statutes § 7-36 provides in relevant part: "(5) 'Certified copy' means a copy of a birth, death, fetal death or marriage certificate that (A) includes all information on the certificate except such information that is nondisclosable by law, (B) is issued or transmitted by any registrar of vital statistics, (C) includes an attested signature and the raised seal of an authorized person, and (D) if submitted to the department, includes all information required by the commissioner . . . ."

certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by the law to so act, shall be competent evidence in any court of this state of the facts contained therein. . . ." (Emphasis added.) This use of the term "certified" suggests that as long as an official with legal authority to do so attests, or states in writing, that the records are true copies of the originals, he or she has issued a "certified record" properly under the act. Put another way, if such a record would be competent evidence in court under § 1-210, it stands to reason that it would also be considered a "certified" record under § 1-212. Indeed, § 1-210 specifically links such a record to those records to which one would be entitled under § 1-212. Furthermore, this general meaning is consistent with the most apt definition provided by the dictionary for the word "certify": "To confirm formally as true, accurate, or genuine; testify to or vouch for in writing." American Heritage Dictionary of the English Language (New College Ed. 1981). Finally, the purposes of the act, namely, to make public records available to the public, except when specifically exempted; see *Groton Police Dept.* v. *Freedom of Information Commission*, 104 Conn. App. 150, 155, 931 A.2d 989 (2007); and to do so without undue burden on the provider of the records, as we will discuss, are fully consistent with this simple, general meaning of the term "certifying."

Applying this general meaning to the facts of this case, we conclude that the records provided to the plaintiff were properly certified within the meaning of the act. The commission found that "the [town] certified that the copies provided to the [plaintiff and the intervenor] were true copies of the originals." Under the particular facts of this case, this was a sufficient certification for purposes of the act.

The plaintiff agrees with the requirements that the certification attest that the copy is a true copy and that it be signed by the certifier. She maintains, however, that the statute requires also that the attestation include that the copy is a "complete copy"; it be "issued by the person who maintains the record or his/her authorized representative"; the "raised seal" of the certifier be "affixed upon each page" of each document; and that "[t]he certification shall be truthful." The plaintiff draws these additional requirements from §§ 7-23 and 7-36. See footnote 7. These two statutes, however, simply represent two instances in which the legislature has decided that a specific form of certification is necessary due to the nature and importance of the records. We see nothing in the language or purpose of either of those statutes or the act to suggest that the specific requirements of those statutes be imported into the provisions of the act.

III

The plaintiff's final claim is that the court improperly determined that pursuant to § 1-212 (e),[8] "page" means one side of a piece of paper, and, therefore, the fee charged for a copy of a page refers to the fee that may be charged for the copy of each side of a piece of paper. In other words, the plaintiff claims that she was charged improperly for each side of the numerous pieces of paper, constituting the certified records that the town provided to her, on which information was recorded; she maintains, to the contrary, that she should have been charged for only each piece of paper supplied to her, despite the fact that information was recorded on both sides thereof. According to the plaintiff, "page" as used in § 1-212 (e) means a piece of paper. We reject this claim.

[8] See footnote 3.

We acknowledge that depending on the context in which it is used, the word "page" can mean either one side of a piece of printed matter or the piece of paper on which the material is printed. One may speak of a page of a book, which ordinarily refers to each side of the piece of paper. One may also, however, speak of tearing out a page of a book, which ordinarily refers to the piece of paper that has printed matter on both sides. See, e.g., American Heritage Dictionary of the English Language, supra ("page . . . 1. One side of a leaf of a book, letter, newspaper, manuscript, or the like. Often used of the entire leaf: *tearing out a page.* 2. The writing or printing on one side of a leaf."). (Emphasis in original.) We conclude that the word "page" as used in the act refers to each side of the document copied. First, that is the more natural meaning in the context of copying a page, as the previously mentioned dictionary reference indicates. In this regard, the other meaning, urged by the plaintiff, appears to apply principally in the context of tearing out a page of a document, which is not the context in which the act uses the word. Second, in other statutory provisions, the legislature has used the term "page" to mean one side of a piece of paper. See General Statutes § 42-158n.[9] Compare General Statutes § 4a-67a (a),[10] in which the legislature has specifically referred to "two-sided copies" of pieces of paper for a different purpose.

[9] General Statutes § 42-158n provides in relevant part: "At or before the commencement of any work under a construction contract, the owner shall post and maintain in a conspicuous place at the construction site . . . (2) the volume and page number of the land records of the town in which such property is located . . . ."

[10] General Statutes § 4a-67a (a) provides in relevant part: "The Commissioner of Administrative Services shall prepare on or before October 1, 1989, and thereafter periodically update, a plan to increase state procurement of goods that contain recycled materials and products that are recyclable or remanufactured . . . . In preparing such plan, the commissioner shall assess the feasibility and efficacy of . . . requiring the state to utilize *two-sided copies*, whenever possible, to reduce paper waste." (Emphasis added.)

The plaintiff argues that the public policy behind the act, namely, relatively inexpensive access to government records, compels this court to interpret "page" to mean a sheet of paper. Thus, the plaintiff argues that she and other requestors of public documents are required to pay only fifty cents for certified, two-sided copies of public records. We disagree.

The plaintiff directs the attention of this court to three of the commission's prior advisory opinions. The plaintiff suggests that these opinions demonstrate the state's strong public policy of providing inexpensive copies of public records to the public. The plaintiff cites the commission's advisory opinions, numbers thirty, fifty-five and fifty-nine.[11] The plaintiff refers to dicta in each of these opinions in which the commission indicates that the purpose of the act is to provide the general public easy and relatively inexpensive access to public records. Although we do not have occasion now to review the particular conclusions of any of the commission's advisory opinions, we believe that it is beyond question that the overarching purpose of the

[11] In advisory opinion thirty, the commission was asked to reconcile the fee provisions of General Statutes § 1-15, now §1-212, with General Statutes § 7-34 (a), with regard to certified copies of land records. The commission determined that § 7-34 (a), because it was more specific than the general provisions of §1-15, and because §1-15 explicitly stated that other established law would apply when it contradicted the general provisions of §1-15, the fee provisions of § 7-34 (a) governed. Opinions, Conn. Freedom of Information Commission No. 30 (February 22, 1978).

In advisory opinion fifty-five, the commission determined that with regard to large property maps, when the agency does not have the capability of providing adequate copies of the large maps, it may offer to send the maps out to have them copied and charge the requestor no more than the cost to the agency, pursuant to General Statutes § 51-15. Opinions, Conn. Freedom of Information Commission No. 55 (November 9, 1983).

Finally, in advisory opinion fifty-nine, the commission determined that agencies may not charge fees in excess of the fee provisions of §1-15 to cover the cost of its personnel preparing and copying the requested records. Opinions, Conn. Freedom of Information Commission No. 59 (August 22, 1984).

act is, as the plaintiff asserts, to "facilitate public access to government records by making such records available at a reasonably low cost." See Opinions, Conn. Freedom of Information Commission No. 55 (November 9, 1983); see also *Chief of Police* v. *Freedom of Information Commission*, 252 Conn. 377, 387, 746 A.2d 1264 (2000). We do not agree, however, that this resolves the question of statutory interpretation before us.

The goal of public access is not the only concern addressed in the statute. Instead, by shifting some of the financial burden onto the requestor through the fee schedule provisions, the legislature has also manifested a second concern, namely, not to overburden agencies with the expense of complying with the act. Furthermore, to the extent that some requestors may find the cost provided in the fee schedule to be prohibitively expensive, § 1-212 (d) provides that the usual fee may be waived in some instances.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

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[12] General Statutes § 1-212 (d) provides: "The public agency shall waive any fee provided for in this section when: (1) The person requesting the records is an indigent individual; (2) The records located are determined by the public agency to be exempt from disclosure under subsection (b) of section 1-210; (3) In its judgment, compliance with the applicant's request benefits the general welfare; or (4) The person requesting the record is an elected official of a political subdivision of the state and the official (A) obtains the record from an agency of the political subdivision in which the official serves, and (B) certifies that the record pertains to the official's duties.

STATE OF CONNECTICUT *v.* SCOTT LEWIS (AC 29167)

Bishop, McLachlan and Harper, Js.

Argued March 25—officially released June 17, 2008

Procedural History

Information charging the defendant with two counts each of the crimes of murder and felony murder, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Ripley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court; thereafter, the Supreme Court affirmed in part and reversed in part the judgment of the trial court and remanded the case for further proceedings; subsequently, the court, *Damiani*, *J.*, granted the state's motion to dismiss the defendant's motion to correct an illegal disposition, and the defendant appealed. *Affirmed*.

Scott Lewis, pro se, the appellant (defendant).

Christopher T. Godialis, senior assistant state's attorney, with whom, on the brief, was *Michael Dearington*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Scott Lewis, appeals from the judgment of the trial court dismissing his motion to correct an illegal disposition. The defendant claims that, in determining that it lacked subject matter jurisdiction, the court improperly construed Practice Book § 43-22. We affirm the judgment of the trial court.

The defendant was convicted, in 1995, of two counts of murder in violation of General Statutes §§ 53a-8 and 53a-54a, and two counts of felony murder in violation

of General Statutes § 53a-54c.[1] Our Supreme Court affirmed the defendant's conviction following his direct appeal. See *State* v. *Lewis*, 245 Conn. 779, 717 A.2d 1140 (1998).[2]

The defendant thereafter filed a motion to correct an illegal disposition pursuant to Practice Book § 43-22, claiming that our Supreme Court, in affirming his conviction, had "relied upon . . . false and wilfully excluded facts . . . in rendering its decision."[3] The state filed a motion to dismiss for lack of subject matter jurisdiction, claiming that a motion to correct pursuant to § 43-22 "is an inappropriate vehicle for challenging a sentence based on some alleged defect in the conviction." The court granted the motion to dismiss, reasoning that "[t]he defendant's motion does not . . . address the sentence or disposition of his case. His only attack is on the validity of the underlying conviction." This appeal followed.

The plaintiff claims that the court, in granting the state's motion to dismiss, overlooked the import of his motion to correct. He argues that the court improperly assumed that he had filed a motion to correct an illegal *sentence* pursuant to § 43-22, whereas he had actually filed a motion to correct an illegal *disposition*. The defendant indicates that § 43-22 clearly provides in relevant part that "[t]he judicial authority may at any time correct an illegal sentence *or other illegal disposition* . . . ." (Emphasis added.) He contends that the claim asserted by his motion to correct, which was that there

[1] The defendant subsequently was sentenced to a term of incarceration of 120 years.

[2] Because the defendant had been convicted of both murder and felony murder with respect to each of two victims, the Supreme Court directed the merger of the felony murder convictions with the murder convictions.

[3] Specifically, the defendant claimed that, due to an incorrect transcript having been filed with our Supreme Court, that court, at the time it considered the direct appeal, was under the improper belief that a third party, whose hearsay statements the defendant had sought to introduce at trial, had not been proven to have been unavailable at trial and that the state knowingly declined to draw the court's attention to this error.

existed a fault in the appeals process, is encompassed within the phrase "other illegal disposition." We do not agree.

Before we address the merits of the defendant's claim, we must first discuss the principles of subject matter jurisdiction that guide our resolution of his claim. "In the absence of statutory or constitutional provisions, the limits of [the trial court's] jurisdiction are delineated by the common law." *State* v. *Luzietti*, 230 Conn. 427, 431, 646 A.2d 85 (1994). Although "the [trial] court loses jurisdiction over the case when [a] defendant is committed to the custody of the commissioner of correction and begins serving [his] sentence"; id., 432; § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. See *State* v. *Lawrence*, 281 Conn. 147, 155, 913 A.2d 428 (2007). Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. Furthermore, "[o]ur standard of review governing an appeal from a judgment granting a motion to dismiss on the ground of lack of subject matter jurisdiction concerns a question of law and is plenary." *Mercer* v. *Rodriquez*, 83 Conn. App. 251, 255, 849 A.2d 886 (2004).

It is well settled that "[t]he purpose of . . . § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition . . . ." *State* v. *Mollo*, 63 Conn. App. 487, 491, 776 A.2d 1176, cert. denied, 257 Conn. 904, 777 A.2d 194 (2001); see also *State* v. *Lawrence*, supra, 281 Conn. 158. Therefore, "the relief allowed by . . . § 43-22 . . . require[s], as a precondition, a valid conviction." *State* v. *Mollo*, supra, 491. It is clear to us that the defendant's motion to correct, regardless of whether framed as a motion to correct an illegal sentence or a motion to correct an illegal disposition, solely challenges his conviction rather than the sentence or disposition of that conviction. His claim that our Supreme

Court relied on a faulty factual basis in rejecting an evidentiary challenge and, thus, affirming his conviction, amounts to a direct attack on the validity of his conviction.[4] Accordingly, the trial court was correct to conclude that it lacked subject matter jurisdiction to review the defendant's claim pursuant to § 43-22.

The judgment is affirmed.

RICHARD RODRIGUEZ *v.* COMMISSIONER OF CORRECTION
(AC 27377)

Harper, Beach and Hennessy, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his previous habeas counsel had provided ineffective assistance. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; even if the petitioner's first habeas counsel was deficient in failing to call a certain witness at the petitioner's first habeas trial, the petitioner failed to show that he was prejudiced thereby and, thus, he failed to demonstrate that the issues raised with regard to the court's denial of his petition for a writ of habeas corpus were debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised deserved encouragement to proceed further.

Argued March 28—officially released June 17, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment

[4] We note that our decision today does not preclude the defendant from pursuing his claim via other remedies available at law, including a petition for a writ of habeas corpus. See, e.g., *Flaherty* v. *Warden*, 155 Conn. 36, 39, 229 A.2d 362 (1967) ("[w]here a person is confined pursuant to a judgment, the validity of his detention under that judgment is the proper issue to be determined [in a writ of habeas corpus]").

denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Damon A. R. Kirschbaum, special public defender, for the appellant (petitioner).

Melissa L. Streeto, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, senior assistant state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Richard Rodriguez, appeals following the denial of certification to appeal from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. The petitioner claims that the court abused its discretion in denying certification to appeal and improperly rejected his claim that his previous habeas counsel, Vicki H. Hutchinson, had provided ineffective assistance. We dismiss the petitioner's appeal.

In December, 1991, an elderly couple was robbed at gunpoint in their Hamden home. The petitioner subsequently was arrested in connection with the robbery. The petitioner was later convicted, after a trial by jury, of various crimes[1] and received a total effective sentence of forty years imprisonment.

[1] Specifically, the petitioner was convicted of two counts of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), one count of conspiracy to commit robbery in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-136, one count of burglary in the third degree in violation of General Statutes § 53a-103, one count of conspiracy to commit burglary in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-103, two counts of kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) and 53a-8, two counts of larceny in the second degree in violation of General Statutes §§ 53a-123 (a) and 53a-8, and one count of larceny in the third degree in violation of General Statutes § 53a-124 (a) and 53a-8.

Our Supreme Court, in considering the petitioner's direct appeal, recited the following relevant facts: "At approximately 6:15 p.m., the Hamden police broadcast a report of an armed robbery . . . involving two large Caucasian males wearing ski masks and baggy pants with elastic waistbands. The report also stated that one of the perpetrators had a mustache.

"Shortly after the broadcast, Sergeant John Kennelly arrived at the victims' home, where he observed a red automobile parked on the side of the road, twenty to twenty-five feet from the victims' driveway. Upon approaching the vehicle, he noted that there was a woman in the driver's seat accompanied by two men, one standing outside the vehicle and the other seated in the rear of the car. Kennelly noted that the man in the back seat was a Hispanic male with dark hair and a mustache. He recognized the man standing alongside the vehicle as Daniel Garrison, a personal acquaintance, and he asked Garrison what he was doing at that location. Garrison responded that they had stopped there because he and his girlfriend, the driver, had been having an argument and she had stopped the car. Kennelly advised Garrison to move along as there recently had been trouble in the area. Kennelly then proceeded to drive up the driveway to the victims' home, where he interviewed the victims briefly. At that point, Kennelly learned from descriptions given by the victims that one of the perpetrators resembled Garrison and that the other had a mustache and had worn a brown leather coat.

"Meanwhile, having learned of the radio report, Hamden police officer Gary Komoroski, alert for possible suspects in the . . . robbery, was patrolling Shepard Avenue. At approximately 6:36 p.m., Komoroski observed several vehicles in front of him swerving as if to avoid an obstruction in the road. As he approached the point of the apparent obstruction, he observed a

mustached Hispanic male wearing a brown leather jacket and jeans, standing in the roadway and waving his arms frantically in an attempt to flag down passing vehicles. The Hispanic male was later identified as the [petitioner]. At that point, the [petitioner] was approximately 2.4 miles from the victims' home on Shepard Avenue and was walking southbound, away from the victims' residence.

"After notifying the police dispatcher that he was leaving his vehicle to question the [petitioner], Komoroski approached the [petitioner] and asked several questions to which the [petitioner] gave responses that Komoroski considered suspicious. For example, when asked what he was doing, the [petitioner] said, 'just walking.' When asked where he was going, the [petitioner] replied that he was walking from New Haven to Hartford. Komoroski then asked the [petitioner] if he knew what town he was in and the [petitioner] replied that he did not know. The [petitioner] then told Komoroski that he had been in a car with a man and a woman and that they had started to fight and had let him out of the car. The [petitioner] also stated that he did not know the names of the people with whom he had been in the vehicle.

"Acting on the [petitioner's] implausible and evasive responses, as well as the fact that the [petitioner] had a mustache and was found walking away from the crime scene within a time frame that could have placed him at his present location after having participated in the crimes, Komoroski radioed to Kennelly to tell him that he might have one of the perpetrators of the robbery with him. Kennelly responded that he would be there shortly. Komoroski then returned to the [petitioner] and asked him his name. The [petitioner] responded that his name was Anthony Rodriguez. Komoroski then conducted a patdown search for weapons but found none.

"Komoroski subsequently began to issue the [petitioner] a summons for the infraction of reckless use of a highway by a pedestrian in violation of General Statutes § 53-182. While filling out the summons, he asked the [petitioner] for identification in order to confirm the [petitioner's] identity and to complete the summons. Without checking his pockets, the [petitioner] responded that he did not have any identification. Komoroski then asked the [petitioner] either to check his pockets for identification or to empty his pockets to see if he had any identification.

"The [petitioner] immediately and voluntarily emptied his pockets and extracted, among other things, a rubber glove and a tin foil packet containing baking soda. When asked by Komoroski about the purpose of these items, the [petitioner] responded that he used them to freebase cocaine. Komoroski then arrested the [petitioner] for possession of drug paraphernalia in violation of General Statutes § 21a-267 and placed the [petitioner] in his police vehicle. Shortly thereafter, and approximately ten minutes after Komoroski had first seen the [petitioner], Kennelly arrived at the scene. After he arrived, Kennelly approached Komoroski's vehicle and immediately recognized the [petitioner], who was seated in the rear of the police vehicle, as one of the passengers in the red vehicle that had been parked near the victims' driveway.

"Thereafter, the [petitioner], after he had orally waived his *Miranda* rights,[2] voluntarily spoke with Kennelly concerning his activities earlier that evening. The [petitioner] confirmed that he had been in the red car near the victims' driveway. He stated that he had been there because he and the two others in the car had been using cocaine and had pulled over to the side of

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the road to do so. The [petitioner] stated that he did not know the name of the other male in the car, but that the female's name was either Carol or Chris, despite having previously told Komoroski that he did not know her name. A few minutes after his initial statement to Kennelly, the [petitioner] further stated that at some point the female and the other male had left the vehicle and had walked up the victims' driveway. He said that they later returned down the driveway carrying a Macy's bag. After making this second statement, the [petitioner] was transported to the victims' home for a show-up in order to allow the victims to attempt to identify him.

"Upon arriving at the victims' home, the [petitioner] stood on the front walkway illuminated by two lights. The victims observed the [petitioner] from a window in their darkened house. This arrangement was made so that the [petitioner] would be unable to see the victims. There was no evidence introduced at [the criminal] trial relevant to whether the victims, at the show-up, had been able to identify the [petitioner] positively. The [petitioner] was then escorted back to the police vehicle where, although he had not been informed of the number, age or gender of the victims, he twice stated that the 'old man' and the 'old woman' could not identify him.

"The following day, while in the Meriden courthouse detention area awaiting his arraignment, the [petitioner] was seen wearing a woman's diamond ring on his finger. When a sheriff asked for the ring in order to inventory it, the [petitioner] removed the ring from his finger, placed it in his mouth and appeared to swallow it. A warrant was thereafter issued for an X ray of the [petitioner] in order to determine the location of the ring. After the warrant had been issued but before the [petitioner] was taken to the hospital, he produced the ring from his pocket and turned it over to the police. The

ring was later identified as belonging to [one of the victims]." *State* v. *Rodriguez*, 239 Conn. 235, 238–43, 684 A.2d 1165 (1996).

At the petitioner's criminal trial, the petitioner's trial counsel, Jerome Rosenblum, filed a motion to suppress the introduction of, inter alia, the ring as fruit of the allegedly illegal search of the petitioner's pockets.[3] The court denied the motion. This court reversed the petitioner's conviction on direct appeal, holding that the motion to suppress had been denied improperly, and our Supreme Court then reversed the decision of this court, holding that the motion to suppress had, in fact, been denied properly. See id., 251. The petitioner's conviction was reinstated on remand to this court. See *State* v. *Rodriguez*, 44 Conn. App. 818, 692 A.2d 846, cert. denied, 242 Conn. 902, 697 A.2d 363 (1997).

The petitioner then filed a petition for a writ of habeas corpus, claiming that Rosenblum had rendered ineffective assistance of counsel in failing to cross-examine Komoroski adequately at the suppression hearing. The petitioner's habeas counsel, Hutchinson,[4] did not call Komoroski to testify at the habeas trial. The habeas court denied the petition, and the petitioner did not appeal from that judgment. Instead, the petitioner filed a second petition for a writ of habeas corpus. In his second petition, the petitioner claimed that Hutchinson had rendered ineffective assistance of counsel in failing to call Komoroski to testify at the first habeas trial. The second habeas court denied this second petition and then denied the petitioner certification to appeal. This appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate

[3] The legality of this search is irrelevant to our disposition of the petitioner's appeal.

[4] Although the petitioner initially filed this petition pro se, Hutchinson commenced representing him prior to the habeas trial.

review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 740–41, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

Furthermore, "[o]ur Supreme Court set the standard of review to be afforded an appeal from the dismissal of a habeas corpus petition alleging ineffective assistance of habeas counsel in *Lozada* v. *Washington*, 223 Conn. 834, 613 A.2d 818 (1992). To succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. A convicted [petitioner's] claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Only if the petitioner succeeds in [this] herculean

task will he receive a new trial." (Citations omitted; internal quotation marks omitted.) *Denby* v. *Commissioner of Correction*, 66 Conn. App. 809, 812–13, 786 A.2d 442 (2001), cert. denied, 259 Conn. 908, 789 A.2d 994 (2002).

Our resolution of the petitioner's claim of ineffective assistance of counsel requires a thorough explanation of the parameters of our Supreme Court's analysis in rejecting the petitioner's claim that the trial court had improperly denied his motion to suppress.

On the basis of the aforementioned facts, our Supreme Court concluded that "a finding of probable cause to believe that the [petitioner] had committed the . . . robbery arose from grounds entirely independent of the allegedly illegal search of the [petitioner's] pockets," and the petitioner's motion to suppress had thus been denied properly. *State* v. *Rodriguez*, supra, 239 Conn. 244.

The court explained that "there were two independent and simultaneous investigations occurring pertaining to the activities of the [petitioner] on the night of the . . . robbery," one of which involved the petitioner's suspicious behavior on the highway, the other the robbery itself. Id., 244–45. The court continued that "[i]t is undisputed that when Komoroski saw the [petitioner] obstructing the highway and engaging in 'aggressive hitchhiking,' he had a reasonable and articulable suspicion to conduct a brief, investigatory detention of the [petitioner] under *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), in order to determine the reason for the [petitioner's] aberrant conduct and to issue him a summons for reckless use of a highway in violation of § 53-182.

"Once Komoroski had lawfully detained the [petitioner] in connection with his behavior on Shepard Avenue, several other factors arose that provided

Komoroski with a reasonable and articulable suspicion regarding the [petitioner's] involvement in the robbery . . . . That suspicion led Komoroski to contact Kennelly. Those factors included: (1) the fact that the [petitioner] had a mustache, as did one of the perpetrators of the recent robbery; (2) the fact that the [petitioner] was traveling away from the scene of the crime and on the same road on which the crime had occurred; (3) the fact that the short distance from the crime scene easily could have been traveled on foot in the time intervening since the crime; (4) the fact that the [petitioner] claimed to be 'just walking,' even though Komoroski had seen him aggressively attempting to flag down passing cars; (5) the fact that the [petitioner] claimed to be walking from New Haven to Hartford even though traveling southbound on Shepard Avenue was an unlikely route, and even though a 'walk' from New Haven to Hartford would be approximately forty-five miles; (6) the fact that the [petitioner] claimed not to know where he was; and (7) the fact that the [petitioner] claimed to have been traveling with a male and a female whose names he did not know and who had asked him to leave their car." *State* v. *Rodriguez*, supra, 239 Conn. 245–46. Therefore, the court reasoned, Komoroski had been justified in detaining the petitioner for a short while until Kennelly arrived at the scene, and, on the basis of Kennelly's previous interaction with the petitioner in the area, probable cause existed to arrest the petitioner for the robbery. Id., 247–49. On this basis, the Supreme Court concluded that "the robbery investigation proceeded from beginning to end without being influenced by the alleged search of the [petitioner's] pockets" and that the trial court properly had denied the petitioner's motion to suppress. Id., 245.

The crux of the petitioner's claim of ineffective assistance of counsel is that our Supreme Court based this legal conclusion on a faulty factual basis. The petitioner

contends that although our Supreme Court assumed that Komoroski radioed Kennelly prior to Komoroski's search of the petitioner's pockets, Komoroski clearly testified at the second habeas trial that he contacted Kennelly only after searching the petitioner. The petitioner argues that this factual distinction demonstrates that suspicion of the petitioner as a suspect in the robbery arose only after the search had occurred and, therefore, that the discovery of the ring and subsequent arrest of the petitioner would not have occurred but for the search of the petitioner's pockets. The petitioner concludes that had the trial court been presented with this correct factual basis, which was elicited at this second habeas trial, it would have been compelled to grant the petitioner's motion to suppress the ring as fruit of an illegal search. The petitioner argues that the failure of Rosenblum and Hutchinson to present adequately Komoroski's testimony as to the timing of this radio call, in turn, amounted to ineffective assistance of counsel.

The second habeas court concluded, upon hearing this argument and hearing Komoroski's testimony, that even had counsel's performance been deficient, the petitioner had not been prejudiced thereby. We agree. The second habeas court aptly observed that the precise timing of Komoroski's radio call to Kennelly was irrelevant to the ultimate conviction of the petitioner. The petitioner's contention that the pocket search gave rise to Komoroski's suspicion of the petitioner, and, a fortiori, the petitioner's arrest, simply is not borne out by the facts. Our Supreme Court enumerated seven factors supporting a reasonable and articulable suspicion for Komoroski to have suspected the petitioner's involvement in the robbery, none of which involve or relate to the search of the petitioner's pockets.[5] We agree

[5] Indeed, the petitioner conceded at oral argument that an objective reasonable and articulable suspicion existed prior to the search of his pockets. He contended, however, that this objective suspicion was rendered immate-

with the reasoning of the second habeas court and our Supreme Court that the pocket search simply was irrelevant to Komoroski's investigation of the robbery. The petitioner has therefore failed to demonstrate that he was prejudiced by Hutchinson's performance, and his claim of ineffective assistance of counsel must fail. See *Ricks* v. *Commissioner of Correction*, 98 Conn. App. 497, 517–18, 909 A.2d 567 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007).

In light of the foregoing conclusions, the petitioner has not demonstrated that the issues raised with regard to the court's denial of his petition for a writ of habeas corpus are debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised deserve encouragement to proceed further. Thus, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

HOUSING AUTHORITY OF THE CITY OF NEW HAVEN *v.* THELMA GOODWIN ET AL.
(AC 27938)

Bishop, DiPentima and Robinson Js.

Syllabus

The plaintiff housing authority sought, by way of summary process, to regain possession of a low income housing unit where the defendant resided on the basis of her failure to maintain the apartment in a clean and

rial by Komoroski's admission, at the second habeas trial, that he did not form a subjective suspicion until after the pocket search. The plaintiff's contention is nonetheless belied by Komoroski's earlier testimony at the second habeas trial that he had first formed a subjective suspicion after hearing the petitioner's nonsensical answers to his questions, which occurred well before the search of the petitioner's pockets.

sanitary condition. The trial court rendered judgment for the plaintiff in accordance with a stipulation of the parties that required the defendant and her minor children to vacate the apartment within one month. Thereafter, the defendant moved to open the judgment, claiming that she suffered from serious cognitive limitations and that, as a result, she was unable to understand the significance and consequences of the stipulated judgment. The trial court denied the motion to open without the benefit of oral argument or an evidentiary hearing and, thereafter, denied the defendant's motion for reargument, and the defendant appealed to this court. *Held* that the trial court abused its discretion in denying the defendant's motions to open and for reargument without affording the defendant an opportunity to present evidence in support of her claim of mistake: although the defendant failed to request an evidentiary hearing in her motion to open, she did raise the issue of her limited ability to understand the stipulation in that motion, and her motion for reargument specifically requested an evidentiary hearing to demonstrate that she did not understand the stipulation she had signed and that her mistake in entering into the stipulation was due to her limited cognitive abilities; furthermore, the defendant's motions, along with the attachments thereto and the argument of counsel, were sufficient to give notice to the trial court that a factual determination was necessary to decide the motion to open fairly and that the presentation of evidence was a necessary predicate to those factual determinations.

Argued April 14—officially released June 17, 2008

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Doherty, J.*, rendered judgment for the plaintiff in accordance with the parties' stipulation; thereafter, the court denied the named defendant's motions to open the judgment and to reargue, and the named defendant appealed to this court; subsequently, the court, *Doherty, J.*, issued an articulation of its decision. *Reversed; further proceedings.*

Amy D. Marx, with whom was *Shelley A. White*, for the appellant (named defendant).

G. Adam Schweickert III, with whom, on the brief, was *Robert W. Chesson*, for the appellee (plaintiff).

Opinion

BISHOP, J. The dispositive issue in this housing appeal is whether the trial court abused its discretion in denying the defendant Thelma Goodwin[1] an evidentiary hearing on her motion to open a stipulated judgment that she had entered into one month earlier with the plaintiff, the housing authority of the city of New Haven. Because we resolve that issue in the affirmative, we reverse the judgment of the trial court.

The following factual and procedural history is relevant to the defendant's appeal. The defendant resides in a federal low income housing unit in New Haven, owned and operated by the plaintiff. On February 28, 2006, the plaintiff instituted a summary process action to recover possession of the premises on the basis of the defendant's failure to maintain the apartment in a clean and sanitary condition. The defendant filed an answer denying the allegations of the complaint and raising the special defense that all rent had been paid to the landlord.[2] On April 25, 2006, the defendant appeared pro se for trial and met with the attorney for the plaintiff. This meeting resulted in the parties' entering into a stipulated agreement under which judgment would enter in favor of the plaintiff with a final stay of execution until May 31, 2006. The defendant agreed to vacate the premises by May 31, 2006. The court questioned the defendant about her understanding of this agreement and then rendered judgment in accordance with the stipulation.[3]

[1] Marcus Goodwin and Monica Goodwin also were parties in the summary process action. Because they are not parties to this appeal, however, we refer to Thelma Goodwin as the defendant throughout this opinion.

[2] Interestingly, the plaintiff denied the defendant's special defense but did not allege nonpayment of rent as a basis for its summary process complaint.

[3] The court's canvass consisted of the following questions, to which the defendant responded affirmatively: "Are you [a party] to this agreement?"; "Have you read [the agreement]?"; "Have . . . you signed [the agreement]?"; "Do you understand what your rights and obligations are under this agreement?"; and, "Do you feel it's a fair and equitable proposal?"

On May 25, 2006, the defendant, with the assistance of counsel, filed a motion to open the judgment pursuant to Practice Book § 17-4[4] and General Statutes § 52-212a.[5] In her motion, the defendant claimed that she "suffers from serious cognitive limitations that affected her ability to understand the significance and consequences of the stipulated agreement without [the] advice of counsel or assistance of a mediator." Additionally, the defendant asserted her belief that she had a defense to the summary process action based on her disability and the plaintiff's duty to provide her a reasonable accommodation. On May 26, 2006, the court denied the motion to open without the benefit of oral argument or an evidentiary hearing.[6]

On May 31, 2006, the defendant filed a motion for reargument because the court had denied the motion to open without an evidentiary hearing. In support of her motion, the defendant presented an affidavit in which she asserted that she did not understand that the stipulation required that she vacate her apartment by May 31. The defendant claimed that she suffers from serious cognitive limitations, specifically that she has an IQ of sixty-five and has been classified as "mildly mentally retarded," which prevented her from understanding her procedural rights and the meaning and consequences of the stipulation.[7] The defendant

[4] Practice Book § 17-4 (a) provides in relevant part that "any civil judgment or decree rendered in the superior court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. . . ."

[5] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ."

[6] The record does not reflect that the defendant asked for oral argument or an evidentiary hearing in conjunction with this filing.

[7] In this regard, the defendant presented an affidavit from a licensed psychologist, as well as a copy of a psychological evaluation prepared in conjunction with proceedings in the Juvenile Court. In addition to classifying

claimed that when she signed the stipulation, she did so under the mistaken belief that she was being offered the opportunity to stay in the apartment, not that she, along with her seven minor children, would be required to vacate it in approximately four weeks.

The defendant's motion for reargument was scheduled for a hearing on June 6, 2006. At that hearing, the defendant, through counsel, requested that the court grant her motion for reargument and proceed with an evidentiary hearing on the underlying motion to open. The court continued the matter to June 20, 2006, to give the plaintiff an opportunity to respond to the motion for reargument.[8]

On June 20, 2006, the court heard oral argument on the defendant's motion for reargument. The defendant argued that she was entitled to an evidentiary hearing on her motion to open because she had set forth a "prima facie factual dispute" regarding her mistake in signing the stipulation. The plaintiff objected, arguing that the defendant cannot avoid a stipulation on the ground that she made a mistake unless that mistake was mutual, that the defendant did not ask for oral argument or an evidentiary hearing in her motion to open and that in signing the stipulated judgment, the defendant waived her right to open or to appeal from

the defendant as "mildly mentally retarded," the psychologist indicated that "[d]ue to her intellectual limitations, [the defendant] is likely to misunderstand or misapprehend detailed information, such as would be presented in a court proceeding. Further, part of her accommodation to limited understanding is to agree without question or to fail to seek clarification."

The defendant also presented the affidavit of her alderman, who indicated that when he told the defendant that she had agreed to vacate her apartment, she burst into tears, indicated that she had not understood that and asked what she was supposed to do with her seven children because she had nowhere else to go.

[8] On June 9, 2006, the court entered an injunction against the issuance of any execution pending the outcome of the defendant's motion for reargument. The defendant is still in possession of the subject premises.

the stipulated judgment.[9] On August 7, 2006, the court denied the motion for reargument without a written opinion. This appeal followed.

On November 24, 2006, the court issued an articulation setting forth several factual findings. The court found that the attorney for the plaintiff, who appeared before it on a regular basis, previously had been candid with the court when a tenant lacked the ability or competence to enter into a binding agreement and that he had not previously sought or allowed a judgment to enter against such a party. The court further found that the defendant's daughter and codefendant was "privy to the entire negotiation of the stipulated agreement and was well aware of [the defendant's] participation in those negotiations. She was also at [the defendant's] side when the court canvassed the agreement. At no time did she raise any concerns about the alleged limitations on [the defendant's] part, which would later become the basis of [the defendant's] attempts to open the judgment. If [the defendant] had any problems in coming to this agreement or in understanding the canvass by the court, it most certainly would have been obvious to her daughter, who most probably knows her better than anyone. It would also have been incumbent upon [the defendant's daughter] as codefendant to bring such concerns to the court's attention." Finally, the court found that the "defendant was neither defrauded nor mistaken as to the terms of the stipulated agreement she reached with the plaintiff's attorney and in the presence of her daughter . . . ." The court concluded that it did not, therefore, find that "proper grounds existed to permit or require an opening of the stipulated judgment of April 25, 2006, as evidenced by the [transcript

[9] The plaintiff contends that because the defendant expressly waived her right to open or to appeal from the stipulated judgment, this court does not have jurisdiction to consider this appeal. Because, however, the validity of the stipulated judgment is the underlying issue in this matter, the plaintiff's argument must fail.

of the entry of stipulated judgment], and, for that reason, both the motion to open and the motion to reargue were denied by this court."

In denying the defendant's motion for reargument, the court addressed the merits of her motion to open. Accordingly, we begin by setting forth the standard of review for a challenge to the denial of a motion to open.[10] "The principles that govern motions to open or set aside a civil judgment are well established. A motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Cox* v. *Burdick*, 98 Conn. App. 167, 176–77, 907 A.2d 1282, cert. denied, 280 Conn. 951, 912 A.2d 482 (2006).

"A stipulated judgment constitutes a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction. . . . A stipulated judgment allows the parties to avoid litigation by entering into an agreement that will settle their differences once the court renders judgment on the basis of the agreement. . . . A stipulated judgment, although obtained through mutual consent of the parties, is binding to the same degree as a judgment obtained through litigation. . . . It necessarily follows that if the judgment conforms to the stipulation it cannot be altered or set aside without the consent of all the parties, unless

[10] The standard of review for a court's denial of a motion to reargue also is abuse of discretion. *Terry* v. *Terry*, 102 Conn. App. 215, 230, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007).

it is shown that the stipulation was obtained by fraud, accident or mistake." (Citations omitted; internal quotation marks omitted.) *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 310, 780 A.2d 916 (2001).

"A motion to open a stipulated judgment, when grounded on mistake or duress, necessarily requires the court to make a factual determination before it can exercise its discretion to grant or deny the motion . . . . In making its factual determination whether a stipulated judgment should be opened, the court must inquire into whether the decree itself was obtained by fraud, duress, accident or mistake." (Internal quotation marks omitted.) *Cox* v. *Burdick*, supra, 98 Conn. App. 177. When such a factual determination must be made, "due process requires a hearing to provide the parties with an opportunity to present evidence." *Housing Authority* v. *Lamothe*, 225 Conn. 757, 769, 627 A.2d 367 (1993).

Both parties contend that *Lamothe* is pivotal in the resolution of this appeal. We agree. In *Lamothe*, the plaintiff housing authority sought, by way of a summary process action, to recover possession of certain premises leased to the defendants. The trial court rendered judgment awarding possession to the plaintiff in accordance with a stipulation of the parties. Id., 759–60. Thereafter, the defendant moved to open the judgment, claiming that the stipulation was the product of duress and mistake. Specifically, the defendant claimed that she entered into the stipulation without understanding its terms or the consequences of agreeing to a final stay of execution. Id., 760. Without allowing the defendant to introduce any evidence in support of the motion, the trial court denied the motion to open. Id., 762. Our Supreme Court held that because the defendant was prepared to present evidence in support of her motion to open that "would have provided the facts necessary for a proper evaluation of the legal issues raised by the

motion [to open] and the background against which the legal theories could have been tested,'' the court should have afforded her an opportunity to present that evidence. Id., 769.

Here, as in *Lamothe*, the defendant sought an evidentiary hearing to demonstrate that she did not understand the stipulation she had signed and that her mistake in entering into the stipulation was due to her limited cognitive abilities. Although she did not request an evidentiary hearing in her motion to open, she did raise the issue of her ability to understand in that motion, and she specifically requested an evidentiary hearing in her motion to reargue to provide the court with additional information regarding her cognitive difficulties. Her motions, along with the attachments thereto and the argument of counsel, were sufficient to give notice to the court that a factual determination was necessary to decide the motion to open fairly and that the presentation of evidence was a necessary predicate to those factual determinations.[11] Because the defendant should have been afforded the opportunity to present evidence in support of her claim of mistake,[12] we conclude that the court abused its discretion in denying her motions to open and for reargument.

The judgment is reversed and the case is remanded with direction to afford the defendant a full evidentiary hearing on her motion to open the stipulated judgment.

In this opinion the other judges concurred.

[11] Although the court did not afford the defendant an evidentiary hearing on the claims she raised in her motions to open and to reargue, it did make factual findings.

[12] The plaintiff contends that to open a stipulated judgment, even within four months from the date of its rendering, a movant must prove that the mistake was mutual. All of the cases cited by the plaintiff, however, in which mutual mistake is required concern situations in which the motion to open was filed beyond four months of the date of judgment. In *Lamothe*, on which we rely, the motion to open was filed within four months of the date of judgment and did not concern a mutual mistake. *Housing Authority* v. *Lamothe*, supra, 225 Conn. 760.

PABLO ANDRADES *v.* COMMISSIONER OF CORRECTION
(AC 28133)

Flynn, C. J., and Gruendel and Lavine, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, B, had rendered ineffective assistance by failing to file an application for sentence review. The habeas court rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court's determination that the petitioner failed to demonstrate that B's representation fell below an objective standard of reasonableness because it was the responsibility of the petitioner, not of B, to apply for sentence review was neither legally and logically correct nor supported by the facts in the record; B having undertaken to apply for sentence review on the petitioner's behalf, B was obligated to represent the petitioner effectively and to ensure that the application was filed properly, and it was undisputed that the petitioner never had his sentence reviewed by the sentence review division.

2. The petitioner could not prevail on his claim that the habeas court improperly concluded that B was not ineffective in failing to provide the petitioner with a Spanish language interpreter during the criminal trial, which the petitioner claimed was necessary to understand his rights and the criminal proceedings; B's failure to obtain a Spanish language interpreter at trial did not deprive the petitioner of any constitutional rights, and the habeas court's findings that the petitioner understood the English language, that there was no credible evidence that the petitioner had any difficulty understanding what was being said at trial and, thus, that it was not necessary to have an interpreter assisting the petitioner in translation during the trial were not clearly erroneous and were supported by the record.

3. The habeas court properly concluded that the petitioner failed to satisfy his burden of establishing that B was ineffective in failing to request additional competency examinations, that court's finding that the petitioner had failed to present credible evidence at the habeas proceedings that he was not mentally competent throughout the underlying criminal trial not having been clearly erroneous, and the petitioner having failed to rebut the strong presumption that B's performance during the criminal trial fell within the wide range of reasonable professional assistance.

Argued January 10—officially released June 17, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Hon. Sidney Axelrod*, judge trial referee; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Hon. Sidney Axelrod*, judge trial referee, issued an articulation of its decision. *Reversed in part; judgment directed.*

Elio C. C. Morgan, special public defender, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, C. J. The petitioner, Pablo Andrades, appeals from the judgment of the habeas court dismissing his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claims that his trial counsel had rendered ineffective assistance by failing (1) to file an application for sentence review properly, (2) to obtain a Spanish language interpreter at trial and (3) to ensure that the petitioner was competent throughout the trial. We agree only with the petitioner's first claim and, therefore, reverse in part and affirm in part the judgment of the habeas court.[1]

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. In 2000,

[1] The court, in a thoughtful decision, addressed the petitioner's eight claims, some of which included subclaims; on appeal, the petitioner briefed but three. We therefore limit our review to the claims set forth in the petitioner's appellate brief.

the petitioner was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The court thereafter sentenced the petitioner to a total effective term of fifty years imprisonment. The petitioner's conviction was upheld on appeal. *State* v. *Andrades*, 68 Conn. App. 905, 793 A.2d 299, cert. denied, 260 Conn. 909, 795 A.2d 545 (2002).

On September 16, 2005, the petitioner filed a second amended petition for a writ of habeas corpus, in which he raised multiple claims of ineffective assistance of trial counsel, Kevin Barrs. In his prayer for relief, the petitioner requested, inter alia, that his sentence review rights be reinstated. A habeas trial was held on April 18 and May 19, 2006. On August 31, 2006, the court dismissed the petition, finding that the petitioner had failed to satisfy his burden of proving ineffective assistance of counsel. The court subsequently granted the petition for certification to appeal to this court, and this appeal followed. Additional facts will be set forth as necessary.

Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Citation omitted; internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 80 Conn. App. 499, 503, 835 A.2d 1036 (2003), cert. denied, 267 Conn. 918, 841 A.2d 1190 (2004).

"In *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States

Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Internal quotation marks omitted.) *Nieves* v. *Commissioner of Correction*, 92 Conn. App. 534, 536, 885 A.2d 1268 (2005), cert. denied, 277 Conn. 903, 891 A.2d 2 (2006).

"The first part of the *Strickland* analysis requires the petitioner to establish that . . . counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

"Turning to the prejudice component of the *Strickland* test, [i]t is not enough for the [petitioner] to show that the errors [made by counsel] had some conceivable effect on the outcome of the proceeding. . . . Rather, [the petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Citation omitted; internal quotation marks omitted.) *Bova* v. *Commissioner of Correction*, 95 Conn. App. 129, 135, 894 A.2d 1067, cert. denied, 278 Conn. 920, 901 A.2d 43 (2006). With these principles in mind, we address in turn each of the petitioner's claims.

I

We first address the petitioner's claim that the court improperly concluded that Barrs did not provide ineffective assistance by failing to file properly an application for sentence review pursuant to General Statutes § 51-195.[2] We agree with the petitioner.

At the habeas hearing, the petitioner, in response to questions concerning his sentence review application, testified that Barrs had informed him that he would take care of the paperwork necessary to file the sentence review application. In a similar vein, Barrs stated that it was his practice to file an application for sentence review on behalf of his clients when he filed a motion for a waiver of fees and costs to appeal. Although Barrs testified as to his belief that he had applied for sentence review in the petitioner's case, he acknowledged that he did not have a copy of that application in his file,

[2] General Statutes § 51-195 provides: "Any person sentenced on one or more counts of an information to a term of imprisonment for which the total sentence of all such counts amounts to confinement for three years or more, may, within thirty days from the date such sentence was imposed or if the offender received a suspended sentence with a maximum confinement of three years or more, within thirty days of revocation of such suspended sentence, except in any case in which a different sentence could not have been imposed or in any case in which the sentence or commitment imposed resulted from the court's acceptance of a plea agreement or in any case in which the sentence imposed was for a lesser term than was proposed in a plea agreement, file with the clerk of the court for the judicial district in which the judgment was rendered an application for review of the sentence by the review division. Upon imposition of sentence or at the time of revocation of such suspended sentence, the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the term within the limits fixed by law. A form for making such application shall accompany the notice. The clerk shall forthwith transmit such application to the review division and shall notify the judge who imposed the sentence. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven days if requested to do so by the review division. The filing of an application for review shall not stay the execution of the sentence."

nor did he have any documentation reflecting that the application had been filed with the court. The petitioner stated that the sentence review division had not reviewed his sentence. Likewise, Barrs testified that, although the sentence review division usually would contact him about a pending sentence review, he was never informed of a sentence review concerning the petitioner by the sentence review division. Moreover, Barrs stated that he never inquired about the status of the petitioner's sentence review.

Following the hearing, the court issued a memorandum of decision in which it determined that it was the petitioner's "responsibility to follow through with a request for sentence review and not that of his attorney." The court, therefore, concluded that the petitioner had not satisfied his burden of proving that Barrs was ineffective with respect to the sentence review application. On March 19, 2008, this court, sua sponte, ordered an articulation. In response, the habeas court indicated that it had inferred that Barrs had undertaken to file the application for sentence review on behalf of the petitioner.

On the basis of our plenary review, we conclude, contrary to the habeas court, that the petitioner satisfied both prongs of the *Strickland* test as to his claim of ineffective assistance pertaining to the filing of the application for sentence review. First, it is undisputed that the petitioner never had his sentence reviewed by the sentence review division. With respect to the court's determination that the petitioner failed to demonstrate that Barrs' representation fell below an objective standard of reasonableness because it was the petitioner's responsibility to apply for sentence review, we conclude that such a conclusion is not legally or logically correct, nor does it find support in the facts that appear

in the record. See *Sadler* v. *Commissioner of Correction*, 100 Conn. App. 659, 661, 918 A.2d 1033, cert. denied, 285 Conn. 901, 938 A.2d 593 (2007).

In so concluding, we find instructive our Supreme Court's discussion in *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 712 A.2d 947 (1998), concerning claims of ineffective assistance of counsel with respect to sentence review. "Under article first, § 8, of the Connecticut constitution and the sixth and fourteenth amendments to the United States constitution, the petitioner had a right to the effective assistance of counsel with respect to access to sentence review. '[T]he sentencing process is a critical stage of a criminal trial.' *Consiglio* v. *Warden*, 153 Conn. 673, 676, 220 A.2d 269 (1966). Accordingly, an indigent criminal defendant has a constitutional right to appointed counsel at sentence review. Id., 676. The right to counsel at sentence review would be meaningless unless it also implied the right to effective assistance of such counsel. See *Lozada* v. *Warden*, [223 Conn. 834, 838–39, 613 A.2d 818 (1992)]. *It would equally be meaningless if it were not afforded at the time when invocation of sentence review is at issue.*" (Emphasis added.) *James L.* v. *Commissioner of Correction*, supra, 144.

In the present case, as the court indicated in its articulation, Barrs had undertaken to ensure that the application for sentence review was filed properly on behalf of the petitioner, and this finding is supported by the evidence, namely, the testimony given by the petitioner and by Barrs. In light of this finding and *James L.*, the court therefore could not have concluded properly that it was the petitioner's responsibility to apply for sentence review. See id. Because Barrs had undertaken to apply for sentence review, the petitioner had a right to the effective assistance of counsel with respect to the sentence review application. See id. Nevertheless, the petitioner never had his sentence reviewed, and Barrs,

having undertaken the responsibility of filing the application for sentence review, had an obligation to represent the petitioner effectively and to ensure that the application was filed properly. As a result, the petitioner was prejudiced because he was denied the right to have his sentence reviewed. Accordingly, we conclude that the petitioner satisfied his burden of proving a claim of ineffective assistance under *Strickland*, and he is entitled to have his right to sentence review restored. See id., 148.

II

The petitioner next claims that the court improperly concluded that he failed to prove his claim of ineffective assistance with respect to the need for a Spanish language interpreter during the criminal trial. The petitioner argues that he needed the assistance of an interpreter during trial in order to understand the nature of his rights and the criminal proceedings and that, therefore, Barrs was ineffective in failing to provide the petitioner with an interpreter. We disagree.

"Our Supreme Court [in *State* v. *Munoz*, 233 Conn. 106, 132, 659 A.2d 683 (1995)] has held that continuous translations are required at trial when a non-English speaking defendant cannot understand or appreciate the proceedings. . . . Elaborating on this principle, the court has stated that under appropriate circumstances, a [non-English speaking] defendant's [constitutional rights] . . . may be violated if he is not provided with [an] . . . interpreter . . . [for] the testimony of English speaking witnesses and interpreting between him and his English speaking counsel during the testimony of all witnesses . . . . The court has cautioned, however, that [a] critical factual underpinning of these constitutional requirements . . . is that the defendant has so limited an understanding or ability to speak English that his ability to comprehend the proceedings

and to communicate with his counsel is significantly impaired, adding that the basic constitutional inquiry is whether [the failure to provide an interpreter throughout the entire trial] made the trial fundamentally unfair . . . and the failure to provide continuous, word-for-word translation will require a new trial only upon such a showing of fundamental unfairness." (Citations omitted; internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 57 Conn. App. 550, 553–54, 749 A.2d 657 (2000).

We conclude that under this standard and given the facts as found by the habeas court, Barrs' failure to obtain a Spanish language interpreter at trial did not deprive the petitioner of any constitutional rights. The record indicates that although the petitioner's primary language is Spanish, he also understands and communicates with others in English. At the habeas proceedings, the petitioner testified, through an interpreter, that he understands English "[m]ore or less" but that he has difficulty comprehending certain legal concepts in English. When the petitioner attended school, he was in bilingual classes as well as classes that were taught in English. The petitioner further stated that during the competency examinations he underwent prior to trial, the medical professionals communicated with him in English.

At the habeas trial, Barrs testified that during his representation, which occurred over a period of one and one-half years, he communicated with the petitioner in English. In addition, Barrs stated that he met with the petitioner on approximately twenty occasions and that the petitioner spoke in English at these meetings. Barrs also testified that the petitioner never indicated that he was unable to understand English or what transpired in the courtroom. Barrs acknowledged that the petitioner may have had some difficulty comprehending complex legal terms; however, Barrs stated that he had explained

these matters to the petitioner in a way that he could understand.

On the basis of this testimony at the habeas trial, as well as transcripts from the underlying criminal trial reflecting that the petitioner had conferred with Barrs, the habeas court determined that the petitioner failed to establish that Barrs' performance was lacking because he did not obtain a Spanish language interpreter. Specifically, the court found that "the petitioner understands the English language" and also that there was "no credible evidence that the petitioner had any difficulty understanding what was being said at trial." The court therefore determined that it was "not necessary to have an interpreter assisting the petitioner in translation during the trial." After reviewing the parties' briefs and the record, we conclude that the findings of the court are not clearly erroneous. Furthermore, we conclude that the court's legal conclusion that the petitioner was not deprived of the constitutional right to the effective assistance of counsel was correct legally and logically.

III

The petitioner finally claims that the court improperly failed to conclude that Barrs rendered ineffective assistance by not ensuring that the petitioner was competent throughout the criminal trial.[3] We disagree.

The crux of the petitioner's argument is that Barrs was ineffective in failing to request additional competency evaluations pursuant to General Statutes § 54-56d.[4] In support of his claim, the petitioner, in his posttrial brief to the habeas court and in his appellate brief,

[3] In his second amended petition, the petitioner alleged that Barrs "failed to investigate the petitioner's mental competency at the time trial actually began," "failed to ensure [that] the petitioner was mentally competent throughout the entire trial process" and "did not conduct sufficient investigation into mental health issues the petitioner faced during the trial."

[4] General Statutes § 54-56d provides in relevant part: "(a) Competency required. Definition. A defendant shall not be tried, convicted or sentenced

referred to a comment made by Barrs during jury selection in which he stated that the petitioner was having difficulty concentrating.[5]

The following testimony and evidence was presented at the hearing on the petitioner's habeas petition. Barrs testified that shortly after commencing representation of the petitioner, he made a request to the trial court for an examination of the petitioner to determine his competency. The court granted the request, and, subsequently, James Phillips, a physician, evaluated the petitioner and, in a July 26, 1999 report, concluded that the petitioner was "able to understand the proceedings against him and [was] able to assist in his defense." Phillips' report was submitted to the trial court on August 24, 1999. Barrs then requested additional time so that another competency examination could be conducted. Thereafter, in September, 1999, Kenneth S. Robson, a physician, conducted an examination of the petitioner. Barrs' testimony at the habeas trial indicated that Robson, following an evaluation of the petitioner, had found the petitioner to be competent. Robson had noted in his report that the petitioner "appeared to understand the nature of the proceedings against him and appeared clearly able to assist in his own defense."

Subsequently, on September 19, 1999, Barrs waived a competency hearing,[6] and the case continued. Barrs

while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense. . . .

"(c) Request for examination. If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency. . . ."

[5] The record indicates that during jury selection, Barrs stated that the petitioner had problems concentrating the previous day "because he was so tired," but that the petitioner had "[gotten] a good night's sleep . . . and [felt] a lot better . . . ."

[6] The petitioner also claims for the first time on appeal that Barrs provided ineffective assistance when he waived the competency hearing under § 54-56d (e). Because this claim was not raised in the habeas court, and, therefore,

testified that during his multiple meetings with the petitioner in the months preceding the commencement of jury selection,[7] the petitioner was focused and able to concentrate. In addition, Barrs testified that he "didn't have any problems with [the petitioner] during jury selection."[8] Barrs' testimony indicated that although he had been concerned about the petitioner's competency when he first met the petitioner, he noticed that over the course of his representation, the petitioner improved and was able to communicate with him, thus quelling Barrs' initial concerns. Barrs therefore did not request any further evaluations of the petitioner's competency.

The habeas court, after hearing the testimony of Barrs and on the basis of the evidence presented, concluded that the petitioner had failed to carry his burden of proof under *Strickland* as to the allegation that Barrs should have requested additional competency examinations. The court found, and we agree, that the petitioner failed to present credible evidence at the habeas proceedings that he "was not mentally competent throughout the underlying criminal trial." After reviewing the record, we cannot conclude that the court's factual

the court did not address it, we decline to afford it review. See *Kelley* v. *Commissioner of Correction*, 90 Conn. App. 329, 335, 876 A.2d 600, cert. denied, 276 Conn. 909, 886 A.2d 423 (2005).

[7] Jury selection began on March 1, 2000, and the presentation of evidence commenced on April 3, 2000. The petitioner was sentenced in June, 2000.

[8] At the habeas trial, the following colloquy occurred between Barrs and the petitioner's habeas counsel:

"Q. Now, so you had about a month, at least three weeks between the end of jury selection and the start of evidence. Is that correct?

"A. That's correct.

"Q. Okay. Based on [the petitioner's] mental health history and the problems that you had during jury selection, did you consult with any mental health experts in those intervening three weeks to make sure [the petitioner] was competent to go forward with trial?

"A. We didn't have any problems with him during jury selection, so that's why we didn't."

findings are clearly erroneous. We agree with the court that the petitioner failed to rebut the strong presumption that Barrs' performance during the criminal trial fell within the wide range of reasonable professional assistance. Accordingly, the court properly concluded that the petitioner failed to satisfy his burden of establishing that Barrs rendered ineffective assistance in failing to request additional competency examinations.

The judgment is reversed only as to the petitioner's claim of ineffective assistance of counsel concerning the application for sentence review and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus as to that claim only and restoring the petitioner's right to apply for sentence review. The judgment is affirmed in all other aspects.

In this opinion the other judges concurred.

SIRI A. KORSGREN *v.* SAMUEL H. JONES
(AC 28021)

Gruendel, Beach and Borden, Js.

Syllabus

The defendant, whose marriage to the plaintiff had been dissolved, appealed to this court from the judgment of the trial court setting his child support obligation. *Held*:

1. The trial court, which rendered judgment on the defendant's motion to set child support less than one month after the hearing thereon, complied with the statute (§ 51-183b) requiring a judgment in a civil cause to be rendered not later than one hundred twenty days from the completion of the trial of the cause.
2. The defendant could not prevail on his claim that the trial court abused its discretion in denying his motion for reargument of that court's child support order because that court failed to consider the regulation (§ 46b-215a-3 [b] [6] [B]) that permits a deviation from the presumptive support amount when there is an extraordinary disparity between the parties' net incomes, the trial court having expressly referenced that regulation and found in an articulation that the evidence did not indicate that there was an extraordinary disparity between the parties' net incomes.

3. The defendant's claim to the contrary notwithstanding, the trial court properly relied on certain precedent in considering and rejecting the defendant's claim that his shared physical custody of the parties' child justified a deviation from the child support guidelines; although the decision relied on by the trial court was factually distinguishable from the matter here, that decision addressed the specific claim raised here concerning a deviation from the child support guidelines in the context of a claim of shared physical custody by a defendant father.

4. On the basis of the evidence before it, including the financial affidavits of the parties, the trial court reasonably could have concluded that the defendant's expenses had not substantially increased and that the plaintiff's had not substantially decreased as a result of the shared parenting plan agreed to by the parties, and, therefore, that court did not abuse its discretion in concluding that a deviation from the child support guidelines was not warranted pursuant to the regulation (§ 46b-215a-3 [b] [6] [A]) that permits a deviation when the shared parenting arrangement substantially increases or decreases a parent's financial obligation.

5. The trial court's finding that the disparity between the parties' net incomes was not extraordinary was not clearly erroneous and, therefore, that court did not abuse its discretion in declining to deviate from the child support guidelines pursuant to the regulation (§ 46b-215a-3 [b] [6] [B]) that allows a deviation where there is an extraordinary disparity.

Argued April 14—officially released June 17, 2008

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Dennis F. Harrigan*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court issued an order of child support and denied the defendant's motion to reargue, and the defendant appealed to this court; subsequently, the court, *Hon. Dennis F. Harrigan*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Samuel H. Jones, pro se, the appellant (defendant).

Leslie I. Jennings-Lax, with whom was *Elizabeth Jennings-Lax*, for the appellee (plaintiff).

GRUENDEL, J. The pro se defendant, Samuel H. Jones, appeals from the judgment of the trial court setting his child support obligation. He claims that the court (1) failed to file its decision in a timely manner pursuant to General Statutes § 51-183b, (2) abused its discretion in denying his motion for reargument, (3) improperly applied *Lefebvre* v. *Lefebvre*, 75 Conn. App. 662, 817 A.2d 750, cert. denied, 263 Conn. 921, 822 A.2d 243 (2003), (4) incorrectly found that his expenses had not increased substantially as a result of the shared parenting plan agreed to by the parties and (5) incorrectly found that no extraordinary disparity existed between the parties' respective incomes.[1] We affirm the judgment of the trial court.

The relevant facts are as follows. The defendant and the plaintiff, Siri A. Korsgren, married in 1999. On August 5, 2000, their son was born. Following the subsequent breakdown of their marriage, the parties entered

[1] The defendant also claims, for the first time on appeal, that the separation agreement entered into by the parties is unenforceable. Specifically, he contends that, in rendering the judgment of dissolution, the court failed to make explicit findings on the record in deviating from the child support guidelines. The defendant did not appeal from the January 8, 2004 judgment of dissolution that incorporated the parties' separation agreement. Moreover, he did not raise this claim before the trial court as part of his various motions concerning his child support obligation. "It is well established that claims that have not been properly raised at trial are not reviewable by [an appellate] court. . . . [I]t is the function of the trial court, not [an appellate] court, to find facts. . . . [T]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Citation omitted; internal quotation marks omitted.) *Intercity Development, LLC* v. *Andrade*, 286 Conn. 177, 187–88, 942 A.2d 1028 (2008); see also Practice Book § 60-5. Accordingly, we decline to review that claim.

We also are compelled to note that the defendant's appellate brief raises the specter of gender bias. Although not separately briefed, the defendant does state that "this appeal would not be necessary if the defendant were female." Our thorough review of the record indicates that his accusation is completely unfounded.

into a separation agreement (agreement) that, after an uncontested hearing, the court incorporated into its judgment of dissolution. Pertinent to this appeal is § 3.2 of the agreement, which provides: "Commencing on the [defendant's] commencement of employment, and retroactive to the date of commencement of employment, the [defendant] shall pay child support to the [plaintiff]. The parties shall attempt to agree on a reasonable child support payment in accordance with the then existing [c]hild [s]upport [g]uidelines, if any. In the event the parties are unable to reach an agreement with respect to said child support payment, this issue shall be referred to the Superior Court at Stamford, Connecticut for a binding determination. The parties agree that a contingent wage withholding order shall issue to secure said obligation. Said obligation to support the child shall cease when the child attains age eighteen (18), or if the child is still attending high school when he attains age eighteen, support shall continue until the child has completed his high school education or attained age nineteen (19), dies or is emancipated, whichever event shall first occur." The court rendered judgment of dissolution on January 8, 2004. Neither party appealed from that judgment.

Pursuant to § 3.2 of the agreement, the defendant on August 31, 2004, filed a "motion to set child support—postjudgment." Following a series of continuances, the court held a hearing on the motion on April 20, 2006. In its May 10, 2006 memorandum of decision, the court found that the defendant became employed as a teacher in August, 2004. Although there had been a temporary lapse of employment, the court found that the lapse was voluntary and applied the earning capacity principle to that time period in calculating the defendant's child support obligation. The court noted that the defendant claimed that because he shared physical custody of the

child, he was entitled to a deviation from the presumptive support amount under the child support guidelines. The court found that the arrangement between the parties, "although not fifty-fifty, is clearly a shared custody." The court further found that the defendant's expenses had not substantially increased and that the plaintiff's expenses had not substantially declined. It therefore concluded that a deviation from the guidelines was inappropriate. The court fixed child support at $110 per week and ordered him to pay an additional $22 per week until a calculated arrearage of $10,150 was paid in full.

On May 17, 2006, the defendant filed a motion for reargument of the court's child support order, which the court denied without comment. On June 30, 2006, the defendant filed a motion for clarification of the court's ruling on the motion for reargument, which the court also denied. On December 6, 2006, the defendant filed a motion for articulation. In its brief reply to that motion, the court stated that in applying § 46b-215a-3 (b) (6) (B) of the Regulations of Connecticut State Agencies, "[t]he evidence did not indicate that there was an 'extraordinary disparity' between the [parties'] net incomes." This appeal followed.

Before considering the defendant's specific claims, we first note the standard of review applicable in domestic relations matters. "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. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess

the personal factors so significant in domestic relations cases. . . .

"With respect to the factual predicates for modification of an alimony award, our standard of review is clear. This court may reject a factual finding if it is clearly erroneous, in that as a matter of law it is unsupported by the record, incorrect, or otherwise mistaken. . . . This court, of course, may not retry a case. . . . The factfinding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us. Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court. . . . 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." (Citations omitted; internal quotation marks omitted.) *Doody* v. *Doody*, 99 Conn. App. 512, 516–17, 914 A.2d 1058 (2007).

I

The defendant first contends that the court failed to file its decision in a timely manner pursuant to § 51-183b. That claim requires little discussion. Section 51-183b provides in relevant part that "[a]ny judge of the Superior Court and any judge trial referee who has the power to render judgment, who has commenced the trial of any civil cause, shall have power to continue such trial and shall render judgment not later than one hundred and twenty days from the completion date of the trial of such civil cause. . . ." In the present case,

the court rendered judgment on the defendant's motion to set child support on May 10, 2006, less than one month after the April 20, 2006 hearing thereon. It therefore complied with the mandate of § 51-183b.

II

The defendant next claims that the court abused its discretion in denying his motion for reargument. "We review claims that the court improperly denied a motion for reargument under the abuse of discretion standard. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness." (Citation omitted; internal quotation marks omitted.) *Murray* v. *Murray*, 65 Conn. App. 90, 102, 781 A.2d 511, cert. denied, 258 Conn. 931, 783 A.2d 1029 (2001).

The defendant claims that the court abused its discretion in denying his motion for reargument because the court failed to consider § 46b-215a-3 (b) (6) (B) of the regulations.[2] That argument is undermined by the court's express reference to § 46b-215a-3 (b) (6) (B) and its corresponding finding in its articulation that "[t]he evidence did not indicate that there was an 'extraordinary disparity' between the [parties'] net incomes." The court did not abuse its discretion in denying reargument.

III

The defendant also claims that the court improperly applied *Lefebvre* v. *Lefebvre*, supra, 75 Conn. App. 662.

[2] Section 46b-215a-3 (b) (6) of the Regulations of Connecticut State Agencies provides in relevant part that "[i]n some cases, there may be special circumstances not otherwise addressed in this section in which deviation from presumptive support amounts may be warranted for reasons of equity. Such circumstances are limited to the following. . . . (B) . . . When the custodial parent has high income, resulting in an extraordinary disparity between the parents' net incomes, it may be appropriate to deviate from presumptive support amounts . . . ."

Specifically, he maintains that because *Lefebvre* "is not at all analogous to the facts in this case," the court should not have "cit[ed] this case as an authority." Because it presents a question of law, our review of the defendant's claim is plenary. Thus, "[w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 217, 764 A.2d 739 (2001).

In *Lefebvre*, this court discussed deviations from the child support guidelines in the context of a claim of shared physical custody by the defendant father. We explained: "[T]he defendant is required to prove more than shared physical custody. The defendant is required to demonstrate a visitation schedule that exceeds the typical visitation rights, *and* the defendant would be required to prove that a deviation from the guidelines would be warranted. Section 46b-215a-3 (b) (6) (A) of the [r]egulations . . . provides that a deviation is warranted *only* when the arrangement substantially increases or decreases a parent's financial obligation." (Emphasis in original.) *Lefebvre* v. *Lefebvre*, supra, 75 Conn. App. 669. In its memorandum of decision, the court here found that "[t]he evidence presented did not convince the court that a substantial reduction occurred in the plaintiff's expenses for the child. It must also be determined if a substantial increase in the defendant's expenses for the child resulted from the shared custody. The court cannot conclude that the [defendant's] expenses have substantially increased. The court concludes that a deviation is not appropriate." It then provided a citation to *Lefebvre* in support thereof.

We conclude that the court properly relied on that precedent in considering the defendant's claim that his shared physical custody justified a deviation from the

child support guidelines. *Lefebvre* is one of few appellate decisions addressing such a claim. Furthermore, the fact that *Lefebvre* may be factually distinguishable from a given case does not negate the precedential value of its analysis of § 46b-215a-3 (b) (6) (A). Accordingly, the defendant's claim fails.

IV

The defendant next argues that the court incorrectly found that his expenses had not increased substantially as a result of the shared parenting plan agreed to by the parties. We review that claim under the clearly erroneous standard. See *Doody* v. *Doody*, supra, 99 Conn. App. 516–17.

As this court emphasized in *Lefebvre*, § 46b-215a-3 (b) (6) (A) of the regulations provides that a deviation is warranted only when the shared parenting arrangement substantially increases or decreases a parent's financial obligation.[3] *Lefebvre* v. *Lefebvre*, supra, 75 Conn. App.

[3] In his reply brief, the defendant suggests that we should apply the "explicit definition of 'substantial' " allegedly contained in General Statutes § 46b-86 (a). That statute provides in relevant part that "the court may order either party to maintain life insurance for the other party or a minor child of the parties or any final order for the periodic payment of permanent alimony or support or an order for alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. There shall be a rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial. . . ." General Statutes § 46b-86 (a).

The defendant misreads the statute, which addresses a 15 percent deviation from the child support guidelines, not a 15 percent change in income or expenses of a party. Section 46b-215a-3 (b) (6) of the regulations makes no reference to § 46b-86 (a), and the defendant has provided no analysis as to its applicability to that regulation. "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We will not review claims absent law and analysis." (Internal quotation marks omitted.) *Collins* v. *Anthem Health*

669. In the present case, the court reviewed financial affidavits submitted by both parties. The defendant's November 14, 2003 financial affidavit indicated weekly expenses of $690, his October 27, 2004 financial affidavit indicated weekly expenses of $991, and his May 19, 2005 financial affidavit indicated weekly expenses of $886. At the April 20, 2006 hearing on the motion to set child support postjudgment, the defendant submitted a financial affidavit indicating $928 in weekly expenses. In light of that evidence, the court reasonably could have concluded that the defendant's expenses had not substantially increased.

The court also had before it the plaintiff's August 23, 2004 and May 5, 2005 financial affidavits, which listed weekly expenses of $1219 and $1301, respectively. In addition, the plaintiff testified that her January 8, 2004 financial affidavit that was filed with the court at the time of the uncontested hearing indicated weekly expenses of $1179. On that evidence, the court reasonably could have found that the plaintiff's expenses had not substantially decreased. As a result, the court did not abuse its discretion in concluding that a deviation from the guidelines was unwarranted under § 46b-215a-3 (b) (6) (A) of the regulations.

V

The defendant's final claim is that the court incorrectly found that no extraordinary disparity existed between the parties' respective incomes. Like the previous claim, we review it under the clearly erroneous standard.

Section 46b-215a-3 (b) (6) (B) of the regulations permits the trial court, at its discretion, to deviate from

Plans, Inc., 266 Conn. 12, 54, 836 A.2d 1124 (2003). In addition, "[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Lopez*, 280 Conn. 779, 816 n.25, 911 A.2d 1099 (2007). We decline to further address the defendant's claim.

the guidelines when it finds an "extraordinary disparity" between the parents' net incomes. See footnote 2. The defendant did not allege an extraordinary disparity in parental income either in his motion to set child support or at the April 20, 2006 hearing. Rather, he raised that issue for the first time in his motion for reargument. During the April 20, 2006 hearing, the defendant claimed a deviation solely based on the shared custody. Nevertheless, in its response to the defendant's motion for articulation, the court, referencing § 46b-215a-3 (b) (6) (B), found that "[t]he evidence did not indicate that there was an 'extraordinary disparity' between the [parties'] net incomes."

By the regulation's plain language, application of the "special circumstances" delineated in § 46b-215a-3 (b) (6) is left to the sound discretion of the trial court. It provides that in certain circumstances, "deviation from presumptive support amounts may be warranted for reasons of equity. . . ." Section 46b-215a-3 (b) (6) (B) similarly provides in relevant part that "[w]hen the custodial parent has high income, resulting in an extraordinary disparity between the parents' net incomes, it may be appropriate to deviate from presumptive support amounts . . . ."

The question of whether a disparity in income is extraordinary is an infrequent one in our decisional law. In *Lusa* v. *Grunberg*, 101 Conn. App. 739, 923 A.2d 795 (2007), the trial court found that the defendant's net weekly income was $2715 while the plaintiff's was $62, a difference of approximately 97 percent. The court found that that difference constituted an extraordinary disparity. Id., 748. Likewise, in *Misthopoulos* v. *Misthopoulos*, Superior Court, judicial district of Middlesex, Docket No. FA-04-4000976-S (July 25, 2006), the court found that, in the year preceding the dissolution, the defendant earned $753,014 while the plaintiff earned roughly $25,000 in that period, a difference of more

than 96 percent. Because the plaintiff at the time of dissolution had virtually no weekly income while the defendant earned "well in excess of $5000 per week," the court found an extraordinary disparity between the parties' incomes. The court in *Maturo* v. *Maturo*, Superior Court, judicial district of Middlesex, Docket No. FA-04-0198618-S (June 12, 2006), reached the same result where the plaintiff was a stay at home mother and the defendant earned well in excess of $5000 per week. Although it did not discuss specific net income figures, the court in *Lavoie* v. *Lavoie*, Superior Court, judicial district of Hartford, Docket No. FA-04-4004268-S (September 20, 2007), found an extraordinary disparity where the defendant was "able to support the parties' two children on her income" while the plaintiff earned "considerably less and is just surviving on that."

The financial affidavits before the court in the present case indicate the following. The plaintiff's net weekly income was $1115.93 as of August 23, 2004, and $1191.33 as of March 5, 2005. The defendant's net weekly income was $739 as of October 27, 2004. A handwritten stipulation agreed to by the parties and introduced into evidence at the April 20, 2006 hearing states that the defendant's net weekly income at that time was $744. Thus, the difference between the respective net weekly incomes of the parties was approximately 38 percent. Although not insignificant, that disparity is far less than that deemed extraordinary in the aforementioned cases. Viewing the evidence before the court in light of those decisions, we cannot say that the court's finding that the disparity between the parties' incomes was not extraordinary is clearly erroneous. Indulging every reasonable presumption in favor of the court's ruling, we conclude that the court did not abuse its discretion in declining to deviate from the guidelines pursuant to § 46b-215a-3 (b) (6) (B).

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* BRANDON GARCIA (AC 28453)

McLachlan, Lavine and Mihalakos, Js.

Syllabus

Convicted of the crimes of possession of cocaine with intent to sell by a person who is not drug-dependent, possession of a controlled substance with intent to sell within 1500 feet of a school, possession of marijuana with intent to sell and possession of marijuana with intent to sell within 1500 feet of a school, the defendant appealed to this court. The defendant was arrested after the police, who had been conducting surveillance, observed him exit his vehicle, walk to another car while carrying a white shopping bag and engage in what appeared to be a drug transaction and then exit the other vehicle. After arresting the defendant, the police searched him and thereafter brought his vehicle to the police station, where they conducted an inventory search, resulting in the discovery of two boxes containing large amounts of cash. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion in limine to preclude admission into evidence of $14,510 in cash found in his car following his arrest, which he claimed was not relevant to the charges because the cash in his car did not change hands during the events that gave rise to the criminal charges; that court did not abuse its discretion in determining that the cash found in the defendant's car was probative of the defendant's participation in drug sales and therefore relevant to his intent to sell drugs and to the crimes charged, especially given the defendant's use of his vehicle to facilitate drug sales, which supplied a nexus between the cash recovered from the car and the defendant's intent to sell drugs, and the evidence was not unduly prejudicial, as it did not tend to arouse the jury's emotions or sympathy, the cash seized did not create a collateral issue at trial, the evidence and counterproof did not consume an undue amount of time and the defendant had reasonable grounds to anticipate the evidence.
2. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress the cash recovered from his car because the boxes containing the cash—one found on the rear passenger seat and the other in the trunk of the vehicle—were found and opened at the arrest scene without a warrant in violation of his constitutional rights: the Supreme Court having determined that a lawful custodial arrest of a motor vehicle operator justifies a contemporaneous search of the entire passenger compartment of an automobile, whether or not the arrestee actually had control over the area, the cash discovered on the rear seat of the defendant's vehicle was admitted properly as having been seized pursuant to the lawful arrest of the defendant; moreover, the trial court properly denied the motion to suppress the cash found in

the trunk of the defendant's vehicle and determined that it was recovered pursuant to a valid inventory search of the vehicle, it having been within the province of the trial court to evaluate the credibility of the witnesses.

3. The defendant could not prevail on his claim that the trial court improperly ordered the forfeiture of the cash seized from his vehicle, which was based on his claim that the money could be forfeited only after an in rem hearing pursuant to statute (§ 54-36h): the trial court properly exercised its authority to forfeit contraband to the state pursuant to the statute (§ 54-36a [c]) that empowers courts presiding over criminal actions to dispose of contraband, including currency linked to illegal drug transactions, provided that a nexus exists between the contraband and the crimes charged, the trial court having found such a nexus when it concluded that the currency constituted proceeds of an illegal drug transaction, and the defendant, who was unemployed at the time, having offered no plausible explanation as to how he obtained the cash, which was found in a vehicle being used in a drug transaction; moreover, it was clear that § 54-36h was intended to protect from forfeiture only that property that has not yet been seized by the state, which was not the situation here, and the fact that, under § 54-36h, the state had to act within ninety days if it chose to bring an in rem proceeding did not prohibit the trial court from making a forfeiture determination about the contraband at issue in this criminal trial pursuant to § 54-36a (c).

Argued December 3, 2007—officially released June 24, 2008

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, possession of a controlled substance with intent to sell within 1500 feet of a school, possession of marijuana with intent to sell and possession of marijuana with intent to sell within 1500 feet of a school, brought to the Superior Court in the judicial district of Waterbury, where the matter was tried to the jury before *Prescott*, *J.*; thereafter, the court denied the defendant's motions to preclude and to suppress certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Mary Anne Royle, special public defender, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *John A. Connelly*, state's attorney, and, on the brief, *Patrick J. Griffin*, assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Brandon Garcia, appeals from the judgment of conviction, rendered after a jury trial, of possession of cocaine with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278, possession of a controlled substance with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b), possession of marijuana with intent to sell in violation of General Statutes § 21a-277 and possession of marijuana with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b). On appeal, the defendant claims that the trial court (1) abused its discretion when it denied his motion in limine to preclude evidence of the cash found in his car, (2) improperly denied his oral motion to suppress the cash found in his car and (3) lacked jurisdiction to determine that he should forfeit the money seized from his car. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 22, 2004, undercover members of the Waterbury police tactical narcotics team, Gary Angon, Eddie Apicella, John Healey and Danny Ferrucci, were surveilling the parking lot by the Shell gasoline station and convenience store at 79 Homer Street in Waterbury. The police had received numerous complaints about open drug dealing at this location and had made several narcotics arrests there previously. While Angon and Healey surveyed the area from an unmarked car parked at one of the gasoline pumps, Apicella and Ferrucci kept watch from an unmarked vehicle in a lot across the street. The officers communicated by portable radios.

Shortly after 9:30 p.m., the officers noticed Matthew Jenkins sitting in a Ford Explorer in an area of the lot that lies within 1500 feet of Sprague Elementary School. Minutes later, the defendant arrived in a black Lexus. When Jenkins sounded his vehicle's horn, the defendant acknowledged him. The defendant parked, exited his vehicle and walked to the Explorer, carrying a white shopping bag. At 9:42 p.m., the officers observed the defendant get into the Explorer, remove a smaller bag from the shopping bag and place it next to Jenkins. They observed Jenkins hand the defendant a roll of cash. The defendant then exited the Explorer and headed toward the convenience store. Angon arrested and searched the defendant, finding marijuana on his person, $2650 in one of his pockets and $570 in another pocket.

Jenkins, meanwhile, attempted to escape in his Explorer. When Apicella and Healey blocked Jenkins' exit with their vehicles, Jenkins fled on foot. From the Explorer, the officers recovered one bag containing 2.97 ounces of cocaine and another bag containing one half ounce of marijuana. Jenkins was apprehended subsequently. He testified at trial that when he telephoned the defendant to arrange his purchase of three ounces of cocaine for $2400 and one half ounce of marijuana for $250, the defendant suggested they meet at the Shell station parking lot. Jenkins also testified that he bought drugs from the defendant in the manner described by the undercover officers, exchanging cash for cocaine and marijuana.

At the arrest scene, Apicella assigned Angon to drive the defendant's vehicle to the police station. Angon quickly examined the defendant's vehicle to ensure that nothing in it would be disturbed or cause any danger during transit. On the rear seat, he discovered a shoe box containing cash. In the trunk of the car, he discovered another shoe box containing cash. Angon showed

Apicella the two boxes but did not count the money. Angon then drove the car to the station, logged it in as evidence and conducted an inventory search of its contents. The inventory recovered included the boxes of cash from the rear seat and trunk, which contained $10,510 and $4000, respectively. The money was seized as drug sale proceeds.

The defendant was charged with possession of cocaine with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (a), possession of a controlled substance with intent to sell within 1500 feet of a school in violation of § 21a-278a (b), possession of marijuana with intent to sell in violation of § 21a-277 and possession of marijuana with intent to sell within 1500 feet of a school in violation of § 21a-278a (b). Following a jury trial, he was convicted on all four counts and sentenced to thirty-one years of incarceration. At his sentencing, he filed a motion for the return of the seized currency. The court denied the motion, ordering that the money seized be forfeited to the state. This appeal followed.

I

The defendant's first claim is that the court abused its discretion when it denied his motion in limine to preclude evidence of the cash found in his car because the evidence was not relevant to the crimes charged. The defendant maintains that because the cash at issue did not change hands during the events that gave rise to the criminal charges, the admission of the cash into evidence at trial was more prejudicial than probative. We disagree.

Prior to trial, the defendant filed a motion in limine to prevent the state from admitting into evidence the cash seized from his vehicle. The court denied the motion, concluding that the cash was probative of the defendant's participation in drug sales and therefore

relevant to his intent to sell drugs. The court additionally determined that the prejudicial effect of the evidence did not outweigh its probative value. Subsequently, the cash was admitted into evidence.

In denying the defendant's motion, the court explained that the defendant's alleged use of his vehicle to facilitate drug sales supplied a nexus between the cash recovered from the car and the defendant's intent to sell drugs: "The defendant was seen arriving in his car by the officers . . . . He is alleged to have parked the car a short distance away from where there was an apparent or alleged sale of narcotics. This is not a situation like the cases cited by the defendant in his motion where there is little or no factual nexus between the crime charged and the location from which the evidence in those cases was seized." Discerning a plausible connection between the defendant's intent to sell and the quantum of cash found in the car, the court deemed the evidence more probative than prejudicial.

"[T]he trial court has broad discretion in ruling on the admissibility of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Carty*, 100 Conn. App. 40, 52, 916 A.2d 852, cert. denied, 282 Conn. 917, 925 A.2d 1100 (2007). "[E]vidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . [A]dverse evidence is . . . inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Internal quotation marks omitted.) *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 66, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004). "The primary responsibility

for conducting the balancing test to determine whether the evidence is more probative than prejudicial rests with the trial court, and its conclusion will be disturbed only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Fernandez*, 76 Conn. App. 183, 189, 818 A.2d 877, cert. denied, 264 Conn. 901, 823 A.2d 1220 (2003).

The admissibility of evidence is governed by the rules of relevance. See *State* v. *Echols*, 203 Conn. 385, 393, 524 A.2d 1143 (1987). "The quantity of money seized from [a] defendant [is] relevant to the issue of intent to sell cocaine." *State* v. *Monar*, 22 Conn. App. 567, 577, 579 A.2d 104, cert. denied, 216 Conn. 828, 582 A.2d 206 (1990). "[E]vidence from which the jury could reasonably infer intent to sell the . . . cocaine includes . . . the amount of . . . cash the defendant possessed . . . ." *State* v. *Baldwin*, 224 Conn. 347, 368–69, 618 A.2d 513 (1993). Accordingly, even if the proceeds from the sale to Jenkins were not included in the cash seized from the defendant's car, the cash was relevant to the issue of the defendant's alleged participation in narcotics trafficking. Such evidence is commonly admitted as circumstantial evidence of a defendant's intent to sell drugs. See *State* v. *Holeman*, 18 Conn. App. 175, 179, 556 A.2d 1052 (1989). "Proof of a defendant's intent generally takes the form of circumstantial evidence . . . ." (Internal quotation marks omitted.) *State* v. *Uribe*, 14 Conn. App. 388, 393, 540 A.2d 1081 (1988).

We find no abuse of discretion in the court's determination that the cash found in the defendant's car was relevant to the crimes charged. We also are not persuaded that this evidence was unduly prejudicial. Our Supreme Court has defined the situations in which the potential prejudicial effect of relevant evidence would suggest its exclusion as the following: "(1) where the facts offered may unduly arouse the jury's emotions,

hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Harris*, 277 Conn. 378, 391, 890 A.2d 559 (2006).

None of these circumstances is present in this case. First, the defendant cites no authority to support his allegation that the cash at issue tended to arouse the jury's emotion, hostility or sympathy.[1] On the contrary, our courts regularly have regarded a criminal defendant's quantum of cash as circumstantial evidence of his intent to sell drugs. See *State* v. *Baldwin*, supra, 224 Conn. 368–69 ("[t]he evidence from which the jury could reasonably infer intent to sell . . . cocaine includes . . . the amount of . . . cash the defendant possessed"); *State* v. *Uribe*, supra, 14 Conn. App. 394 ("[t]he defendant also possessed a quantity of cash in denominations which could reasonably lead a jury to conclude that the defendant intended to sell marihuana"). Second, the cash seized did not create a collateral issue during the trial but, rather, was germane to the charges. The defendant was free to explain the origin of the money as well as his theory that it was irrelevant to the crimes charged. Third, the evidence

[1] Citing *State* v. *Hall*, 82 Conn. App. 435, 438, 844 A.2d 939 (2004), the defendant argues that "[t]he cash was exactly the type of evidence that could excite the passions of the jury or implicate criminal propensity." In *Hall*, however, the type of evidence claimed to be the type that could excite the passions of the jury was not a large quantity of cash but, rather, a large quantity of blank prescription pads. The defendant in that case was convicted of twenty-two counts of illegally prescribing a narcotic substance and fourteen counts of illegally prescribing a controlled substance. As to the admission of the pads, this court ruled that "the error, if any, was harmless . . . ." *State* v. *Hall*, supra, 439–40.

and counterproof did not consume an undue amount of time. Defense counsel's counterargument was direct and brief. Finally, the defendant had reasonable grounds to anticipate the evidence. The fact that he filed a pretrial motion to preclude the evidence at issue proves that he was not surprised by it.

Because a quantum of cash may provide circumstantial evidence of the intent to sell narcotics and because such evidence was not unduly prejudicial in this case, we deem proper the court's denial of the defendant's motion to preclude the cash found in his car.

II

The defendant's second claim is that the court improperly denied his motion to suppress the cash recovered from his car because the boxes containing the cash were found and opened at the arrest scene without a warrant in violation of his rights under the fourth amendment to the federal constitution[2] and article first, § 7, of the constitution of Connecticut.[3] In particular, the defendant claims that the court improperly denied his motion to suppress (1) the cash found on the rear seat of the passenger compartment because the search incident to arrest exception to the warrant

[2] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[3] Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

Although the defendant claims his rights were violated under both the United States constitution and the constitution of Connecticut, he has not provided a separate analysis for his state constitutional claim. Consequently, we deem it abandoned and will not afford it review. *State* v. *Fauntleroy*, 101 Conn. App. 144, 159 n.5, 921 A.2d 622 (2007).

requirement applies only when an arrestee is able to reach for weapons or destroy evidence and (2) the cash found in the trunk because the inventory search exception cannot be applied to evidence discovered at the arrest scene.[4] We do not agree.

The defendant's motion to suppress was not made before trial but after the state had rested. By the time the defendant had moved to suppress the evidence in question, the jury was fully aware of it. After hearing arguments on the motion over a period of two days, the court denied it, determining that (1) the cash on the rear seat was discovered legally pursuant to a search incident to arrest and (2) the cash in the trunk was discovered legally pursuant to an inventory search. The court suggested that defense counsel present his positions regarding the evidence at issue during his closing argument.[5] In his closing argument, defense counsel characterized as inconsistent the officers' testimony about when and where the evidence at issue was discovered.

[4] The defendant also claims that the court improperly denied his motion to suppress all the cash recovered from the vehicle on the ground that it was stored in closed containers, the opening of which required a search warrant. Because this claim is subsumed by the search incident to arrest and inventory search exceptions, we need not address it. See *State* v. *Longo*, 243 Conn. 732, 740, 708 A.2d 1354 (1998) ("the Appellate Court repeatedly has upheld . . . warrantless searches of closed containers located in automobiles where probable cause existed to search the vehicle"); see also *State* v. *Billias*, 17 Conn. App. 635, 642, 555 A.2d 448 (1989), citing *United States* v. *Frank*, 864 F.2d 992, 1001–1002 (3d Cir. 1988) (permissible for police to open closed containers in inventory searches if they follow standard police procedures), cert. denied, 490 U.S. 1095, 109 S. Ct. 2442, 104 L. Ed. 2d 998 (1989).

[5] The court stated, "At this point, I'm going to deny without prejudice your motion. I will permit you to develop facts as part of your case to further support your claim. We are going to do that in the presence of the jury. . . . If you demonstrate facts which change my mind, I will then consider whether or not the toothpaste can be put back in the tube. . . . It may be that that is an argument for you . . . with the jury during closing argument, but again, we would address that if, and only if, I am persuaded that the evidence shows otherwise."

We first set forth our standard of review. "The Fourth Amendment to the United States constitution protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures. Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. [A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception." (Internal quotation marks omitted.) *State* v. *Orellana*, 89 Conn. App. 71, 79–80, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005).

"Under the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality. . . . On appeal, we apply a familiar standard of review to a trial court's findings and conclusions in connection with a motion to suppress. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . . Whether the trial court properly found that facts submitted were enough to support a finding of probable cause is a question of law. . . . Because a trial court's determination of the validity of a . . . search [or seizure] implicates a defendant's constitutional rights, however, we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . . However, [w]e . . . give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it

and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) Id., 79.

As the defendant's claim challenges the court's denial of the motion to suppress on separate grounds, we address them in turn.

A

Claiming that the court improperly denied his motion to suppress the cash discovered on the rear seat of the passenger compartment, the defendant challenges the court's determination that Angon's inspection of the passenger compartment at the scene of the arrest was a search incident to arrest. According to the defendant, the search incident to arrest exception applies only when the arrestee is able to reach for weapons or destroy evidence.

In its ruling regarding the motion to suppress the cash found on the rear seat of the passenger compartment, the court stated: "The law is clear that the scope of a search incident to a full custodial arrest of a motor vehicle operator, which was the case in this case, includes a search of the passenger compartment of the vehicle and the contents of any open or closed containers found in the passenger compartment. That includes the rear seat. That includes things like the glove compartment, even if that compartment is locked. This is true . . . even where the arrestee has been removed from the vehicle and [is] handcuffed and placed in a patrol car. Consequently, as I see it, the defendant has no claim with respect to the shoe box seized from the passenger compartment." We agree with the court's interpretation of the law.

"There are four recognized situations where a warrantless search of a car may lead to the conclusion that such a search was reasonable under the United States or state constitutions. They are: (1) it was made incident

to a lawful arrest; (2) it was conducted when there was probable cause to believe that the car contained contraband or evidence pertaining to a crime; (3) it was based upon consent; or (4) it was conducted pursuant to an inventory of the car's contents incident to impounding the car." (Citation omitted; internal quotation marks omitted.) *State* v. *Miller*, 29 Conn. App. 207, 237–38 n.1, 614 A.2d 1229 (1992), aff'd, 227 Conn. 363, 630 A.2d 1315 (1993); see *State* v. *Delossantos*, 211 Conn. 258, 266–67, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989).

"[W]hen police make a lawful custodial arrest of an occupant of an automobile, and the arrestee is detained at the scene, police may contemporaneously search without a warrant the interior passenger compartment of the automobile." *State* v. *Delossantos*, supra, 211 Conn. 266–67. "The search incident to an arrest exception . . . has traditionally been justified by the reasonableness of searching for weapons, instruments of escape and evidence of crime when a person is taken into custody and lawfully detained." (Internal quotation marks omitted.) *State* v. *Santiago*, 17 Conn. App. 273, 276–77, 552 A.2d 438 (1989). "[W]e have recognized that the police may make a search without a warrant incidental to a lawful custodial arrest. . . . Custodial arrests not only serve to protect the police themselves, but also serve . . . to assist in the investigation of crime." (Citations omitted.) *State* v. *Dukes*, 209 Conn. 98, 121, 547 A.2d 10 (1988).

The defendant's theory that the search incident to arrest exception requires that an arrestee be able to reach for weapons or destroy evidence is not supported by our case law. "In *New York* v. *Belton*, [453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)], the United States Supreme Court held that a lawful custodial arrest justifies a contemporaneous search of the entire passenger compartment of an automobile, *whether or not the*

arrestee actually had control over the area." (Emphasis added.) *State* v. *Santiago*, supra, 17 Conn. App. 277. Indeed, our Supreme Court in *State* v. *Badgett*, 200 Conn. 412, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986), declared that it "ordinarily will refuse to evaluate whether or not an individual arrested while in an automobile actually had access to the passenger compartment at the time of the search," citing several cases in which the searches were upheld even though the arrestee had no apparent opportunity to gain access to the passenger compartment of the automobile.[6] (Internal quotation marks omitted.) *State* v. *Lizotte*, 11 Conn. App. 11, 22, 525 A.2d 971, cert. denied, 204 Conn. 806, 528 A.2d 1154 (1987), quoting *State* v. *Badgett*, supra, 427. Significantly, "a search incident to an arrest [need not] be limited to evidence of the crime for which a defendant is initially arrested." *State* v. *Santiago*, supra, 277.

Because the scope of a search incident to the arrest of a motor vehicle operator includes the passenger compartment of the vehicle, regardless of whether the arrestee could gain access to it, the cash discovered on the rear seat of the defendant's vehicle was admitted properly pursuant to Angon's lawful arrest of the defendant.[7] Consequently, the defendant's claim that the court improperly denied his motion to suppress this cash must fail.

[6] See *State* v. *Badgett*, supra, 200 Conn. 427, citing *United States* v. *Cotton*, 751 F.2d 1146, 1148–49 (10th Cir. 1985) (*Belton* applicable even though defendant outside car and handcuffed); *Traylor* v. *State*, 458 A.2d 1170, 1173 (Del. 1983) (defendant in handcuffs); *State* v. *Valdes*, 423 So. 2d 944, 944 (Fla. App. 1982) (defendant seated in police car); *State* v. *Hopkins*, 163 Ga. App. 141, 141, 293 S.E.2d 529 (1982) (defendant seated in police car).

[7] We note, furthermore, that the cash at issue would not have been suppressed had the court deemed its discovery inevitable. "[S]uppression of unconstitutionally obtained evidence [is required] only if the state fails to establish that the evidence would subsequently have been obtained pursuant to the inevitable discovery doctrine." *State* v. *Miller*, 227 Conn. 363, 386, 630 A.2d 1315 (1993).

B

The defendant also claims that the court improperly determined that Angon recovered the money from the trunk of the defendant's car pursuant to a valid inventory search. Specifically, the defendant argues that the court should not have credited Angon's testimony that this evidence was the product of a valid inventory search in light of Apicella's testimony that the money was discovered at the arrest scene prior to the inventory search at the police station.

Mindful that "[u]nder the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality"; (internal quotation marks omitted) *State* v. *Orellana*, supra, 89 Conn. App. 79; we recognize the inventory search as "a well-defined exception to the warrant requirement." (Internal quotation marks omitted.) *State* v. *Gasparro*, 194 Conn. 96, 107, 480 A.2d 509 (1984), cert. denied, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 74 (1985). "In the performance of their community caretaking functions, the police are frequently obliged to take automobiles into their custody. . . . A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." (Citations omitted; internal quotation marks omitted.) Id., 107–108.

Angon testified that in keeping with Waterbury police policy, he cursorily searched the car at the arrest scene and later counted the cash during an inventory search at the police station. Healey testified that at the scene of the crime, Angon "did a search of the immediate area of the Lexus that [the defendant] had exited from. He took all the evidence he had, and he drove that vehicle back to headquarters." Similarly, Apicella testified that at the arrest scene, Angon quickly examined

the Lexus to ensure that nothing in it would cause a danger, or be disturbed, during transit. This testimony, which essentially corroborated the police report, suggests that Angon's examination of the car at the arrest scene was motivated by the "three governmental interests support[ing] inventory searches: (1) protection of the police from danger; (2) protection of the police against claims and disputes over lost or stolen property and (3) protection of the owner's property while it remains in police custody." (Internal quotation marks omitted.) *State* v. *Hicks*, 53 Conn. App. 470, 475–76, 730 A.2d 649 (1999).

The defendant alleges that there is a significant contradiction between Angon's testimony that the money in the trunk was discovered during the inventory search and Apicella's testimony that Angon told him at the arrest scene and prior to the inventory search that "there [was] money in these boxes." The defendant is not claiming that the court did not have sufficient evidence on which to base its decision. Rather, he argues that the evidence the court relied on was not sufficiently credible. This claim therefore distills to a credibility contest. See *State* v. *Nowell*, 262 Conn. 686, 695, 817 A.2d 76 (2003).

In ruling on the motion to suppress the cash recovered from the trunk, the court stated: "[T]he issue is whether that shoe box was discovered and opened pursuant to a valid inventory search. [Defense counsel] claimed that it was not [discovered pursuant to a valid inventory search] based upon Detective Apicella's testimony in which he indicated that he returned to the gasoline station where he found Detective Angon and [the defendant] in custody. His testimony *may*, *and I stress the word may*, be somewhat contradictory with that of Detective Angon, who testified that he conducted an inventory search of the vehicle at the police station and [that] it was at that point that he discovered

the shoe box containing the cash in the trunk." (Emphasis added.)

The court made credibility determinations to conclude that Angon properly received and recorded the box of cash from the trunk of the car as part of an inventory search, as is apparent from the following statements: "[I]t appears that [Angon] may have opened the trunk briefly at the scene, but certainly the sense I got from the testimony, *which I credit*, is that he actually took the shoe box out of the motor vehicle at the police department, and that's where he found one pile of cash . . . . [T]he court credits the testimony of Detective Angon that the second shoe box, the one taken from the trunk, was properly taken as part of a lawful inventory search." (Emphasis added.)

"[W]e . . . give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *State* v. *Orellana*, supra, 89 Conn. App. 79. We note that "[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. . . . In a case that is tried to the court . . . the judge is the sole arbiter of the credibility of witnesses, and the weight to be given to their specific testimony." (Internal quotation marks omitted.) *McClean* v. *Commissioner of Correction*, 103 Conn. App. 254, 263, 930 A.2d 693 (2007), cert. denied, 285 Conn. 913, 943 A.2d 473 (2008); see *State* v. *DaEria*, 51 Conn. App. 149, 157, 721 A.2d 539 (1998).

In deference to the court's decision, which was based on credibility determinations, that the cash at issue was recovered pursuant to the standardized procedures of

an inventory search, we conclude that the court properly denied the motion to suppress the evidence gathered during the search of the trunk of the defendant's vehicle.

III

The defendant last claims that the court improperly ordered the forfeiture of $14,510 seized from his vehicle. Specifically, he asserts that this cash could be forfeited only after an *in rem* hearing pursuant to General Statutes § 54-36h. Absent such a hearing, the defendant argues, the court lacked subject matter jurisdiction to make a forfeiture determination about money that did not change hands in the drug transaction under prosecution. The court, determining that the money seized from the defendant's vehicle constituted drug proceeds, concluded that it was authorized to forfeit the money to the state pursuant to General Statutes § 54-36a (c). We agree with the court's conclusion.

The defendant's claim raises issues of statutory construction, over which our review is plenary. *Whitaker* v. *Commissioner of Correction*, 90 Conn. App. 460, 470, 878 A.2d 321, cert. denied, 276 Conn. 918, 888 A.2d 89 (2005). "A fundamental tenet of statutory construction is that statutes are to be considered to give effect to the apparent intention of the lawmaking body. . . . The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., citing General Statutes § 1-2z.

"Where . . . more than one statute is involved, we presume that the legislature intended them to be read

together to create a harmonious body of law . . . and we construe the statutes, if possible, to avoid conflict between them." (Citations omitted.) *Berger* v. *Tonken*, 192 Conn. 581, 589–90, 473 A.2d 782 (1984). "[I]t is an elementary rule of construction that all sections of an act relating to the same subject matter should be considered together . . . . Insofar as possible the separate effect of each individual part or section of an act is made consistent with the whole." (Internal quotation marks omitted.) *Ossen* v. *Wanat*, 217 Conn. 313, 320, 585 A.2d 685, cert. denied, 502 U.S. 816, 112 S. Ct. 69, 116 L. Ed. 2d 43 (1991).

The subsection invoked by the court in this case, § 54-36a (c), which is contained in chapter 959 of the General Statutes, part III, titled, "Seized Property," specifically authorizes the judicial disposition of contraband, defined as "any property, the possession of which is prohibited by any provision of the general statutes," at the conclusion of criminal actions. "*Unless such seized property is stolen property* and is ordered returned pursuant to subsection (b) of this section or unless such seized property is adjudicated a nuisance in accordance with section 54-33g, *or unless the court finds that such property shall be forfeited or is contraband*, or finds that such property is a controlled drug, a controlled substance or drug paraphernalia as defined in subdivision (8), (9) or (20) of section 21a-240, it shall, at the final disposition of the criminal action or as soon thereafter as is practical, or, if there is no criminal action, at any time upon motion of the prosecuting official of such court, order the return of such property to its owner within six months upon proper claim therefor." (Emphasis added.) General Statutes § 54-36a (c). "A person should not be allowed to vest himself with a possessory interest by crime or to invoke the law in order to disengage himself from the unlawfulness of

his conduct." *State* v. *Morant*, 242 Conn. 666, 671–72, 701 A.2d 1 (1997).

General Statutes § 54-36h, on which the defendant relies, is entitled, "Forfeiture of moneys and property related to illegal sale or exchange of controlled substances or money laundering. In rem proceeding. Disposition." It outlines the procedures required for effectuating *in rem* forfeiture proceedings.[8] On its face, the language of this statute could be applied to currency such as that at issue in this case. The legislative history of § 54-36h, as well as the words "related to" in its title, suggest, however, that this section addresses money and property not disposed of by the court at the disposition of a criminal trial pursuant to § 54-36a. In passing § 54-36h, legislators addressed the type of property at issue in the case at bar: "[I]f [the state] were to go after a dealer and he had $100,000 in the bank, the government could not claim the whole $100,000 as

[8] General Statutes § 54-36h provides in relevant part: "(a) The following property shall be subject to forfeiture to the state pursuant to subsection (b) of this section: (1) All moneys used, or intended for use, in the procurement, manufacture, compounding, processing, delivery or distribution of any controlled substance, as defined in subdivision (9) of section 21a-240; (2) All property constituting the proceeds obtained, directly or indirectly, from any sale or exchange of any such controlled substance in violation of section 21a-277 or 21a-278; (3) All property derived from the proceeds obtained, directly or indirectly, from any sale or exchange for pecuniary gain of any such controlled substance in violation of section 21a-277 or 21a-278; (4) All property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of section 21a-277 or 21a-278 . . . .

"(b) Not later than ninety days after the seizure of moneys or property subject to forfeiture pursuant to subsection (a) of this section, in connection with a lawful criminal arrest or a lawful search, the Chief State's Attorney or a deputy chief state's attorney, state's attorney or assistant or deputy assistant state's attorney *may* petition the court in the nature of a proceeding in rem to order forfeiture of said moneys or property. Such proceeding shall be deemed a civil suit in equity, in which the state shall have the burden of proving all material facts by clear and convincing evidence. The court shall identify the owner of said moneys or property and any other person as appears to have an interest therein . . . ." (Emphasis added.)

potentially illegal and not give him the use of that." 32 H.R. Proc., Pt. 20, 1989 Sess., p. 6939, remarks of Representative Richard D. Tulisano. "*A different result is mandated, however, where the property at issue is found alongside and seized contemporaneously with the drugs. In that instance, the connection between the property and the drugs is less speculative and, accordingly, that property is less worthy of an inference that it may be property that is not subject to* [*in rem*] *forfeiture* [*proceedings*]." (Emphasis added.) *State* v. *$28,194.63 U.S. Currency*, Superior Court, judicial district of Ansonia-Milford, geographical area number five, Docket No. CR5-6977 (April 17, 2001) (29 Conn. L. Rptr. 672). "If the property that is confiscated in an automobile with drugs or in an apartment where you have half a million dollars in small bills as a part of an arrest, could this be used for a legal defense?" 32 H.R. Proc., supra, pp. 6938–39, remarks of Representative J. Peter Fusscas. "[I]n the situation you described, that would not be available. That would be confiscated funds." Id., p. 6939, remarks of Representative Tulisano.

The distinction in Connecticut statutes delineating the disposition of property seized as evidence, pursuant to § 54-36a, from property subject to forfeiture proceedings, pursuant to § 54-36h, leads us to conclude that seized contraband does not require *in rem* forfeiture proceedings, as unseized property does. "[A] careful reading of all of the relevant provisions of [§ 54-36h], as well as a search of its legislative history, reveal[s] that [the statute] was only intended to protect from forfeiture that property that has not yet been seized by the state . . . . *This exemption was not intended, however, to extend to property that has been seized simultaneously with drugs, incident to a drug sales arrest.*" (Emphasis added.) *State* v. *$28,194.63 U.S. Currency*, supra, 29 Conn. L. Rptr. 672.

The court in this case distinguished money that has exchanged hands in a drug transaction from the type of property at which § 54-36h is aimed.[9] The court nonetheless made a finding that the money at issue constituted drug proceeds even though it had not exchanged hands during the transaction on which the charges against the defendant were based: "The defendant was not employed at the time and no plausible explanation was offered as to how the defendant could have lawfully possessed the large amount of cash [found in the vehicle]." Consequently, the court ordered the currency forfeited to the state pursuant to § 54-36a (c).

We agree with the court's conclusion that "the legislative history makes clear that these two statutes are to operate in tandem, even in cases involving seized cash from drug transactions." Id. We conclude that the court in this case properly exercised its authority to forfeit contraband to the state pursuant to § 54-36a (c). "The language of § 54-36h (b) is clear and unambiguous. It means what it says. The state '*may* petition the court in the nature of a proceeding in rem to order forfeiture,' but if it chooses to do so, the petition must be filed '[*n*]*ot later than ninety days* after the seizure of moneys or property.' " (Emphasis in original.) *State* v. *$1970*, 43 Conn. Sup. 203, 206, 648 A.2d 917 (1994). The fact that the state must act within ninety days if it chooses to bring an *in rem* proceeding does not prohibit a court from making forfeiture determinations about contraband at issue in a criminal trial pursuant to § 54-36a (c).

Having reviewed the relevant statutes and case law, we hold that § 54-36a (c) empowers courts presiding over criminal actions to dispose of contraband, including currency linked to illegal drug transactions, provided that a nexus exists between the contraband and

[9] The court stated that "[General Statutes § 54-36h] is intended to permit the seizure and forfeiture of more than just the cash that may exchange hands in [a] drug transaction."

the crimes charged.[10] In this case, the court specifically found that nexus to exist when it concluded that the currency "constitutes proceeds of an illegal drug transaction." The defendant, who was unemployed at the time of his arrest, offered no plausible explanation as to how the cash was obtained. The cash was found in a vehicle being used in a drug transaction. Finally, the defendant was convicted. The defendant's claim that the court lacked the authority to dispose of the seized money must fail.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] In the United States Court of Appeals for the Second Circuit, the weight of the authority indicates that the government in an *in rem* forfeiture hearing relating to narcotics trafficking charges must demonstrate a nexus between the seized property and illegal drug activity. See *United States* v. *Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993).

Although the disputed order before us was not an *in rem* forfeiture determination but, rather, a judicial order at the culmination of a criminal trial, this nexus principle serves to guide courts on the due process limitations that apply to *in personam* forfeiture determinations given the property interests involved.

For example, in *United States* v. *$31,990 in U.S. Currency*, 982 F.2d 851, 854–55 (2d Cir. 1993), the court held that the following factors favor forfeiture of currency: the currency is found in a vehicle containing drugs; the currency is found close to drug activity; in cases where drugs are present, the currency constitutes an unusually large amount of money and is bundled. In *United States* v. *$103,025.00 in U.S. Currency*, 741 F. Sup. 903, 904 (M.D. Ga. 1990), the court noted that "Congress certainly had no intention to elevate naked possession into equitable ownership in circumstances pointing to the likelihood that the possessor was a courier of drug money."

[11] In light of our conclusion that § 54-36a (c) provided a basis for the court's action, we do not reach the issue of whether the court had the inherent or common-law authority to order the seized money forfeited. We also are not required to reach the issue of whether this section "codified" any prior, inherent common-law authority to order the proceeds forfeited.

STATE OF CONNECTICUT *v.* SULTAN WILLIAMS (AC 27085)

Flynn, C. J., and McLachlan and Robinson, Js.

Syllabus

Convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs, the defendant appealed to this court. He claimed that the trial court abused its discretion and deprived him of his right to an impartial jury when it discharged a regular juror, M, and replaced her with an alternate juror, T, and denied his motion for a continuance. When M had failed to report on the day trial was to commence, the defendant's counsel objected to proceeding with T and sought a continuance of the trial until the following morning, which the trial court denied. *Held* that the trial court abused its discretion in denying the defendant's motion for a continuance under the unique circumstances here, where the defendant's challenge to T for cause was denied and the defendant claimed that he would not have selected T as a member of the jury if he had not already exhausted his peremptory challenges, M was not present on the day trial was to commence through no fault of the defendant, but as a result of a recorded message she received when she telephoned the jury administrator's office as instructed, and was unable to make alternative arrangements for her teaching responsibilities that day but was available for the remainder of the trial, the defendant timely made his request for a continuance and the state did not object to that request; nevertheless, the defendant having failed to demonstrate any specific harm resulting from the trial court's replacement of M by T, this court could not presume that T was not an impartial juror.

Argued February 7—officially released June 24, 2008

Procedural History

Substitute information charging the defendant with two counts of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Winslow*, *J.*, denied the defendant's motion for a continuance; thereafter, the matter was tried to the jury; subsequently, the court granted the defendant's motion for a judgment of acquittal as to one count of operating a motor vehicle while under the

influence of intoxicating liquor or drugs; verdict and judgment of guilty of one count of operating a motor vehicle while under the influence of intoxicating liquor or drugs, from which the defendant appealed to this court. *Affirmed*.

Robert M. Berke, with whom was *Samantha A. Kretzmer*, for the appellant (defendant).

Sarah Hanna, deputy assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Marc R. Durso*, assistant state's attorney, for the appellee (state).

Opinion

McLACHLAN, J. The defendant, Sultan Williams, appeals from the judgment of conviction, rendered after a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (1). On appeal, the defendant claims that the trial court abused its discretion and deprived him of his right to an impartial jury when it (1) discharged a regular juror and replaced her with the alternate juror and (2) denied his motion for a continuance.[1] Although we conclude that the court abused its discretion under the circumstances of this case, we nevertheless affirm the judgment because the record is inadequate to conclude that the defendant was prejudiced.

The charge against the defendant arose from an incident that occurred on the afternoon of November 22, 2003, in Stratford. Two police officers were dispatched to an accident involving the defendant's vehicle and a

[1] In his brief on appeal, the defendant raised two additional issues concerning the denial of his motion for a judgment of acquittal with respect to the operation of the vehicle and the denial of his motion to preclude certain statements of one of the arresting officers. The defendant withdrew those two claims at the time of argument before this court, and we therefore do not address them.

parked, unoccupied vehicle. The defendant was not driving his vehicle at the time the officers arrived at the scene, and they could not recall whether he was inside or outside of the vehicle when they first approached him. A front tire of the defendant's vehicle was flat, and there was damage to the front end area. The parked vehicle was damaged in the left rear area. Upon questioning the defendant, the officers detected the odor of alcohol on his breath and observed that he was unsteady on his feet. After failing certain field sobriety tests, the defendant was arrested and transported to the Stratford police station.

The defendant elected to be tried by a jury. During jury selection, the defendant exhausted his peremptory challenges after the selection of five jurors. At that point he requested two additional challenges, and that request was denied by the court. After the sixth juror was accepted, the court indicated that counsel were to select one alternate juror. At the conclusion of the voir dire of juror T,[2] counsel for the defendant challenged him for cause. The court refused to excuse T for cause, and T became the alternate juror. The defendant did not seek any additional peremptory challenges at that time.

After jury selection had been completed, the court indicated that outstanding pretrial motions would be heard on Tuesday, May 31, 2005, at 10 a.m. and that the jury would be sworn immediately thereafter. When counsel arrived the morning of May 31, the court informed them that all of the jurors were not present because of "a miscommunication of some kind." Although the court told the selected jurors that they were to report on May 31, one of the jurors, M, additionally was told to contact the jury administrator before coming that day in the event of a change in the schedule.

[2] We refer to the jurors by initial to protect their legitimate privacy interests. *State* v. *Wright*, 86 Conn. App. 86, 88 n.3, 860 A.2d 278 (2004).

Any caller who telephoned the number provided was connected to a recorded message and instructed not to report until contacted by the court. Most of the jurors had not telephoned the designated number and came to the courthouse as originally instructed. The clerk was trying to contact the jurors who had not appeared, and the court was hopeful that all would be reached and available by the time the arguments on the outstanding motions had concluded.

After the luncheon recess, the court informed counsel that six of the seven jurors were at the courthouse. The court reported that M, one of the six selected jurors, however, had "child care responsibilities" and was unable to make alternative arrangements. The alternate was available to replace her, and the court stated that counsel would proceed with the trial that afternoon. Counsel for the defendant objected to proceeding with the alternate as a regular member of the jury and requested that the court continue the trial until the following morning. The court overruled the objection. Counsel then concluded their arguments on the outstanding motions, and the trial commenced later that afternoon. The jury found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or drugs. This appeal followed.

The defendant claims that the court abused its discretion in denying his motion for a continuance. The defendant argues that in denying that motion, thereby excusing M and replacing her with T, he was deprived of his right to an impartial jury. We agree that the court abused its discretion in denying the defendant's motion for a continuance, but we cannot conclude, on the basis of the record before us, that the defendant was prejudiced by that denial.

"The determination of whether to grant a request for a continuance is within the discretion of the trial court,

and will not be disturbed on appeal absent an abuse of discretion. . . . A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . In addition, we consistently have acknowledged that [o]ur role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives. . . .

"We have articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the defendant's personal responsibility for the timing of the request . . . .

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. . . . In connection with this inquiry into harmless error, [w]e distinguish between two types of cases: those in which a constitutional right has been implicated by a denial of a continuance, and those of a nonconstitutional nature. . . .

Although prejudice is presumed in instances in which a defendant has suffered a deprivation of a constitutional right, in order to establish reversible error in nonconstitutional claims, the defendant must prove both an abuse of discretion and harm . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Coney*, 266 Conn. 787, 801–802, 835 A.2d 977 (2003).

In the present case, through no fault of the defendant, a regular member of the jury, M, was not present on May 31, 2005. On the first day of jury selection, two jurors were accepted and were told that the trial would commence on May 31. No jurors were selected on the second day of jury selection. On the third day of jury selection, the remaining four regular jurors were accepted, and T, the alternate, was accepted by the state and challenged for cause by the defendant. When the court refused to excuse T for cause, he was added to the jury. The court informed the third and sixth jurors selected, as well as the alternate juror, that the trial would commence May 31 and asked them to provide emergency telephone numbers. With respect to the fourth juror and M, however, the court indicated that the trial would probably commence May 31 but that there was a possibility it would be delayed until the following day.

When M was selected, she particularly was concerned about the starting date of the trial. M taught at a middle school and had to make arrangements to procure a substitute teacher in her absence. The court told her to plan on being at the courthouse on May 31, but she also was told to telephone the jury administrator after 5 p.m. on Friday, May 27, or over the weekend for a recorded message in the event the schedule changed.[3]

[3] The colloquy between the court and M was as follows:

''The Court: All right. I've been telling everybody to come on Tuesday. It's just possible we may start on Wednesday and just go Wednesday to Friday. So, double-check before you come on Tuesday. But I need to take an emergency phone number from you. Our clerk will take it from you and

The recorded message specifically instructed jurors for

give you some instructions, and then you're going to go back up to the seventh floor and hand in some stuff.

"[M]: Okay.

"The Court: So, if you can do that.

"[Defense Counsel]: I'm sorry, Your Honor. Did you tell her it's at the other courthouse?

"The Court: I will.

"The Clerk: I just need a phone number—

"[M]: You mean like any time—

"The Clerk: One that you can be reached at in case there's an emergency in the last second. We need to tell you if there's a change in the trial schedule.

"[M]: Okay. [Provides telephone number.]

"The Clerk: Your social security number and your phone number are on here. And once you're done here, if you can just go up to the seventh floor and hand that to the jury administrator.

"[M]: Okay.

"The Court: Now, I'll go first. On—when you do report, we're going to be over on Golden Hill [Street].

"[M]: Okay.

"The Court: The other courthouse.

"[M]: Okay.

"The Court: So, when you come in, you'll go in the other courthouse; keep your little jury button there.

"[M]: Okay.

"The Court: And you'll go in the side door over at Golden Hill. Now, your turn.

"[M]: Okay. When will I know if I—if court's going to be [in] session, if I need to come on Tuesday?

"The Court: You will—there's a phone number.

"[M]: So, should I just assume I'm going to be here on Tuesday, and then I call? Is that what I do?

"The Court: Yeah.

"[M]: Okay. And when would I know that I'm not needed? I'm just thinking about them getting a substitute for school, for my teaching job.

"The Court: At this point, you should be planning on a substitute for Tuesday. [Unintelligible.]

"[M]: No, that's okay.

"The Clerk: What you should do is Friday, after five or on the weekend, you can call this number here.

"[M]: Okay.

"The Clerk: And it will confirm or—

"[M]: Okay.

"The Clerk: [Unintelligible.]

"[M]: All right. Today is Friday, so—

"The Court: Plan on being here Tuesday.

the case not to come in until further contacted by the court. Having heard the recorded message, M did not appear on May 31, and, when contacted by the clerk, stated that she was unable to make the necessary arrangements in order to be present that day in court.

Immediately after the luncheon recess, but before counsel had concluded their arguments on outstanding pretrial motions, the court informed counsel about M's inability to be present that day and indicated that they would be proceeding with T, the alternate juror, as the sixth juror. Counsel for the defendant objected. She stated that she would not have selected T as a member of the jury if the defendant had not exhausted his peremptory challenges. She requested that the trial commence the following morning, when M would be available. The court denied that request without giving any reason for its decision other than that the alternate was selected in the same manner as the regular jurors were selected.[4]

"[M]: Plan on being here Tuesday.

"The Court: Unless you hear something at the last minute.

"[M]: And then you'll call—basically, you'll call?

"The Court: You've got it. Thanks very much.

"[M]: All right. I'll see you on Tuesday."

[4] The colloquy between the court and defense counsel was as follows:

"[Defense Counsel]: With all due respect, Your Honor, the defense objects to proceeding with the alternate as part of the jury. We have our six jurors who were chosen. The defendant was out of peremptory challenges. The defendant would not have chosen [T]. It's not like [M is] saying, I can't ever come. I mean, she was told—

"The Court: She can't come today, [counsel].

"[Defense Counsel]: I know, but—

"The Court: She can't be here today, the trial starts today.

"[Defense Counsel]: Yeah, but that was not the defendant's fault that, you know—that was a miscommunication. I'm not saying it was someone's fault, but I'm saying, that's not part of our jury. I don't see why we couldn't proceed tomorrow with the jury, Your Honor. That's the alternate. That's not part of the jury.

"The Court: No, we're proceeding today and we're proceeding with six. Your objection is noted.

"[Defense Counsel]: Thank you, Your Honor.

In determining whether the trial court abused its discretion in denying the defendant's motion for a continuance, we look to the previously articulated factors. See *State* v. *Coney*, supra, 266 Conn. 801–802. The defendant timely made his request for a continuance. As soon as the court indicated that M could not be present that day and that the trial would proceed with T as the sixth juror, defense counsel objected and requested the continuance. The length of delay was a few hours at most. Counsel proceeded to conclude their arguments on outstanding motions that afternoon, and the trial commenced immediately thereafter. Although the transcript does not reflect the exact time that the jury was sworn, it does reflect that only one witness was called that afternoon and that her testimony had not concluded when court was adjourned.[5]

The state did not object to the defendant's request for a continuance. At oral argument before this court, the state conceded that "presumably" it would not have been inconvenienced by the delay because it had no expert witnesses scheduled to testify on May 31. Sarah Patrick, one of the arresting police officers, testified that afternoon. Patrick had testified earlier that day in connection with one of the defendant's outstanding motions. Patrick's testimony before the jury did not conclude that day; she returned the next day for continued cross-examination by defense counsel.

We next look to the legitimacy of the reasons proffered for the request for a continuance. The defendant wanted to be tried by the six regular members of the jury. He did not want to proceed with the alternate, T,

"The Court: The alternate was selected just like everybody else. We have a motion to suppress evidence. I'll hear from the defendant."

[5] Court resumed after the luncheon recess at page sixty-three of the transcript. Counsel concluded their arguments on the outstanding motions at page 114 of the transcript, and the jury was sworn. The witness began testifying at page 124 of the transcript, and court adjourned at page 172 of the transcript.

in place of M. During jury selection, the defendant had challenged T for cause,[6] and the court refused that request. The defendant could not exercise a peremptory challenge because they had been exhausted, and the court had refused to grant his request for additional challenges. M was not present because she had been told to telephone the jury administrator's office and, by a recorded message, had been instructed not to come to court until contacted by the court. M was unable to make alternative arrangements for that day but was available for the remainder of the trial. When presented with these reasons, the court summarily stated that "we're proceeding today and we're proceeding with six," and "[t]he alternate was selected just like everybody else."

Even though we afford great deference to a court's ruling on a motion for a continuance, we conclude that the court's denial was unreasonable and arbitrary under the unique circumstances of this case.

Having concluded that the court abused its discretion in denying the defendant's motion for a continuance, we must next determine whether he was prejudiced by that denial. "In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *State* v. *Coney*, supra, 266 Conn. 802. The defendant claims that he was deprived of his sixth amendment right to an impartial jury. He provides no analysis or case law, however, in

[6] Defense counsel challenged T for cause because T's vehicle had been struck from behind by an intoxicated driver. When T exited his vehicle, he spoke with the driver who "clearly smelled of alcohol and couldn't talk right." T indicated that he flagged down an officer who happened to be driving by and told him that "this guy's going to kill somebody." T also indicated that he had been a passenger in an automobile when his friend, the driver, was stopped and arrested for driving while intoxicated and that he had managed an employee who "was an alcoholic and . . . slammed into the back of a police car in the middle of the day."

support of this contention. Because the defendant has failed to assert a plausible constitutional claim, he bears the burden of showing that he was harmed by the denial of his motion for a continuance.

Although the defendant challenged T for cause during jury selection, he did not request additional peremptory challenges after the court refused to excuse T for cause. See *State* v. *Ross*, 269 Conn. 213, 230, 849 A.2d 648 (2004); *State* v. *Esposito*, 223 Conn. 299, 313, 613 A.2d 242 (1992). Whether the court improperly denied the defendant's request to excuse T for cause is not an issue on appeal. T was added to the jury as an alternate juror and became a regular member when the court excused M. Alternate jurors, by statute, must have the same qualifications and be selected in the same manner as regular jurors. General Statutes 54-82h (a).[7] The defendant has not demonstrated any specific harm resulting from the court's replacement of M by T, the alternate juror. We cannot presume that T was not an impartial juror under these circumstances.

The judgment is affirmed.

In this opinion the other judges concurred.

MARY ANNE MANN *v.* GLADYS REGAN
(AC 28736)

Flynn, C. J., and Robinson and Peters, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she had sustained to her face when she was bitten by a dog owned by the defendant. The trial court rendered judgment in favor of the plaintiff in accordance

[7] General Statutes § 54-82h (a) provides in relevant part: "Such alternate jurors shall have the same qualifications and be selected and subject to examination and challenge in the same manner and to the same extent as the jurors constituting the regular panel . . . ."

with a jury verdict, from which the defendant appealed to this court. *Held*:

1. It was not improper for the trial court to admit into evidence, under the tacit admission exception to the hearsay rule, a statement of the defendant's daughter, H, that the dog had bitten the defendant and the defendant's silence in response to H's statement, the trial court not having abused its discretion in determining that the circumstances surrounding H's statement naturally called for a reply by the defendant; the trial court reasonably could have concluded that regardless of the relationship between the people present when the statement by H was made, a dog owner such as the defendant, after hearing a statement about how she herself had been bitten by her dog, reasonably would be expected to respond by denying that the incident had occurred or, at the very least, offering an explanation for the incident.
2. The defendant could not prevail on her claim that the trial court lowered the standard of care and misled the jury when it instructed the jury that an owner of a dog may be held liable for harm caused by the pet if the owner knows or should have known that the dog had "dangerous" or "potentially dangerous" propensities: that court's use of the word "dangerous" rather than "vicious," as requested by the defendant, conveyed the same general principle, namely, the characteristic of a dog that demonstrates a tendency or inclination to cause harm to a person, and the defendant failed to show that there was a meaningful distinction between the words "vicious" and "dangerous" as used in the context of an action stemming from a dog bite; moreover, the trial court's use of the word "potentially" was not improper and was meant to distinguish between the different types of evidence that may be used to establish the vicious or dangerous propensity of the dog about which the owner was charged with having knowledge.
3. The evidence was not insufficient to support the jury's verdict on the plaintiff's claim of negligence; the evidence presented at trial, which showed that the dog would become upset and growl when people leaned toward him, that loud noises and sudden movements upset the dog and that the dog previously had bitten the defendant, was sufficient to support the jury's determination that the defendant's dog had vicious or dangerous propensities and that the defendant was aware or reasonably should have been aware of those propensities.

Argued April 15—officially released June 24, 2008

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Miller*, *J.*; verdict

for the plaintiff; thereafter, the court denied the defendant's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

James F. Sullivan, for the appellant (defendant).

Gerald S. Sack, with whom, on the brief, was *Eamonn Wisneski*, for the appellee (plaintiff).

Opinion

FLYNN, C. J. The plaintiff, Mary Anne Mann, brought this action to recover damages for injuries she had sustained to her face when she was bitten by a dog owned by the defendant, Gladys Regan. The defendant appeals from the judgment of the trial court rendered in favor of the plaintiff after a jury trial. On appeal, the defendant claims that (1) the court improperly admitted into evidence a statement of the defendant's daughter and the defendant's silence in response to that statement under the tacit admission exception to the hearsay rule, (2) the court improperly instructed the jury and (3) the evidence was insufficient to support the jury's verdict. We reject the defendant's claims and affirm the judgment of the trial court.[1]

The jury reasonably could have found the following facts. At the time of the incident in December, 2004, the plaintiff and the defendant had been friends for approximately thirty years. The plaintiff resided in Windsor, and the defendant lived in Florida and was the owner of a Lhasa Apso dog named Sam. The defendant's dog was afraid and distrustful of strangers and would bark at strangers. The dog would become upset

[1] In the event that the defendant prevailed on appeal, the plaintiff presented an adverse ruling of the trial court for our consideration pursuant to Practice Book § 63-4 (a) (1) (B). The plaintiff claimed that the court improperly granted the defendant's motion to strike the second count of the complaint. Because we affirm the trial court's judgment, we do not reach this issue. See *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 786 n.2, 807 A.2d 467 (2002).

when people hovered or leaned over him. In addition, loud noises and sudden movements sometimes would upset the defendant's dog.

On December 17, 2004, the defendant traveled to Connecticut with her dog. The plaintiff and her friend, Barbara Scanlon, met the defendant at the airport. While the defendant retrieved her luggage, Scanlon watched the dog, and, during this time, the dog growled at Scanlon when she reached her hand down toward the dog. The defendant stayed at the plaintiff's house for a few days before departing on December 20, 2004, to attend a wedding in Wisconsin. Because the parties previously had agreed that the plaintiff would care for the defendant's dog while the defendant traveled out of state, the dog remained at the plaintiff's house.

Approximately six hours after the defendant left for Wisconsin, the plaintiff noticed that the dog was sitting on her couch in the sunroom. The plaintiff decided to place a blanket underneath the dog, and, as she leaned in toward the dog, the dog suddenly bit the plaintiff's right cheek, causing severe puncture wounds. The plaintiff immediately telephoned Scanlon, and Scanlon, after arriving a few minutes later, drove the plaintiff to a medical clinic where the plaintiff received treatment.

On December 22, 2004, the defendant and her daughter went to the plaintiff's house to retrieve the defendant's dog. Upon arriving, the defendant observed the plaintiff's injuries, and a discussion ensued in which, inter alia, the plaintiff explained the incident. Thereafter, the defendant departed. The plaintiff continued to receive medical treatment for her injuries.

The plaintiff subsequently filed this action to recover damages from the defendant, claiming that the defendant was liable on a theory of common-law negligence. The complaint also contained a claim that the defendant was liable under General Statutes § 22-357, the "dog

bite'' statute, a strict liability statute for any injury caused by a dog, but the court struck this count.

A jury trial commenced on March 1, 2007. At the conclusion of the plaintiff's case-in-chief, the defendant orally made a motion for a directed verdict, arguing that the evidence was insufficient to establish that the defendant was negligent. The court stated that it would take the defendant's motion under advisement. The defendant did not present any evidence, thereby concluding the evidentiary phase of the trial. The defendant then renewed her motion for a directed verdict, to which the court replied that it would reserve judgment on the defendant's motion. The case was submitted to the jury, and, on March 2, 2007, the jury returned a verdict in favor of the plaintiff and awarded damages in the amount of $101,411.76. The jury also found that the plaintiff was 10 percent at fault for her injuries, and the damages award was reduced correspondingly. The court accepted the jury's verdict, and the defendant subsequently filed a motion to set aside the verdict,[2] which the court denied. Thereafter, the court rendered judgment in favor of the plaintiff.[3] This appeal followed. Additional facts will be set forth where necessary.

I

The defendant first claims that the court improperly admitted into evidence the statement of her daughter, Christina Hahn, and the defendant's silence in response to that statement under the tacit admission exception to the hearsay rule. The defendant argues that the plaintiff, as the proponent of the evidence, failed to establish

[2] In her motion to set aside the verdict, the defendant alleged that the court improperly (1) charged the jury, (2) admitted the statement of the defendant's daughter and (3) allowed the plaintiff to call Wes Mann, the plaintiff's husband, as a witness.

[3] The court's rendering of judgment in favor of the plaintiff was an implicit denial of the defendant's motion for a directed verdict, which was based on the claim of insufficiency of the evidence.

one of the requirements of that exception, namely, that the circumstances surrounding Hahn's statement naturally called for a reply from the defendant. We disagree.

The plaintiff made an offer of proof, outside of the jury's presence, that the plaintiff's testimony would include a hearsay statement pursuant to the tacit admission exception. During the proffer, the plaintiff testified that when the defendant came to retrieve her dog, the defendant was accompanied by Hahn. The plaintiff's friend, Scanlon, also was present at the plaintiff's house, and the four women were standing in close proximity in the plaintiff's kitchen. Upon observing the plaintiff's bandaged face, the defendant asked the plaintiff what had happened. The plaintiff informed the defendant that the defendant's dog had bitten her. The defendant then stated, "What do you mean Sam bit you? What did you do to him?" The plaintiff told the defendant that she did not do anything to the dog and then explained the dog bite incident. Hahn stated, "Well, mom, you know he bit you." The plaintiff further testified that the defendant, who was standing approximately five feet away, did not respond to Hahn's statement, nor did she deny Hahn's statement. The plaintiff testified that Hahn spoke loud enough for the defendant to hear. On the basis of the foregoing, the court concluded that the evidence qualified under the tacit admission exception to the hearsay rule and admitted it over the defendant's objection. The plaintiff subsequently testified before the jury in a manner consistent with the testimony she gave during the offer of proof. In addition, Scanlon testified in the jury's presence about Hahn's statement and the defendant's silence. The defendant claims on appeal that the court improperly admitted the evidence because one of the requirements of the tacit admission exception to the hearsay rule was lacking. We disagree.

Before addressing the defendant's specific claim, we first identify the applicable standard of review. "To the

extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, [an appellate court's] standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. . . .

"We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted.) *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007).

In the present case, the defendant does not argue that the court improperly construed the hearsay rule, nor does she assert that the tacit admission exception to the hearsay rule was identified improperly. Rather, the defendant's claim concerns the propriety of the court's determination that the circumstances naturally called for a reply from the defendant so as to satisfy the relevant requirements for the tacit admission exception. Because the court's assessment of whether the circumstances naturally called for a reply involves a "judgment call" by the court, we conclude that, under *Saucier*, the proper standard of review is the abuse of discretion standard.

Having identified the applicable standard of review, we now set forth the relevant legal principles that govern our resolution of the defendant's claim. "An out-of-court statement used to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception applies." *DeMarkey* v. *Fratturo*, 80 Conn. App. 650, 654, 836 A.2d 1257 (2003). Section 8-3 of the Connecticut Code of Evidence provides that certain statements are "not excluded by the hearsay rule, even though the declarant is available as a witness," including a "statement that is being offered against a party and is . . . (B) a statement that the party has adopted or approved . . . ." Conn. Code. Evid. § 8-3 (1). The commentary to § 8-3 (1) (B) provides that "the common-law hearsay exception for tacit admissions, under which silence or a failure to respond to another person's statement may constitute an admission . . . *Obermeier* v. *Nielsen*, 158 Conn. 8, 11–12, 255 A.2d 819 (1969); is carried forward in Section 8-3 (1) (B)." (Citation omitted.) Conn. Code Evid. § 8-3 (1) (B), commentary.

In *Obermeier*, our Supreme Court stated that "[t]he failure of one person to contradict or reply to the statement of another person made in his presence and hearing may amount to an admission by adoption of the other's assertion, providing the person remaining silent actually heard and understood the statement and was not disabled or prevented from replying, and the statement, under the circumstances made, was such as would naturally call for an answer. Under such circumstances evidence of the making of the statement and the silence of the person in whose presence it was made is admissible under the exception to the hearsay rule raised with respect to admissions . . . . This is known as the doctrine of tacit admissions . . . ." (Internal quotation marks omitted.) *Obermeier* v. *Nielsen*, supra, 158 Conn. 11–12. The plaintiff, as the proponent of the tacit admission, had to establish that (1) the defendant

comprehended the statement made, (2) the defendant had the opportunity to speak, (3) the circumstances naturally called for a reply from the defendant and (4) the defendant remained silent. Id., 12; see also *Roberto* v. *Honeywell, Inc.*, 43 Conn. App. 161, 165, 681 A.2d 1011, cert. denied, 239 Conn. 941, 684 A.2d 712 (1996).

In support of her claim that the circumstances did not naturally call for a reply, the defendant argues that Hahn's statement was made "in a meeting among longstanding friends who gathered around the holiday season and whose first concern was not the fault of any person but the injury that the plaintiff incurred. That is why under the circumstances . . . the first natural response of the defendant . . . was to inquire about [the plaintiff's] injury, not to reply to some cryptic, vague and ambiguous utterance by [Hahn]."

We cannot conclude that it was unreasonable for the court to determine that the circumstances naturally called for a reply from the defendant. The plaintiff testified that the statement by Hahn was given in the context of a conversation about the dog bite. Also, immediately preceding the statement by Hahn, the defendant had responded to the plaintiff's assertion that the dog had bitten her by saying to the plaintiff, "What do you mean Sam bit you? What did you do to him?" The court reasonably could have concluded that this statement by the defendant indicated disbelief on the part of the defendant and that Hahn's statement, which referred to an instance in which the dog previously had bitten the defendant, was meant to address this disbelief.

Contrary to the defendant's argument, the fact that Hahn's statement was made during a conversation among friends, rather than adversaries, is not dispositive of whether the circumstances naturally called for a reply. The court reasonably could have concluded that regardless of the relationship between the people

present when the statement was made, an owner, after hearing a statement about how she herself had been bitten by her dog, reasonably would be expected to respond to such a statement. Furthermore, the court reasonably could have determined that under the circumstances of the present case, a dog owner, such as the defendant, either would deny that such an occurrence had occurred or, at the very least, would offer an explanation for the incident so as to distinguish it from the present situation. After reviewing the record, we cannot say that the court abused its discretion in determining that the circumstances surrounding Hahn's statement naturally called for a reply. Accordingly, we conclude that the court did not abuse its discretion in admitting the statement and the defendant's silence under the tacit admission exception to the hearsay rule.

II

The defendant next claims that the court's instruction to the jury regarding "dangerous" or "potentially dangerous" propensities was improper. Specifically, the defendant argues that the court should have instructed the jury on "vicious" propensities, as the defendant had requested in her proposed charge, rather than on "dangerous" or "potentially dangerous" propensities.[4] The defendant contends that the court's instruction "lowered the standard of care and misled the jury."[5] We are not persuaded.

[4] This claim is preserved for our review. The defendant filed a request to charge, and, following the court's charge, the defendant took an exception, in which she argued that the court should have referred to "vicious" propensities.

[5] The defendant also appears to claim that the court submitted improper interrogatories to the jury because the court failed to use the defendant's proposed interrogatories. Because the defendant has failed to brief this claim adequately, we decline to afford it review. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Citation omitted; internal

As a preliminary matter, we identify the applicable standard of review and set forth the legal principles that govern our resolution of the defendant's instructional claim. "A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." *Pickering* v. *Rankin-Carle*, 103 Conn. App. 11, 14, 926 A.2d 1065 (2007). "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 572–73, 898 A.2d 178 (2006).

In its charge to the jury, the court, in adapting the law to the case in question, stated that "[u]nder our law, the owner of a dog may be held liable for harm caused by the pet if the owner knows or should have known that the dog had *dangerous or potentially dangerous propensities.* Liability in such situation is based upon a finding that the dog owner failed to act upon knowledge of the propensity, which would constitute a breach of the duty of care by the owner to those coming into contact with . . . her dog." (Emphasis added.)

The defendant first argues that the court's usage of the word "dangerous," rather than "vicious," to describe

quotation marks omitted.) *Turner* v. *American Car Rental, Inc.*, 92 Conn. App. 123, 130–31, 884 A.2d 7 (2005).

the propensities of the dog was improper. We conclude that the court's charge on "dangerous" propensities conveyed the same general principle as that requested by the defendant, namely, the characteristic of a dog that demonstrates a tendency or inclination to cause harm to a person. This principle also was explicated in the court's discussion of examples of the type of evidence that may be sufficient to establish a dangerous propensity. Specifically, the court charged that "[e]vidence that the dog has bitten or attacked others or evidence of the owner's knowledge that the dog engaged in behaviors which would tend to indicate a propensity to bite or otherwise injure people may be sufficient to establish" that the dog had dangerous propensities.

Furthermore, we are not persuaded that there is a meaningful distinction between the words "vicious" and "dangerous" as used in the context of an action stemming from a dog bite, nor has the defendant explained what that distinction would be. A review of appellate decisions reveals that this court, as well as our Supreme Court, frequently has used words other than vicious when referring to a dog's propensities. See *Granniss* v. *Weber*, 107 Conn. 622, 625, 141 A. 877 (1928) ("[P]rincipal purpose and effect [of the dog bite statute] was to abrogate the common-law doctrine of scienter as applied to damage by dogs to persons and property, so that liability of the owner or keeper became no longer dependent upon his knowledge of the dog's *ferocity or mischievous propensity*; literally construed the statute would impose an obligation on him to pay for any and all damage the dog may do of its own volition. It 'extends the liability of the owner of a dog beyond that existing at common law.' " [Emphasis added.]); see also *Auster* v. *Norwalk United Methodist Church*, 286 Conn. 152, 160 n.10, 943 A.2d 391 (2008) (same); *Stokes* v. *Lyddy*, 75 Conn. App. 252, 266, 815 A.2d 263 (2003) (same);

Murphy v. *Buonato*, 42 Conn. App. 239, 253, 679 A.2d 411 (1996) (*O'Connell*, *J.*, dissenting) ("no indication in the present case that the plaintiff had such knowledge, i.e., scienter, of the *dangerous* propensities of the defendant's dog" [emphasis added]), aff'd, 241 Conn. 319, 696 A.2d 320 (1997); see generally 4 Am. Jur. 2d, Animals §§ 75–76 (2007); 3B C.J.S., Animals §§ 331–32, 334 (2003).

With respect to the defendant's claim that the court improperly charged on "potentially dangerous" propensities, we conclude that the court's use of the word "potentially" was not improper and was meant to distinguish between the different types of evidence that may be used to establish the vicious or dangerous propensity of the dog about which the owner was charged with having knowledge.

The court instructed the jury that for the defendant to be liable, the plaintiff had to prove, inter alia, that the defendant knew or reasonably should have known of the dog's dangerous or potentially dangerous propensities. In discussing this element of a common-law negligence action, the court stated that it could be established by evidence that the defendant had knowledge that the dog engaged in behaviors, other than biting or causing actual injury, that tended to indicate that the dog had a propensity to bite or otherwise to injure people. The court, in instructing the jury on this element, was explaining that other conduct on the part of a dog, in addition to the propensity to bite, could indicate a propensity, which likely or potentially could cause injury. This charge also was in accord with 3B C.J.S., supra, §§ 331–32, which similarly indicates that other propensities, besides the propensity to bite, can demonstrate the potential or the likelihood of a dog to cause injury, and, thus, the owner is charged with having knowledge of the dog's dangerous propensities. We conclude that the instructions, when read as a whole,

were adapted properly to the law and provided the jury with sufficient guidance. Accordingly, the defendant's claim fails.

III

The defendant last claims that there was insufficient evidence to support the jury's verdict on the plaintiff's claim of negligence. Specifically, the defendant contends that the jury reasonably could not have concluded that the dog had vicious propensities or that the defendant was aware of those propensities. We do not agree.

We begin by setting forth the standard of review applicable to claims of insufficient evidence. Our Supreme Court has stated: "[I]t is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it." (Citations omitted; internal quotation marks omitted.) *Ormsby* v. *Frankel*, 255 Conn. 670, 692, 768 A.2d 441 (2001).

"Under the common law of this state, it has been held that liability for injuries committed by a vicious animal is grounded in negligence. See *Ford* v. *Squatrito*, 86 Conn. 710, 86 A. 579 (1913). It is the duty of the owner of such an animal, having knowledge of its vicious propensities, to give notice of the propensities or to restrain the animal, and that failure to do so is negligence that makes the owner liable for its consequences." *Stokes* v. *Lyddy*, supra, 75 Conn. App. 265–66. "[T]he plaintiff must prove that the dog had vicious

propensities and that the owner or keeper had knowledge, or the means of knowledge, of them." *Basney* v. *Klema*, 2 Conn. Cir. Ct. 538, 544, 203 A.2d 95 (1964).[6] A vicious propensity is any propensity on the part of a dog that is likely to cause injury under the circumstances. See 3B C.J.S. 410, supra, § 331.

To support her claim that the evidence was insufficient, the defendant contends that the evidence adduced at trial indicated only that the dog barked at strangers and was shy, skittish and nervous. The defendant further argues that the evidence was insufficient because the circumstances surrounding the prior dog bite incident were unknown. We disagree and conclude that the evidence presented at trial was sufficient to support the jury's determination that the defendant's dog had vicious or dangerous propensities and that the defendant was aware or reasonably should have been aware of those propensities.

Contrary to the defendant's arguments, the evidence was not insufficient and did not establish only that the dog was shy and skittish. Rather, the evidence demonstrated that the defendant's dog would become upset and growl when people leaned toward him. Indeed, the

[6] "Any propensity on the part of a dog, which is likely to cause injury under the circumstances . . . is a dangerous or vicious propensity, and a vicious propensity does not mean only the type of malignancy exhibited by a biting dog, that is, a propensity to attack human beings. . . . In order to charge the owner or keeper of a dog with knowledge or scienter of the animal's vicious propensity, the notice of the dog's propensity must be such as to put a prudent person on guard, and require him as an ordinarily prudent man to anticipate the injury. The crucial issue is whether the owner knows, or had reason to know, of the animal's dangerous propensities. . . . Although the fact that the owner or keeper knows that the dog has on a previous occasion attacked or bitten a person, or otherwise manifested its vicious propensity, may be sufficient to charge him with knowledge thereof, it is not necessary that there be a previous attack or bite in order to charge the owner or keeper with knowledge or notice of the vicious propensity, for he is bound to observe other manifestations short of actual injury, and he cannot disregard them . . . ." 3B C.J.S., supra, §§ 331–32.

defendant's testimony indicated that she knew that her dog would become upset when people hovered or leaned over him and also that her dog, who was afraid and distrustful of strangers, would bark at strangers. The defendant further testified that loud noises and sudden movements sometimes would upset her dog. Scanlon stated that the dog growled at her when she had reached down toward the dog at the airport. In addition, from the testimony of the plaintiff and Scanlon, the jury heard evidence relating to an incident in which the dog previously had bitten *the defendant*. Although the defendant testified at trial that her dog had never bitten her, the jury, as the trier of fact and the final judge of the credibility of witnesses, was free to disbelieve the defendant and to reject this testimony as self-serving. See *Birchard* v. *New Britain*, 103 Conn. App. 79, 89, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007). After reviewing the record before us and considering the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found as it did.

The judgment is affirmed.

In this opinion the other judges concurred.

CARMEN MUNIZ *v.* ALLIED COMMUNITY RESOURCES, INC., ET AL.
(AC 28252)

Harper, Beach and Borden, Js.

Syllabus

The plaintiff appealed to this court from the decision of the workers' compensation review board, which reversed the decision of the workers' compensation commissioner finding that the plaintiff had suffered a compensable injury and awarding her benefits under the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff claimed that the board improperly concluded that she was not an employee entitled to benefits under the provision (§ 31-275 [9] [B]) of the act that provides that an

employee entitled to benefits under the act shall not be construed to include any person engaged in any type of service in or about a private dwelling provided the person is not regularly employed by the owner or occupier over twenty-six hours per week. At the time the plaintiff sustained an injury to her knee, she was employed as a personal care assistant for L and worked up to 25.75 hours per week at L's private residence. *Held* that the board properly vacated the commissioner's ruling because the plaintiff, who was not an employee for purposes of the act, was not entitled to benefits under the act; the fact that the plaintiff was not employed during the period in question for more than twenty-six hours per week was dispositive under § 31-275 (9) (B) and precluded her from invoking the remedies provided under the act.

Argued February 13—officially released June 24, 2008

Procedural History

Appeal from the decision by the workers' compensation commissioner for the fifth district granting the plaintiff's claim for benefits, brought to the workers' compensation review board, which vacated the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Jack Senich, for the appellant (plaintiff).

Lawrence G. Widem, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *William J. McCullough*, assistant attorney general, for the appellee (defendant second injury fund).

Opinion

HARPER, J. The plaintiff, Carmen Muniz, appeals from the decision of the workers' compensation review board (board), which reversed the decision of the workers' compensation commissioner for the fifth district (commissioner). The commissioner ruled that the plaintiff had suffered a compensable injury and awarded her benefits under the Workers' Compensation Act (act), General Statutes § 31-275 et seq. The plaintiff claims that the board improperly concluded that she was not

an employee entitled to benefits under the act. We affirm the decision of the board.

At a contested hearing before the commissioner, it was undisputed and found that between October, 2001, and November, 2002, the plaintiff was employed as a personal care assistant,[1] in which employment she provided personal care services for Gary LaChance.[2] It was further undisputed and found that during this period of employment, the plaintiff worked up to 25.75 hours per week in or about LaChance's private residence. The plaintiff claimed that she sustained a work-related knee injury for which she underwent surgery and suffered a period of total disability.

[1] The department of social services operates the personal care assistance waiver program, which, with federal funding, assists eligible disabled adults by paying for qualifying personal care assistance services. Under General Statutes § 17b-262, the commissioner of social services promulgated regulations governing the program. See Regs., Conn. State Agencies §§ 17b-262-587 through 17b-262-596a.

[2] The plaintiff brought the claim against LaChance, Allied Community Resources, Inc., and the Connecticut Health Care Workers' Compensation Trust (trust). The commissioner determined that LaChance, who did not defend the claim, was an uninsured party. The commissioner determined that Allied Community Resources, Inc., at relevant times a contractor hired by the state to act as a fiscal intermediary between personal care assistants and eligible individuals receiving assistance, was not a liable party. Finally, the commissioner determined that the trust was not a liable party. None of these determinations is challenged in this appeal.

The commissioner found that LaChance was the plaintiff's employer. The second injury fund; see General Statutes § 31-355; appeared before the commissioner and asserted that the claim was not compensable and that the plaintiff was an employee of the department of social services. The department of social services appeared before the commissioner and asserted that LaChance was the plaintiff's employer and that due to LaChance's uninsured status, the second injury fund was responsible for paying the plaintiff's claim.

Neither LaChance, Allied Community Resources, Inc., nor the trust participated in proceedings before the board, before which appeared, in addition to the plaintiff, representatives of the second injury fund and the department of social services. Only the plaintiff and the second injury fund have filed briefs in this appeal.

General Statutes § 31-275 (9) (B) provides that an "employee" entitled to benefits under the act "shall not be construed to include . . . (iv) [a]ny person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week . . . ." The commissioner concluded that in enacting this provision, the legislature "did not intend to exclude people like this [plaintiff] from workers' compensation coverage. The [plaintiff] clearly was not a casual employee." The commissioner concluded that the plaintiff was injured in the course of her employment, as a result of repetitive kneeling, as alleged. The commissioner ordered LaChance to pay total disability benefits and other related compensation to the plaintiff. The commissioner noted that in the event that LaChance failed to pay the claim, the plaintiff could obtain an order against the second injury fund.

The second injury fund appealed to the board. Following a hearing, the board applied § 31-275 (9) (B) (iv) and concluded that the plaintiff, who had not worked more than 25.75 hours a week as a personal care assistant, was not an employee entitled to benefits under the act. The board vacated the commissioner's decision, and this appeal by the plaintiff followed.

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously

been subject to judicial scrutiny." (Internal quotation marks omitted.) *Deschenes* v. *Transco, Inc.*, 284 Conn. 479, 487, 935 A.2d 625 (2007).

"We will not change the finding of the commissioner unless the record discloses that the finding includes facts found without evidence or fails to include material facts which are admitted or undisputed. . . . Similarly, [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Citation omitted; internal quotation marks omitted.) *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 324, 823 A.2d 1223 (2003).

The relevant facts underlying the plaintiff's appeal are not in dispute; the claim advanced by the plaintiff, which is that she is not encompassed in the casual employee exception codified in § 31-275 (9) (B) (iv), presents an issue of statutory interpretation to which we afford plenary review. See *Smith* v. *Yurkovsky*, 265 Conn. 816, 821, 830 A.2d 743 (2003). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Groton* v. *Mardie Lane*

Homes, *LLC*, 286 Conn. 280, 286–87, 943 A.2d 449 (2008).

The meaning of the governing statute is plain and unambiguous and, as applied to the facts of this case, is susceptible of only one reasonable interpretation. Only employees, as defined in the act, may avail themselves of benefits under the act. The relevant statutory provision, § 31-275 (9) (B), provides that the term " '[e]mployee' shall not be construed to include . . . (iv) [a]ny person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week . . . ." On the basis of the facts before the board, we conclude that the board correctly vacated the commissioner's ruling because the plaintiff, who was not an employee for purposes of the act, was not entitled to benefits under the act.

"Although we recognize that the [act] should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries. . . . The entire statutory scheme of the [act] is directed toward those who are in the employer-employee relationship as those terms are defined in the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act; a claimant . . . who is not an employee has no right under this statute to claim for and be awarded benefits. . . . [A claimant] may invoke the remedy provided under the [act] only if [the claimant], as a matter of law, satisfies the requisite jurisdictional standard of employee as defined by the legislature . . . ." (Citations omitted; internal quotation marks omitted.) *Smith* v. *Yurkovksy*, supra, 265 Conn. 822–23.

In challenging the board's decision, the plaintiff relies on the commissioner's finding that LaChance had personal care assistants, other than her, provide services

for him. Thus, the plaintiff asserts that LaChance received personal care services in excess of forty hours per week. The plaintiff also relies on the fact that subsequent to her employment, the regulations governing the personal care assistant waiver program were amended to cover the services of a single personal care assistant up to forty hours per week. See Regs., Conn. State Agencies § 17b-262-593 (a) (3). The plaintiff also suggests that because she was a "low wage earner" who provided "invaluable service to a physically handicapped person," public policy considerations warrant a reversal of the board's decision.

The plaintiff's arguments are unavailing. The fact that LaChance received care from others during the time of the plaintiff's employment or that after her employment, the regulations governing her position were amended does not alter the fact that the plaintiff was not employed during the period in question for more than twenty-six hours per week. It is this dispositive fact that, in accordance with § 31-275 (9) (B) (iv), precludes the plaintiff from invoking the remedies provided under the act.

The decision of the workers' compensation review board is affirmed.

In this opinion the other judges concurred.

EDWIN C. ST. GERMAIN *v.* GARY LABRIE ET AL. (AC 28380)

Lavine, Beach and Peters, Js.

Syllabus

The plaintiff sought, inter alia, to enjoin the defendants, his former roommates, from damaging or removing the plaintiff's personal property located at a house where the plaintiff had resided with the defendants. The plaintiff had been involved in a physical altercation at the house and, as a result, a protective order had been issued that prohibited him

from returning to the house for eight years. The trial court granted the motions to dismiss filed by the defendants L and Z for lack of subject matter jurisdiction. Thereafter, that court rendered judgment dismissing the entire action against all defendants for lack of subject matter jurisdiction, and the plaintiff appealed to this court. *Held*:

1. Although the trial court properly granted the motions by L and Z to dismiss for lack of subject matter jurisdiction the portion of the plaintiff's complaint that sought to control the activities of persons on the premises, as the plaintiff failed to allege in his complaint facts sufficient to establish that he was an owner of the property and, thus, lacked standing with respect to those claims, the trial court improperly dismissed for lack of subject matter jurisdiction the portion of the plaintiff's complaint seeking to enjoin the defendants from damaging or removing his personal property, as there was nothing in the record indicating that the trial court lacked the authority to hear that particular type of legal controversy and the plaintiff had standing with respect to that portion of his complaint; moreover, with respect to the trial court's dismissal sua sponte of the entire action against all defendants, that court properly dismissed the portion of the complaint seeking to enjoin the defendants from damaging the house itself and from permitting other persons to access the house but improperly dismissed the portion of the complaint seeking to enjoin the defendants from damaging or removing the plaintiff's personal property located at the house.
2. The trial court did not abuse its discretion in denying the plaintiff's motion for disqualification of the judicial authority and for a mistrial, certain adverse rulings by that court not having amounted to evidence of bias sufficient to support a claim of judicial disqualification.
3. The plaintiff's claim that the trial court improperly failed to rule on his motion for a continuance was unavailing, that court implicitly having denied the motion when it had the parties proceed with their arguments despite the plaintiff's request for a continuance and when it determined, at the conclusion of arguments, that it would take the papers and decide the case, and the plaintiff offered no evidence or explanation as to why he was unable to proceed in the matter.
4. Any impropriety committed by the trial court, as claimed by the plaintiff, in permitting a third party, R, to speak in open court during oral argument on the motions to dismiss was harmless, R not having said anything inconsistent with the undisputed facts in the plaintiff's complaint.

Argued March 13—officially released June 24, 2008

Procedural History

Action to enjoin the defendants from damaging or removing the plaintiff's personal property from a certain residence, and for other relief, brought to the Superior Court in the judicial district of New London, where

the court, *Hon. D. Michael Hurley*, judge trial referee, granted the motions to dismiss filed by the named defendant et al.; thereafter, the court denied the plaintiff's motions for disqualification and for a mistrial and a continuance, and the plaintiff appealed to this court; subsequently, the court, *Hon. D. Michael Hurley*, judge trial referee, rendered judgment of dismissal, and the plaintiff filed an amended appeal with this court. *Reversed in part; further proceedings.*

Edwin C. St. Germain, pro se, the appellant (plaintiff).

Gary LaBrie, pro se, and *Charles Zuch*, pro se, the appellees (defendants).

Opinion

BEACH, J. In this action for injunctive relief, the pro se plaintiff, Edwin C. St. Germain, appeals from the judgment of the trial court dismissing the action against the defendants, Gary LaBrie, Richard Barber, Charles Zuch and Patricia Startz, for lack of subject matter jurisdiction. On appeal, the plaintiff claims that the court improperly (1) dismissed his complaint for lack of subject matter jurisdiction, (2) denied his motion for disqualification of the judicial authority and for a mistrial, (3) failed to rule on his motion for a continuance and (4) permitted an unsworn "witness" to "testify" at oral argument on the motions to dismiss filed by LaBrie and Zuch. With respect to the first issue, we conclude that the court properly dismissed the portion of the complaint in which the plaintiff sought to control the activities of persons on his alleged premises but improperly dismissed the portion of his complaint in which he sought to enjoin the defendants from damaging or removing his personal property located at the premises. We are not persuaded by the plaintiff's other claims on appeal. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. In December, 2005, the plaintiff brought a complaint against the defendants, his former roommates, in which he alleged that he had purchased a twenty room house in Norwich in 1997 and subsequently sold it to a business partner. He claimed that he continued to reside in the house and that he rented out several rooms. He further claimed that he had been involved in a physical altercation with one of the individuals renting a room and that, as a result, a protective order was issued against him prohibiting him from returning to the house for eight years. In his complaint, the plaintiff essentially seeks to control the activities of persons on the premises and to enjoin all of the defendants from damaging or removing his personal property located at the house.

LaBrie and Zuch filed separate motions to dismiss the plaintiff's complaint for lack of subject matter jurisdiction. On April 3, 2006, the court, *Hon. D. Michael Hurley*, judge trial referee, granted the motions to dismiss without a memorandum of decision. The plaintiff thereafter, on December 22, 2006, filed an appeal from the granting of the motions to dismiss.

On January 10, 2007, the trial court issued an order stating that pursuant to Practice Book § 10-33, the action was dismissed. The court also prepared a judgment file indicating that the entire action was dismissed for lack of subject matter jurisdiction. The plaintiff then filed an amended appeal on January 26, 2007, seeking to challenge the court's January 10, 2007 "alteration of [the] judgment . . . ." Additional facts will be set forth as necessary.

I

The plaintiff claims that the court improperly dismissed his complaint for lack of subject matter jurisdiction. The plaintiff seems to divide this claim into two

parts. He claims first that the court improperly granted the motions to dismiss filed by LaBrie and Zuch and, second, that the court improperly thereafter dismissed the entire action sua sponte against all defendants. We agree with both of the plaintiff's claims but only with respect to the portion of his complaint concerning his personal property and not with respect to the portion of his complaint seeking to control the activities of persons on the premises.

We first set forth our standard of review. The standard of review of a challenge to a court's granting of a motion to dismiss is well established. "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Chiulli* v. *Zola*, 97 Conn. App. 699, 703–704, 905 A.2d 1236 (2006).

"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. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [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]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 538, 893 A.2d 389 (2006).

A

The plaintiff first claims that the court improperly granted the motions to dismiss filed by LaBrie and Zuch. We agree in part and disagree in part.

We begin our analysis by noting that the court had before it arguable short calendar motions to dismiss. There was no evidentiary hearing, and the file reveals no request for one, nor were affidavits filed by LaBrie and Zuch with their motions to dismiss. In this context, we consider only the complaint and facts necessarily implied from the complaint in deciding the motion. In the absence of any disputed issues of fact pertaining to subject matter jurisdiction, our review is plenary. See *Fennelly* v. *Norton*, 103 Conn. App. 125, 139 n.11, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

We first address the portion of the plaintiff's complaint seeking to control the activities of persons on the premises. The plaintiff has failed to allege facts in his complaint sufficient to establish standing, and, therefore, we conclude that the court properly dismissed that portion of the plaintiff's complaint for lack of subject matter jurisdiction. Specifically, we conclude that the plaintiff has not alleged facts sufficient to meet the first prong of the test for classical aggrievement. The plaintiff alleges in his complaint that he sold the house in 1997 to a business partner, who thereafter held title to the property.[1] Because the plaintiff, in effect, acknowledged that he was not an owner, he lacks standing with respect to these claims.[2] Accordingly, we conclude that the court properly granted LaBrie's and Zuch's motions to dismiss for lack of subject matter jurisdiction with respect to the portion of the plaintiff's complaint in which he sought to control the activities of persons on the premises.

We next address the portion of the plaintiff's complaint seeking to enjoin the defendants from damaging or removing his personal property. We conclude that the court improperly dismissed that portion of the plaintiff's complaint for lack of subject matter jurisdiction. We find nothing in the record indicating that the court lacked the authority to hear this particular type of legal controversy. Specifically, we note that the plaintiff has standing with respect to that portion of his complaint. In his complaint, the plaintiff seeks to enjoin the defendants from damaging or removing his personal property, which, undisputedly, was located at the house.

[1] The plaintiff also alleges in his complaint that he held an agreement to repurchase the property. Under the circumstances of this case, this alleged fact does not affect our analysis.

[2] We note that at the time of the court's April 3, 2006 decision, another trial court, *Schimelman*, *J.*, on December 21, 2005, previously had dismissed a summary process action brought by the plaintiff, concluding that the plaintiff lacked standing to evict the tenants of the property.

"[T]he actual owner of personal property is a proper plaintiff in an action for damage to or loss of such personal property . . . ." 59 Am. Jur. 2d 444, Parties § 39 (2002). When construing the complaint in the light most favorable to the pleader, we conclude that the plaintiff has met both prongs for showing classical aggrievement. In his complaint, he has alleged facts sufficient to support a finding that he has a specific, personal and legal interest in his personal property and also has alleged that his specific personal and legal interest in his property specifically and injuriously has been affected by the challenged action.

B

The plaintiff also argues that the court improperly dismissed the entire action sua sponte against all defendants on January 10, 2007, for lack of subject matter jurisdiction. Specifically, he claims that the court improperly "altered the original [April 3, 2006] judgment" by dismissing the entire action against all defendants on January 10, 2007. "[T]he question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, *or by the court*, *sua sponte*, at any time." (Emphasis in original; internal quotation marks omitted.) *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 28, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005); see also Practice Book § 23-29. We reiterate that because "[a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286, 939 A.2d 561 (2008). We conclude that the same reasoning that applies to LaBrie and Zuch applies with respect to the remaining defendants. Accordingly, we conclude that with respect to all of the defendants, the court

properly dismissed the plaintiff's complaint as to the portion that sought to enjoin the defendants from damaging the house itself and from permitting other persons' access to the house but improperly dismissed the complaint as to the portion seeking to enjoin the defendants from damaging or removing his personal property located at the house.

II

The plaintiff next appears to claim that the court improperly denied his motion for disqualification of the judicial authority and for a mistrial. We disagree.

Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Canon 3 (c) of the Code of Judicial Conduct . . . ." "[C]anon 3 of the Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 527, 911 A.2d 712 (2006).

"The standard for determining whether a judge should recuse himself or herself pursuant to canon 3 (c) is well established. The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. . . . The standard for appellate review of whether the facts require disqualification is whether the court's discretion has been abused." (Internal quotation marks omitted.) *Sabatasso* v. *Hogan*, 91 Conn. App. 808, 825–

26, 882 A.2d 719, cert. denied, 276 Conn. 923, 888 A.2d 91 (2005).

Our review of the plaintiff's grounds for disqualification that he asserted in his motion, and briefed on appeal, reveal that the grounds asserted amount to nothing more than claims that the court's rulings were improper.[3] "[A]dverse rulings by the judge do not amount to evidence of bias sufficient to support a claim of judicial disqualification." *State* v. *Bunker*, 89 Conn. App. 605, 613, 874 A.2d 301 (2005), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006). Accordingly, we conclude that the court did not abuse its discretion in denying his motion.

III

The plaintiff next claims that the court improperly failed to rule on his motion for a continuance. We disagree.

"When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Citation omitted; internal quotation marks omitted.) *Valentine* v. *LaBow*, 95 Conn. App. 436, 451–52, 897 A.2d 624, cert. denied, 280 Conn. 933, 909 A.2d 963 (2006).

[3] The plaintiff also claims that the court failed to read his motion before ruling on it. Absent some indication in the record to the contrary, we presume that the court acted properly in the performance of its duties, including reading the plaintiff's motion, and thus reject this claim. See *Rosenblit* v. *Danaher*, 206 Conn. 125, 134, 537 A.2d 145 (1998) ("as to judges and courts, under the law of evidence, it is presumed, unless the contrary appears, that judicial acts and duties have been duly and regularly performed, the presumption of regularity attending the acts of public officers being applicable to judges and courts and their officers" [internal quotation marks omitted]).

On April 3, 2006, the plaintiff made an oral motion for a continuance. The plaintiff argued that he had a separate case pending in which he sought to evict certain individuals from the house, including LaBrie and Zuch, and that a continuance should have been granted so that the eviction case could be heard first. After hearing arguments from both sides, the court determined that it would "take the papers and decide the case."

Contrary to the plaintiff's assertion, the court did not fail to rule on his motion for a continuance. Instead, the court implicitly denied the motion when it had the parties proceed with their arguments despite the plaintiff's request for a continuance and when it determined, at the conclusion of arguments, that it would "take the papers and decide the case."

The plaintiff offered no evidence or explanation as to why he was unable to proceed in the present case. The court was within its discretion to deny the continuance when there was no evidence that the plaintiff would be unable to proceed in this matter because of other pending matters or for any other stated reason. See, e.g., *Catalano* v. *Falco*, 74 Conn. App. 86, 91, 812 A.2d 63 (2002) (review of denial of motion for continuance limited to abuse of discretion standard).

IV

The plaintiff last claims that the court improperly permitted a third party, Jack Ross, to speak in open court during oral argument on April 3, 2006. Specifically, the plaintiff claims that the admission of this "witness' testimony" was improper because (1) Ross was permitted to "testify" without first having been administered an oath, (2) the court, rather than the parties, posed questions to Ross and (3) the plaintiff was not permitted to cross-examine Ross.[4] If there was any impropriety, we conclude that it constituted harmless error.

[4] In this regard, the plaintiff argues as though the oral argument on the motions to dismiss was an evidentiary hearing; it was not.

When hearing oral argument on the defendants' motions to dismiss, the court asked: "Is the owner [of the house] here?" Ross was present at the hearing and responded to the court's question. He stated that his wife owned the property but acknowledged that the plaintiff's personal property still was then on the premises.

"[T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 358, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). There is no indication that Ross' being permitted to speak affected the result. The facts relevant to subject matter jurisdiction and standing, namely, that the plaintiff was not the owner of the house but owned property that was at the house, were undisputed. The plaintiff alleged these undisputed facts in his complaint. Ross did not say anything that was inconsistent with those facts. The plaintiff has not shown any harm.

Although we affirm the portion of the judgment in which the trial court dismissed the plaintiff's claims in which he sought to control the activities of others on the premises, we reverse the portion of the judgment in which the trial court dismissed the plaintiff's claims concerning his personal property and we remand the case to the trial court for further proceedings consistent with this opinion.

The judgment is reversed only with respect to the plaintiff's claim concerning his personal property and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ABEL RODRIGUEZ *v.* STEVEN SAUCIER ET AL. (AC 29024)

Flynn, C. J., and McLachlan and Pellegrino, Js.

Syllabus

The plaintiff, R, sought to recover damages for personal injuries he sustained when his automobile came into contact with an automobile owned by the defendant city and driven by the defendant S, a police officer. Prior to the commencement of R's action, the city had filed an action against R in the small claims session of the Superior Court, seeking recovery for property damage to the police cruiser involved in the accident. After R instituted his action, he filed an answer and counterclaim for personal injuries in the city's small claims action, incorporating by reference his complaint in the civil action. The small claims court found that R was at fault, awarded damages to the city and dismissed R's counterclaim. Thereafter, the defendants filed a motion for summary judgment in R's action on the basis of the doctrine of collateral estoppel, which the trial court granted. On R's appeal to this court, *held* that the trial court properly granted the defendants' motion for summary judgment and determined that R's action was barred by the doctrine of collateral estoppel: R's claim that collateral estoppel was inapplicable because of the unavailability of appellate review of small claims judgments was unavailing, as R, by electing to bring his claim as a counterclaim in the small claims proceeding, voluntarily chose to utilize the small claims session to seek adjudication of his rights, rather than proceed with his independent cause of action, and could not now assert that the absence of the ability to appeal rendered the doctrine of collateral estoppel inapplicable, especially in light of the fact that he could have opted to move the small claims action to the regular docket of the Superior Court; moreover, R could not prevail on his claim that the prior small claims judgment for property damage did not bar the subsequent action for personal injuries arising out of the same accident, as R, by incorporating the entire complaint from his action into his counterclaim in the small claims action, had the opportunity during the small claims action to litigate fully and fairly all of the issues that he sought to raise in his action, and because the small claims court dismissed the counterclaim after R had the opportunity fully and fairly to litigate it, R could not relitigate the same claim on the regular docket.

Argued March 31—officially released June 24, 2008

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence,

brought to the Superior Court in the judicial district of Waterbury, where the court, *Gallagher*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ramiro Alcazar, for the appellant (plaintiff).

Paula N. Anthony, office of the corporation counsel, for the appellees (defendants).

Opinion

PELLEGRINO, J. The plaintiff, Abel Rodriguez, appeals from the judgment of the trial court rendered following the granting of the defendants'[1] motion for summary judgment. The issue on appeal is whether the court properly determined that the plaintiff's action was barred by the doctrine of collateral estoppel. We affirm the judgment of the trial court.

The facts of this case are not in dispute. The underlying claims arise from an automobile accident that occurred in Waterbury on July 12, 2004. The plaintiff, while operating his motor vehicle, came into contact with an automobile owned by the city of Waterbury (city) and driven by Steven Saucier, a Waterbury police officer. On July 6, 2006, the city filed an action in the small claims session of the Superior Court against the plaintiff, seeking recovery for property damage to the police cruiser involved in the accident.

Shortly thereafter, the plaintiff instituted the action on which this appeal is based on the regular docket of the Superior Court, alleging that he had sustained personal injuries in the July 12, 2004 accident. His complaint alleged that Saucier, while acting within the scope of his employment, negligently operated the police

[1] The defendants are Steven Saucier and the city of Waterbury.

cruiser and that the city is liable for damages pursuant to General Statutes §§ 7-465 and 52-557n.[2]

On October 6, 2006, the plaintiff filed an answer and counterclaim for personal injuries in the city's small claims action. His answer incorporated by reference his complaint in the civil action. On February 20, 2007, the small claims court found that the plaintiff was at fault for the accident and awarded damages to the city. The court dismissed the plaintiff's counterclaim because there was no evidence to support it.

On April 30, 2007, the defendants filed a motion for summary judgment in the plaintiff's action. The motion claimed that, as a matter of law, the plaintiff's claim was barred by the equitable doctrines of res judicata or collateral estoppel. The court granted the defendants' motion on the basis of collateral estoppel. This appeal followed.

We begin by setting forth the applicable standard of review. "[T]he issue of whether principles of res judicata and collateral estoppel are applicable to a particular set of facts is a question of law over which an appellate court's review is plenary." *Ammirata* v. *Zoning Board of Appeals*, 264 Conn. 737, 744–45, 826 A.2d 170 (2003). "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue

[2] The plaintiff's complaint alleged that Saucier "was driving and operating a vehicle, owned by [the] defendant [c]ity of Waterbury, acting as a police officer with the Waterbury [p]olice [d]epartment and acting in the performance of his duties, and within the scope of his employment." The plaintiff's complaint did not allege that Saucier was liable in his individual capacity for wanton or reckless conduct, and, accordingly, we find that the city of Waterbury is the real party in interest in this case, as it was in the small claims action. See General Statutes § 52-557n.

was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Citations omitted; internal quotation marks omitted.) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 772, 770 A.2d 1 (2001).

"Because these doctrines are judicially created rules of reason that are enforced on public policy grounds . . . [our Supreme Court has] observed that whether to apply either doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citation omitted; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 601–602, 922 A.2d 1073 (2007).

The plaintiff first claims that the doctrine of collateral estoppel is inapplicable because of the unavailability of appellate review of small claims judgments. We reject this argument when, as here, the plaintiff *elected to*

litigate in a small claims proceeding. Furthermore, beyond that fact, the small claims session of the Superior Court is a court of competent jurisdiction for purposes of collateral estoppel. See, e.g., *Isaac* v. *Truck Service, Inc.*, 253 Conn. 416, 420–21, 428–29, 752 A.2d 509 (2000); *Dontigney* v. *Roberts*, 73 Conn. App. 709, 710–12, 809 A.2d 539 (2002), cert. denied, 262 Conn. 944, 815 A.2d 675 (2003); but see *Isaac* v. *Truck Service, Inc.*, supra, 416 (questioning whether issue preclusion applies when review unavailable).

Moreover, we find that the plaintiff's actions in this case result in the unavailability of appellate review because he elected to bring his claims as counterclaims in the city's small claims action. He was not required to do this, as Connecticut has no compulsory counterclaims. See *Lowndes* v. *City National Bank*, 79 Conn. 693, 696, 66 A. 514 (1907) ("[w]hile the law encourages, it does not compel, the settlement of all controversies between the same parties by a single action"). The plaintiff, therefore, voluntarily elected to utilize the small claims session to seek adjudication of his rights, rather than proceeding with his independent cause of action.

Furthermore, if the plaintiff had wanted to litigate his claims with the city in a single proceeding, he had the option to move the small claims action to the regular docket of the Superior Court. See Practice Book § 24-21. "[W]here the parties have litigated to final judgment a small claims action . . . it fairly may be assumed that they have chosen to do so because the goals of inexpensive, prompt, informal and final adjudication were consistent with their goals in resolving their particular dispute." *Isaac* v. *Truck Service, Inc.*, supra, 253 Conn. 427. The plaintiff cannot now, after electing to proceed in the small claims session and forgoing his ability to appeal, assert that the absence of the ability to appeal renders the doctrine of collateral estoppel inapplicable. To permit such a result would grant the plaintiff a second bite of the apple. Accordingly, we

conclude that the doctrine of collateral estoppel is applicable in this case. The plaintiff also claims that the court improperly rendered summary judgment because an exception to the doctrine of collateral estoppel is applicable in this case. Specifically, the plaintiff claims that a prior small claims judgment for property damage does not bar a subsequent action for personal injuries arising out of the same accident. See id., 416. We disagree.

In *Isaac* v. *Truck Service, Inc.*, supra, 253 Conn. 416, our Supreme Court held that "where the parties litigate to judgment, on the small claims docket, a claim for property damage to a motor vehicle arising out of a motor vehicle accident, that judgment will not bar a subsequent action, on the regular docket, for personal injuries arising out of the same accident." Id., 422. The court's holding was based, in part, on the fact that the amount of the property damage claim in automobile accidents typically will be ascertained much sooner than the ultimate value of the personal injury claim. Id., 423. Accordingly, public policy favors the prompt resolution of the property damage claims through the small claims process. Id., 424. In light of the limited amount of money involved, the ability of the plaintiff to forgo the small claims process and the option of the defendant to transfer the action to the regular docket, the court found that "where the parties have litigated to final judgment a small claims action for property damage arising out of an automobile accident, it fairly may be assumed that they have chosen to do so because the goals of inexpensive, prompt, informal and final adjudication were consistent with their goals in resolving their particular dispute." Id., 427. The court concluded that "the doctrine [of collateral estoppel] does not apply to a claim for personal injuries arising out of an automobile accident, filed on the regular docket of the Superior Court, where the parties have litigated the question of property damage arising out of the same

accident on the small claims docket of the court." Id., 420.

The plaintiff argues that *Isaac* is analogous to the present case. We do not agree. Unlike in *Isaac*, the plaintiff in the present case had the opportunity, during the small claims action, to litigate fully and fairly all of the issues that his current action seeks to raise. By incorporating his entire complaint from the present case into his counterclaim in the small claims action, he raised the same issues in the small claims action that he is trying to raise in this case.[3] The current case, therefore, is not a subsequent action as contemplated by *Isaac* but, rather, a concurrent action that was already litigated in the small claims court. Because the small claims court dismissed the plaintiff's counterclaim after he had the opportunity fully and fairly to litigate it, he cannot relitigate the same claim on the regular docket. Accordingly, his claim is barred by the doctrine of collateral estoppel.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LOUISE CALLAHAN (AC 28609)

DiPentima, Lavine and Peters, Js.

Syllabus

The defendant, who had been charged with the crime of making a false statement in the second degree in connection with her complaint to police that M had driven an automobile in a manner intended to force

[3] Although not raised by the plaintiff before the trial court or on appeal, a claim against Saucier in his individual capacity might not be barred by the doctrine of collateral estoppel because Saucier was not a party to the small claims action giving rise to the preclusive judgment on which our decision is based. We conclude, however, that the plaintiff's complaint only alleged that Saucier was negligent while acting within the scope of his employment and does not state a claim that he is liable in his individual capacity. See footnote 2.

the defendant's vehicle off the road, applied for and was granted permission to participate in the statutory (§ 54-56e) accelerated rehabilitation program. As a condition of her rehabilitation, the defendant was ordered to issue an apology to M. Upon determining that the defendant's written apology was not sincere, the trial court terminated the defendant's participation in the accelerated rehabilitation program, and the defendant appealed to this court. *Held*:

1. The defendant, having conceded that the trial court had the authority to order an apology and having acquiesced in the order issued, waived her right against self-incrimination; furthermore, the defendant could not now claim that the order was inconsistent with the principle that participation in the accelerated rehabilitation program does not constitute an acknowledgement of guilt.
2. The trial court's finding that the letter written by the defendant to M, which contained no expression of regret on the defendant's part for her actions, was not a sincere apology was not clearly erroneous; moreover, the defendant could not prevail on her claim that the existence of civil litigation that she had initiated against M was a special circumstance that required the court either to refrain from ordering the apology or to take that litigation into account in its assessment of the defendant's compliance with the order, it being clear from § 54-56e (d) that the defendant's only choice was to accept and to abide by the conditions set by the court, or to reject the conditions and to face further criminal prosecution.

Argued April 17—officially released June 24, 2008

Procedural History

Information charging the defendant with the crime of making a false statement in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the court, *Bellis*, *J.*, granted the defendant's application for accelerated rehabilitation; thereafter, the court terminated the order of accelerated rehabilitation, and the defendant appealed to this court. *Affirmed.*

William B. Westcott, for the appellant (defendant).

Richard K. Greenalch, Jr., special deputy assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Robert G. Hall, Jr.*, supervisory assistant state's attorney, for the appellee (state).

PETERS, J. General Statutes § 54-56e[1] establishes a discretionary accelerated rehabilitation program for certain criminal cases that permits the suspension of criminal prosecution for a stated period of time subject to such conditions as the court may order. *State* v. *Spendolini*, 189 Conn. 92, 95, 454 A.2d 720 (1983); *State* v. *Trahan*, 45 Conn. App. 722, 734, 697 A.2d 1153, cert. denied, 243 Conn. 924, 701 A.2d 660 (1997). Compliance

[1] General Statutes § 54-56e provides in relevant part: "(a) There shall be a pretrial program for accelerated rehabilitation of persons accused of a crime or crimes or a motor vehicle violation or violations for which a sentence to a term of imprisonment may be imposed, which crimes or violations are not of a serious nature.

"(b) The court may, in its discretion, invoke such program on motion of the defendant or on motion of a state's attorney or prosecuting attorney with respect to a defendant (1) who, the court believes, will probably not offend in the future, (2) who has no previous record of conviction of a crime or of a violation of section 14-196, subsection (c) of section 14-215, section 14-222a, subsection (a) of section 14-224 or section 14-227a, (3) who has not been adjudged a youthful offender within the preceding five years under the provisions of sections 54-76b to 54-76n, inclusive, and (4) who states under oath, in open court or before any person designated by the clerk and duly authorized to administer oaths, under the penalties of perjury that the defendant has never had such program invoked in the defendant's behalf, provided the defendant shall agree thereto and provided notice has been given by the defendant, on a form approved by rule of court, to the victim or victims of such crime or motor vehicle violation, if any, by registered or certified mail and such victim or victims have an opportunity to be heard thereon. . . .

"(d) Except as provided in subsection (e) of this section, any defendant who enters such program shall pay to the court a participation fee of one hundred dollars. Any defendant who enters such program shall agree to the tolling of any statute of limitations with respect to such crime and to a waiver of the right to a speedy trial. Any such defendant shall appear in court and shall, under such conditions as the court shall order, be released to the custody of the Court Support Services Division . . . . If the defendant refuses to accept, or, having accepted, violates such conditions, the defendant's case shall be brought to trial. . . .

"(f) . . . An order of the court denying a motion to dismiss the charges against a defendant who has completed such defendant's period of probation or supervision or terminating the participation of a defendant in such program shall be a final judgment for purposes of appeal."

with the stipulated conditions for the requisite period of time permits a defendant to apply to the court for dismissal of the applicable criminal charges. *State* v. *Parker*, 194 Conn. 650, 658, 485 A.2d 139 (1984). Failure to comply may, however, result in termination of the defendant's participation in this discretionary program. In this case, the trial court terminated the defendant's participation because the court found that the defendant had not complied with the court's order to send a genuine letter of apology to a person whom the defendant had accused of harassment. The defendant has appealed. We affirm the judgment of the trial court.

The defendant, Louise Callahan, applied for participation in the accelerated rehabilitation program after having been arraigned on the charge of having made a false statement in the second degree in violation of General Statutes § 53a-157b.[2] This charge arose from a complaint made by the defendant to Officer Tyrone Boyd of the Norwalk police department on September 12, 2005, in which the defendant alleged that, earlier that day, while she was driving on a local street, another driver, identified by the defendant as Barbara Murawski, had tried to force her off the road. On the following day, the defendant filed a formal complaint including a sworn statement alleging that Murawski had harassed her family for many years. Upon further investigation, Boyd determined that there was probable cause to believe that the defendant had provided a false statement regarding the incident on the road.

The trial court held a dispositional hearing to consider whether to admit the defendant to the accelerated

[2] General Statutes § 53a-157b provides: "(a) A person is guilty of false statement in the second degree when he intentionally makes a false written statement under oath or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable, which he does not believe to be true and which statement is intended to mislead a public servant in the performance of his official function.

"(b) False statement in the second degree is a class A misdemeanor."

rehabilitation program.[3] Pursuant to § 54-56e (b), the court afforded Murawski an opportunity to be heard. Although Murawski described a protracted pattern of unfortunate encounters between her family and that of the defendant, she agreed that the defendant should be permitted to enter the accelerated rehabilitation program.

The state also agreed that the defendant was eligible for participation in the program but suggested to the court that, as a condition of her rehabilitation, the defendant be ordered to issue an apology to Murawski. Because of pending civil litigation with Murawski, the defendant expressed her reluctance to accede to a court-ordered apology.[4] The court decided, nonetheless, that it would not permit the defendant to participate in the program unless the defendant agreed to apologize. After consultation with counsel, the defendant acquiesced in the court's order for an apology, for the posting of certain letters of retraction with respect to another dispute between the defendant and Murawski and for compliance with a no contact order. The court then granted the application for accelerated rehabilitation and released the defendant to the custody of the court support services division.

Three months later, the trial court heard further argument occasioned by Murawski's expressed concern to the defendant's probation officer that the defendant had failed to fulfill the conditions of her rehabilitation.[5]

[3] Before ruling on the merits of the defendant's application, the court gave the defendant the opportunity to submit a psychological evaluation. The defendant submitted a detailed psychological report, and, as an additional condition of her accelerated rehabilitation, the court ordered the defendant to continue with any recommended treatment.

[4] The record indicates that the litigation to which the defendant was referring was initiated by the defendant.

[5] There also was a disagreement between the defendant and Murawski about the sufficiency of the letters of retraction ordered by the trial court at the same time that it ordered the defendant to send a letter of apology. The court terminated the defendant's participation in the accelerated rehabilitation program without addressing the merits of this disagreement.

The probation officer submitted to the court the defendant's purported letter of apology, which stated: "Mr. & Mrs. J. Murawski: I apologize if you felt that the statements set forth on lines 28, 29, on page two of a correspondence dated October 31, 2005 from Attorney Dave Rubin to Attorney John Cohane, caused unhappiness. Louise Callahan."

After examining this document, the trial court informed the defendant that it had "major issues" with this document as a letter of apology. The court observed: "[It is] one sentence and it says, 'I apologize if you felt that it caused unhappiness.' It's not apologizing for her actions. . . . Where's the apology for her actions?" In response, defense counsel argued that the letter indeed had complied with the court's order, asserting: "I don't think that, respectfully, the court or anyone else is in a position to say that's not an apology. It certainly is what it purports to be." The trial court disagreed, found the letter to be an "insincere apology" that "in no way meets the conditions of her release" and terminated the defendant's participation in the accelerated rehabilitation program.

The defendant has appealed. Although at trial she acquiesced in the order for an apology and although she now acknowledges, in her appellate brief, that the court had the authority, as a general matter, to require her to make an apology, she nonetheless maintains that, under the circumstances of this case, the termination order was an abuse of the court's discretion. She argues that (1) the court's order violated her constitutional right against self-incrimination due to the pendency of the underlying criminal proceedings; (2) the court's order was inconsistent with the principle that participation in the program does not constitute an acknowledgement of guilt; (3) the court had no authority to decide whether a letter purporting to be an apology was in fact an apology; and (4) the court's order was prejudicial

to unresolved issues in pending civil litigation between the defendant and Murawski of which the court had been apprised.

As a preliminary matter, we set forth the applicable standard of review. "Our review of the trial court's exercise of its discretion is limited to the questions of whether the court correctly applied the law and whether it could reasonably conclude as it did. See *Timm* v. *Timm*, 195 Conn. 202, 210, 487 A.2d 191 (1985). It is only where an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion. *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 192, 510 A.2d 972 (1986); *State* v. *Devanney*, 12 Conn. App. 288, 292, 530 A.2d 650 (1987). Every reasonable presumption will be given in favor of the trial court's ruling. *State* v. *Rodriguez*, 10 Conn. App. 176, 179, 522 A.2d 299 (1987)." *State* v. *Angelo*, 25 Conn. App. 235, 241, 594 A.2d 24, cert. denied, 220 Conn. 911, 597 A.2d 335 (1991); cf. *State* v. *Fanning*, 98 Conn. App. 111, 122, 908 A.2d 573 (2006), cert. denied, 281 Conn. 904, 916 A.2d 46 (2007). "The trial court's findings of fact are entitled to great deference and will be overturned only upon a showing that they were clearly erroneous." *State* v. *Bletsch*, 281 Conn. 5, 19, 912 A.2d 992 (2007).

On the record in this case, the defendant's first two arguments require little discussion. Having conceded that the court had the authority to order an apology and having acquiesced in its issuance, the defendant has waived any right against self-incrimination with respect to the apology. She properly does not suggest that the court's order is subject to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). It similarly is too late in the day now to claim an improper inconsistency between the court's order and an acknowledgement of guilt.

The defendant's claim that the court had no authority to decide whether a letter purporting to be an apology was in fact an apology stands on a different footing, but it too is unpersuasive. On its face, the argument seems to be that the court was bound to find acceptable as an apology any document using any form of the word "apology," no matter how hedged by accompanying verbiage. On that theory, even an apology accompanied by a repetition of the offensive accusation would have sufficed. That cannot be correct. A more reasonable argument is that the court's determination was a finding of fact that, in the defendant's view, was clearly erroneous. Even that contention, however, cannot be sustained. The letter stated: "I apologize if you felt that the statements [in designated correspondence] caused unhappiness." At best, it communicated some acknowledgement by the defendant of the possibility that Murawski's feelings might have been hurt, but it contained no expression of regret on the part of the defendant for her own actions. We are persuaded, therefore, that the trial court's finding that the apology was insincere was not clearly erroneous. Cf. *Higgins* v. *Liston*, 88 Conn. App. 599, 614, 870 A.2d 1137 (upholding finding of criminal contempt of court because defendant's apology insincere), cert. denied, 276 Conn. 911, 886 A.2d 425 (2005), cert. denied, 546 U.S. 1220, 126 S. Ct. 1444, 164 L. Ed. 2d 143 (2006).

The defendant contends, however, in her final claim on appeal, that the court's appraisal of the sufficiency of her letter of apology was too narrowly focused on the wording of the apology because it failed to take into account the fact of ongoing civil litigation between the defendant and Murawski. The defendant informed the court of the existence of this litigation at the outset, when she urged the court not to order her to send a letter of apology. In effect, the defendant appears to argue that the existence of litigation that she herself

had initiated was a special circumstance that required the court, in the exercise of its discretion, either to refrain from ordering an apology or to take this litigation into account in assessing the defendant's compliance with the court's order. We disagree.

As this court recently has observed: "Accelerated rehabilitation is not a right at all. It is a statutory alternative to the traditional course of prosecution available for some defendants and totally dependent upon the trial court's discretion. . . . In essence, the legislature has declared [an accused] a worthy candidate for a second chance. . . . The purpose of probation is to afford a period during which a penitent offender may be assisted in rehabilitation." (Citations omitted; internal quotation marks omitted.) *State* v. *Fanning*, supra, 98 Conn. App. 116. The defendant has cited no authority for the proposition that the accelerated rehabilitation program gives criminal defendants the authority to frame the conditions with which they are prepared to comply in order to demonstrate their rehabilitation. To the contrary, the law is clear that the only choice that the statute gives such defendants is to accept and to abide by the conditions set by the court, or to reject the conditions and to face further criminal prosecution. General Statutes § 54-56e (d).

The judgment is affirmed.

In this opinion the other judges concurred.

KERMIT ELLISON *v.* COMMISSIONER OF CORRECTION
(AC 28291)

Flynn, C. J., and DiPentima and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of certain crimes in connection with his alleged sexual assault of two minor girls, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective

assistance on direct appeal by failing to include in her initial brief to this court the constitutional argument that certain constancy of accusation testimony at the petitioner's criminal trial had violated the petitioner's sixth amendment right to confrontation. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly found that omission of the sixth amendment claim from the petitioner's direct appeal did not prejudice him because that claim would have been decided adversely to him on the basis of certain case law from the Supreme Court; accordingly, because no reasonable jurist could have concluded otherwise, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

Argued March 13—officially released June 24, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Mary H. Trainer, special public defender, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Elizabeth C. Leaming*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, J. The petitioner, Kermit Ellison, appeals following the denial of his petition, filed pursuant to General Statutes § 52-470 (b),[1] for certification

[1] General Statutes § 52-470 (b) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying the petition for certification to appeal. We dismiss the petitioner's appeal.

The facts underlying the petitioner's conviction are set forth in this court's opinion following the petitioner's direct appeal; see *State* v. *Ellison*, 79 Conn. App. 591, 594–97, 830 A.2d 812, cert. denied, 267 Conn. 901, 838 A.2d 211 (2003); and may be summarized as follows. On January 4, 1999, the petitioner and two other men brought three minor girls to a motel in Vernon where the petitioner forced two of the girls to engage in sexual intercourse with him. Id. The following morning, as the three minor girls watched, the petitioner participated in a brutal assault on the brother of one of the minor girls. Id.

On October 26, 2000, the petitioner was found guilty by the jury of two counts of conspiracy to commit risk of injury to a child in violation of General Statutes § 53a-48 and General Statutes (Rev. to 1999) § 53-21 (1), two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), three counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) and two counts of risk of injury to a child by impairing the morals of a child in violation of General Statutes (Rev. to 1999) § 53-21 (2). *State* v. *Ellison*, supra, 79 Conn. App. 593–94. At the trial, the victims testified as to the details of the incidents and the identities of persons to whom they had reported the incidents. Id., 605. Following the victims' testimony, the court admitted the testimony of four other witnesses, under the constancy of accusation doctrine, as set forth by our Supreme Court in *State* v. *Troupe*, 237 Conn. 284, 304–305, 677 A.2d 917 (1996) (en banc). *State* v. *Ellison*, supra, 605–10.

On direct appeal, the petitioner's attorney, Darcy McGraw, raised, inter alia, an evidentiary claim that the constancy testimony went beyond what is permitted by the rule enunciated in *Troupe*. Id., 604. After filing her initial brief, McGraw attempted to supplement her evidentiary claim, by way of a motion to amend her statement of issues, with an argument that the constancy testimony had violated the petitioner's right to confrontation under the sixth amendment to the United States constitution. This court denied McGraw's motion and, subsequently, affirmed the judgment of the trial court.

On February 15, 2006, the petitioner filed an amended petition for a writ of habeas corpus, alleging that McGraw had rendered ineffective assistance on direct appeal by failing to include in her initial brief to this court her constitutional argument that the constancy testimony had violated his sixth amendment right to confrontation. In a memorandum of decision filed October 2, 2006, the habeas court denied the petition. In its memorandum of decision, the court noted that the federal constitutional issue that McGraw had failed to raise would have been decided adversely to the petitioner on the basis of our Supreme Court's decision in *State* v. *Samuels*, 273 Conn. 541, 871 A.2d 1005 (2005). Accordingly, the court denied the petition, concluding that the petitioner had failed to demonstrate that McGraw's alleged ineffectiveness had prejudiced him. The court subsequently denied the petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the court improperly relied on *Samuels* in addressing his claim that at his criminal trial, the victims were not subject to full and effective cross-examination, in violation of his sixth amendment right to confrontation. In essence, he claims that the trial court improperly permitted the constancy witnesses to testify as to the details of the sexual assaults in violation of the rule set forth in

Troupe[2] and, to the extent that they did, their hearsay testimony violated his right to confrontation because he was not permitted an opportunity to cross-examine the victims on those hearsay statements. We find no merit in the petitioner's claim.

Our standard of review for the petitioner's claim is well settled. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . We

[2] In *Troupe*, the Supreme Court held that "a person to whom a sexual assault victim has reported the assault may testify only with respect to the fact and timing of the victim's complaint; any testimony by the witness regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator. . . . [S]uch evidence is admissible only to corroborate the victim's testimony and not for substantive purposes. Before the evidence may be admitted, therefore, the victim must first have testified concerning the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. In determining whether to permit such testimony, the trial court must balance the probative value of the evidence against any prejudice to the defendant." *State* v. *Troupe*, supra, 237 Conn. 304–305.

examine the petitioner's underlying claim of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. . . . In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable." (Internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 740–41, 936 A.2d 653 (2007), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008). "[The habeas] court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Rivera* v. *Commissioner of Correction*, 70 Conn. App. 452, 456, 800 A.2d 1194, cert. denied, 261 Conn. 921, 806 A.2d 1061 (2002).

We focus our analysis on the second prong of *Strickland* because the habeas court denied the petitioner's claim on the ground that the alleged deficient performance of McGraw resulted in no prejudice to him. "The second part of the *Strickland* analysis requires more than a showing that the errors made by counsel may have had some effect on the outcome of the proceeding.

. . . Rather, [the petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Langston* v. *Commissioner of Correction*, 104 Conn. App. 210, 214, 931 A.2d 967, cert. denied, 284 Conn. 941, 937 A.2d 697 (2007).

"To satisfy the prejudice prong, a petitioner must, thus, establish that, as a result of appellate counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. Put another way, he must establish that, because of the failure of his appellate counsel to raise a [particular] claim, there is a reasonable probability that he remains burdened by an unreliable determination of his guilt. . . . In order to prevail on a claim of ineffective assistance of appellate counsel, therefore, a habeas petitioner must show not only that his appeal would have been sustained but for counsel's deficient performance, but also that there is a reasonable probability that the trial verdict would have been different." (Citation omitted; internal quotation marks omitted.) *Vivo* v. *Commissioner of Correction*, 90 Conn. App. 167, 173, 876 A.2d 1216, cert. denied, 275 Conn. 925, 883 A.2d 1253 (2005).

The petitioner has failed to persuade this court, as he failed to persuade the habeas court, that he suffered any prejudice from McGraw's omission of his constitutional claim on direct appeal. The petitioner does not dispute that the victims in this case testified and were subject to cross-examination. Instead, he intimates that the constancy of accusation witnesses were permitted to give improper hearsay testimony as to the details of the assaults, which exceeded the permissible scope of such testimony as delineated in *Troupe* and, as a result, the cross-examinations of the victims were rendered incomplete and ineffective.

To the extent that he claims that the constancy testimony exceeded the limitations of *Troupe*, the petitioner's claim is nothing more than an attempt at a second bite of the apple. This court disposed of that argument on the petitioner's direct appeal. See *State* v. *Ellison*, supra, 79 Conn. App. 610. The petitioner cannot resurrect his failed evidentiary claim by garbing it in a constitutional disguise. See *Henderson* v. *Commissioner of Correction*, 104 Conn. App. 557, 569, 935 A.2d 162 (2007) ("[t]his court strongly disfavor[s] collateral attacks upon judgments because such belated litigation undermines the important principle of finality" [internal quotation marks omitted]), cert. denied, 285 Conn. 911, 943 A.2d 470 (2008).

Given that the constancy testimony fell squarely within the parameters of *Troupe*, we conclude that the habeas court properly relied on *Samuels* as the basis for denying the petition for a writ of habeas corpus. In *Samuels*, our Supreme Court reiterated *Troupe*'s holding that "[b]ecause constancy of accusation evidence is not admissible unless the victim has testified, and is subject to cross-examination . . . concerning the crime and the identity of the person or persons to whom the victim has reported the crime," the constancy of accusation doctrine does not violate the sixth amendment. (Internal quotation marks omitted.) *State* v. *Samuels*, supra, 273 Conn. 569. Accordingly, the habeas court properly found that McGraw's omission of the petitioner's sixth amendment claim on direct appeal did not prejudice the petitioner because, on the basis of the holding in *Samuels*, the outcome of his direct appeal would have been the same. Because no reasonable jurist could have concluded otherwise, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

SMITH BROTHERS WOODLAND MANAGEMENT, LLC *v.* ZONING BOARD OF APPEALS OF THE TOWN OF BROOKFIELD (AC 28376)

DiPentima, Lavine and Lavery, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant zoning board of appeals of the town of Brookfield upholding an order issued to the plaintiff by the town zoning enforcement officer to cease and desist certain activities on its property that were in violation of a certificate of zoning compliance that had been issued for the property. The plaintiff's predecessor had applied to the town zoning commission for a certificate of zoning compliance for use of the property as a general contractor site with nonretail logging as an accessory use. The application, which was taken over by the plaintiff upon its purchase of the property, was denied initially but, upon reconsideration, was granted with certain stipulations, which included a prohibition on the storage of logs on site. Subsequently, following an inspection of the property that revealed that the plaintiff was in violation of the stipulations in the certificate of compliance, the commission voted to issue the cease and desist order for the improper storage of logs and the onsite storage and maintenance of unregistered motor vehicles. The plaintiff claimed, inter alia, that its use of the property was a valid, nonconforming use and that it had never intended to abandon that use. The trial court sustained the plaintiff's appeal in part, and the board, on the granting of certification, appealed to this court. *Held* that the trial court should not have sustained the plaintiff's appeal and determined that the certificate of zoning compliance was not binding on the plaintiff and that the plaintiff therefore could continue all valid, nonconforming uses of the property, the plaintiff, by initiating the application to clarify the uses of the property, having become bound by the outcome and not having appealed from the decision of the commission, which it could have done; moreover, the board had substantial evidence before it that the certificate of zoning compliance explicitly provided what was permitted and not permitted on the property and that some of the logging practices of the plaintiff were not permitted because such practices, even if they were preexisting, nonconforming uses, had been abandoned.

Argued February 14—officially released June 24, 2008

Procedural History

Appeal from the decision by the defendant upholding an order issued to the plaintiff to cease and desist certain activities on certain of its real property that were

allegedly in violation of town zoning regulations, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Mintz*, *J.*; judgment sustaining the appeal in part, from which the defendant, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Thomas W. Beecher, for the appellant (defendant).

Brian A. Lema, for the appellee (plaintiff).

Opinion

LAVERY, J. The defendant, the zoning board of appeals of the town of Brookfield (board), appeals from the judgment of the trial court sustaining in part the appeal of the plaintiff, Smith Brothers Woodland Management, LLC, from a decision of the board upholding a cease and desist order issued by the Brookfield zoning enforcement officer. The board contends that the court improperly held that (1) the certificate of zoning compliance did not confer a benefit on the plaintiff and therefore it was not bound by the certificate's terms that were never appealed, and (2) existing Connecticut case law is distinguishable. We reverse the judgment of the trial court.

The following facts are relevant to the board's appeal. Prior to the plaintiff's purchase of the subject property on April 1, 1999, the premises were owned by John J. Kolinchak, Jr., from 1971 to 1999 and were sold to him by his parents, who had purchased the property on June 23, 1934. On March 23, 1999, Kolinchak submitted an application for a certificate of zoning compliance to the Brookfield zoning commission (commission) for use of the property as a general contractor site with nonretail logging as an accessory use. When the premises were purchased by the plaintiff, the application was taken over by the company. The application was denied on March 26, 1999, but the plaintiff requested that the

denial be reconsidered because it could confirm the nonconforming use of the site as a contractor site.

Letters were presented to confirm that heavy equipment had been stored on site, consistent with a contractor's site, but there also was testimony that logs had not been seen stored there. The plaintiff indicated that the primary purpose of the property was to store equipment, but the commission stated that it sounded like the plaintiff wanted to run a logging business from the property and that there was an attempt to enlarge the existing nonconforming use. The commission requested additional information about the proposed logging use, specifically looking for definitions of construction material, how to eliminate seeing a pile of logs from the street, what size the logs would be and a list of how many trucks would be on the property per week.[1] In a letter dated April 15, 1999, the plaintiff defined the parameters of his logging business, as well as proposed improvements, and stipulated activities that would not occur on the property, including the grinding of materials, the presence of stumps and wood chips and that logs less than twelve feet in length would be present only in a designated area for up to five days.

Specifically, the plaintiff wrote that "[t]he [l]ogging operation of [the plaintiff] is an [a]ccessory use to its [g]eneral [c]ontractor [o]peration. It is not a [r]etail [b]usiness. There have been no complaints associated with the current operations. This property will be dramatically improved with the added [s]creening, [p]ainting, elimination of all [vehicles] [t]ruck [b]odies, [buses] [p]arts, etc. [a]s mandated in the condition of sale. The property and activity will be more conforming than at present. There will be [*n*]*o* [*e*]*xpansion of a* [*n*]*on*-[*c*]*onforming use*, since the proposed use will have

[1] The record of the commission meetings in 1999 exists in the form of minutes from the meetings on April 8 and 22, 1999.

less [e]quipment, no storage of [others'] [v]ehicles, no outside repairs, significantly less [e]mployees, no [buses], [t]ruck [b]odies, large and small [p]arts, [r]ecreation [v]ehicles, [s]and [g]ravel will be present. The property will be utilized less and therefor[e] will not be an expansion of use." (Emphasis in original.) The application for the certificate of zoning compliance was granted by the commission with the stipulation that the provisions in the letter be part of the certificate, and a prohibition against the marshaling of logs, with marshaling defined as "the gathering, storing on site, [and] removal to another location." The plaintiff did not appeal from the imposition of the stipulations or take any further action regarding the certificate of zoning compliance.

The commission inspected the subject property in 2005 and found evidence of grinding material, storage of logs in excess of twelve feet in length, additional log storage outside of the approved area of the property and the presence of numerous unregistered vehicles that constituted an illegal junkyard.[2] On April 1, 2005, the commission sent a letter to inform the plaintiff of the results of the inspection and to inform the plaintiff that its representatives were to attend the next commission meeting to show cause as to why they should not be issued a citation for the noncompliance. At the commission meeting on April 14, 2005, the plaintiff appeared and agreed to move the logs in the unapproved area, to remove the unregistered vehicles and to remove the pile of wood chips. At the April 28, 2005 meeting, the zoning enforcement officer reported that no

[2] Section 242-202 of the Brookfield zoning regulations defines a junkyard in relevant part as "any place of outside storage or deposit, whether in connection with a business or not, for two (2) or more motor vehicles which are no longer intended or in condition for legal use on the public highways and shall also include any place of outside storage or deposit of used parts of motor vehicles which on any lot have an aggregate bulk equal to one (1) automobile."

changes had been made to the subject property, and the commission voted to issue a cease and desist order dated May 2, 2005, for the improper storing of logs and the on-site storage and maintenance of unregistered motor vehicles. The plaintiff appealed from the decision of the commission to the board.

At the July 11, 2005 meeting of the board, counsel for the plaintiff argued that the current use of the property was an intensification of a lawful, nonconforming use and that there was never an intention to relinquish that use. He argued that the application for the certificate of zoning compliance had no force and effect on the use carried out on the property and that construction yards have unregistered motor vehicles on them all the time. He also argued that there had been no change of use of the property and that since 1934, the property had been used for the storage of logs, storage and maintenance of construction materials, and for the storage of unregistered vehicles. Kolinchak attested in an affidavit that the property was "continuously used as a commercial contractor's yard for vehicle and materials storage and for the operation of our construction business. . . . In conjunction with the operation of our construction and commercial businesses at the [p]roperty, my father and I regularly and continuously utilized the [p]roperty for [1] the storage of building materials such as concrete blocks and lumber; [2] the storage of raw materials such as asphalt, concrete, cut logs, wood chips, sand, gravel and stone . . . and [5] the processing of raw and other materials such as the crushing, grinding and screening of stone along with the splitting and cutting of wood and lumber products."

The commission presented the certificate of zoning compliance and the attached stipulations to the board and stated that the commission had determined that the plaintiff had a preexisting, nonconforming use as a

contractor's yard, that the certificate with the stipulations was supposed to have been filed in the land records and that the plaintiff previously had not appealed from these findings. The commission argued that the certificate of zoning compliance defines the scope of the nonconforming use. In deciding to uphold the cease and desist order, the board determined that the certificate of zoning compliance was the "guiding document" and that, although the plaintiff had proven that its activities were preexisting, nonconforming uses, in context with the certificate of zoning compliance, there was an abandonment of all the activities other than a contractor's yard. As further evidence, the board pointed out the plaintiff's compliance with other cease and desist orders that had been issued after 1999.

The plaintiff appealed from this decision to the Superior Court, where a trial was held on April 3, 2006. The plaintiff argued that there had been no expansion of nonconforming uses on the property and that there was never an abandonment of the nonconforming use. The board argued that there was an intent to abandon when the plaintiff proposed the stipulated conditions and applied for the certificate of zoning compliance. It further argued that the plaintiff could not claim that the conditions in the certificate of zoning compliance are unenforceable because the plaintiff could have appealed and challenged the conditions within the statutory time limit. In a memorandum of decision dated July 3, 2006, the court found that the board's argument that the certificate of zoning compliance with its attached stipulations demonstrated the plaintiff's intent to abandon was "contrary to the evidence and established precedent." The court determined that the language in the stipulations expressed a less intensive use of the site but not abandonment. In relation to the unregistered vehicles on the property, the court held that the plaintiff had not established that this was a

valid preexisting, nonconforming use of the property and found that the board's upholding of the cease and desist order as to the motor vehicles was supported by substantial evidence in the record.

Specifically, the court distinguished *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 616 A.2d 793 (1992), and *Spectrum of Connecticut, Inc.* v. *Planning & Zoning Commission*, 13 Conn. App. 159, 535 A.2d 382, cert. denied, 207 Conn. 804, 540 A.2d 373 (1988). The court held that the cases were distinguishable because in both cases, the plaintiffs had enjoyed a benefit from the permits that had been granted, which also had been subject to conditions. The court drew a distinction because the certificate of zoning compliance in this case never had been recorded in the land records, and the court held that the plaintiff never had enjoyed the benefit of the permit.

The board filed a motion to reargue on the basis of the court's interpretation of a Brookfield zoning regulation that did not pertain to certificates of zoning compliance. The court agreed that the regulation was not relevant to the case at bar but held that it did not alter its analysis of *Upjohn Co.* and *Spectrum of Connecticut, Inc.*, nor its conclusion. The court affirmed its conclusion that the plaintiff had not utilized the certificate of zoning compliance because it legally could continue all valid, nonconforming uses. The court held that the certificate of zoning compliance was not binding on the plaintiff. Further, the court held that the plaintiff had not abandoned or unlawfully expanded its preexisting, nonconforming uses in regard to its logging operation. The court dismissed the plaintiff's appeal, in part, because the cease and desist order related to the storage of unregistered motor vehicles was supported by substantial evidence, and the court found that the plaintiff had abandoned grinding or retail sales of logs as a nonconforming use.

We begin by setting forth the relevant standard of review. "In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the board] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [board]. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Vine* v. *Zoning Board of Appeals*, 281 Conn. 553, 559–60, 916 A.2d 5 (2007), citing *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 453, 853 A.2d 511 (2004). "Since the credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency . . . the court must determine the correctness of the conclusions from the record on which they are based." (Citation omitted; internal quotation marks omitted.) *Spectrum of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 13 Conn. App. 163, quoting *Feinson* v. *Conservation Commission*, 180 Conn. 421, 425, 429 A.2d 910 (1980); *Housatonic Terminal Corp.* v. *Planning & Zoning Board*, 168 Conn. 304, 306, 362 A.2d 1375 (1975).

When a zoning authority has stated the reasons for its action, a reviewing court may determine only if the

reasons given are supported by the record and are pertinent to the decision. *Goldberg* v. *Zoning Commission*, 173 Conn. 23, 25–26, 376 A.2d 385 (1977). The decision of a zoning authority will be disturbed only if it is shown that it was arbitrary, illegal or an abuse of discretion. *Beit Havurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 444, 418 A.2d 82 (1979).

"Abandonment is a question of fact which implies a voluntary and intentional renunciation. Nevertheless, the intent to abandon may be inferred as a fact from the circumstances. . . . The mere discontinuance of a use where there is no intent to abandon is not enough. . . . To establish abandonment, the intention on the part of the owner [must be] to relinquish *permanently* the nonconforming use. . . . Because the conclusion as to the intention of the landowner is an inference of fact, it is not reviewable unless it was one which the trier could not reasonably make." (Emphasis in original; internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Zoning Board of Appeals*, 74 Conn. App. 622, 631, 814 A.2d 396, cert. denied, 263 Conn. 901, 819 A.2d 836 (2003).

Our Supreme Court has "ordinarily recognized that the failure of a party to appeal from the action of a zoning authority renders that action final so that the correctness of that action is no longer subject to review by a court. . . . All of these rules rest in large part, at least in the zoning context, on the need for stability in land use planning and the need for justified reliance by all interested parties . . . ." (Citations omitted.) *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 102.

In *Upjohn Co.*, the plaintiff applied to the town zoning board for permits and site plan approval to enclose certain structures in connection to the wastewater

treatment system on its property. Id., 98. The applications were approved by the board, subject to twenty conditions, one of which was the elimination over time of an activity that was a valid nonconforming use, referred to as condition seven. Id. The plaintiff did not appeal from the imposition of the condition. Id. When the town zoning enforcement officer issued a cease and desist order that insisted that condition seven be enforced, the plaintiff then challenged the conditions. Id., 99. Our Supreme Court held that the plaintiff could not challenge the conditions of the application after the plaintiff failed to appeal in a timely manner.[3] Id., 105. In a subsequent opinion, the Supreme Court wrote that in deciding *Upjohn Co.*, "[f]irst, we reasoned that the rules requiring a contemporaneous appeal from the imposition of a zoning condition, and thus depriving a trial court of subject matter jurisdiction over a subsequent challenge, rest 'on the need for stability in land use planning and the need for justified reliance by all interested parties—the interested property owner, any interested neighbors and the town—on the decisions of the zoning authorities.' [Id., 102.] Second, we noted that 'there are limits to the notion that subject matter jurisdictional defects may be raised at any time'; id., 103; and that those limits applied to that case because '[t]he lack of jurisdiction, if any, was far from obvious, [the plaintiff] had the opportunity to challenge it at the time, and we perceive[d] no strong policy reasons to give [the plaintiff] a second opportunity to do so now.'

[3] In *Upjohn Co.*, the Supreme Court opined that there may be "exceptional cases" in which a previously unchallenged condition "was so far outside what could have been regarded as a valid exercise of zoning power that there could not have been any justified reliance on it, or in which the continued maintenance of a previously unchallenged condition would violate some strong public policy." *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105. Such "exceptional cases" have been found. See *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 150–51, 763 A.2d 1011 (2001); *Gay* v. *Zoning Board of Appeals*, 59 Conn. App. 380, 388, 757 A.2d 61 (2000). The plaintiff has not claimed that this case is exceptional.

Id., 104." *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 149–50, 763 A.2d 1011 (2001).

Spectrum of Connecticut, Inc., supra, 13 Conn. App. 159, was about a special permit for a video arcade, to which a special condition was imposed. The special condition was attached to the initial permit, and, in considering the renewal of the permit, the commission considered the noncompliance with the condition. Id., 162. The plaintiff "did not contest the imposition of the conditions before the commission with respect to the renewal of the permit. Just as a party may not ordinarily ask for a certain result and then challenge its validity on appeal . . . a party may not challenge on appeal the validity of a preexisting condition to a special permit which it seeks to renew." (Citations omitted.) Id.

The conclusion of the court that *Upjohn Co.* and *Spectrum of Connecticut, Inc.*, are distinguishable because, in the present case, there was no perceived benefit in obtaining the certificate of zoning compliance is not in conformity with the established case law. When the certificate of zoning compliance was applied for in 1999, there was a contract for the sale of the property. The plaintiff, in purchasing the property, had an interest in ensuring that the company's intended uses for the property were existing, nonconforming uses and had an interest in having documentation to prove the legal nonconformity. In the present case, as in *Upjohn Co.* and *Spectrum of Connecticut, Inc.*, once the stipulations in the application were imposed, the document became the operative document with respect to the permitted uses of the property. *Upjohn Co.* and *Spectrum of Connecticut, Inc.*, illustrate the point that when a person or entity applies for a permit or other zoning instrument, they then have two choices once the board accepts the application, even when there are conditions imposed; they can either accept the conditions and conform, or they can appeal from the imposition of the

conditions. Failure to conform to the conditions and appealing from their imposition only when the board enforces them is not an option save for "exceptional" circumstances. See *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105.

By initiating the application to clarify the uses of the property, the plaintiff became bound by the outcome and could have appealed from the decision of the commission. Because the certificate of zoning compliance was not appealed from, we do not question its accuracy or the decision of the commission in granting it. In the present case, the commission made it clear that the stipulations, and not the preexisting, nonconforming uses, were to be adhered to when other cease and desist orders were issued on the subject property. Historically, the plaintiff complied with the stipulations and, if found by the board to not be in compliance, tailored its actions to conform. The board's determination that the application and stipulations showed an intent to abandon was one that it could reasonably make. The board had substantial evidence before it that the certificate of zoning compliance explicitly provided what was permitted and not permitted on the property and that some of the logging practices of the plaintiff were not permitted because such practices, even if they were preexisting, nonconforming uses, had been abandoned.

The judgment is reversed and the case is remanded with direction to dismiss the plaintiff's appeal in its entirety.

In this opinion the other judges concurred.

CONNECTICUT LIGHT AND POWER COMPANY *v.* WESTVIEW CARLTON GROUP, LLC, ET AL.
(AC 28470)

Bishop, Gruendel and Borden, Js.

Syllabus

The plaintiff electric company sought to recover damages from the defendants, W Co. and its sole shareholder, S, for, inter alia, breach of contract for the alleged failure of the defendants to pay for electrical services provided by the plaintiff to an apartment complex owned by the defendants. The trial court rendered judgment for the plaintiff on the count of its complaint alleging breach of contract against both defendants, from which the defendants appealed and the plaintiff cross appealed to this court. *Held*:

1. The trial court's conclusion that S was personally liable for W Co.'s breach of contract was not improper, there having been ample evidence to support that court's determination that the corporate veil should be pierced here under the instrumentality test for piercing the corporate veil; the evidence showed that W Co. had no separate existence, lacked an agent for service, filed no annual reports with the secretary of the state, lacked any documentation required for a limited liability company, failed to maintain any business records for the property, failed to file tax returns for any of the years involved and was undercapitalized, and that S commingled W Co.'s funds for his own benefit and used W Co. to perpetrate an unjust act in contravention of the plaintiff's legal rights.
2. It was not improper for the trial court to conclude that the plaintiff was not obligated to mitigate its damages by promptly applying for a receiver of rents pursuant to statute (§ 16-262f) when W Co. first failed to make payments; although § 16-262f affords an electric utility a means of mitigating its damages, it does not mandate that it do so regardless of the circumstances, a rent receivership would have itself been expensive and time-consuming and might have resulted in tenants declining to pay rent at all, and there was evidence showing that S had misrepresented to the plaintiff that he was working on a long-term solution that would have afforded payment to the plaintiff and, instead, sold the property without notifying the plaintiff and retained the net proceeds of the sale for himself.
3. The trial court's award of prejudgment interest pursuant to statute (§ 37-3a [a]) for money wrongfully withheld was amply supported by the evidence and was not an abuse of discretion.
4. This court could not say that the trial court acted unreasonably or in abuse of its discretion in concluding that the plaintiff had not established a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) by the defendants, the trial court having stated only that

the defendants' conduct did not rise to the level of a CUTPA violation and the plaintiff not having sought an articulation of the reasoning underlying that finding.

Argued March 20—officially released June 24, 2008

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. William L. Hadden, Jr.*, judge trial referee; judgment for the plaintiff in part, from which the defendants appealed and the plaintiff cross appealed to this court. *Affirmed.*

Dov Braunstein, with whom was *Lawrence S. Dressler*, for the appellants-appellees (defendants).

Jeanine M. Dumont, for the appellee-appellant (plaintiff).

Opinion

BORDEN, J. The defendants, Westview Carlton Group, LLC (Westview), and Howard S. Sousa, Westview's sole shareholder, appeal from the judgment of the trial court, finding them both liable for electrical services supplied by the plaintiff, Connecticut Light & Power Company, to two buildings owned by Westview. The defendants claim that the court improperly (1) pierced the corporate veil as to Sousa, (2) concluded that the plaintiff was not required to mitigate its damages by applying for a receiver of rents and (3) awarded prejudgment interest to the plaintiff. The plaintiff cross appeals from the judgment, claiming that the court improperly rejected its claim that was based on the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We affirm the judgment of the trial court in all respects.

The plaintiff brought this action in three counts. In the first count, the plaintiff claimed a written contract

with Westview and, as to Sousa, that he was personally liable to the plaintiff on a theory of piercing the corporate veil. In the second count, the plaintiff alleged unjust enrichment. In the third count, the plaintiff sought damages under CUTPA. After a trial to the court, the court found in favor of the plaintiff against both defendants on the first count. On this count, the court rendered judgment in the total amount of $109,160.19. This amount consisted of the following: (1) $46,086.66 as the principal amount of the debt; (2) prejudgment interest of $11,544.34; (3) costs of $3128.19; (4) attorney's fees as allowed by the contract for electrical services in the amount of $39,960; (5) and an offer of judgment interest award of $7878, along with $350 for attorney's fees and $213 for costs. The court found in favor of the defendants on the second count because of its determination on the first count and found in favor of the defendants on the third count because it determined that the defendants' conduct did not rise to the level of a CUTPA violation.[1] These appeals followed.

The court found the following facts. The plaintiff is engaged in the business of selling electrical utility services to the public. Westview is a Connecticut limited liability corporation with its principal place of business at 45 East 89th Street, suite 10B, New York, New York. Sousa was the "sole owner, operator and member of Westview," and he resided at Westview's principal place of business.

Before moving to the United States, Sousa was an accountant in England, the qualifications for which were similar to those in the United States. After coming to the United States, Sousa worked in the accounting department of MCI Telecommunications Corporation,

[1] Technically, the court "dismissed" the second and third counts. We read this as essentially finding in favor of the defendants on those counts, as if the court had rendered judgment in favor of the defendants on those counts.

was a vice president of a semiconductor business in California and was a consultant in general business expansion to MCI Telecommunications Corporation in the late 1980s.

On April 25, 2000, Sousa formed Westview for the purpose of buying two buildings, consisting of 146 rental apartment units, located at 120 and 170 Hillside Avenue, Waterbury. Westview bought the properties on May 4, 2000, and at Westview's request, made by Sousa, the plaintiff began supplying electricity to the common areas of the apartment complex and any apartments owned by Westview.[2]

The court further found that state statutes and regulations require electrical companies such as the plaintiff to provide electrical services to owners of apartment buildings such as those owned by Westview. Further, such companies are prohibited from requiring the owner of such properties to post a security deposit, from eliciting a personal guarantee or from terminating service to the owner in the event of nonpayment of the bills for such service.

The only statutory remedy available to the plaintiff in the event of nonpayment for electrical service by an owner of an apartment building is to apply to the Superior Court for the appointment of a receiver of rents pursuant to General Statutes § 16-262f. The court noted that companies such as the plaintiff are reluctant to do so, however, because it is "expensive, time-consuming, confusing to the tenants, causes tenants to stop paying rent to anyone and can result in the electric utility becoming in effect the manager of the building."

[2] The written application for electrical service, submitted by Westview and signed by Sousa, provides for payment of all charges for such services, including costs and a reasonable attorney's fee incurred in collecting sums owed for the service.

Accordingly, companies such as the plaintiff, when dealing with a nonpaying owner, use the receivership process only as a last resort.

Westview's meters were located in a locked basement, requiring estimated bills to be sent until the plaintiff was able to gain access to them. From the outset of its ownership in May, 2000, Westview was delinquent in paying the monthly bills. It made no payment until August 11, 2000, and by September, 2000, the balance was more than $11,000. It made no further payments until March, 2001. Westview's history on its account was replete with demands for payment, unfulfilled promises of payment by Sousa and threats by the plaintiff of receivership.

Eventually, the plaintiff turned the account over for collection to its counsel, who notified Westview on May 20, 2002, that unless payment in full was received by June 4, 2002, an application for receiver of rents would be filed. Sousa received this letter but did not contact the plaintiff. Several days after June 4, 2002, the plaintiff served Westview with an application for receivership; the plaintiff was then informed that the property had been sold on June 3, 2002.

The court found that the plaintiff had proven a breach of contract by Westview and that as of September 3, 2002, the balance owed by Westview was $46,086.66. The court then turned to the plaintiff's claim that Sousa was personally liable for Westview's obligation to the plaintiff.

Specifically invoking the instrumentality test for piercing the corporate veil; see *Hersey* v. *Lonrho*, 73 Conn. App. 78, 87, 807 A.2d 1009 (2002); the court made the following findings. First, the court found that Sousa was not a credible witness; his testimony was inconsistent, evasive and contradicted by much other evidence, including his deposition. The court further found that he

was the sole owner, member and manager of Westview, which he formed for the sole purpose of owning the two buildings in question. His residence was Westview's principal place of business. He was in total control of all of Westview's operations and made all the decisions involving finances, policy and business practices. No state or federal tax returns were filed by Westview for the three tax years that Westview owned the buildings, and he intentionally failed to preserve Westview's financial records so that there was inadequate documentary support for his claim that Westview was a losing venture. Sousa's control and domination of all of Westview's affairs was such that as to the obligation to the plaintiff, Westview had no separate mind, will or existence of its own.

In addition, the court found that Sousa was aware of the governmental restrictions imposed on the plaintiff in doing business with owners of apartment buildings, such as Westview, and that the plaintiff could not refuse service, demand a personal guarantee from him or disconnect the meters in the event of nonpayment, and that the only action the plaintiff could take would be to apply for a receiver of rents. The court found that Sousa knew that the plaintiff was reluctant to do so and that he could stall the plaintiff from so applying by making partial payments and false promises of payment schedules. Sousa also began negotiating to sell the property while he was continuing to make promises of payment, he knew that the plaintiff was going to apply for a receiver on June 4, 2002, and he sold the property on June 3, 2002, without notifying the plaintiff or making any payment on the outstanding bill of $46,086.66. The effect of the sale was to leave Westview with no assets; there were funds available at the closing to pay the plaintiff's bill, and Sousa personally received approximately $74,000 from the proceeds of the sale. The court further found that "Sousa used his total control of the

affairs of Westview to perpetrate an unjust act in contravention of the plaintiff's legal rights, and that said control and conduct caused the plaintiff a loss of $46,086.66."

The court awarded the plaintiff prejudgment interest on this amount, pursuant to General Statutes § 37a-3, at the rate of 6 percent per year, commencing on November 1, 2002, to the date of judgment. It also awarded the plaintiff costs and attorney's fees on the basis of the application for service. See footnote 2.

Because it found in favor of the plaintiff against both defendants on the first count based on the contract, the court found in favor of the defendants on the second count, which was based on unjust enrichment. On the third count, which was based on CUTPA, the court found that "the conduct underlying the breach of contract by Westview, and the conduct of Sousa which the court has found sufficient to pierce Westview's corporate veil and hold Sousa personally liable for said breach of contract, does not rise to the level of a CUTPA violation." Accordingly, the court found in favor of the defendants on this count.

I

THE DEFENDANTS' APPEAL

A

Piercing the Corporate Veil

The defendants first claim that the court improperly concluded that Sousa was personally liable for Westview's breach of contract.[3] We disagree.

[3] The defendants separate this claim into two arguments: (1) the court improperly found Sousa liable for Westview's breach of contract and (2) the court improperly found Sousa liable under the contract for attorney's fees, interest and costs because Sousa signed the contract as president of Westview, and not as an individual. We consider both these arguments together because, contrary to the defendants' suggestion that they are severable, the same legal principles and factual findings govern both.

Whether the corporate veil should be pierced presents a question of fact, which we review under the clearly erroneous standard. *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 148, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). The instrumentality test for piercing the corporate veil, which the court applied in the present case, "requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Emphasis in original; internal quotation marks omitted.) Id., 152.

"Courts, in assessing whether an entity is dominated or controlled, have looked for the presence of a number of factors. Those include: (1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlapping ownership, officers, directors, personnel; (5) common office space, address, phones; (6) the amount of business discretion by the allegedly dominated corporation; (7) whether the corporations dealt with each other at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of debts of the dominated corporation; and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own." (Internal quotation marks omitted.) Id., 152–53.

There was more than ample evidence to support the court's determination that under the instrumentality test, the corporate veil should be pierced in this case. In addition to, and in support of, the numerous specific factual findings made by the trial court, there was evidence that Westview lacked an agent for service as required by General Statutes §§ 34-121 and 34-104, filed no annual reports with the secretary of the state as required by General Statutes § 34-106 and lacked any of the documentation required for a limited liability corporation, as required by General Statutes § 34-144. In addition, there was evidence that Westview failed to maintain any business records for the property, failed to file tax returns for any of the years involved and was undercapitalized. There was also evidence that Sousa commingled Westview funds for his own benefit, by transferring funds from Westview to a different entity controlled by him, namely, the Clyde Group, for purported payment of undocumented and unsubstantiated loans. Finally, there was evidence that when Westview sold the property, Sousa, not the plaintiff, Westview's creditor, was the beneficiary of the $74,000 net proceeds of the sale.

Thus, we reject the defendants' suggestion that this was simply a case of a single shareholder being charged with a corporate debt solely because of his ownership status. There was ample evidence that Westview had no separate existence, that Sousa treated it as such and that Sousa used it to perpetrate an unjust act in contravention of the plaintiff's legal rights. The evidence in this case amply supports the court's determination that the corporate veil should be pierced.

B

Mitigation of Damages

The defendants next claim that the court improperly concluded that the plaintiff was not obligated to mitigate its damages by promptly applying for a receiver of

rents pursuant to § 16-262f.[4] Specifically, the defendants claim that because Westview breached the contract within the first two months of their relationship, and because by June, 2001, it was clear that Westview was not making its payments in full, the plaintiff should have mitigated its damages by applying for a receivership at that time.[5] We disagree.

The defendants' claim requires little discussion. A party being damaged has an obligation to make reasonable efforts to mitigate its damages, and the question of what constitutes such efforts is a question of fact that is subject to the clearly erroneous scope of review. *Vanliner Ins. Co.* v. *Fay*, 98 Conn. App. 125, 145, 907 A.2d 1220 (2006). The breaching party has the burden of proof on this issue. Id.

We agree with the court and the plaintiff that although § 16-262f affords an electric utility a means of mitigating its damages, it does not mandate that it do so regardless of the circumstances. The court's findings, which are amply supported by the evidence, support its determination that the plaintiff was not obligated to mitigate its damages by resorting to a rent receivership, which would have itself been expensive, time-consuming, and might well have resulted in tenants declining to pay rent at all. Furthermore, there was evidence that Sousa misrepresented to the plaintiff that he was working on

[4] General Statutes § 16-262f provides in relevant part: "(a) (1) Upon default of the owner, agent, lessor or manager of a residential dwelling who is billed directly by an electric, electric distribution, gas or telephone company or by a municipal utility for electric or gas utility service furnished to such building, such company or municipal utility or electric supplier providing electric generation services may petition the Superior Court or a judge thereof, for appointment of a receiver of the rents or payments for use and occupancy or common expenses . . . for any dwelling for which the owner, agent, lessor or manager is in default. . . ."

[5] As with their first claim, the defendants separate this claim into two parts. Also as with that claim, we treat both parts in one analysis because the same legal principles and facts govern both.

a long-term solution that would have afforded payment to the plaintiff. Instead, he sold the property without notifying the plaintiff and pocketed the net proceeds of the sale for himself.

C

Prejudgment Interest

The defendants' final claim is that the court improperly awarded prejudgment interest pursuant to § 37-3a (a).[6] This claim also requires little discussion. The trial court's award of interest pursuant to the statute for money wrongfully withheld was amply supported by the evidence and was not an abuse of discretion. See *McCullough* v. *Waterside Associates*, 102 Conn. App. 23, 33, 925 A.2d 352, cert. denied, 284 Conn. 905, 931 A.2d 264 (2007).

II

THE PLAINITFF'S CROSS APPEAL

The plaintiff, in its cross appeal, claims that the court improperly declined to find the defendants liable under CUTPA. Specifically, the plaintiff claims that the overwhelming evidence established that the defendants' conduct violated some or all of the three parts of the familiar "cigarette rule." See *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 709, 927 A.2d 312, cert. denied, 284 Conn. 927, 934 A.2d 243 (2007). We reject this claim.

Whether conduct violates CUTPA is an issue of fact for the trial court. *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 433–34, 849 A.2d 382 (2004). A reviewing court will direct a judgment for the plaintiff on a CUTPA claim only when the trial

[6] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ."

court could not have reasonably reached its conclusion that there was no CUTPA violation. See id., 442; see also *Smith* v. *Greenwich*, 278 Conn. 428, 441, 899 A.2d 563 (2006).

In the present case, the court stated only that "the conduct underlying the breach of contract by Westview, and the conduct of Sousa, which the court has found sufficient to pierce the corporate veil and hold Sousa personally liable for said breach of contract, does not rise to the level of a CUTPA violation." The plaintiff did not ask the court to articulate its reasoning underlying this finding. On this state of the record, although the court could have found otherwise, we cannot say that the court acted unreasonably and in abuse of its discretion in concluding as it did. Put another way, it cannot be said that on this state of the record, a CUTPA violation was established as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

KIP KRICHKO *v.* LESLIE KRICHKO
(AC 27691)

Flynn, C. J., and Lavine and West, Js.

Syllabus

The plaintiff, whose marriage to the defendant had been dissolved, appealed to this court from the judgment of the trial court granting his motion to terminate his obligation to pay alimony to the defendant. The plaintiff claimed, inter alia, that the trial court, relying on the statute (§ 46b-86) governing alimony, improperly determined that his alimony obligation terminated on February 14, 2006, the date of the commencement of the hearing regarding his motion to terminate alimony. Instead, he claimed that, as required by the parties' separation agreement that was incorporated into the dissolution judgment, his alimony obligation should have been terminated as of September, 2005, when the defendant began cohabiting with T, an unrelated male. *Held* that the trial court improperly failed to determine that the plaintiff's alimony obligation terminated on the date on which the defendant began cohabiting with T, the parties'

separation agreement not having referenced § 46b-86 and the plaintiff's motion to modify alimony having been made solely on the basis of the separation agreement, which was self-executing upon cohabitation; accordingly, the trial court not having found the date on which the defendant's cohabitation with T began, the matter was remanded to the trial court to make a finding thereon.

Argued April 22—officially released June 24, 2008

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Carroll*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Pinkus*, *J.*, granted the plaintiff's motion to terminate alimony, and the plaintiff appealed to this court. *Reversed in part; further proceedings*.

William R. Donaldson, with whom, on the brief, was *Christopher P. Norris*, for the appellant (plaintiff).

David P. Ball, for the appellee (defendant).

Opinion

WEST, J. The plaintiff, Kip Krichko, appeals from the judgment of the trial court, granting his motion to terminate his obligation to pay alimony. He claims that the court improperly (1) failed to rule that alimony terminated on the date on which the defendant, Leslie Krichko, began cohabiting with an unrelated male and (2) failed to find the date on which the defendant began to cohabit with an unrelated male. We reverse the judgment of the trial court.

The following factual and procedural history is relevant to our disposition of the plaintiff's appeal. The parties were married on September 10, 1983, in Maine, and they subsequently had three children. The marriage was dissolved by the court, *Carroll*, *J.*, on April 15, 2002. On that date, the parties executed a separation

agreement, which was incorporated into the dissolution judgment. Section 13.2 of that agreement provides in relevant part: "After April 30, 2005, if alimony has not previously been terminated . . . then the [plaintiff] shall on the 1st day of May, 2005 and continuing thereafter on the 15th day and 1st day of each month, pay the [defendant] the sum of Seven Hundred Fifty and no/100 ($750.00) Dollars as alimony provided that such payment shall terminate on the earliest of the following events to occur: a. The death of either party; or b. The remarriage or cohabitation of the[defendant]; or c. The date on which the [defendant] obtains her Master's Degree; or d. April 30, 2007." On October 6, 2005, the plaintiff filed a motion for an order, postjudgment, seeking to terminate alimony immediately pursuant to § 13.2 of the separation agreement.[1] In his motion, the plaintiff requested that the alimony he was paying to the defendant be terminated immediately due to the fact that the defendant was cohabiting with an unrelated adult male and that, as a result, there was a change of circumstances, which altered the defendant's financial needs. The plaintiff did not cite a statute in support of his claim.

A hearing regarding the issue of termination of alimony was held on February 14, 2006, and was continued to March 31, 2006, and concluded on that date. At the conclusion of the hearing, the court, *Pinkus*, *J.*, found that the defendant was cohabiting with an unrelated adult male and that the defendant's financial circumstances had changed, and, as a result, the court terminated the plaintiff's alimony obligation. The court did not decide the date as of which the alimony was to be

[1] The plaintiff also filed the same motion for an order on January 24, 2006, and then filed an amended motion for an order on March 10, 2006. The motions filed on October 6, 2005, and on January 24, 2006, were identical in substance. The amended motion filed on March 10, 2006, corrected a scrivener's error present in the first two motions by substituting the word "defendant" for the word "plaintiff" in two places.

terminated and gave the attorneys an opportunity to submit case law on that issue.

The plaintiff argued that his alimony obligation should terminate as of the beginning of September, 2005, when the defendant began cohabiting with the unrelated male, and relied on *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 620 A.2d 1327 (1993), in support of this argument. On April 3, 2006, however, the court ordered alimony terminated effective February 14, 2006. The court arrived at this conclusion by relying on the language of General Statutes § 46b-86 (a), which provides in relevant part: "No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50." The court did not believe it could terminate the alimony retroactively pursuant to § 46b-86 (a).[2]

On April 19, 2006, the plaintiff filed a motion to reargue, claiming that the court improperly terminated the alimony as of February 14, 2006, instead of early September, 2005. The plaintiff cited *Mihalyak* v. *Mihalyak*, supra, 30 Conn. App. 516, for the proposition that the alimony should be terminated at the start of the cohabitation, regardless of the date of the hearing. The motion, however, was denied by the court on April 24, 2006. On May 12, 2006, the plaintiff appealed from the April 3, 2006 decision regarding the effective date of the termination of the alimony. Subsequently, on April 19, 2007, the plaintiff filed a motion for articulation, asking

[2] Although the statute allows retroactive modification of alimony from the date of service of notice of the pending motion for modification on the opposing party, the court did not modify the alimony from the date of the service of the motion.

the court to articulate several things, including, inter alia, the specific date on which the defendant's cohabitation began, whether the court terminated the alimony pursuant to the separation agreement or some other legal authority and a legal rationale for terminating alimony as of February 14, 2006. The court denied this motion on May 9, 2007. On May 17, 2007, the plaintiff filed a motion for review concerning the court's May 9, 2007 decision. This court granted the motion for review on July 11, 2007, but denied the relief requested by the plaintiff. Additional facts will be set forth as necessary.

Prior to examining the plaintiff's appeal, we set forth the applicable standard of review. The parties are not disputing any issues of fact. The crucial issue is whether the court properly determined that the plaintiff's alimony obligation terminated on the date of the commencement of the hearing regarding the plaintiff's motion to terminate alimony. Accordingly, the parties are not disputing *whether* the alimony should have been terminated but, rather, *when* it should have been terminated. When the alimony should have been terminated is a question of law over which we afford plenary review. "We afford plenary review to conclusions of law reached by the trial court." *Sagamore Group, Inc.* v. *Commissioner of Transportation*, 29 Conn. App. 292, 300, 614 A.2d 1255 (1992). "Under plenary review, we must decide whether the trial court's conclusions of law are legally and logically correct and find support in the record." (Internal quotation marks omitted.) *William Raveis Real Estate, Inc.* v. *Newtown Group Properties Ltd. Partnership*, 95 Conn. App. 772, 777, 898 A.2d 265 (2006).

I

The plaintiff claims that the court improperly failed to determine that his alimony obligation terminated on

the date on which the defendant began cohabiting with an unrelated male. We agree with the plaintiff.

The following additional facts are relevant to the disposition of the plaintiff's claim. On March 31, 2006, the court heard testimony from both the defendant and her significant other, Donald Townsend, regarding the date they began to cohabit. The defendant testified that at the beginning of the 2005-2006 school year, she registered her daughter to take the bus from Townsend's home address. Townsend testified that the defendant began living with him around the first week of September, 2005. There was no evidence presented to demonstrate that the defendant and Townsend began cohabiting any earlier or later than the first week of September, 2005. In addition, both the defendant and Townsend testified regarding the extent to which the defendant's financial circumstances had changed as a result of her living with him. Townsend testified that he and the defendant essentially were sharing the costs of running the house. The defendant testified that she and Townsend evenly shared the cost of the utilities for the house, that they evenly divided the cost of the mortgage payment for the house and that she moved in with Townsend in order to reduce her expenses. At the end of the hearing, the court found that the defendant was cohabiting with an unrelated male and that there was a change in the financial circumstances of the defendant.

The plaintiff argues that the court should have relied on the separation agreement, not the relevant portions of § 46b-86,[3] to terminate the alimony. The plaintiff cites

[3] In addition to relying on the relevant portion of § 46b-86 (a), the court also relied on § 46b-86 (b), which provides: "In an action for divorce, dissolution of marriage, legal separation or annulment brought by a husband or wife, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under

Mihalyak v. *Mihalyak*, supra, 30 Conn. App. 516, as being directly on point in the present case. The plaintiff argues that in *Mihalyak*, the former husband sought under the terms of the separation agreement to terminate alimony due to his former wife's cohabitation with an unrelated male. This court, in *Mihalyak*, agreed that the former husband's alimony obligation should have been terminated as of the date the cohabitation began. The plaintiff here argues that, as in *Mihalyak*, the applicable provision of the separation agreement was automatic and self-executing. Accordingly, the moment the defendant began cohabiting with Townsend, the alimony ceased, and the plaintiff is entitled to the reimbursement of all alimony payments made to the defendant after the commencement of cohabitation. We agree with the plaintiff.

Our decision in *Mihalyak* v. *Mihalyak*, supra, 30 Conn. App. 516, controls.[4] In *Mihalyak*, the parties' marriage was dissolved, and the judgment, which incorporated an oral stipulation of the parties, provided that "the [former] [w]ife's right to receive alimony will terminate upon the death of either party or upon the [former] wife's remarriage or cohabitation." (Internal quotation marks omitted.) Id., 518. After learning of the cohabitation, the former husband filed a motion for modification

circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party."

[4] The defendant argued at oral argument that *DeMaria* v. *DeMaria*, 247 Conn. 715, 724 A.2d 1088 (1999), controls the present case because in *DeMaria*, our Supreme Court stated that in deciding whether to modify alimony on the basis of the cohabitation of one party, the trial court must be guided by the statutory analysis, even if the separation agreement does not reference the statute. *DeMaria* is inapposite, however, because *DeMaria* discussed what the trial court should consider in deciding *whether* to terminate alimony on the basis of cohabitation, not *when* the alimony should be terminated after a court decides it should be terminated.

or termination of alimony in February, 1991, but continued paying alimony until July 19, 1991. Id. The trial court held a hearing and found that the former wife had been cohabiting with another man since September 1, 1988, and that her financial needs had changed. Id., 518–19. The court, therefore, terminated the alimony as of the date the former husband filed his motion for modification. Id., 519. The former husband appealed, claiming that pursuant to the dissolution decree, the court should have terminated the alimony as of the date it found that cohabitation had commenced. Id. This court stated that the former husband sought termination of alimony solely on the basis of the provision in the decree, not § 46b-86. Id., 520–21. In such a situation, "[t]he provisions of . . . § 46b-86 are inapplicable. The trial court should have considered the terms of the dissolution decree, which incorporated the agreement of the parties in the form of a stipulation." Id., 521. Furthermore, in reversing the judgment of the trial court, this court held that "[t]he [dissolution] judgment in this case is clear: by its unambiguous terms, alimony ceased when the [former wife's] cohabitation began on September 1, 1988. The alimony termination provision was automatic and self-executing *upon cohabitation* . . . . No alimony 'accrued' between September 1, 1988, and July 19, 1991, and the defendant was properly entitled to a reimbursement of the sums he had paid to the [former wife] during that period." (Emphasis in original.) Id., 522.

In the present case, as in *Mihalyak*, the separation agreement did not reference § 46b-86, and the plaintiff's motion to modify the alimony was made solely on the basis of the separation agreement, not the statute. In fact, the wording of the separation agreement in the present case was almost identical to that of the agreement in *Mihalyak*. Therefore, as in *Mihalyak*, the

separation agreement's termination provision was self-executing upon cohabitation. Accordingly, the court improperly failed to conclude that the plaintiff's alimony obligation terminated as of the date the defendant began cohabiting, pursuant to the separation agreement.

II

The plaintiff also claims that the court improperly failed to find a date on which the defendant began to cohabit. The court did not find a date on which cohabitation by the defendant commenced. Because we have concluded that the alimony should have terminated on the date cohabitation commenced, we remand the case to the trial court to make that finding.

The judgment is reversed only as to the date of termination and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

DAVID H. PORTER *v.* MAUREEN MORRILL ET AL. (AC 27739)

Flynn, C. J., and McLachlan and West, Js.

Syllabus

The plaintiff, who owned property adjoining that of the defendant R Co., sought to quiet title to certain property over which both the plaintiff and R Co. claimed to have record title and title by adverse possession. The trial court rendered judgment in part for the plaintiff, concluding that the plaintiff was the record owner of the disputed parcel and that R Co. had not established title by adverse possession. On R Co.'s appeal to this court, *held*:

1. R Co. could not prevail on its claim that the description of the disputed parcel in an 1816 deed as a one acre woodlot adjoining the north side of a first parcel conveyed in the same deed was legally insufficient to convey title to T, the plaintiff's predecessor in title; although the description of the one acre woodlot in the 1816 deed was ambiguous in that the deed did not give a precise location of the woodlot along

the northern boundary of the first parcel, the description of the one acre woodlot in the 1816 deed was not so indefinite as to render the conveyance void as claimed by R Co., especially given that the ambiguity was resolved in a deed from 1852 in the plaintiff's chain of title, which included a description that was sufficient to locate the parcel along the northern boundary of the first parcel, and the trial court properly considered the relevant extrinsic evidence found in the land records to locate the one acre woodlot.

2. The trial court's finding that the plaintiff was the record owner of the disputed parcel was not clearly erroneous and was supported by ample evidence in the record, it having been the function of the trial court to weigh the evidence concerning inaccuracies in the parties' chains of title and to determine the credibility of the expert witnesses concerning which party had record title to the disputed parcel.

3. The trial court's finding that R Co. failed to prove adverse possession of the disputed parcel was not clearly erroneous; R Co.'s claim that its payment of local property taxes on the disputed parcel supported its adverse possession claim was unavailing in light of the fact that the plaintiff also paid taxes on the disputed parcel, and the evidence supported the finding that although certain actions of R Co. satisfied the elements of open and notorious use under a claim of right, none of those incidents of ownership took place prior to 2003, and R Co. presented no evidence indicating that its predecessors in title similarly had used the disputed parcel.

Argued March 10—officially released June 24, 2008

Procedural History

Action to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Trombley*, *J.*; judgment for the plaintiff on the complaint in part and on the counterclaim in part; subsequently, the defendants withdrew the counterclaim in part and appealed to this court. *Affirmed.*

James P. Brennan, for the appellants (named defendant et al.).

William C. Franklin, for the appellee (plaintiff).

McLACHLAN, J. The defendant RMM Consulting, LLC,[1] appeals from the judgment of the trial court quieting title to a 1.728 acre parcel located in Warren (disputed parcel) in favor of the plaintiff, David H. Porter. The defendant claims that the court improperly failed to conclude (1) that the description of the disputed parcel contained in an 1816 deed in the plaintiff's chain of title was legally insufficient to convey title, (2) that it was the record owner of the disputed parcel and (3) that it had acquired title by adverse possession if it was not the record owner of the disputed parcel. We affirm the judgment of the trial court.

The facts that follow were either found by the court or are not in dispute. The plaintiff and the defendant are owners of adjoining properties located in the Lake Waramaug area of Warren. The plaintiff's father acquired 5.18 acres, a portion of the plaintiff's property, in 1937. In 1954, the plaintiff's father acquired a contiguous 5.64 acre tract, which is claimed to include the disputed parcel. The combined tracts, consisting of 10.82 acres, are shown on a 1954 map and were conveyed through a straw deed to the plaintiff's parents in survivorship. The plaintiff's father died in 1960. In August, 1986, the plaintiff's mother conveyed the 10.82 acre tract to the plaintiff. The property has been used by the plaintiff's parents and, subsequently, the plaintiff and his family as a summer cottage.

Maureen Morrill, the sole member of the defendant limited liability company, first became aware of the availability of two undeveloped lots in an approved

[1] RMM Consulting, LLC, and Maureen Morrill were named as defendants in this action, and both appealed. Morrill is the sole member of RMM Consulting, LLC, which claimed ownership of the disputed parcel. Because this appeal only involves the title to the disputed parcel, we refer in this opinion to RMM Consulting, LLC, as the defendant.

subdivision in the late summer or fall of 2002. As a builder of single-family houses, she entered into contracts for the purchase of those two lots in early 2003, each lot being owned by different owners. She engaged the services of Michael Riordan, a land surveyor, to revise the lot lines, and he prepared a revision map that was referred to in the defendant's deed recorded on May 15, 2003. The original two lots, referred to as old lots 9A and 9B by the parties and the court at trial, became new lots 9A and 9B. The disputed parcel is old lot 9B.

After the lot revisions were approved by local authorities, the defendant began the construction of a single-family dwelling on new lot 9A. In the fall of 2003, before construction had been completed, Morrill contacted the plaintiff by telephone to inquire about the removal of some trees from the plaintiff's property that would obstruct the view from the house being built. The content of that conversation is disputed, but a large number of trees were cut down between November, 2003, and May, 2004, by an individual hired by the defendant. The plaintiff, who resides in New York, was not at the Warren property during that time period.

The plaintiff returned to the summer cottage on May 22, 2004. At that time, he observed that numerous trees had been cut on his property. He investigated the area to determine the extent of the tree removal and discovered the house built by the defendant. When he saw it, he became concerned that it had been constructed on his property or, at the very least, was in violation of the town's setback requirements.[2] When he visited the town hall and reviewed the maps on file a few days later, he discovered that the defendant claimed a portion of his property.

[2] It is undisputed that the rear deck of the house is located on the disputed parcel.

The plaintiff commenced this action against the defendant and Morrill, claiming record title to the disputed parcel and title by adverse possession. The defendant and Morrill filed a counterclaim, also alleging record title and title by adverse possession.[3] The defendant and Morrill, as third party plaintiffs, additionally filed a complaint against Mary Lewis Sheehan, Monica E. Tague, Matthew Sheehan and John V. Sheehan, the third party defendants, who were the defendant's predecessors in title. They conveyed new lots 9A and 9B to the defendant by warranty deed. The third party plaintiffs and the third party defendants reached an agreement shortly after this appeal was filed, and the trial court rendered judgment in accordance with their stipulation on August 30, 2006.[4]

During a seven day trial, the court heard testimony from several expert and fact witnesses for the plaintiff

[3] In addition to those claims, the plaintiff's seven count amended complaint alleged trespass, nuisance, unjust enrichment, violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and diminution in the value of his property due to the loss of his trees. The defendant and Morrill's five count counterclaim also alleged slander of title, tortious interference with a contract and fraud. Following a case management conference, the court ordered the title and adverse possession issues to be severed from all other counts for purposes of trial.

After the court issued its memorandum of decision quieting title in the plaintiff, the defendant and Morrill withdrew the remaining counts of their counterclaim and then filed the present appeal. The plaintiff filed a motion to dismiss the appeal, claiming that there was no final judgment. This court denied the motion as to the defendant's and Morrill's counterclaim. The partial judgment on the plaintiff's complaint is not part of this appeal.

[4] At oral argument before this court, counsel for the plaintiff suggested that the defendant was collaterally estopped from pursuing its claims because of the stipulated judgment. Although that judgment had been rendered prior to the filing of the appellate briefs in this case, the issue had not been raised previously by the plaintiff. Collateral estoppel does not implicate a court's subject matter jurisdiction. *State* v. *T.D.*, 286 Conn. 353, 360 n.6, 944 A.2d 288 (2008). We, therefore, decline to address this issue. "We generally do not consider claims raised for the first time at oral argument." (Internal quotation marks omitted.) *Zelvin* v. *JEM Builders, Inc.*, 106 Conn. App. 401, 408 n.6, 942 A.2d 455 (2008).

and the defendant. It also admitted eighty-six exhibits, including deeds and maps from both chains of title. Following trial, the court issued a fifty-five page memorandum of decision in which it painstakingly evaluated both parties' claims of record title and adverse possession. It concluded that the plaintiff was the record owner of the disputed parcel and that the defendant had not proved title by adverse possession.

In that decision, the court found that each side relied on a chain of deeds going back to the eighteenth century. The common grantor, Elias Taylor, acquired the Peters Farm in 1798, which consisted of approximately 155 acres. In 1816, Taylor conveyed two separately described parcels, totaling thirty-six acres, from that farm to Ebenezer Thomas, the plaintiff's predecessor in title. The second parcel, which the plaintiff claims is the disputed parcel, was described as a one acre woodlot adjoining the north side of the first described parcel.[5] In 1839, Taylor conveyed the remainder of the farm to Daniel Beeman, Jr., the defendant's predecessor in title. Subsequently, Lucinda Beeman, in a deed in the plaintiff's chain of title, more particularly described the woodlot as being located at the northwest corner of the first described parcel. She also referenced the Taylor to Thomas deed in describing the woodlot in that 1852 deed. Until 1852, the woodlot had not been located precisely on the northern boundary of the first parcel.

The court rejected the defendant's claim that the disputed parcel became included in its chain of title when the remainder of the farm was conveyed to its predecessor in title in 1839. The court was not persuaded by the argument that it was "accidentally" conveyed to the defendant's predecessor in title because

[5] The handwritten deed from Taylor to Thomas is difficult to read. Although it is clear that the deed was recorded at volume 7, page 3 of the Warren land records, the date that it was recorded is not apparent. The acknowledgement on the deed is dated July 25, 1816, and the parties and the court referred to this deed as the 1816 deed.

the description of the woodlot in the 1816 deed was too uncertain to convey title to the plaintiff's predecessor in title. The court found that the 1852 deed "corrected and improved" the less than perfect description in the 1816 deed, that the disputed parcel first became included in the plaintiff's chain of title by way of the 1816 deed and that it has remained in the plaintiff's chain of title since that time.

With respect to the defendant's various other claims concerning perceived inaccuracies in the plaintiff's chain of title, the court found that the deficiencies in the defendant's chain of title "far outweigh[ed], individually and collectively, the alleged kinks in the plaintiff's chain of title." In reaching that determination, the court noted that the plaintiff's title expert and the defendant's title expert searched both chains of title. The court found, however, that unlike the plaintiff's expert, the defendant's expert "was very defensive on cross-examination." Further, in evaluating the testimony of Riordan, the defendant's surveyor, the court considered his bias and motivation in light of the fact that he had prepared the lot revision map for the defendant *prior* to its purchase of the disputed parcel. Even though Riordan discovered conflicting claims of ownership while researching the relevant conveyances and maps in the preparation of his survey map, he never shared that information with the defendant.

With respect to the defendant's adverse possession claim, the court agreed that the defendant used the disputed parcel openly, notoriously and under claim of right from the time it purchased new lots 9A and 9B in 2003. The court found, however, that the defendant failed to provide any evidence that its predecessors in title *used* the disputed parcel "for any purpose whatsoever." The court concluded that the defendant failed to prove the elements of adverse possession by clear

and convincing evidence. Accordingly, the court rendered judgment quieting title to the disputed parcel in the plaintiff. This appeal followed.

I

The defendant first claims that the description of the woodlot in the 1816 deed was legally insufficient to convey title to Thomas, the plaintiff's predecessor in title. Specifically, the defendant argues that the conveyance of the woodlot from Taylor to Thomas was ineffective because the description failed to describe and locate the one acre woodlot with the specificity required by law. The defendant further claims that the 1852 deed from Lucinda Beeman, which located the woodlot at the northwest corner of the first described parcel, could not correct or clarify a deed that was void for indefiniteness.

The court's determination that the ambiguous description of the woodlot in the 1816 deed did not void the attempted conveyance to Thomas is a question of law that merits plenary review. To reach that determination, it is necessary to construe the language in that deed. "Ordinarily, the interpretation of a deed is a matter of law subject to plenary review." *Palmieri* v. *Cirino*, 90 Conn. App. 841, 846 n.7, 880 A.2d 172, cert. denied, 276 Conn. 927, 889 A.2d 817 (2005).

The principles governing the construction of instruments of conveyance are well established. "In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, 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. . . . [*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*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 780–81, 687 A.2d 1270 (1997).

After the description of the first conveyed parcel in the 1816 deed from Taylor to Thomas, the second parcel was described as follows: "Also one acre of woodland adjoining to the north side of the first described piece, being about thirty rods long east and west, and to be of equal width at the east and west ends." The northern boundary of the first parcel, which ran along a stone wall, was approximately 1030 feet. The second parcel, the one acre woodlot, was approximately 495 feet in length. The description in the 1816 deed, therefore, did not locate precisely the woodlot along that northern boundary. All parties agree that the description was ambiguous.

That description was not made more specific until the 1852 conveyance from Lucinda Beeman to Edwin R. Beeman. That deed, which is in the plaintiff's chain of title, describes the second parcel as follows: "Also one acre adjoining said land on the northwest corner about thirty rods long east and west to be of equal width at the east and west ends and for reference had to Thomas deed from Elias Taylor . . . ." The parties agree that the description in the 1852 deed was sufficient to locate that parcel along the northern boundary of the first parcel, but the defendant argues that the subsequent deed could not correct the 1816 deed because the 1816 deed was invalid.

Although the description of the woodlot contained the requisite dimensions of the land being conveyed, it was ambiguous because it did not locate the parcel with precision on the northern boundary of the first piece. We conclude, as did the parties and the trial court, that the description of the one acre woodlot in the 1816 deed was ambiguous. It was not, however, so indefinite as to render the conveyance void as claimed by the defendant.

The defendant does not provide us with any cases that are factually similar to this case. It references the general language in treatises that provides that property descriptions in instruments of conveyance must be definite enough to ascertain the location of the land. The treatises, however, also provide that courts will generally strive to interpret documents so as to validate the transaction. See 14 R. Powell, Real Property (2008) § 81A.07 [1] [e], p. 81A-137. "People will be presumed not to intend nullities by their solemn conveyances." 23 Am. Jur. 2d 207, Deeds § 199 (2002). "A deed is not void for uncertainty of description if the quantity, identity, or boundaries of the property can be determined by reference to extrinsic evidence." 23 Am. Jur. 2d 244, supra, § 259.

This is not a situation in which it is impossible to determine the location of the land, such as the conveyance of a portion of a larger tract of land without dimensions or placement within that larger tract (e.g., a one acre parcel out of a 155 acre tract on Curtis Road). The only uncertainty in this case was the woodlot's precise location along the stone wall on the northern boundary of the first conveyed parcel. That ambiguity was resolved thirty-six years later when Lucinda Beeman situated the one acre parcel at the northwest corner. At that time, the description was definite and the exact location of the land was ascertainable.

Although the defendant agrees that the description was ambiguous and that the court could consider extrinsic evidence to determine the intention of the parties, it insists that the court could consider evidence only as to the surrounding circumstances at the time of the conveyance in 1816 and the situation of Taylor and Thomas at that time. We disagree. This title problem originated with a deed that is nearly 200 years old. The intention of Taylor and Thomas cannot be determined if the court is restricted solely to a review of the 1816 deed; the individuals who could provide information relative to that conveyance died many years ago. The only intention that *is* apparent from the 1816 deed is that Taylor intended to convey a one acre woodlot adjoining to the north of the first parcel that he conveyed to Thomas.

Moreover, there is extrinsic evidence that does locate the property with certainty. "[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." *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, supra, 239 Conn. 780–81. The 1852 deed is relevant extrinsic evidence.

Further, even though the standards of title of the Connecticut Bar Association are not controlling, contractually or otherwise, they do establish the custom in the legal community. Id., 782 n.20. Standard 10.1 provides: "Errors, irregularities and deficiencies in property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the land which was conveyed or intended to be conveyed, or the description falls beneath the minimal requirement of sufficiency and definiteness which is essential to an effective conveyance. *Lapse of time*,

subsequent conveyances, the patent or typographical nature of errors or omissions, accepted rules of construction, and other considerations should be relied upon to approve marginally sufficient or questionable descriptions." (Emphasis added.) Connecticut Bar Association, Connecticut Standards of Title (1999), standard 10.1. Comment one of that standard additionally provides that "[i]t is reasonable to rely upon corrections or improved descriptions appearing in later conveyances and upon the passage of time in which difficulty has not arisen from the less than perfect description. All matters of record, such as adjoining descriptions, maps and surveys on file and the land owned by the grantor, can be means of explanation for the problem description." Id., comment one.

In the present case, we find the standards and comments to be helpful in resolving this issue. An 1816 deed containing an ambiguous description was clarified by a subsequent grantee in 1852. The court properly considered the relevant extrinsic evidence found in the Warren land records to locate the one acre woodlot, which is the disputed parcel. We conclude, therefore, that the description in the 1816 deed was not insufficient as a matter of law to convey title to that parcel.

II

The defendant next claims that the court improperly concluded that the plaintiff, rather than the defendant, was the record owner of the disputed parcel. Specifically, the defendant argues that because of the various inaccuracies in the plaintiff's chain of title, it established record title through the submission of deeds and maps going back to 1839.

Whether a disputed parcel of land should be included in one or another chain of title is a question of fact for the court to decide. *Feuer* v. *Henderson*, 181 Conn. 454, 458, 435 A.2d 1011 (1980). In such a determination, it

is the court's duty to accept the testimony or evidence that appears more credible. Id. It is well settled that we review the court's findings of fact under the clearly erroneous standard. "We cannot retry the facts or pass on the credibility of the witnesses. . . . 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.) *Palmieri* v. *Cirino*, supra, 90 Conn. App. 846.

A substantial amount of evidence was presented by the parties at trial, consisting of eighty-six exhibits, including maps, surveys, photographs and deeds together with considerable testimony from expert and fact witnesses. The defendant does not claim that there was no evidence to support the court's conclusions; instead, it claims that its evidence was more substantial in light of the inaccuracies in the plaintiff's chain of title.

The defendant brought all of the perceived inaccuracies in the plaintiff's chain of title to the court's attention at trial. The court thoroughly addressed each claim in its memorandum of decision. It recognized the discrepancies between the configuration and acreage of the original conveyance and the disputed parcel as surveyed—the woodlot in 1816 being described as one acre in size and 495 feet by 88 feet in dimension and the surveyed disputed parcel being an irregularly shaped quadrangle totaling 1.728 acres. It also noted discrepancies in the number of acres deeded to Julian Voisard, the plaintiff's predecessor in title, and the number of acres that he conveyed to various grantees. Further, it acknowledged the omission of an abutting owner in the eastern call of the description in the deed from Alice Strong to Voisard. Nevertheless, the court concluded

that the inaccuracies in the defendant's chain of title[6] "far outweigh[ed], individually and collectively," the inaccuracies in the plaintiff's chain of title.

"[I]t is the function of the trial court to weigh the evidence and the credibility of the parties and to find the facts; we cannot retry the case on appeal." *Riscica* v. *Riscica*, 101 Conn. App. 199, 207, 921 A.2d 633 (2007). "The court [is] free to accept or to reject, in whole or in part, the testimony of one expert over another." *Palmieri* v. *Cirino*, supra, 90 Conn. App. 847. In the present case, the court heard extensive testimony from the plaintiff's title expert and surveyor, who explained in detail the bases for their conclusion that the plaintiff was the record owner of the 1.728 acre parcel. The thrust of the defendant's argument is that the court should have credited its evidence and found in its favor. We conclude that the record contains ample evidence to support the court's conclusion as to the ownership of the disputed parcel and that its factual determinations were not clearly erroneous.

III

The defendant's final claim is that the court improperly concluded that it had not proven the elements of

[6] The court noted, inter alia, the following problems in the defendant's chain of title: (1) a map prepared in 1936 for Winifred Young, the defendant's predecessor in title, indicated that her property was 45.7 acres in size when she received 41.5 acres from her grantor; (2) subsequent maps were "traced from" the Young map; (3) Young entered into a bond for deed with Housatonic Valley Insurance Agency, Inc. (agency), using the Young map description but conveyed the property to the agency using the original 41.5 acre description by which she took title; (4) the agency conveyed the 41.5 acres by warranty deed to Hoyt Smith and Helen Smith but excepted from that conveyance one and one-half acres "claimed by Julian P. Voisard." The agency then quitclaimed the one and one-half acres by a separate instrument to the Smiths; (5) Hoyt Smith also conveyed the one and one-half acre parcel by quitclaim deed after excepting it from a warranty deed conveying the remaining property; and (6) when the property was subdivided and the disputed parcel became old lot 9B, the subdivision map did not provide access to that lot; it was landlocked, and the adjoining lots were not subject to a right-of-way in favor of old lot 9B for ingress and egress.

adverse possession. Specifically, the defendant claims that the evidence it submitted demonstrating that it paid taxes on the property, that it cleared and built a house on the property and that its predecessors in title filed subdivision maps incorporating the disputed parcel into the defendant's chain of title constituted clear and convincing evidence that it acquired title by adverse possession. We disagree.

We first set forth the applicable standard of review. "Because adverse possession is a question of fact for the trier . . . the court's findings as to this claim are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . [O]nly in rare instances is [an appellate] court justified in holding, as a matter of law, that [adverse possession] has been established. A trial court's findings in an adverse possession case, if supported by sufficient evidence, are binding on a reviewing court . . . .

"Where title is claimed by adverse possession, the burden of proof is on the claimant. . . . The 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. . . . Such a possession is not to be made out by inference, but by clear and convincing proof. . . . The doctrine of adverse possession is to be taken strictly." (Citations omitted; internal quotation marks omitted.) *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, 93 Conn. App. 759, 779–80, 890 A.2d 645 (2006).

The defendant argues that its payment of local property taxes on the disputed parcel supports its adverse possession claim. "Payment of property taxes is powerful evidence to show that the occupier claimed the land

as his own . . . although it is not dispositive." (Citations omitted; internal quotation marks omitted.) *Top of the Town, LLC* v. *Somers Sportsmen's Assn., Inc.*, 69 Conn. App. 839, 849, 797 A.2d 18, cert. denied, 261 Conn. 916, 806 A.2d 1058 (2002). In the present case, however, the defendant's argument fails because the plaintiff also was paying taxes on the disputed parcel. The court found that "[the plaintiff] also has been paying taxes to the town of Warren on the same piece and, therefore, is likewise entitled to claim equal benefit from said evidence." The defendant does not dispute that finding by the court.

With respect to the defendant's use of the disputed parcel, the court acknowledged that its actions in staking old lot 9B, digging test holes for the septic system, blasting rock and removing trees satisfied the elements of open and notorious use under a claim of right. The court found, however, that none of those incidents of ownership took place prior to 2003. The defendant presented no evidence that indicated his predecessors in title similarly used the disputed parcel.[7] The defendant argues that the recording of the subdivision maps in 1972 and 1973 placing the disputed parcel in the defendant's chain of title demonstrates a claim of right sufficient to meet the standard for adverse possession. Significantly, he cites no case law in support of that contention.

We conclude that the court's finding that the defendant failed to prove adverse possession of the disputed area has evidentiary support and, therefore, was not clearly erroneous. The court properly concluded that

[7] The defendant did suggest that Winifred Young, its predecessor in title, "corralled" an area by the stone wall and that "[i]t appears that [she] used old lot 9B as a grazing area for animals." There is no indication, however, as to the exact area corralled or how many years the fence was in place. Moreover, there was no evidence that Young's successors, until 2003, ever used the corralled area for any purpose.

the defendant had not ousted the plaintiff or its predecessors of possession for fifteen years by open, visible and adverse acts.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID PAGE *v.* STATE MARSHAL COMMISSION (AC 27578)

McLachlan, Harper and Peters, Js.

Syllabus

The plaintiff, a state marshal, sought, inter alia, to enjoin the defendant, the state marshal commission, from implementing a certain policy as to state marshals concerning the processing of domestic violence restraining orders. The challenged policy required state marshals, including the plaintiff, physically to report to assigned courthouses on a rotational basis in order to await restraining orders. The trial court granted the commission's motion to dismiss for lack of subject matter jurisdiction and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The commission could not prevail on its claim that the appeal was moot in light of a policy implemented in 2005 that replaced the challenged policy and no longer required state marshals physically to report to court in person; because the 2005 policy was subject to change at the discretion of the commission, an actual controversy still existed, and the issue here concerned not the specific procedures adopted by the commission but, rather, whether the implementation of those procedures violated the plaintiff's rights as an independent contractor.

2. The trial court properly granted the commission's motion to dismiss and determined that, on the basis of the doctrine of sovereign immunity, it lacked subject matter jurisdiction, the plaintiff having failed to show that any of the exceptions to the doctrine of sovereign immunity applied: the plaintiff's claim that the commission deprived him of his liberty by imposing a policy that compelled his attendance at the courthouse was unavailing, the plaintiff's claim not having come within the concept of "liberty" protected by the constitution, and he was not deprived of a property interest—the use of his car—by the commission, which was merely directing and regulating the effective service of restraining orders; moreover, the plaintiff failed to establish his claim that his action fell within the exception to the doctrine of sovereign immunity that applies when an officer of the state acts in excess of statutory authority,

the plaintiff's complaint having been devoid of any factual allegations that, if proven, reasonably would have supported his assertion that the commission acted in excess of its statutory authority in implementing the challenged policy.

Argued February 19—officially released July 1, 2008

Procedural History

Action to enjoin the defendant from implementing certain policies as to state marshals, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Tanzer*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jerome William Paun, for the appellant (plaintiff).

Matthew B. Beizer, assistant attorney general, with whom, on the brief, was *Richard Blumenthal*, attorney general, for the appellee (defendant).

Opinion

McLACHLAN, J. The plaintiff, David Page, appeals from the judgment of the trial court dismissing his action against the defendant, the state marshal commission[1] (commission). The plaintiff claims that the court improperly concluded, on the basis of the doctrine of

[1] The state marshal commission was promulgated pursuant to General Statutes § 6-38b, which provides in relevant part: "(a) There is established a State Marshal Commission which shall consist of eight members appointed as follows: (1) The Chief Justice shall appoint one member who shall be a judge of the Superior Court; (2) the speaker of the House of Representatives, the president pro tempore of the Senate, the majority and minority leaders of the House of Representatives and the majority and minority leaders of the Senate shall each appoint one member; and (3) the Governor shall appoint one member who shall serve as chairperson. No member of the commission shall be a state marshal, except that two state marshals appointed by the State Marshals Advisory Board in accordance with section 6-38c shall serve as ex officio, nonvoting members of the commission."

sovereign immunity, that it lacked subject matter jurisdiction to entertain his action. We affirm the judgment of the trial court.

The following facts, as found by the court in its memorandum of decision, are relevant to the resolution of the plaintiff's appeal. On February 1, 2005, the plaintiff, a state marshal, brought this action against the commission. In his complaint, the plaintiff took issue with a policy of the commission that was implemented in 2001 (policy) and designed to effectuate the efficient processing of domestic violence restraining orders. The policy required state marshals to be present at an assigned courthouse, on a weekly rotational basis, from 12:30 to 1 p.m. and from 4:30 p.m. "until closing, Monday through Friday to meet with the applicant to take possession of the order and to discuss the procedure for serving the order . . . ."[2] The plaintiff alleged that this policy violated both state and federal law. Specifically, the plaintiff sought a declaratory judgment that the commission had "(1) exceeded [its] statutory authority, by implementing a policy that treat[ed] state marshals as state employees, in violation of General Statutes § 6-38a;[3] (2) deprived state marshals of the use of their

[2] The policy effective on July 25, 2001, provides in relevant part: "The timely processing of restraining orders is of great concern to many parties; the applicant, the [s]tate [m]arshal [c]ommission, the [s]tate [m]arshals and the [j]udicial system. To that end it is the policy of the [s]tate [m]arshal [c]ommission that restraining orders will be handled through a statewide system of on-call [s]tate [m]arshals. Every [s]tate [m]arshal who has been appointed and authorized to serve process by the [s]tate [m]arshal [c]ommission will participate in this program."

[3] General Statutes § 6-38a provides: "(a) For the purposes of the general statutes, 'state marshal' means a qualified deputy sheriff incumbent on June 30, 2000, under section 6-38 or appointed pursuant to section 6-38b who shall have authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38 as an independent contractor compensated on a fee for service basis, determined, subject to any minimum rate promulgated by the state, by agreement with an attorney, court or public agency requiring execution or service of process.

"(b) Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no

property without due process of the law or just compensation, in violation of the fifth and fourteenth amendments to the United States constitution and article first, § 11, of the constitution of Connecticut; (3) forced state marshals into involuntary servitude without due process of the law in violation of the thirteenth[4] and fourteenth amendments to the United States constitution; and (4) failed to ensure that restraining orders are expeditiously served, in violation of [General Statutes] § 6-38b (g)." Additionally, the plaintiff sought an injunction that directed the commission to cease and desist from further enforcement of the policy. He also sought damages for the time and use of his personal property, such as his car, in complying with this policy.

On June 20, 2005, the commission filed a motion to dismiss the complaint for lack of subject matter jurisdiction. In its supporting memorandum of law, the commission argued that it was protected from suit by the doctrine of sovereign immunity and that no exception to the doctrine was applicable.

On March 27, 2006, the court issued a memorandum of decision, granting the motion to dismiss. The court concluded that it lacked subject matter jurisdiction because of the doctrine of sovereign immunity. The court rejected the plaintiff's argument that his action fell within either one of two exceptions to the sovereign immunity doctrine. This appeal followed.

I

As a threshold matter, the commission asserts that the appeal is moot. The commission posits that the plaintiff is objecting to the policy because it required him physically to report to his assigned court in order to await restraining orders. Yet, as the commission

such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions."

[4] On appeal, the plaintiff has not pursued a thirteenth amendment claim.

points out, this policy was replaced with another policy in 2005 (2005 policy) that no longer requires state marshals in specified jurisdictions to report to court in person. Instead, this new policy requires that the state marshal telephone a designated court representative to determine whether there are restraining orders to be served. The commission claims that in light of the 2005 policy, which it claims is permanent, the plaintiff's claims are moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Wiltzius* v. *Zoning Board of Appeals*, 106 Conn. App. 1, 10, 940 A.2d 892, cert. denied, 287 Conn. 906, 907, 950 A.2d 1283, 1284 (2008).

In the present case, the plaintiff contends that his claims are not moot because the 2005 policy is not a permanent policy. In support of this contention, the plaintiff refers to language in the policy and language in subsequent bulletins referencing the policy that demonstrates that the 2005 policy is subject to change.[5] On

[5] For example, the commission's administrative bulletin 06-15 states in relevant part: "I would like to remind you of your responsibilities concerning restraining order duty. In those counties where you are required to appear, you must be prompt. Additionally, in those counties where you are allowed to call-in you must call the clerk['s] office at 12:00 noon and 4:00 [p.m.]—

the basis of two considerations, we conclude that this appeal is not moot. First, the appeal is not moot because the policy is subject to change at the discretion of the commission or the judicial branch. Therefore, an actual controversy still exits. Furthermore, the plaintiff may be able to assert a claim for compensation for the period in which the prior policy was in effect. Second, the main issue is not what specific procedures the commission adopts for the equitable assignment of service of restraining orders, as required by § 6-38b (g), but whether the implementation of any such procedures violates the plaintiff's rights as an independent contractor. Thus, the claim is not moot.

II

While the dispositive issue on appeal is whether the court properly dismissed the plaintiff's action for lack of subject matter jurisdiction, the plaintiff asserts the following four claims on appeal: the court improperly (1) applied the standard of review for a motion to dismiss declaratory judgment actions, (2) found that he failed to provide a factual basis demonstrating that the commission acted in excess of its authority, (3) found that he failed to allege a deprivation of a constitutional interest and (4) dismissed his claim for equitable relief in quantum meruit.[6]

"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. . . . When a

not earlier. We have been contacted by court personnel reporting that some marshals are calling an hour or two earlier than required and then are not reachable at the required time. Remember that the *call-in policy can be revoked* by the [j]udicial [b]ranch or the [s]tate [m]arshal [c]ommission should abuses continue." (Emphasis added.)

[6] Because we conclude that the court properly dismissed the plaintiff's action on the basis of the doctrine of sovereign immunity, we need not address the plaintiff's remaining claims.

[trial] court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Tuchman* v. *State*, 89 Conn. App. 745, 750–51, 878 A.2d 384, cert. denied, 275 Conn. 920, 883 A.2d 1252 (2005).

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Internal quotation marks omitted.) *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007).

"[T]he sovereign immunity enjoyed by the state is not absolute. There are exceptions: (1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted.) Id., 720.

A

The plaintiff first claims that his action falls within the second exception to the doctrine of sovereign immunity because the commission violated his constitutional rights. The plaintiff claims violations of the fifth and fourteenth amendments to the United States constitution[7] and article first, § 11, of the constitution of Connecticut, in that "he is being deprived of his liberty and the unfettered use of his property by a unilaterally imposed [commission] policy in violation of his statutory status as an independent contractor."

The plaintiff asserts that the commission's policy deprives him of his liberty because "[i]t compels his attendance at a courthouse for at least one hour each day he is assigned to be there." He notes that he is not compensated for this time, nor is he compensated for the time he spends going to and leaving from the courthouse. The plaintiff asserts that by commandeering one

[7] "The fourteenth amendment to the United States constitution prohibits any state from depriving a person of 'life, liberty or property, without due process of the law . . . .' Article first, § 8, of the constitution of Connecticut contains the same prohibition and is given the same effect as the fourteenth amendment to the federal constitution." *Tuchman* v. *State*, supra, 89 Conn. App. 755.

hour a day during his assigned rotational week, the commission is depriving him of his liberty interest.

While the United States Supreme Court has not precisely defined the liberty interest guaranteed by the fourteenth amendment, "the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." (Internal quotation marks omitted.) *Board of Regents* v. *Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). On its face, the plaintiff's claim does not fall within the concept of "liberty" protected by the constitution.

The plaintiff next claims that his due process rights were violated because he was deprived of his property, specifically, the use of his car, without due process of law. Particularly, he claims that the commission commandeered his car without any reimbursement for expenses.

"Our due process inquiry takes the form of a two part analysis. [W]e must determine whether [the plaintiff] was deprived of a protected interest, and, if so, what process was [he] due." (Internal quotation marks omitted.) *Giaimo* v. *New Haven*, 257 Conn. 481, 499, 778 A.2d 33 (2001). Accordingly, we first examine whether the plaintiff was deprived of a protected interest. "To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement

to it. . . . Property interests, of course, are not created by the [c]onstitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Citation omitted; internal quotation marks omitted.) Id. "If a claimant does not establish a constitutionally protected interest, the due process analysis ceases because no process is constitutionally due for the deprivation of an interest that is not of constitutional magnitude." (Internal quotation marks omitted.) *Hunt* v. *Prior*, 236 Conn. 421, 442, 673 A.2d 514 (1996).

In the present case, the court rejected the plaintiff's due process claim, stating: "The policy does not interfere with the plaintiff's ability to serve process as he sees fit as an independent contractor. The policy is an orderly process which ensures that restraining orders are received by marshals in a timely and equitable manner. The policy is an incidental requirement to the privilege of acting as a state marshal similar in kind to the requirement that marshals give receipts, without fee, for all civil process delivered." The plaintiff claims that in arriving at this conclusion, the court erroneously relied on *Tuchman* v. *State*, supra, 89 Conn. App. 745. We disagree with the plaintiff and conclude that the court properly concluded that he was not deprived of a property interest.

In *Tuchman*, the plaintiffs owned a business that transported hazardous waste. Id., 747. The department of environmental protection (department) implemented a regulation that required a permit to transship hazardous waste. Id., 748. Prior to the regulation, the plaintiffs had been shipping hazardous waste and continued to ship it after the regulation was implemented. Id. In 1998, the department issued the plaintiffs a cease and desist notice that they were in violation of the policy and ordered them to stop transshipment of hazardous

wastes. Id. The plaintiffs complied with the order and filed for a permit, which the department denied. Id. The plaintiffs sought declaratory relief against the state and the department, asserting that the defendants violated their rights under the constitution of Connecticut and the United States constitution. Id., 749. The court dismissed the claim for lack of subject matter jurisdiction, and this court affirmed the dismissal. Id.

The court in *Tuchman* concluded that the shipper did not have a protected property interest sufficient to assert a viable due process claim. Id., 756–57. The shipper could not prove that there was a taking of the property because the government was merely regulating the use of the property. Id. Similarly, here, the plaintiff is not deprived of his property because the commission is merely directing and regulating the effective service of restraining orders. The plaintiff's use of his car is an incidental cost for performance of his job as a state marshal.

Nevertheless, the plaintiff argues that his claim is distinguishable from *Tuchman* because he is a duly appointed state marshal and was never ordered to cease and desist from engaging in any prohibited activity. Conversely, the commission argues that *Tuchman* is applicable because the plaintiff does not and cannot show how the state action prevented him from conducting business as a state marshal. The commission argues that the plaintiff is benefiting from the "coveted monopoly status for the legal execution and service of process in the state of Connecticut" because there is a limited number of state marshals in each county. As the commission states: "The plaintiff certainly takes advantage of this benefit and, presumably, acknowledges the authority of the state to confer this benefit upon him. Indeed, the plaintiff does not challenge the 'constitutionality' of this statutory scheme. Nevertheless, the plaintiff apparently asserts that he has a constitutionally protected property interest in avoiding compliance with

a policy promulgated by the same authority for the service of restraining orders." We agree with the commission.

For the foregoing reasons, the court properly determined that the plaintiff's allegations, if proven, failed to demonstrate an incursion on a constitutionally protected interest. See *Barde* v. *Board of Trustees*, 207 Conn. 59, 65–66, 539 A.2d 1000 (1988).

B

The plaintiff next claims that his action falls within the third exception to the doctrine of sovereign immunity, asserting that the commission acted in excess of its statutory authority.[8] Specifically, the plaintiff asserts that the commission has stepped outside the bounds

[8] In relation to the third exception, our Supreme Court has stated: "We previously have explained the reasons underlying the exception to the doctrine of sovereign immunity for actions seeking declaratory or injunctive relief against a state officer for conduct in excess of statutory authority. Sovereign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property. . . . Because a court may tailor declaratory and injunctive relief so as to minimize any such interference, and in order to afford an opportunity for voluntary compliance with the judgment, actions that seek injunctive or declaratory relief against a state officer acting in excess of statutory authority or pursuant to an unconstitutional statute do not conflict with the policies underlying the doctrine of sovereign immunity." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 314, 828 A.2d 549 (2003).

Moreover, the *Miller* court rejected the adoption of the case-by-case standard previously articulated in *Shay* v. *Rossi*, 253 Conn. 134, 172, 749 A.2d 1147 (2000), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003). The court described the *Shay* standard as "somewhere between . . . two poles, namely, at one pole, the standard for abrogation of judicial immunity, and at the other pole, that a process of statutory interpretation yields a conclusion that the state officials acted beyond their authority." (Internal quotation marks omitted.) *Miller* v. *Egan*, supra, 265 Conn. 326, quoting *Shay* v. *Rossi*, supra, 172. In *Miller*, the court concluded that the restriction of the exception for officials alleged to have acted in excess of their statutory authority to claims for declaratory or injunctive relief rendered it "sufficiently narrow" and eliminated the "danger that the

of the statutory authority provided to it through § 6-38a (a). He states: "To remain within the statutory authority delegated to the [commission], when it fashions a policy to equitably assign restraining orders to state marshals (or any other policy affecting them, for that matter), it must do so within the confines of their statutory status as independent contractors. It cannot implement a policy that treats state marshals as if they were employees or volunteers because under § 6-38a (a) . . . they are not." (Citation omitted.) The plaintiff contends that because state marshals are independent contractors, the commission does not have the power to direct and control how a state marshal performs his or her job. The plaintiff claims that the commission's directive forces him to be at the courthouse when he could be out serving restraining orders or on other assignments.

In opposition, the commission argues that the third exception to the doctrine of sovereign immunity is inapplicable. The commission maintains that pursuant to § 6-38b (g), it is "responsible for the equitable assignment of service of restraining orders to state marshals in each county and [to] ensure that such restraining orders are served expeditiously. . . ." General Statutes § 6-38b (g). In order to carry out this responsibility, the commission under § 6-38b (k) has been granted the power to "adopt such rules as it deems necessary for conduct of its internal affairs . . . ." General Statutes § 6-38b (k). According to the commission, "[t]hese two statutory provisions empower [it] to implement the policy to ensure the expeditious service of restraining orders. It cannot be reasonably argued that by doing so, [it] has acted in excess of its statutory authority."

"For a claim under the third exception, alleging that an officer acted in excess of statutory authority, the

exception will swallow the rule." *Miller* v. *Egan*, supra, 327. Thus, the court concluded that "when a process of statutory interpretation establishes that the state officials acted beyond their authority, sovereign immunity does not bar an action seeking declaratory or injunctive relief." Id.

[plaintiff] must do more than allege that the defendants' conduct was in excess of their statutory authority; [he] also must allege or otherwise establish facts that reasonably support those allegations. . . . In the absence of a proper factual basis in the complaint to support the applicability of [this exception], the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citation omitted; internal quotation marks omitted.) *Tuchman* v. *State*, supra, 89 Conn. App. 754.

In the present case, the court concluded that the commission did not act in excess of its statutory authority. Pursuant to § 6-38b (g), the commission is responsible for the "equitable assignment of service of restraining orders to the state marshals in each county . . . ." General Statutes § 6-38b (g). Section 6-38b (k) provides in relevant part that the "commission may adopt such rules as it deems necessary for conduct of its internal affairs . . . ." General Statutes § 6-38b (k). The court held that "[t]hese two statutory provisions empower the . . . commission to implement the policy, in accordance with the authority granted to it by § 6-38b (k), to aid in the commission's statutory responsibility to ensure the expeditious service of restraining orders." The court concluded "that the plaintiff has not provided a factual basis to support the applicability of this exception." Moreover, the plaintiff's complaint was devoid of any factual allegations that, if proven, reasonably would support his assertion that the commission acted in excess of its statutory authority in implementing the policy. We agree with the court's conclusion.

On the basis of the foregoing, we conclude that because neither of the two exceptions to the doctrine of sovereign immunity asserted by the plaintiff is applicable, the commission is immune from suit. Therefore, the court properly dismissed the plaintiff's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

ANN FAY BARRY *v.* HISTORIC DISTRICT COMMISSION OF THE BOROUGH OF LITCHFIELD
(AC 27545)

McLachlan, Lavine and Foti, Js.

Syllabus

The plaintiff, who owns a house located within a historic district in the borough of Litchfield, appealed to the trial court from the decision of the defendant historic district commission denying her application for a certificate of appropriateness as to exterior architectural features of her house. The trial court rendered judgment sustaining the appeal, from which the commission, on the granting of certification, appealed, and the plaintiff, on the granting of certification, cross appealed to this court. Subsequent to the filing of the appeal and cross appeal, the trial court issued an articulation in which it stated that it had "implicitly remanded" the case to the commission for a new hearing. *Held*:

1. The commission could not prevail on its claim that this court lacked subject matter jurisdiction, which was based on its claim that the trial court's order sustaining the plaintiff's appeal and implicitly remanding the case to the commission for a new hearing was not a final judgment for purposes of appeal; under the circumstances here, where the matter was resolved completely by the commission in the first instance and the remand contemplated a new hearing on an issue that the commission already had determined, the trial court rendered a final judgment, and this court had subject matter jurisdiction over the appeal and cross appeal.
2. The plaintiff could not prevail on her claim on cross appeal that her application was approved automatically as a result of the failure of the commission to provide her with written notice of its denial within sixty-five days of the filing of her application as required by statute (§ 7-147e [b]); because the plaintiff had actual notice of the commission's decision on the night of a public hearing on the application that the plaintiff and her counsel attended and at which they participated, which occurred sixty-three days after the application was filed, she was not entitled to an automatic approval of her application.
3. The trial court properly determined that the plaintiff's right to fundamental fairness had been violated because a commission member, H, who had recused himself from voting on the application, testified adversely to the proposal as an expert and as a member of the general public at the time of the public hearing; because it could hardly be disputed that H had a personal interest in the plaintiff's application, because it would have been very difficult for the other commissioners not to have been unfairly influenced by the testimony of H, and because it was apparent that the commission relied, at lease to an extent, on H's testimony, some

of which was incorporated into the commission's denial of the plaintiff's application, H's conduct undermined public confidence and deprived the plaintiff of her right to a fair and impartial hearing.

Argued March 11—officially released July 1, 2008

Procedural History

Appeal from the decision by the defendant denying the plaintiff's application for a certificate of appropriateness as to exterior architectural features, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Pickard, J.*; judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed, and the plaintiff, on the granting of certification, cross appealed, to this court; thereafter, the court, *Pickard, J.*, issued articulations of its decision. *Affirmed.*

James Stedronsky, with whom was *Robert D'Andrea*, for the appellant-appellee (defendant).

William C. Franklin, for the appellee-appellant (plaintiff).

Opinion

McLACHLAN, J. The defendant, the historic district commission of the borough of Litchfield (commission), denied the application for a certificate of appropriateness as to exterior architectural features filed by the plaintiff, Ann Fay Barry, for proposed changes to the facade of her house. On appeal from the commission's decision, the trial court sustained the plaintiff's appeal.

The commission appeals from that judgment, claiming that the court improperly determined that the plaintiff's right to fundamental fairness had been violated because a commission member, who recused himself from voting on the application, testified adversely to the proposal as an expert and as a member of the general public at the time of the public hearing. The plaintiff filed a cross appeal, claiming that the court

improperly determined (1) that her application was not automatically approved when the commission failed to comply with the time requirements set forth in General Statutes § 7-147e (b) and (2) that the recused commission member did not violate the commission's bylaws when he testified at the public hearing.

Subsequent to the filing of the appeal and cross appeal, the trial court issued an articulation, pursuant to an order of this court issued sua sponte, in which it stated that it "implicitly remanded the case to the defendant commission for a new hearing." The commission amended its preliminary statement of issues by adding the claim that this court lacks jurisdiction because the trial court's decision is not a final judgment.

We conclude that the trial court's decision is a final judgment. We also disagree with the claims raised in the commission's appeal and the plaintiff's cross appeal. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the issues on appeal. The plaintiff owns a single-family residence at 34 South Street in Litchfield, which is located within the borough's historic district. By application dated December 18, 2003, she sought a certificate of appropriateness from the commission for the removal of an exterior door and portico and their replacement with a window to match the existing windows on the east facade of the house. A public hearing on the plaintiff's application was scheduled for January 22, 2004.

At the beginning of that hearing, Glenn Hillman, a commissioner and the clerk of the commission, recused himself from the commission's consideration of the plaintiff's application, stating that he "retain[ed] the right to speak as an expert witness against this application." After the plaintiff's attorney made his presentation in favor of the application, the chairperson asked

for comments from those who opposed the application. At that point, Hillman began to speak before the commission. The attorney for the plaintiff objected, claiming that it was "fundamentally unfair" for Hillman to testify at the hearing because he had a personal interest in the matter. The chairperson responded that she would permit Hillman to testify "[t]o give his expert testimony in this matter, on advice of counsel." Hillman then submitted his resume as an expert in architectural matters and testified against the application. The hearing was continued to February 5, 2004.

On February 5, 2004, Hillman again recused himself from consideration of the plaintiff's application at the beginning of the public hearing. He continued to comment extensively on the application as a member of the public and as an expert in architecture. As an exhibit, Hillman submitted an eight page, single-spaced typewritten letter to the commission in which he reviewed the plaintiff's proposal in detail and specified the reasons for his opposition. He concluded with the statement that the plaintiff's application "for the removal of the door and portico should and must be denied." He read the contents of that letter into the record. Shortly thereafter, the hearing was continued to February 17, 2004.

That meeting was cancelled, and the third night of the public hearing was rescheduled to February 19, 2004. After additional testimony and exhibits were submitted to the commission, the public hearing was closed and the commission voted that same evening to deny the application at its regular meeting. The plaintiff appealed from that decision to the Superior Court, pursuant to General Statutes § 7-147i.[1]

[1] General Statutes § 7-147i provides in relevant part: "Any person or persons severally or jointly aggrieved by any decision of the historic district commission . . . may . . . take an appeal to the superior court for the judicial district in which such municipality is located . . . . Procedure upon such appeal shall be the same as that defined in section 8-8."

The plaintiff raised several issues in that appeal, including the claim that her application had been approved automatically because the commission failed to mail the notice of its decision within the sixty-five day period required by § 7-147e (b). She additionally claimed that she had been denied a fair hearing because Hillman, who had recused himself from hearing and deciding the matter, had testified against the plaintiff's application at the public hearing.

The court filed its memorandum of decision on January 11, 2006, in which it rejected the plaintiff's argument that her application was approved automatically. The court did conclude, however, that the plaintiff's right to fundamental fairness had been violated as a result of Hillman's extensive testimony against her application at the public hearing and, accordingly, sustained her appeal. Because that issue was dispositive of the plaintiff's appeal, the court did not address her other claims.

The defendant filed a petition for certification to appeal, claiming that the court improperly sustained the plaintiff's appeal on the basis of Hillman's participation at the public hearing. The plaintiff filed a cross petition for certification to appeal from the court's determination that her application was not approved automatically as the result of the defendant's failure to mail timely the notice of its decision. This court granted both petitions. An appeal and cross appeal were filed.

The defendant then filed a motion for articulation, requesting that the court articulate its decision by "remanding the matter to the [commission] for a new, full hearing, to be held in a manner consistent with the court's memorandum of decision." The court denied the motion, and the defendant filed a motion for review with this court. This court granted the motion but denied the relief requested. Additionally, this court's order provided: "It is further ordered, sua sponte, that

the trial court is ordered to articulate whether the court implicitly remanded the case to the defendant commission for a new hearing in light of its finding that the plaintiff is entitled to a fair hearing, and if not, then the court is ordered to articulate what relief, if any, the court afforded the plaintiff when it sustained her appeal."

The trial court filed an articulation on November 7, 2006, pursuant to this court's order, and stated that it "implicitly remanded the case to the defendant commission for a new hearing." Subsequently, on November 20, 2006, the commission filed a motion to dismiss its appeal and the plaintiff's cross appeal on the ground that the trial court's decision was not an appealable final decision. We denied that motion without argument by the parties and without a written opinion.[2] The commission has raised this jurisdictional issue in its brief on appeal.

I

Before reaching the merits of the commission's appeal and the plaintiff's cross appeal, we address the commission's claim that this court lacks subject matter jurisdiction because the court's order sustaining the plaintiff's appeal and "implicitly" remanding the case to the commission for a new hearing was not a final judgment for purposes of appeal. Citing *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995), the commission argues that the judgment of remand was not final because a new hearing requires further evidentiary determinations that are not merely ministerial. We disagree.

[2] Although we denied the commission's motion at that time, we reconsider our previous decision as to our jurisdiction. See, e.g., *Governors Grove Condominium Assn., Inc.* v. *Hill Development Corp.*, 187 Conn. 509, 511 n.6, 446 A.2d 1082 (1982) (per curiam), overruled on other grounds by *Morelli* v. *Manpower, Inc.*, 226 Conn. 831, 834, 628 A.2d 1311 (1993).

"The right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . Moreover, [t]he statutory right to appeal is limited to appeals by aggrieved parties from final judgments . . . . Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Thus, unless the remand order of the trial court in [a] zoning appeal constitutes a final judgment, we are required to dismiss the commission's appeal to this court for lack of subject matter jurisdiction. *Lakeside Estates, LLC* v. *Zoning Commission*, 100 Conn. App. 695, 699, 919 A.2d 1044 (2007) (the final judgment rule applies equally to zoning appeals as to other appeals)." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, 284 Conn. 124, 134–35, 931 A.2d 879 (2007).

Appeals from the decisions of historic district commissions are governed by § 7-147i. That statute specifically provides that the procedure to be followed in connection with such an appeal shall be the same as the procedure set forth in General Statutes § 8-8, the statute governing appeals from zoning boards and commissions. It is well settled that "the provisions of the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq.] do not govern a zoning appeal; see General Statutes §§ 8-8 (o), 8-9 and 8-30g (b) [now 8-30g (f)]; it is the scope of the remand order in [a] particular case that determines the finality of the trial court's judgment." *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 129.

Before discussing the specifics of the present case, it is helpful to review the somewhat confusing case law relevant to final judgments in zoning and other

administrative appeals. The first case of significance is *Watson* v. *Howard*, 138 Conn. 464, 86 A.2d 67 (1952). *Watson* involved an appeal by the plaintiff from an order of the Norwalk zoning board of appeals. The trial court sustained the appeal because of a member's improper participation in the board's decision and remanded the matter to the board for another hearing. The defendants challenged the jurisdiction of our Supreme Court to hear the appeal, claiming that the judgment of the trial court was not a final one. In concluding that the judgment was final, the Supreme Court stated: "The test of finality is whether the rights of the parties are concluded so that further proceedings cannot affect them. . . . The judgment in question met that test. *The rights of the parties, in so far as they were capable of being affected by any subsequent proceedings connected with the matter then in court, were forever concluded. Nothing further remained to be decided by the court. The appeal was terminated. The issues which it presented were all resolved.* If a new hearing should be held and if the board should again reach a conclusion adverse to the plaintiff, he would be required to institute a new appeal to the Court of Common Pleas. It follows from what we have said that the judgment was a final one from which an appeal to this court lies." (Citations omitted; emphasis added.) Id., 467–68. Even though *Watson* was decided in 1952, it has not been overruled and was cited with approval as recently as 2003 in *Doe* v. *Connecticut Bar Examining Committee*, 263 Conn. 39, 46–48, 818 A.2d 14 (2003).

In 1987, our Supreme Court again considered whether a decision was a final judgment in an administrative appeal involving a remand order for further proceedings. In *Schieffelin & Co.* v. *Dept. of Liquor Control*, 202 Conn. 405, 521 A.2d 566 (1987), the court dismissed the defendants' appeal from the trial court's ruling remanding the case to the defendant department of

liquor control. The remand order directed the department of liquor control to determine whether the plaintiff substantively had established cause for its termination of the individual defendants' distributorships. In concluding that the decision was not a final judgment, the court provided the following analysis. "Under our existing case law, we have distinguished, with reference to that question, between two kinds of administrative remands. A trial court may conclude that an administrative ruling was in error and order further administrative proceedings on that very issue. In such circumstances, we have held the judicial order to be a final judgment, in order to avoid the possibility that further administrative proceedings would simply reinstate the administrative ruling, and thus would require a wasteful second administrative appeal to the Superior Court on that very issue. See, e.g., *Watson* v. *Howard*, supra, 138 Conn. 468; *Santos* v. *Publix Theatres Corp.*, 108 Conn. 159, 161, 142 A. 745 (1928). A trial court may alternatively conclude that an administrative ruling is in some fashion incomplete and therefore not ripe for final judicial adjudication. Without dictating the outcome of the further administrative proceedings, the court may insist on further administrative evidentiary findings as a precondition to final judicial resolution of all the issues between the parties. See General Statutes § 4-183 (e). Such an order is not a final judgment." *Schieffelin & Co.* v. *Dept. of Liquor Control*, supra, 410.[3]

[3] The holding in *Schieffelin & Co.* has been superseded by statute for cases appealed pursuant to the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. The legislature amended the act in 1988, explicitly providing that where the court issues a remand pursuant to General Statutes § 4-183 (j), the remand is a final judgment for purposes of appeal irrespective of the nature of the remand and the administrative proceedings that are expected to follow it.

In *Westover Park, Inc.* v. *Zoning Board*, 91 Conn. App. 125, 881 A.2d 412 (2005), this court stated that the approach set forth in *Schieffelin & Co.* had little bearing on the analysis of final judgment determinations in zoning appeals. "The provisions of the [Uniform Administrative Procedure Act] do not govern a zoning appeal. . . . Accordingly, the test for finality of *Schief-*

The next major appellate decision addressing the issue of final judgments in zoning appeals is *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 122. Decided in 1995, our Supreme Court concluded that the trial court's decision, which sustained the plaintiff's appeal but remanded the case to give the commission the opportunity to impose reasonable conditions on and make reasonable changes to an affordable housing development, was an appealable final judgment. The court noted that "it is the scope of the remand order in this particular case that determines the finality of the trial court's judgment. *Eastern Connecticut Cable Television, Inc.* v. *Dept. of Public Utility Control*, 214 Conn. 609, 613, 573 A.2d 311 (1990). A judgment of remand is final if it so concludes the rights of the parties that further proceedings cannot affect them. Id., quoting *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983); see also *Schieffelin & Co.* v. *Dept. of Liquor Control*, [supra, 202 Conn. 409–11]. A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, supra, 129–30.

In concluding that the trial court's judgment in *Kaufman* was final, our Supreme Court attached significance to two factors. First, the trial court did not order further evidentiary determinations on remand. Although it allowed the commission to hear additional evidence in order to impose reasonable conditions, the

felin & Co. is inapplicable to zoning appeals." (Citations omitted.) Id., 130. Nevertheless, in *AvalonBay Communities, Inc.* v. *Zoning Commission*, supra, 284 Conn. 137–38 n.13, our Supreme Court indicated that *Schieffelin & Co.* retains its vitality in zoning appeals. We read *AvalonBay Communities, Inc.*, as disavowing our language in *Westover Park, Inc.*, stating that *Schieffelin & Co.* is inapplicable to zoning appeals. As an intermediate court of appeals, we are bound by this decision of the Supreme Court. *Martin* v. *Plainville*, 40 Conn. App. 179, 182, 669 A.2d 1241 (1996), aff'd, 240 Conn. 105, 689 A.2d 1125 (1997).

remand did not require the commission to conduct such an inquiry. Second, and more importantly, the commission was required to approve the application. For that reason, the decision met the *Curcio* test[4] because it so concluded the rights of the parties that further proceedings could not affect them. Id., 130–31.

Following *Kaufman*, this court decided *Kobyluck* v. *Zoning Board of Appeals*, 70 Conn. App. 55, 796 A.2d 567 (2002). In *Kobyluck*, we dismissed an appeal from a decision of the trial court remanding the plaintiffs' zoning appeals to the defendant board. The plaintiffs filed appeals with the board in connection with two cease and desist orders issued by the zoning enforcement officer. Notice of the public hearing on the appeals was published in a local newspaper, but the board did not provide any personal notice of the public hearing to the plaintiffs. Neither the plaintiffs nor their attorney attended the public hearing because they had not seen the newspaper notice, and the board upheld the cease and desist orders. Id., 56–57.

The trial court concluded that the failure to provide personal notice of the public hearing to the plaintiffs violated their due process rights and remanded the matter to the board for a new hearing. In concluding that the trial court's decision was not an appealable final judgment, this court stated: "[A]fter concluding that the board's hearing was held without sufficient notice to the plaintiffs, the court remanded the matter for a new hearing at which the plaintiffs will be able to present their arguments regarding the alleged zoning violations and to introduce evidence in support thereof. Unlike the commission in *Kaufman*, the board has not been directed by the court as to how it must rule on the plaintiffs' appeals. Because the notice issue was dispositive, the court did not reach the other issues relating

[4] See *State* v. *Curcio*, supra, 191 Conn. 31.

to the merits of the plaintiffs' appeals. It is conceivable that after an adversarial hearing in which all of the relevant evidence is considered, the board may decide differently. Therefore, the court's decision has not so concluded the rights of the parties such that the further proceedings cannot affect them." Id., 59.

The commission here argues that *Kaufman* and *Kobyluck* effectively overturned or superseded *Watson*, but our Supreme Court quoted *Watson* with approval in a subsequent opinion addressing the issue of finality in administrative appeals. In *Doe* v. *Connecticut Bar Examining Committee*, supra, 263 Conn. 39, the defendant appealed and the plaintiff cross appealed from the judgment of the trial court reversing the defendant's decision not to recommend the plaintiff for admission to the bar of Connecticut and remanding the case for a new hearing before a different panel of the defendant. The plaintiff claimed that the decision was not a final judgment for purposes of appeal because of the trial court's remand order. Id., 44–45.

The bar examining committee is not an administrative agency subject to the provisions of the Uniform Administrative Procedure Act. Accordingly, the court applied the *Curcio* test. Id., 46 n.4. Under that analysis, the court concluded that the remand order was a final judgment for purposes of the appeal. "The remand order did not call for an evidentiary inquiry into an issue that [the defendant] had not previously addressed . . . but direct[ed] the [defendant] to undertake an administrative reconsideration of [an issue] upon which the [defendant] had previously ruled . . . as did the trial court in *Watson*." (Citations omitted; internal quotation marks omitted.) Id., 49.

Two years later, this court decided *Westover Park, Inc.* v. *Zoning Board*, 91 Conn. App. 125, 881 A.2d 412 (2005). In *Westover Park, Inc.*, this court dismissed an

appeal from a decision of the trial court in which it modified the conditions imposed by the board and remanded the matter to the board for further proceedings. The plaintiffs appealed from that decision, and the appeal was dismissed on the ground that it was not a final judgment. In reaching that determination, this court focused on the remand order and concluded that the trial court's order did not terminate a separate and distinct proceeding. Although the trial court purported to uphold the decision of the board, it neither dismissed nor sustained the plaintiffs' appeal. The court's remand required a new site plan to be submitted and a public hearing to be held, both of which contemplated the presentation of new evidence before the board. Id., 131–32. The trial court also stated that it would retain jurisdiction over the appeal "in the event that the parties . . . wish[ed] to contest the propriety of the zoning board's ruling on any such changes on the plans." (Internal quotation marks omitted.) Id., 132 n.7.

The most recent discussion of final judgment law as applied to zoning appeals is contained in *AvalonBay Communities, Inc.* v. *Zoning Commission*, supra, 284 Conn. 124. In *AvalonBay Communities, Inc.*, the trial court rendered judgment sustaining the plaintiff's appeal and ordered the commission "to consider changes that can reasonably be made to protect the substantial public health and safety interests" implicated by the proposed development. (Internal quotation marks omitted.) Id., 129. The court dismissed the commission's appeal for lack of subject matter jurisdiction. Id.

In reaching that conclusion, the court stated that "under *Kaufman*, a trial court's remand to a zoning commission is an appealable final judgment if it (1) does not require further evidentiary determinations by the commission or (2) dictates the outcome of the post-remand proceedings before the commission with

respect to the application at issue." Id., 138. Under the *Kaufman* analysis, the court found that the remand order in *AvalonBay Communities, Inc.*, was not an appealable final judgment. "Although the trial court's order, like the order in *Kaufman*, does not *explicitly* require the commission to make further evidentiary determinations, the trial court stated that the record before it did not contain sufficient evidence of the 'parameters' of the commission's requirements with regard to the acceptable height of the buildings, the width of the roads, and distance of the buildings to the slope. Given that the trial court conducted a plenary review of the record and found certain evidence to be lacking, its order that the commission 'specify categorically the changes reasonably necessary to protect the substantial health and safety concerns cited as reasons for its denial' implies that the trial court intended to require the commission to conduct further evidentiary proceedings on remand.

"More importantly, however, the trial court's order in this case, unlike the order in *Kaufman*, did not explicitly decide the ultimate issue in this case for the plaintiff. The trial court did not order the commission to grant the plaintiff's application, nor did it state that the commission was stripped of the power to deny the plaintiff's application. Instead, the trial court determined that the commission had not completed its duty as outlined under § 8-30g (g) because it had not shown that the public interests could not be protected by reasonable changes to the plaintiff's plan. The language of the trial court's decision leads us to conclude that it intended for the commission to provide certain parameters that the plaintiff could then use in revising its application for resubmission to the commission. At that point, the commission again would have the discretion to grant or to deny the plaintiff's application. Therefore, because the commission apparently retained its discretion with

regard to the ultimate issue in this matter, the trial court did not render a final judgment, and this court does not have subject matter jurisdiction over the commission's appeal." (Emphasis in original.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, supra, 284 Conn. 139–40.

The following common features are apparent from this analysis of these cases. The courts all focused on the scope of the remand orders. In the cases in which the courts concluded that the trial court decisions were not appealable final judgments, except *Kobyluck*,[5] the remand orders required further evidentiary proceedings. In *Westover Park, Inc.*, the board granted applications for a special exception and site plan subject to twenty-five conditions. On appeal, the trial court concluded that some of those conditions required modification.[6] Although the trial court concluded that the plaintiffs had prevailed on some of their claims, additional issues relative to the conditions required further

[5] We acknowledge that our decision in this case departs from our conclusion with regard to finality in *Kobyluck*. At the time *Kobyluck* was decided, no previous court had considered whether the finality of a remand order in a zoning appeal requiring a new hearing on the merits should be decided under *Kaufman* or *Watson*. This is the first time for us to consider this issue, and, as explained in the body of this opinion, we hold that *Watson* applies.

[6] The remand order directed as follows: "If the defendant Starwood wishes to pursue these applications, a revised site plan should be submitted, but to the defendant zoning board itself. Section 19.3.2.c of the Stamford zoning regulations requires that changes in plans require 'further approval' of the defendant board. Only the issues of intersection improvements, traffic signals, driveway access, traffic 'calming,' a parking plan and a revision of the units in the southwest part of the subject property should be scheduled for a public hearing in order that the plaintiffs and members of the public have the opportunity to contest whether the revised plans are responsive to the conditions imposed by the defendant zoning board. In other words, the defendant zoning board imposed conditions on its approvals. These conditions should be incorporated in an amended plan to demonstrate exactly what Starwood intends to do in response to the conditions, including whether any required approvals from the city of Stamford for off-site improvements have been obtained." (Internal quotation marks omitted.) *Westover Park, Inc.* v. *Zoning Board*, supra, 91 Conn. App. 131–32.

consideration by the board that would require the taking of additional evidence. In addition, the trial court stated that it would retain jurisdiction over the appeal "in the event that the parties . . . wish[ed] to contest the propriety of the zoning board's ruling on any such changes in the plans." (Internal quotation marks omitted.) *Westover Park, Inc.* v. *Zoning Board*, supra, 91 Conn. App. 132 n.7.

Similarly, in *AvalonBay Communities, Inc.*, the trial court stated that the commission failed to carry its final burden under § 8-30g (g), the affordable housing statute, because it "failed to prove that the denial [of the plaintiff's application] was necessary as there is insufficient evidence to prove that the public interest could not be [protected] by reasonable changes to the affordable housing development plan." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, supra, 284 Conn. 133. Accordingly, the court remanded the case to the commission with an order that it "specify categorically the changes reasonably necessary to protect the substantial health and safety concerns cited as reasons for its denial." (Internal quotation marks omitted.) Id., 134.

Here, the commission focuses on the language in *Kaufman* and succeeding cases that a decision is not an appealable final judgment if the remand order requires further evidentiary determinations by the commission that are not ministerial in nature. That language, however, cannot be divorced from the factual background in those cases. The literal language must be construed and evaluated in the context of specific factual situations.

It is important to note that the case that most resembles the present case factually is *Watson*. In *Watson*, the trial court sustained the appeal because one of the board members improperly participated in the board's

decision. The court then remanded the matter to the board with direction to hold another full public hearing.[7] Our Supreme Court concluded that the decision was a final judgment because "the rights of the parties are concluded so that further proceedings cannot affect them" and that "[t]he issues which [the appeal from the board's decision] presented were all resolved." *Watson* v. *Howard*, supra, 138 Conn. 467–68. *Watson* was quoted extensively with approval as recently as 2003, after *Kaufman* and *Kobyluck*, in *Doe* v. *Bar Examining Committee*, supra, 263 Conn. 46–48.

To adopt the commission's position, by logical extension, would result in the appellate dismissal of all zoning appeals in which the trial court sustains the plaintiff's appeal but does not direct a particular action to be taken by the commission or board. Even if a trial court were to go no further than to sustain an appeal, it follows that in virtually every case the matter is "implicitly remanded" for a *new hearing* should the appellant decide to pursue the issues at the local board. We decline to adopt such a position.[8]

[7] It is interesting to note that the court in *Watson* concluded that the trial court should have "gone no further . . . than to sustain the appeal." *Watson* v. *Howard*, supra, 138 Conn. 470. The judgment was set aside and the case was "remanded with direction to render judgment sustaining the appeal." Id.

Here, in the initial memorandum of decision, the court concluded that Hillman's extensive testimony at the public hearing violated the plaintiff's right to fundamental fairness and simply sustained the appeal. The court "implicitly remanded the case to the defendant commission for a new hearing" in a subsequent articulation only after it was ordered to do so by this court. It did not direct or require the commission to do anything further. "Our Supreme Court has indicated that where the court considers the action of an agency illegal, arbitrary or in abuse of its discretion, the court should go no further than to sustain the appeal taken from its action, and not order a remand with direction. . . . If it does not appear as a matter of law that there is only one single conclusion that a commission could reasonably reach, a remand with direction is unwarranted." (Citation omitted.) *Timberland Development Corp.* v. *Planning & Zoning Commission*, 43 Conn. App. 606, 611–12, 684 A.2d 1216 (1996), cert. denied, 240 Conn. 902, 688 A.2d 331 (1997).

[8] We note that the following appeals to this court and the Supreme Court were decided on their merits when the trial court sustained an appeal from

A distinction must be made between an appeal in the usual civil case and an appeal in which the trial court is hearing an appeal from a local board or commission. In both types of cases the final judgment question normally is whether the trial court resolved all of the issues submitted to it.[9] In the former, that question requires examining the action taken by the trial court itself. In the latter, the trial court may not be able to resolve the issues submitted without further action by the local board or commission. By focusing only on the language used by the trial court in the administrative appeal cases (use of the word "remand") and not on the factual landscape in which it arises, it is not possible to determine whether the trial court's judgment is final.

To summarize, there are three general types of remands in administrative appeals that give rise to final judgment concerns. Two of them are analyzed in *Schieffelin & Co*. The first remand discussed in *Schieffelin & Co*. is a remand that involves a second hearing on the

a decision of a board or commission. Although the issue of jurisdiction was not raised by the parties, it could have been raised sua sponte by the court. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Citations omitted; internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005); see, e.g., *Gibbons* v. *Historic District Commission*, 285 Conn. 755, 941 A.2d 917 (2008); *Wilson* v. *Planning & Zoning Commission*, 260 Conn. 399, 796 A.2d 1187 (2002); *Smith Bros. Woodland Management, LLC* v. *Planning & Zoning Commission*, 88 Conn. App. 79, 868 A.2d 749 (2005); *Oakbridge/Rogers Avenue Realty, LLC* v. *Planning & Zoning Commission*, 78 Conn. App. 242, 826 A.2d 1232 (2003); *Nazarko* v. *Conservation Commission*, 50 Conn. App. 548, 717 A.2d 850 (trial court sustained appeal because commission member should have disqualified himself), cert. denied, 247 Conn. 940, 723 A.2d 318 (1998).

[9] We recognize the exceptions made for certain appeals by Practice Book §§ 61-3 and 61-4, and in cases in which the resolution of one or more but less than all of the issues raised would be dispositive.

very issue that the agency already decided. An appeal will lie from such a remand. This type of remand may be implicit, as where a trial court simply sustains an appeal without any further orders. See *Schieffelin & Co.* v. *Dept. of Liquor Control*, supra, 202 Conn. 410. The second type of remand addressed in *Schieffelin & Co.* is a remand that requires that the agency hold a new hearing on an issue that it has never before considered. In that event, the trial court's judgment may not be immediately appealed because the agency proceedings are incomplete; it has not finished adjudicating the application or petition before it. Id. The third type of remand is discussed in *Kaufman*. This type of remand, which is most often encountered in zoning cases, consists of an order that requires the agency to grant or approve a permit or other application. The remand order also addresses any conditions that may attach to the agency's action and may require further proceedings as to the conditions. If the remand as to the conditions requires a hearing at which the agency will need to exercise it discretion, the remand is not a final judgment. On the other hand, if further proceedings on the conditions will entail only ministerial determinations, the remand is a final judgment. *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 130–31. Under either *Kaufman* scenario, the applicant will not be deprived of the permit or approval that it originally sought, but whether the trial court has rendered a final judgment will depend on whether the commission has completed its discretionary action.

In the present case, the trial court initially sustained the plaintiff's appeal without a remand order. When it articulated its decision pursuant to an order of this court, it "implicitly remanded the case to the defendant commission for a new hearing." The scope of that remand order determines the finality of the decision. This is not a situation in which the commission failed

to address some of the issues or did so incompletely, and the court, therefore, did not require further findings from the commission in order to resolve fully the parties' claims. The matter was completely resolved by the commission in the first instance, and the remand contemplated a new hearing on the very issue that the commission initially determined. On remand, the plaintiff is entitled to a whole new hearing if she again chooses to submit her application for a certificate of appropriateness to the commission. This remand falls within the ambit of the first type of remand discussed in *Schieffelin & Co.* and is virtually identical to the situation in *Watson*, which is the case that *Schieffelin & Co.* cited to illustrate this kind of remand.

Accordingly, we conclude that the trial court rendered a final judgment, and this court has subject matter jurisdiction over the commission's appeal and the plaintiff's cross appeal.

II

The next issue we address is whether the plaintiff's application was approved automatically because the commission failed to provide the plaintiff with written notice of its denial within the sixty-five day period set forth in § 7-147e (b). Specifically, the plaintiff, in her cross appeal, argues that the express language of the statute requires that the commission's decision be made *and* that written notice of that decision be provided to the applicant within sixty-five days of the filing of her application. The plaintiff claims that the failure to do both within that time period results in the automatic approval of the application.[10]

[10] We address this issue in the plaintiff's cross appeal before we address the commission's claim pertaining to Hillman's participation at the public hearing because a finding of automatic approval would be dispositive of the parties' remaining claims.

Section 7-147e (b) provides in relevant part: "Within not more than sixty-five days after the filing of an application as required by section 7-147d, the commission shall *pass upon* such application and shall give written notice of its decision to the applicant. . . . Failure of the commission *to act* within said sixty-five days shall constitute approval and no other evidence of approval shall be needed." (Emphasis added.) The plaintiff interprets the statute to require automatic approval if written notice of the commission's decision is not provided to the applicant within sixty-five days. The commission contends that the statute requires automatic approval only if the decision is not made within sixty-five days. The trial court, in its articulation, concluded that the statute does not require the mailing of the commission's decision within the sixty-five day period.

"Issues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008). In the present case, however, the plaintiff's claim fails even if we adopt her interpretation of § 7-147e (b). It is undisputed that the commission made its decision on February 19, 2004, which was sixty-three days after the plaintiff filed her application. It is also undisputed that the plaintiff and her counsel were at the commission's meeting on February 19, 2004, and participated in the public hearing. Immediately after the close of the public hearing on the plaintiff's application, the commission proceeded to deliberate and vote on the subject application and two other pending applications for certificates of appropriateness at its regular meeting.

The plaintiff does not claim that she was not present at the time the commission denied her application on February 19, 2004, nor does she claim that she was prejudiced by the fact that the commission mailed the notice of the denial sixty-eight days after she filed her

application. At oral argument before this court, counsel for the plaintiff stated that the claim is one of statutory violation only; the plaintiff conceded that she did not suffer any actual harm. The plaintiff, therefore, had actual notice of the commission's decision on February 19, 2004.

"[The Supreme Court] has distinguished between statutorily required published notice to the general public and statutorily required personal notice to specific individuals. We have long held that failure to give newspaper notice is a subject matter jurisdictional defect . . . and that [s]ubject matter jurisdiction cannot be waived or conferred by consent. . . . We have also long held, however, that failure to give personal notice to a specific individual is not a jurisdictional defect . . . .

"In *Schwartz* v. *Hamden*, [168 Conn. 8, 357 A.2d 488 (1975)], we discussed the different purposes of published newspaper notice and personal notice. The purpose of a personal notice statute is to give actual notice to [the person entitled to notice]. . . . Therefore, if a person has actual notice of a hearing, the failure to give mailed notice does not frustrate the purpose of the notice provision." (Citations omitted; internal quotation marks omitted.) *Lauer* v. *Zoning Commission*, 220 Conn. 455, 461–62, 600 A.2d 310 (1991); see also *Delfino* v. *Planning & Zoning Commission*, 30 Conn. App. 454, 459, 620 A.2d 836 (1993).

The plaintiff had actual notice of the commission's decision to deny her application for a certificate of appropriateness within sixty-five days of the filing of her application and timely appealed from that decision to the Superior Court. We conclude, therefore, that she is not statutorily entitled to an automatic approval of her application under § 7-147e (b).

III

The commission claims that the court improperly determined that Hillman's testimony at the public hearing violated the plaintiff's right to fundamental fairness. The commission argues that Hillman properly could recuse himself from acting as a commission member in connection with the plaintiff's application and yet retain the right to speak against it as an expert in architectural matters and as a member of the general public. We disagree.[11]

In reaching its conclusion, the court made the following findings. Hillman "appeared as a witness at the public hearing and testified at great length, purportedly as an expert in historic restoration. . . . He made a physical inspection of the property and offered testimony which was at variance with the plaintiff's position. He offered photographs and opinions which were in direct opposition to the plaintiff's experts. He questioned the plaintiff's expert from the audience. . . . He cited the Connecticut statutes and gave the commission legal advice on the obligations and rights of the commission." The commission does not challenge any of those findings on appeal.

In determining whether a land use commission has violated an applicant's right to fundamental fairness, "[w]e generally employ a deferential standard of review to [its] actions . . . . [C]ourts are not to substitute their judgment for that of the board, and . . . the decisions of local boards will not be disturbed as long as honest judgment has been reasonably and fairly made after a full hearing. . . . [T]he plaintiff challenges not

[11] Because we conclude that the court properly determined that Hillman's testimony at the public hearing violated the plaintiff's right to fundamental fairness, we do not address the plaintiff's claim on her cross appeal that Hillman's conduct violated the commission's bylaws.

the ultimate decision of the board but, rather, the fundamental fairness of the board's hearing. The question of whether the board violated the plaintiff's right to fundamental fairness in that administrative proceeding presents a question of law over which our review is plenary. . . .

"While proceedings before zoning and planning boards and commissions are informal and are conducted without regard to the strict rules of evidence . . . they cannot be so conducted as to violate the fundamental rules of natural justice. . . . Fundamentals of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary. . . . In short, [t]he conduct of the hearing must be fundamentally fair." (Citations omitted; internal quotation marks omitted.) *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 607–609, 942 A.2d 511 (2008).

We have long recognized this common-law right to fundamental fairness in administrative hearings. See *Grimes* v. *Conservation Commission*, 243 Conn. 266, 273–74, 703 A.2d 101 (1997). "Judicial review of administrative process is designed to assure that administrative agencies act on evidence which is probative and reliable and act in a manner consistent with the requirements of fundamental fairness." *Feinson* v. *Conservation Commission*, 180 Conn. 421, 429, 429 A.2d 910 (1980). Further, we have repeatedly emphasized that "[n]eutrality and impartiality of members are essential to the fair and proper operation of . . . [zoning] authorities." (Internal quotation marks omitted.) *Fletcher* v. *Planning & Zoning Commission*, 158 Conn. 497, 507, 264 A.2d 566 (1969). In reviewing the challenged conduct of public officials, "fairness and impartiality are fundamental." *Low* v. *Madison*, 135 Conn. 1, 7, 60 A.2d 774 (1948).

Public policy requires that a member of a public board or commission refrain from placing himself or herself in a position in which personal interest may conflict with public duty. See *Thorne* v. *Zoning Commission*, 178 Conn. 198, 204 n.2, 423 A.2d 861 (1979); *Low* v. *Madison*, supra, 135 Conn. 8. "A personal interest has been defined as an interest in either the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A personal interest can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess." (Internal quotation marks omitted.) *Thorne* v. *Zoning Commission*, supra, 204–205.

The issue of personal interest generally arises in the context of whether a commission member should be disqualified from hearing and deciding a particular application pending before the commission. Most of our appellate case law focuses on the refusal of a member to recuse himself or herself from participating in the public hearing as a member of the commission. In this case, Hillman did recuse himself from acting on the plaintiff's application but then participated at the public hearing as a member of the general public and as an expert in voicing his opposition to it.

There is one case, *Cioffoletti* v. *Planning & Zoning Commission*, 209 Conn. 544, 552 A.2d 796 (1989), cited by the commission, that is factually similar to the present case. In *Cioffoletti*, a commission member disqualified himself from all phases of the proceedings involving the plaintiffs' application to expand their mining operation. At the public hearing, however, his wife read into the record a letter expressing his and her opposition to the proposed expansion. Our Supreme Court concluded

that his remarks at the hearing, as voiced through his wife, did not constitute "participation" in the hearing or decision of the commission as prohibited by General Statutes § 22a-42 (c).[12] *Cioffoletti* v. *Planning & Zoning Commission*, supra, 557.

Cioffoletti is not supportive of the commission's position under the circumstances of this case. The plaintiffs in *Cioffoletti* claimed only that the commission member's conduct violated the strictures of § 22a-42 (c); id.; they did not claim that their right to fundamental fairness had been violated as the result of his participation. Accordingly, no fundamental fairness analysis was undertaken as to that claim. In the present case, that issue was squarely presented and addressed by the court.

Even though there are no appellate Connecticut cases directly on point, the reasoning in the cases addressing situations in which commission members should have disqualified themselves but failed to do so, thereby rendering the decisions invalid, is instructive. "The bright line rule is that decisions of zoning authorities should be overturned if they have not been reached fairly and with proper motives. . . . Public office is a trust conferred by public authority for a public purpose. The status of each member of the commission forbids him from placing himself in a position where private interests conflict with his public duty. . . . The law does not require proof that the interested commissioner actually acted wrongfully. The evil lies not in the wrongful act of the commissioner but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights

[12] General Statutes § 22a-42 (c) provides in relevant part: "No member or alternate member of such board or commission shall participate in the hearing or decision of such board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. . . ."

which the property owner must feel assured will always exist . . . .'' (Citations omitted; internal quotation marks omitted.) *Brunswick* v. *Inland Wetlands Commission*, 29 Conn. App. 634, 638–39, 617 A.2d 466 (1992). ''The test is not whether the personal interest does conflict but whether it reasonably might conflict.'' (Internal quotation marks omitted.) *Nazarko* v. *Conservation Commission*, 50 Conn. App. 548, 552, 717 A.2d 850, cert. denied, 247 Conn. 940, 723 A.2d 318 (1998).

It can hardly be disputed that Hillman had a personal interest in the plaintiff's application.[13] He recused himself from participating as a commission member at the beginning of the public hearing but retained his ''right to speak as an expert witness against [the] application.'' As soon as Hillman began commenting as a member of the audience at the public hearing, counsel for the plaintiff objected to his participation. The chairperson indicated that she would allow him to give expert testimony. Hillman then proceeded to voice his opposition to the application through ''extensive testimony'' and the submission of various exhibits. It is apparent that the commission relied on his testimony because he was referenced in the decision to deny the certificate of appropriateness.

In its memorandum of decision, the court stated: ''My reading of . . . Hillman's testimony leads me to conclude that it would have been very difficult for the other commissioners not to have been unfairly influenced by his testimony. It is unlikely that the other commissioners were able to give the testimony of the plaintiff's expert witnesses the same consideration that they gave to the testimony of their fellow commissioner, Commissioner Hillman. It is not simply that . . . Hillman

[13] We note that Hillman participated and voted as a commission member in several previous meetings and hearings held between May and December, 2003, involving the plaintiff's applications for permission to make a variety of exterior changes to this same property, including the removal of the door and portico.

opposed the application. It is that he placed his professional reputation at stake in fervent opposition to the application. It would have been very uncomfortable for the other commissioners to have approved the application and then [to have] continued to work with . . . Hillman as members of the same deliberative body."

The commission argues that the record does not reflect that any commissioner was "unduly influenced" by Hillman's testimony or that Hillman "had either collegial or other control over the commission." That is not the test, however, to determine whether a personal interest conflicts with public duty. As we previously noted, "[t]he test is not whether the personal interest does conflict but whether it *reasonably might* conflict." (Emphasis added; internal quotation marks omitted.) *Nazarko* v. *Conservation Commission*, supra, 50 Conn. App. 552. The persuasiveness of his testimony in influencing his fellow commissioners need not be known. "The evil lies in its presence to any degree. . . . However fair [the] proceedings may, in actuality, have been, it would be difficult if not impossible to satisfy [the individuals appealing from the commission's decision] that they had received a fair and impartial hearing." *Low* v. *Madison*, supra, 135 Conn. 9–10.

In the present case, it is apparent that the commission relied, at least to some extent, on Hillman's testimony because the commission incorporated some of his testimony into the denial of the plaintiff's application. "Zoning restrictions limit the individual's free use of his real estate in the interest of the general public good. The administration of power of that nature . . . demands the highest public confidence." Id., 9. Hillman's conduct undermined that confidence, and it deprived the plaintiff of her right to a fair and impartial hearing.

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT E. MARTIN, JR. *v.* TOWN OF WESTPORT (AC 28524)

Flynn, C. J., and Lavine and Beach, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, the allegedly wrongful termination of his employment with the defendant town, alleging that the defendant had discriminated against him in violation of statute (§ 31-290a) when the defendant terminated his employment after he filed a workers' compensation claim. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion for summary judgment on counts one and two of the complaint, which alleged violations of § 31-290a, there having been no genuine issue of material fact that the defendant terminated the plaintiff's employment because he could no longer work as a master mechanic and not for a discriminatory reason: in granting the motion for summary judgment, the trial court did not weigh the evidence but, rather, reviewed it, as it was required to do, in determining whether the motion should be granted, and it properly determined that there was no genuine issue of material fact concerning the lack of a causal connection between the defendant's having awarded the plaintiff a disability pension, his work-related injury and the exercise of his rights under the workers' compensation laws; moreover, the plaintiff, who is African-American, failed to present evidence demonstrating a genuine issue of material fact concerning his claims that he was treated differently from his white coworkers and that a supervisor had assigned duties that aggravated his injury.
2. There was no merit to the plaintiff's claim that the trial court improperly determined that the count alleging negligent and intentional infliction of emotional distress by the defendant's agents and employees was barred by governmental immunity.

Argued February 25—officially released July 1, 2008

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful termination of the plaintiff's employment, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Tobin*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ikechukwu Umeugo, for the appellant (plaintiff).

Michael J. Rose, with whom were *Adrienne R. DeLucca*, and, on the brief, *Johanna G. Zelman*, for the appellee (defendant).

Opinion

LAVINE, J. This appeal concerns the trial court's granting of a motion for summary judgment filed by the defendant, the town of Westport, in an action in which the plaintiff, Robert E. Martin, Jr., alleged that the defendant discriminated against him in violation of General Statutes § 31-290a.[1] Specifically, the plaintiff alleges that the defendant improperly terminated his employment after he was injured during the course of his employment and filed a workers' compensation claim and that the defendant's agents or employees intentionally and negligently inflicted emotional distress on him. On appeal, the plaintiff claims that in granting the motion for summary judgment, the court improperly (1) weighed the evidence as to his allegations under § 31-290a, rather than limiting its decision to whether there were genuine issues of material fact, and (2) determined that governmental immunity barred his emotional distress claims. We affirm the judgment of the trial court.

The plaintiff commenced his three count action in December, 2004. In count one, the plaintiff alleged that the defendant, through its agents and employees, violated § 31-290a by discriminating against him on the

[1] General Statutes § 31-290a, entitled "Discharge or discrimination prohibited. Right of action," provides in relevant part: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

basis of his work-related injury. In count two, the plaintiff alleged that the defendant, through its agents and employees, discriminated against him because he filed a claim for workers' compensation benefits pursuant to § 31-290a.[2] In count three, the plaintiff alleged that the conduct of the defendant's agents and employees was extreme and outrageous and resulted in negligent and intentional infliction of emotional distress. In response, the defendant alleged several special defenses as to each count.

The plaintiff's claims are predicated on the following facts as alleged in his complaint. The defendant employed the plaintiff as a mechanic in 1984 and later, for fourteen years, as a master mechanic. The plaintiff was the only African-American male employed by the defendant as a master mechanic in the defendant's department of public works. The complaint also alleged that the defendant is a municipal corporation that regularly employs more than fifteen persons. At all times relevant, Stephen J. Edwards was the director of public works.

On March 18, 2002, the plaintiff injured his back in the course of his employment and sought treatment for his injury. The plaintiff's treating physicians, Anthony LaMarca and Nicholas Polifroni, orthopedic surgeons, placed the plaintiff on light duty from 2003 until August, 2004. On April 8, 2003, Polifroni opined that the plaintiff had a 5 percent permanent partial disability of his back

[2] The court noted that in count one, the plaintiff alleged that the defendant discriminated against him in violation of § 31-290a because he sustained a work-related injury. In count two, the plaintiff alleged that the defendant discriminated against him in violation of § 31-290a because he filed a claim for workers' compensation benefits. Because the plaintiff failed to demonstrate how the allegations of count one and count two were different, the court analyzed the claims together. The plaintiff has not challenged the court's decision on that basis. We likewise will consider the allegations in counts one and two together.

and that he had reached maximum medical improvement. The complaint further alleged that the defendant began to mistreat him and place certain conditions on him on the basis of his March 18, 2002 work-related injury. The plaintiff returned to work several times, and the defendant sent him home, despite the plaintiff's having obtained a physician's permission to work. Edwards refused to let the plaintiff perform light duty assignments as permitted by his treating physician.

The plaintiff also alleged that on April 8, 2003, he was able to return to his employment without any restrictions. He alleged that due to his disability or work-related injury, the defendant deprived him of certain privileges that were available to his colleagues, such as permitting him to work with his disability or work-related injury. The plaintiff alleged that he complained about the discriminatory practices of his colleagues but that the defendant did nothing to remedy the situation and violated the duty it owed the plaintiff.

On August 10, 2004, the defendant informed the plaintiff that it had awarded him a disability pension, as the result of his March 18, 2002 back injury, effective September 1, 2004. According to the plaintiff, the defendant's actions against him were extreme and outrageous and created an unreasonable risk of causing him emotional distress. Moreover, the plaintiff alleged that the defendant intended, knew or recklessly disregarded the fact that its extreme and outrageous conduct caused the plaintiff to suffer mental, physical and emotional harm, as well as injury to his self-esteem and sense of self-worth.

The plaintiff alleged that as a direct and proximate result of the defendant's acts and those of its agents and employees, he suffered injury to his physical health, good reputation, humiliation, anguish, embarrassment, mortification, outrage, lost wages and work benefits,

such as vacation, sick and personal time, salary increases and pension benefits. The plaintiff alleged that the defendant's acts were oppressive and malicious, entitling him to an award of punitive damages.

In March, 2006, the defendant filed a motion for summary judgment. In its motion, the defendant claimed that there were no genuine issues of material fact and that it was entitled to summary judgment on the grounds that (1) there was no causal connection between the plaintiff's exercising his right to workers' compensation benefits and his receiving a disability pension, (2) the defendant was entitled to governmental immunity for claims of intentional infliction of emotional distress and (3) the plaintiff's claim for negligent infliction of emotional distress failed because the plaintiff's employment was not terminated because he was awarded a disability pension. The defendant supported its motion for summary judgment with copies of medical records from the plaintiff's treating physicians, medical reports issued pursuant to three independent medical examinations, deposition testimony and an affidavit from Edwards and Scott Sullivan, the defendant's highway superintendent.

The plaintiff objected to the motion for summary judgment, arguing that (1) the defendant's awarding him a disability pension violated § 31-290a because it was based on his back injury of March 18, 2002, (2) the defendant assigned him tasks that aggravated his injury, (3) he returned to work capable of doing his job, but the defendant refused to let him do so, (4) the awarding of his disability pension was a case of retaliatory discharge, (5) other employees who sustained injuries were treated differently, and (6) the defendant's conduct was extreme and outrageous. The plaintiff attached his affidavit, some medical records and correspondence to his objection. The defendant responded to the plaintiff's objection in a memorandum of law,

arguing that the evidence produced by the plaintiff constituted legal conclusions and did not raise genuine issues of material fact.

The court granted the motion for summary judgment in a memorandum of decision on January 17, 2007, and rendered judgment thereon. With respect to the first two counts of the complaint alleging discrimination on the basis of the plaintiff's injury and workers' compensation claim, the court found that there was no dispute that the plaintiff had engaged in a protected activity and that the defendant's awarding the plaintiff a disability pension terminated his employment. The court also concluded that the plaintiff failed to present any facts that created a genuine issue of material fact as to the causal relationship between his injury and workers' compensation claim and the defendant's awarding him a disability pension. The plaintiff failed to offer any evidence that the defendant had awarded him a disability pension for any reason other than that it could no longer afford to pay him for work he could not perform. Although the plaintiff claimed that the defendant treated him differently from other employees who had suffered work-related injuries, he failed to provide any evidence to substantiate his claim. The court therefore concluded that there were no genuine issues of material fact as to counts one and two and that the defendant was entitled to summary judgment.

As to the allegations of count three, the court concluded, citing *Pane* v. *Danbury*, 267 Conn. 669, 684–86, 841 A.2d 684 (2004), that the defendant was immune from liability for the alleged intentional infliction of emotional distress by its employees. As to the plaintiff's claims of negligent infliction of emotional distress, the court concluded that a municipality cannot be sued directly for common-law negligence and that the plaintiff failed to allege any statute that would abrogate the common law. The defendant, therefore, was entitled to

summary judgment. The court granted the defendant's motion for summary judgment, and this appeal followed.

This court's review of a trial court's granting of a motion for summary judgment is plenary in nature. See *Reardon* v. *Windswept Farm, LLC*, 280 Conn. 153, 158, 905 A.2d 1156 (2006). Our task is to determine "whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Pepitone* v. *Serman*, 69 Conn. App. 614, 618, 794 A.2d 1136 (2002). "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 moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Kinney* v. *State*, 285 Conn. 700, 709, 941 A.2d 907 (2008). "The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Reardon* v. *Windswept Farm, LLC*, supra, 158.

I

The plaintiff claims that the court improperly granted the defendant's motion for summary judgment as to his § 31-290a claims because the court weighed the evidence rather than deciding whether there were genuine issues of material fact. We disagree. Our review of the record discloses that the court, in its memorandum of decision, did not weigh the evidence but distinguished

the character and quality of the alleged evidence produced by the parties.

"Claims of employment discrimination are evaluated under the burden shifting analysis set forth in *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53–54, 578 A.2d 1054 (1990). . . . Section 31-290a (a) prohibits an employer from discharging or otherwise discriminating against an employee because the employee had filed a claim for workers' compensation benefits or otherwise exercised her rights under the act. . . . The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. . . . In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination. . . . If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. . . . The plaintiff then must satisfy her burden of persuading the factfinder that she was the victim of discrimination either directly by persuading the [factfinder] . . . that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Citations omitted; internal quotation marks omitted.) *Moran* v. *Media News Group, Inc.*, 100 Conn. App. 485, 493–94, 918 A.2d 921 (2007).

"To establish a prima facie case of discrimination under § 31-290a, the plaintiff must show that she was exercising a right afforded her under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] and that the defendant discriminated against her for exercising that right. . . . [T]he plaintiff must show

a casual connection between exercising her rights under the act and the alleged discrimination she suffered. Implicit in this requirement is a showing that the defendant knew or was otherwise aware that the plaintiff had exercised her rights under the act. . . . [T]o establish [a] prima facie case of discrimination, the plaintiff must first present sufficient evidence . . . that is, evidence sufficient to permit a rational trier of fact to find [1] that she engaged in protected [activity] . . . [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action . . . ." (Citations omitted; internal quotation marks omitted.) *Moran* v. *Media News Group, Inc.*, supra, 100 Conn. App. 494–95.

Here, the court determined that there was no genuine issue of material fact that the plaintiff had alleged a prima facie case of discrimination. The parties agree that the plaintiff had engaged in a protected activity by filing a claim for workers' compensation benefits for his March 18, 2002 injury and that the defendant was aware of it. The court also determined, as a matter of law, that there was no dispute that the plaintiff suffered a materially adverse change in the terms and conditions of his employment. See *Sanders* v. *New York City Human Resources Administration*, 361 F.3d 749, 755 (2d Cir. 2004) ("adverse employment action [is defined] as a materially adverse change in the terms and conditions of employment. . . . To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly

diminished material responsibilities, or other indices . . . unique to a particular situation." [Citations omitted; internal quotation marks omitted.]).[3] There is no dispute that the plaintiff made out a prima facie case. The court's decision to grant the motion for summary judgment turned on its conclusion that there were no genuine issues of material fact that a causal connection between the plaintiff's exercising his right to workers' compensation benefits and his disability pension did not exist. That decision concerns the third step of the *Ford* analysis.

"A causal connection may be established either *indirectly* by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or *directly* through evidence of retaliatory animus directed against a plaintiff by a defendant." (Emphasis in original; internal quotation marks omitted.) *Johnson* v. *Palma*, 931 F.2d 203, 207 (2d Cir. 1991).

In an effort to overcome the inference of discrimination implied by the awarding of the disability pension, the defendant presented evidence that more than two years after the March 18, 2002 work-related injury, the plaintiff still was unable to perform the duties of a master mechanic without restrictions. During that period of time, the defendant provided the plaintiff with

[3] In its memorandum of law in support of its motion for summary judgment, the defendant maintained that it had not terminated the plaintiff's employment. There was no factual dispute, however, that the defendant had awarded the plaintiff a disability pension. "Section 31-290a (a) contains no requirement that any particular word be used in the process of terminating an employee's employment. Any words or conduct that an employee would reasonably understand to signify that his employment was terminated are sufficient." *Loftus* v. *Vincent*, 49 Conn. App. 66, 69, 713 A.2d 892 (1998). The court concluded that the plaintiff reasonably could have understood that his employment had been terminated. On appeal, the defendant does not challenge the court's legal conclusion.

light duty assignments, and the plaintiff continued to receive workers' compensation benefits. After two years, however, the defendant could no longer justify the expense of continuing to pay the plaintiff for work that he could no longer perform.[4] The court ultimately concluded, after reciting the plaintiff's alleged claims of discrimination and the reasons given in his brief, that he had failed to raise any genuine issue of material fact that the defendant's reason for awarding him a disability pension was anything other than the one proffered by the defendant. To support its conclusion that the defendant had terminated the plaintiff's employment for a legitimate, nondiscriminatory reason, the court quoted this court's decision in *Kopacz* v. *Day Kimball Hospital of Windham County, Inc.*, 64 Conn. App. 263, 779 A.2d 862 (2001). Section "31-290a . . . does not require an employer to retain an employee unable to perform his or her work simply because that inability resulted from a work related injury or illness. . . . Businesses would suffer significant losses if they were prevented from filling employment vacancies after the lapse of a reasonable period of time." (Citations omitted; internal quotation marks omitted.) Id., 269.

On appeal, the plaintiff claims that there is a genuine issue of material fact as to whether there is a causal connection between the exercise of his right to workers' compensation benefits and the termination of his employment. To establish the necessary dispute as to material facts, the plaintiff suggested that (1) he was treated in a manner different from that of his coworkers,

[4] The defendant presented the court with the minutes of its public works pension board meeting of August 10, 2004, that stated in part that the defendant "initiated [the plaintiff's] disability retirement consideration based upon the determination by four (4) physicians that, as a result of his injuries, [the plaintiff] could not perform the duties of his position and would not be able to do so in the future. [The] applicable provision of the collective bargaining agreement with [the plaintiff's] union was Article IX Section 3. INJURY LEAVE UP TO MAXIMUM RECOVERY." The board approved "the disability retirement of [the plaintiff] to retire effective September 1, 2004 with a monthly retirement benefit of $2273.82 . . . ."

Dale Wehmhoff, Douglas Meyers and Joe Bottone, who are white and who were provided light duty assignments; (2) Edwards assigned him work and equipment that aggravated his shoulder injury; (3) the defendant failed to pay him for time he worked in August, 2002; (4) Edwards sent him home despite the plaintiff's having a note from his physician that he was able to work light duty; and (5) the defendant deprived him of certain privileges that were available to his coworkers, i.e., permitting him to work with his disability.[5]

"It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact." (Internal quotation marks omitted.) *McKinney* v. *Chapman*, 103 Conn. App. 446, 451, 929 A.2d 355, cert. denied, 284 Conn. 928, 934 A.2d 243 (2007). "Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material

[5] In his brief, the plaintiff does no more than claim that the defendant failed to pay him for time worked in August, 2002, Edwards sent him home when the plaintiff had a physician's note that he could work and the defendant deprived him of certain privileges. The plaintiff, however, has failed to provide any analysis of or evidence to support those claims. Without legal analysis with references to law, we deem the plaintiff's claims abandoned. See *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 295, 880 A.2d 999, cert. denied, 276 Conn. 910, 886 A.2d 424 (2005).

fact capable of defeating summary judgment." (Citation omitted.) *Wadia Enterprises, Inc.* v. *Hirschfeld*, 27 Conn. App. 162, 170, 604 A.2d 1339, aff'd, 224 Conn. 240, 618 A.2d 506 (1992).

With regard to the plaintiff's assertion that he was treated differently from his white coworkers, the court found that he failed to provide details of the coworkers' duties, injuries or restrictions. The defendant, however, by means of an affidavit from Edwards, presented details of the several injuries that the plaintiff sustained during the course of his employment with the defendant[6] and those of Wehmhoff, Meyers and Bot-

[6] Edwards' affidavit set forth the following work-related injuries the plaintiff sustained:

"6. In 1985, [the plaintiff] sustained a shoulder injury; he required [ten] days to rehabilitate the injury;

"7. In 1987, [the plaintiff] injured his back; recovery from this back injury required two weeks;

"8. An injury to [the plaintiff's] shoulder on June 6, 1995 required extensive rehabilitation that did not result in a full return to work until February 1996;

"9. [The plaintiff] filed Workers' Compensation claims for all these injuries;

"10. On December 20, 1999, [the plaintiff] injured his wrist while working on a vehicle;

"11. On January 10, 2000 he returned to work under a light duty restriction but continued wrist pain forced him off the job on February 3, 2000;

"12. [The plaintiff] again underwent extensive therapy and was returned to work for four hours per day for a light duty assignment on August 15, 2000;

"13. [The plaintiff] continued to work half-day/light duty until December 21, 2000 when he was forced to discontinue even the light duty assignment due to excessive pain;

"14. [The plaintiff's] doctor issued a maximum medical improvement rating effective December 13, 2000;

"15. Based on this finding, Workers' Compensation issued a partial Permanent Disability for this wrist injury around this time;

"16. In mid-February 2001 when the Workers' Compensation payments were discontinued and the [defendant] discontinued salary to [the plaintiff], he returned to his doctor and was given a release for light duty assignment, [eight] hours per day;

"17. The [defendant] provided a [ten]-week light duty assignment until May 1, 2001. At this time, [the plaintiff's] treating physician still did not release him for an unrestricted assignment;

"18. The [defendant] requested that [the plaintiff] undergo three independent physical examinations to see if he could perform the essential functions of his position. These were completed during September 2001 and each identified [the plaintiff] fit for work. The [defendant] further sent [the plaintiff] for a Functional Capacity Examination, which also supported his return to full duty. [The plaintiff] returned to full duty with no restrictions on October 15, 2001;

"19. [The plaintiff] worked for five months and on March 21, 2002 injured his back while climbing down off of a sweeper;

tone.[7] Edwards attested that there "are nine more

"20. Again [the plaintiff] filed a claim for Workers' Compensation. After seven weeks of therapy and rehabilitation, [the plaintiff] was released for light duty assignments on May 6, 2002 but no light duty assignments were available with the [defendant] until August 21, 2002;

"21. [The plaintiff] reported to the light duty assignment on September 10, 2002 and on September 12, 2002 reported an aggravation of his prior 1985 shoulder and 2002 back injury and was released from work by his physician, Dr. LaMarca, with acute low back pain.

"22. [The plaintiff] was again cleared for light duty with restrictions on October 23, 2002 by Dr. Polifroni;

"23. The [defendant] had no light duty assignments until November 12, 2002;

"24. [The plaintiff] worked for the next two months (November 12, 2002 through January 28, 2003) on a light duty assignment;

"25. On January 28, 2003 [the plaintiff] returned to his physician, Dr. Polifroni, and was released from work until further reevaluation;

"26. On February 11, 2003, [the plaintiff] was again cleared for light duty but no light duty assignment was identified until February 25, 2003;

"27. For the next five weeks, [the plaintiff] performed his light duty assignments. On April 8, 2003, Dr. Polifroni returned [the plaintiff] to full duty;

"28. A little more than a month later (May 20, 2003), [the plaintiff] re-injured his shoulder and was released from work until further evaluation;

"29. On June 2, 2003, Dr. LaMarca cleared [the plaintiff] for a light duty assignment and the [defendant] found an assignment;

"30. On August 18, 2003 [the plaintiff] aggravated a prior injury and was not capable of work until he was reevaluated on September 29, 2003, at which time he was returned to a light duty assignment. A re-injury of his prior back and shoulder injuries while performing a light duty assignment on October 30, 2003 again required Dr. LaMarca to request that [the plaintiff] be given several days off due to the injury;

"31. On November 17, 2003 Dr. LaMarca again cleared [the plaintiff] for a light duty assignment;

"32. Based on the fact that [the plaintiff] had re-injured his back and shoulder a number of times while on light duty assignments, and the department had provided in excess of 175 days of light duty assignments for him over the past two years, the [defendant] could provide no further light duty assignments for [the plaintiff]. At that time, the [defendant] could not accommodate [the plaintiff's] requirement for a light duty assignment limited to office work within the garage;

"33. From November 17, 2003 through May 20, 2004, [the plaintiff] was on continued light duty from Dr. LaMarca. The [defendant] had no light duty assignments for [the plaintiff] during this time;

"34. [The plaintiff] continued to receive Workers' Compensation benefits during this time;

"35. I made the recommendation that [the plaintiff] be given a disability pension based on [the plaintiff's] prior two years of injuries. This recommendation was also based upon the doctor's reports I had at the time . . . ."

[7] In his affidavit, Edwards attested to the injuries of the plaintiff's coworkers. Bottone is an equipment operator who had knee surgery on March 27, 1997, as a result of a work-related injury. He was out of work for five weeks and returned without restrictions. Wehmhoff is an equipment operator who injured his knee on February 10, 1997, and underwent surgery for the same

employees in the building maintenance division . . . than . . . in the equipment division. . . . The different functions performed by maintenance or highway divisions provide greater opportunities for long-term, light duty assignments than in the [two]-person equipment maintenance division . . . .'' The plaintiff presented no evidence to challenge the evidence presented in Edwards' affidavit. The court concluded that the plaintiff failed to carry his burden to demonstrate the existence of a genuine issue of material fact.

As to the allegation that Edwards once assigned him duties that aggravated his injury, in a deposition the plaintiff testified that he was referring to the shoulder and arm injury he sustained prior to his back injury. The court noted that this action arose from an injury to the plaintiff's back. The court also noted that the plaintiff had litigated the injuries related to his arm and shoulder in a federal civil rights action. See *Martin* v. *Westport*, 329 F. Sup. 2d 318 (D. Conn. 2004) (alleging claims arising under title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1983, Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and state statutory and common-law claims). During his deposition, the plaintiff could not recall when Edwards assigned him the tasks of which he complains.[8] The court properly noted that ''[t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether

on March 12, 1997. Wehmhoff returned to unrestricted work on May 23, 1997, fifteen weeks after surgery. Meyers is a building maintenance mechanic. As the result of a back injury, Meyers had a lifting restriction of forty pounds and was accommodated on a light duty assignment covering for a custodian who was ill for a period of ten months.

[8] In his appellate brief, the plaintiff claims that there is a genuine issue of material fact as to his claim that the defendant assigned him to perform tasks with equipment that would aggravate his injuries. He contends that the acts of the defendant's agents or employees took place during a critical time ''in which the defendant terminated'' the plaintiff's employment, yet he provides no date on which the alleged acts took place.

they are contained in a complaint or a brief." (Citations omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244–45, 659 A.2d 1226, cert. denied, 235 Conn. 915, 665 A.2d 609 (1995).

The plaintiff also contends that with regard to the medical records submitted by the parties, the court made a decision to believe the evidence submitted by the defendant rather than the plaintiff's evidence. Before beginning our analysis of this contention, it is important to note that in his brief, the plaintiff has failed to distinguish between what he believes to have happened and evidence that supports his version of the events. The defendant, however, has referred us to specific documents and statements in evidence to support its reason for terminating the plaintiff's employment. The plaintiff has failed to draw our attention to facts in a document or testimony that counter the facts relied on by the defendant.

The essence of the plaintiff's claim is that the defendant discriminated against him because he has a 5 percent disability of his back. To support this claim, he relies on the fact that none of the three physicians retained by the defendant to evaluate him stated literally that he is not able to perform the duties of a master mechanic due to his back injury. The plaintiff quoted portions of the reports submitted by the three physicians. Kenneth M. Kramer, an orthopedic surgeon, stated in part in his report of June 22, 2004, that the plaintiff "should be on permanent restrictions with regard to the . . . injury, consisting of a [thirty-five] pound lifting restriction with no repetitive lifting or bending." The July 7, 2004 report of Eric M. Garver, an orthopedic surgeon, provides in part that the plaintiff "does have a prior history, many years ago, with his right arm as having had an ulnar nerve transposition in the right elbow following a work related injury, *however, the* [*plaintiff*] *had returned to work. . . . At this*

point it appears that his [*low*] *back is giving him less of a problem.*" (Emphasis in original.) The plaintiff quoted from a portion of a report dated July 13, 2004, prepared by a rehabilitation physician, Gary D. Solomon, that "currently, [the plaintiff] states that he is virtually pain free except for occasional recurrences of back pain, usually attributed to cold weather. He currently states that he is [able] to bend, twist, turn and lift without recurrence of pain complaints." Those quotations, however, do not place the physicians' conclusions in proper context.

The defendant made the physicians' complete reports available for the court to review, in addition to reports from Polifroni. On the basis of its review of the medical records, the court found that on May 20, 2004, Polifroni stated that the plaintiff "may have difficulty going back to any job that requires physical activities . . . ."[9] In an August 9, 2004 report, Polifroni stated that the plaintiff "should limit his strenuous activities because of his back."[10] Kramer stated that the plaintiff "should be on permanent restrictions . . . ."[11] Garver stated that the

[9] The statement is taken from the "impression" portion of Polifroni's progress report of May 20, 2004, which stated in its entirety: "Persistent lumbar sprain. I think at this time his injuries are permanent. I think he may have difficulty going back to any job that requires physical activities though he was doing light work at his previous job without much intervention with his lower back but his injuries at this time are probably permanent and he sustained a lumbar sprain. I do not expect much improvement."

[10] Polifroni's complete August 9, 2004 note states that "[i]n reference to my note of May 20, 2004, I did not state that [the plaintiff] was unable to work. I expressed my thoughts that he should limit his strenuous activities because of his back pain. He is capable of work and has been working this past year."

[11] Kramer's statement came from the portion of his report labeled "review of symptoms," which stated in part: "My impression is of persistence of the chronic lumbar strain injury sustained in the work incident of 3/18/02, which at this point has indeed clinically plateaued at [maximum medical improvement], with no additional formal treatment measures indicated or anticipated. In accordance with [America Medical Association] [g]uidelines, he has a DRE category 2, 5 [percent] permanent partial impairment on the basis of the chronic lumbar strain, which in medical probability is directly

plaintiff "is able to work light duty. He would be unable to do heavy lifting or repetitively use the right upper extremity."[12] In his report of July 13, 2004, Solomon stated, in part, that the plaintiff "is not capable of performing full duty work as a master mechanic without restrictions . . . ."[13] The plaintiff has not brought to

causally related to the work incident of 3/18/02. He should be on permanent restrictions with regard to [this] injury, consisting of a [thirty-five] pound lifting restriction with no repetitive lifting or bending. As a spinal specialist, not caring for shoulder problems, any analogous assessments regarding the shoulder must be deferred to the specialists who are caring for this condition."

[12] The entire discussion portion of Garver's report states: "At this point I believe the patient is able to work light duty. He would be unable to do heavy lifting or repetitively use the right upper extremity. It is certainly reasonable to proceed as Dr. Gross has suggested with carpal tunnel release of the right hand inasmuch as this is a relatively minimal procedure. Whether the patient should have a re-exploration of his right elbow at the same time is an interesting question. On one hand he is certainly having significant difficulty and it is possible this may give him some improvement if there is entrapped scar found at the time of surgery. On the other hand since this has been persistent for a long period of time I am somewhat pessimistic that this will lead to a great deal of improvement at the elbow. The patient is having no active therapy at this time, which I find strange. Certainly the patient should have some range of motion and strengthening for the right upper extremity especially including the shoulder. Therefore, I believe the patient is disabled with respect to his right upper extremity, however, the patient is able to work selected light duty at this time. It is reasonable to proceed with at least a portion of the recommended surgical procedures."

[13] The impression portion of Solomon's independent medical report states in full: "[The plaintiff] presents with a history of multiple injuries to his lower back, right shoulder and right upper extremity following a work related injury which occurred on March 18, 2002 when he slipped on a step while climbing onto a street sweeper.

"[The plaintiff] further sustained an aggravation of his right upper extremity injuries when he sustained a [second] work related injury while fixing a brake line in 2003.

"He also presents with evidence of carpal tunnel syndrome, which has been attributed to repetitive trauma from his work as a master mechanic.

"I have also reviewed the job requirements of a master mechanic as outlined by the Department of Public Works, Equipment Maintenance Division, Town of Westport.

"It is my opinion that [the plaintiff] is not capable of performing full duty work as a master mechanic without restrictions due to persistent injuries to his right shoulder and right upper extremity which include multiple

the attention of the trial court or this court an opinion from any physician that he is capable of performing all of the duties of a master mechanic despite his multiple injuries. There is, therefore, no genuine issue of material fact as to the plaintiff's inability to perform the job for which the defendant had engaged his services.

The plaintiff relies on a handwritten return to work noted signed by Stewart C. Gross, the physician who treated the plaintiff for the shoulder injury he sustained in 1999. On the note, dated "8-8-04," Gross marked an X in the box next to the language "may return to regular duty work on" and added "10/15/01 & is still in effect as of 8-6-04." When he was deposed, Gross testified that the plaintiff never told him that he, the plaintiff, had sustained a lower back injury.[14]

On the basis of our review of the court's memorandum of decision and the documents submitted to the court for its review when considering the defendant's motion for summary judgment, we conclude that the court did not weigh the evidence but, rather, reviewed it, as it was required to do, in deciding the motion for summary judgment. We also conclude that the court did not improperly find that there is no genuine issue of material fact concerning the lack of a causal connection between the defendant's having awarded the plaintiff

tendinitis as well as ulnar and median nerve neuropathies. Specifically, [the plaintiff] would have difficulty complying with the job requirements as indicated by the Department of Public Works, which include: 'Capable of the complete diagnosis, disassembly, overhaul, repair and reassembly of any mechanical, electrical or other breakdown or failure of a motor, truck or piece of construction equipment.

"Due to the chronicity of [the plaintiff's] injuries, I believe that they are permanent in nature."

[14] The plaintiff disclosed Gross as an expert who would testify on his behalf at trial. During his deposition, Gross testified that he did not know that he had been disclosed as an expert. He also testified that his medical specialty is the treatment of hands and arms. He does not treat back injuries. Gross testified that he was not prepared to testify as to the status of the plaintiff's back injury as of August 6, 2004.

a disability pension and his work-related injury of March 18, 2002, and the exercise of his rights under our workers' compensation laws. In other words, there is no genuine issue of material fact that the defendant terminated the plaintiff's employment because he could not work as a master mechanic and not for a discriminatory reason. For those reasons, the court properly rendered summary judgment in favor of the defendant on counts one and two of the plaintiff's complaint.

II

The plaintiff's third claim is that the court improperly determined that governmental immunity barred his claims of negligent and intentional infliction of emotional distress. This claim lacks merit.

"The general rule is that governments and their agents are immune from liability for acts conducted in performance of their official duties. The common-law doctrine of governmental immunity has been statutorily enacted and is now largely codified in General Statutes § 52-557n." (Internal quotation marks omitted.) *Durrant* v. *Board of Education*, 96 Conn. App. 456, 474, 900 A.2d 608 (2006) (*Schaller*, *J.*, dissenting), rev'd on other grounds, 284 Conn. 91, 931 A.2d 859 (2007). Section 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct . . . ."

In ruling on the allegations of negligent and intentional infliction of emotional distress, the court properly concluded that a municipality may not be held liable for the intentional acts of its employees pursuant to § 52-557n (a) (2) (A), including intentional infliction of emotional distress. See *Pane* v. *Danbury*, supra, 267 Conn. 684–86.

The court found that the plaintiff had not alleged any statute that would abrogate the defendant's governmental immunity for negligent infliction of emotional distress. On appeal, the plaintiff argues that he alleges Edwards' name in his complaint,[15] which is sufficient to invoke General Statutes § 7-465. In support of this contention, the plaintiff relies on *Williams* v. *New Haven*, 243 Conn. 763, 707 A.2d 1251 (1998). We disagree that *Williams* supports the plaintiff's position. In *Williams*, the plaintiffs brought an action against the city of New Haven but "did not name any agent, employee or officer of the municipality as a *defendant* . . . ." (Emphasis added.) Id., 765. The plaintiffs also did not allege any statute that abrogates governmental immunity or seek indemnification pursuant to § 7-465. Id., 769. Our Supreme Court held that the plaintiffs could not prevail. Id., 765. On procedural grounds, this case is indistinguishable from *Williams*, and the court properly granted the motion for summary judgment as to the plaintiff's claims for negligent infliction of emotional distress.

The plaintiff further argues that he alleged a violation of § 31-290a and that the defendant subjected itself to the requirements of our workers' compensation laws. Our workers' compensation scheme provides a cause of action against an employer who discriminates against an employee because the employee has filed a workers' compensation claim. It does not create liability for all

[15] Edwards is not a defendant in this action.

torts and does not create a statutory basis for the abrogation of governmental immunity as to other torts. Moreover, during oral argument, counsel for the plaintiff conceded that damages for emotional distress may be alleged in a cause of action brought pursuant § 31-290a. The plaintiff's claims for damages for emotional distress, therefore, were encompassed in counts one and two.

The judgment is affirmed.

In this opinion the other judges concurred.

PATRICK SOLANO *v.* SARA CALEGARI
(AC 28420)

Flynn, C. J., and DiPentima and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, his sister, for breach of contract, conversion and fraudulent misrepresentation in connection with the defendant's alleged failure to repay money he had loaned to her. The trial court granted the defendant's motion to dismiss on the ground that the plaintiff had failed to obtain jurisdiction over her pursuant to the statute (§ 52-59b) concerning long arm jurisdiction and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly considered the defendant's motion to dismiss without first vacating a judgment of default for failure to plead that had been entered against the defendant by the Superior Court clerk's office; the plaintiff's claim was premised on his mistaken belief that the trial court acted on a motion to dismiss filed by the defendant after the entry of the default, the record clearly having showed that the trial court was acting on a motion to dismiss filed by the defendant prior to the entry of the default, rather than a second motion to dismiss she had filed after the entry of the default, and the plaintiff provided no argument in his brief as to whether the trial court was required to vacate the default judgment prior to ruling on the first motion to dismiss.

2. The plaintiff could not prevail on his claim that the trial court improperly determined that he had failed to prove that the requirements of § 52-59b had been satisfied with respect to the defendant, a nonresident individual: although the discussion of the loan and the request for the

loan took place in Connecticut, those contacts did not amount to a single purposeful business transaction, the nonspecific nature of the trial court's findings and the fact that the plaintiff did not seek an articulation of the trial court's decision did not permit this court properly to analyze the defendant's contacts with this state and, in the absence of the necessary factual findings, it could not be said that the defendant transacted business in this state and was thus subject to long arm jurisdiction; moreover, the plaintiff's claim that long arm jurisdiction existed because the defendant committed a tortious act in this state by making a fraudulent misrepresentation was unavailing, the plaintiff having presented no evidence showing that the defendant's representations were untrue and known by her to be untrue when she made them.

3. This court declined to review the plaintiff's unpreserved claim that the trial court failed to afford him due process when it improperly expanded the scope of its hearing and denied him the right to present evidence; at no point during the hearing did the plaintiff object to the manner in which the hearing was conducted, claim that he was deprived of procedural due process or seek a continuance to permit him additional time to gather evidence pertaining to personal jurisdiction, and he did not request review of his unpreserved constitutional claim pursuant to *State* v. *Golding* (213 Conn. 233) or the plain error doctrine.

4. The plaintiff could not prevail on his claim that the trial court improperly treated the defendant's motion to dismiss as a motion for summary judgment, thereby improperly ruling on the merits of his fraudulent misrepresentation count; the trial court's conclusion that the plaintiff failed to meet his burden of proof was not a ruling on the merits of the fraudulent misrepresentation count but, rather, was a ruling that the plaintiff had not presented facts sufficient to satisfy the statutory jurisdictional requirements.

Argued April 16—officially released July 1, 2008

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant was defaulted for failure to plead; thereafter, the court, *Tobin*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John Timbers, for the appellant (plaintiff).

Sara Calegari, pro se, the appellee (defendant).

Opinion

PELLEGRINO, J. This is an appeal from the judgment of the trial court rendered after the granting of a motion to dismiss, sustaining a claim that the plaintiff, Patrick Solano, failed to obtain jurisdiction over the pro se defendant, Sara Calegari, pursuant to our long arm statute.[1] See General Statutes § 52-59b. On appeal, the plaintiff claims that the court improperly (1) considered the defendant's motion to dismiss without first vacating a prior default judgment that had entered against her, (2) concluded that he had failed to prove that the requirements of our long arm statute were satisfied, (3) failed to afford him procedural due process and (4) ruled on the merits of his complaint.[2] We affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiff filed a three count complaint against his sister, the defendant, seeking to recover moneys that he allegedly had loaned to her and that she had failed to repay (count one), that she had converted to her use (count two) and that she fraudulently had misrepresented that she would repay (count three).

[1] We are mindful in reaching our decision that the defendant represents herself on appeal. "This court has always been solicitous of the rights of pro se litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Although we will not entirely disregard our rules of practice, we do give great latitude to pro se litigants in order that justice may both be done and be seen to be done. . . . For justice to be done, however, any latitude given to pro se litigants cannot interfere with the rights of other parties, nor can we disregard completely our rules of practice." (Citation omitted; internal quotation marks omitted.) *Wasilewski* v. *Machuga*, 92 Conn. App. 341, 342, 885 A.2d 216 (2005).

[2] The plaintiff also claims that the court improperly failed to permit him to introduce evidence pertaining to the merits of his complaint. Because we conclude that the court did not rule on the merits of the plaintiff's complaint, we likewise conclude that the court did not improperly prevent the plaintiff from introducing evidence pertaining to the merits of his complaint.

On February 27, 2006, the defendant, acting pro se, filed a motion to dismiss, claiming that the court lacked jurisdiction over her person.[3] The plaintiff thereafter filed a motion for default for the defendant's failure to plead, and the Superior Court clerk's office, on March 17, 2006, prior to the court's ruling on the motion to dismiss, entered a judgment of default against the defendant. See Practice Book § 17-32. On March 28, 2006, the defendant filed a second motion to dismiss. The plaintiff subsequently filed a claim for a hearing in damages arising from the default judgment.

On December 11, 2006, the court held a hearing on the defendant's first motion to dismiss. On the basis of the evidence presented at that hearing, the court concluded that the plaintiff had failed to establish facts necessary to satisfy the statutory requirements necessary for long arm jurisdiction. The court, accordingly, dismissed the complaint.[4] Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly considered the motion to dismiss because a default

[3] The motion to dismiss originally was assigned and heard before *Hon. William B. Lewis*, judge trial referee, but, because of his untimely death before the matter was adjudicated, it was reassigned to the court, *Tobin*, *J.*

[4] The plaintiff has failed to provide this court with a memorandum of decision or a transcript signed by the trial court setting forth the court's findings of fact and conclusions of law, as required by Practice Book § 64-1. When the record does not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision, "this court frequently has declined to review the claims on appeal because the appellant has failed to provide the court with an adequate record for review." *Connecticut Light & Power Co.* v. *Gilmore*, 89 Conn. App. 164, 171 n.9, 875 A.2d 546, cert. denied, 275 Conn. 906, 882 A.2d 681 (2005). If there is an unsigned transcript on file in connection with an appeal, the claims of error raised by the plaintiff may be reviewed if this court determines that the transcript adequately reveals the basis of the trial court's decision. See id. Because we find that the transcript adequately reveals the basis of the court's decision, we will review the claims of error raised by the plaintiff.

judgment had entered against the defendant.[5] Specifically, the plaintiff argues that the default judgment entered on March 17, 2006, before the defendant filed her March 28, 2006 motion to dismiss, and the court, therefore, could not rule on the motion to dismiss without vacating the default judgment. We are not persuaded.

A simple time line of events is dispositive of this issue. On February 27, 2006, the defendant filed a motion to dismiss (first motion). On March 17, 2006, the Superior Court clerk's office entered a default against the defendant for her failure to plead. The defendant thereafter, on March 28, 2006, filed a second motion to dismiss (second motion), asserting the same grounds for dismissal as stated in her first motion.

The plaintiff's argument is premised entirely on his belief that the court acted on the second motion, which the defendant filed after a default judgment was entered against her. This is not the fact. The record clearly reflects that the court was acting on the first motion, which the defendant had filed prior to the entry of default, rather than the second motion.[6] The plaintiff's

[5] The plaintiff also claims that the defendant's motion to dismiss failed to comply with the rules of practice and had procedural defects. This claim was not raised at trial. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *Ingels* v. *Saldana*, 103 Conn. App. 724, 730, 930 A.2d 774 (2007). "For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Internal quotation marks omitted.) *Gilbert* v. *Beaver Dam Assn. of Stratford, Inc.*, 85 Conn. App. 663, 680, 858 A.2d 860 (2004), cert. denied, 272 Conn. 912, 866 A.2d 1283 (2005); see also Practice Book § 60-5. Accordingly, we decline to address this claim.

[6] The judgment file states in relevant part: "This action, by writ and complaint, claiming damages, came to this court on January 31, 2006 and thence to February 27, 2006 when [the] [d]efendant filed a [m]otion to [d]ismiss and thence to the present time when the parties appeared and were at issue on the [d]efendant's [m]otion to [d]ismiss as on file."

claim, therefore, is premised on a misunderstanding of the court's judgment. Moreover, he has set forth no argument as to whether the court was required to vacate the default judgment prior to ruling on the first motion. Because this issue has not been briefed, we are not obligated to afford it consideration. See *West Haven* v. *Norback*, 263 Conn. 155, 177, 819 A.2d 235 (2003). Accordingly, the plaintiff's claim fails.

II

The plaintiff next claims that the court improperly concluded that he had failed to prove that the requirements of our long arm statute were satisfied. Specifically, the plaintiff asserts that the court's findings showed that the defendant (1) transacted business within this state so as to permit the court to exercise jurisdiction over the breach of contract and conversion counts of his complaint, and (2) committed a tortious act within this state so as to permit the court to exercise jurisdiction over the fraudulent misrepresentation count of his complaint. We disagree.

We note at the outset the scope of our analysis. "When a defendant files a motion to dismiss challenging the court's jurisdiction, a two part inquiry is required. The trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *Knipple* v. *Viking Communications, Ltd.*, 236 Conn. 602, 606, 674 A.2d 426 (1996). "Only if we find the statute to be applicable do we reach the question whether it would offend due process to assert jurisdiction." *Lombard Bros., Inc.* v. *General Asset Management Co.*, 190 Conn. 245, 250, 460 A.2d 481 (1983).

Here, the court went no further than the first inquiry; it found that the plaintiff had failed to prove that the requirements of the long arm statute—§ 52-59b, with respect to nonresident individuals—had been satisfied. The court, therefore, did not reach the issue of whether the exercise of personal jurisdiction over the defendant would violate constitutional principles of due process. Because we agree with the court's determination, we similarly limit our analysis.

The relevant portions of § 52-59b provide that jurisdiction may be exercised over a nonresident individual who "[t]ransacts any business within the state"; General Statutes § 52-59b (a) (1); or "commits a tortious act within the state . . . ." General Statutes § 52-59b (a) (2). In deciding whether the applicable long arm statute authorizes jurisdiction over the defendant, the court generally is limited to the allegations in the complaint; however, "[w]hen issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 56, 459 A.2d 503 (1983).

In the present case, the court held a hearing to determine its jurisdiction. When a hearing is required to determine the court's personal jurisdiction, we engage in a two part inquiry in reviewing the actions of the trial court. Cf. *Gordon* v. *H.N.S. Management Co.*, 272 Conn. 81, 92, 861 A.2d 1160 (2004) (court engages in two part inquiry when reviewing trial court's decision on jurisdiction, which involves mixed question of fact and law). "We determine first whether the facts found by the court were clearly erroneous and then conduct a plenary review of the court's legal conclusions." (Internal quotation marks omitted.) Id., 92–93. Furthermore, when a challenge to the court's jurisdiction is raised by a nonresident individual, the plaintiff must

bear the burden of proving the court's jurisdiction. *Knipple* v. *Viking Communications, Ltd.*, supra, 236 Conn. 607.

In the court's oral decision on the motion to dismiss, it made numerous findings of fact. The court found that the discussion of a loan and the request for a loan took place in Connecticut. The discussion of the loan included the defendant's telling the plaintiff that she intended to keep the loaned funds in her bank account and not to withdraw them. The loaned funds subsequently were transferred between brokerage accounts in New York and were not advanced in Connecticut. The defendant thereafter withdrew the loaned funds from a financial institution outside of Connecticut.

On the basis of our review of the evidence, we cannot say that the court's findings were clearly erroneous. The plaintiff's testimony provided the necessary foundation for the court's factual findings. Accordingly, we now conduct a plenary review of the court's legal conclusions to determine whether the facts found by the court require the conclusion that the plaintiff failed to show that long arm jurisdiction was proper.

A

The plaintiff first claims that long arm jurisdiction exists because the defendant transacted business in this state. See General Statutes § 52-59b (a) (1). Specifically, the plaintiff argues that the court's findings satisfy the "transacts any business" standard necessary for jurisdiction over his causes of action for breach of contract and conversion. We disagree.

The phrase "transacts any business" has been construed by our Supreme Court to embrace a single purposeful business transaction. *Zartolas* v. *Nisenfeld*, 184 Conn. 471, 474, 440 A.2d 179 (1981). In determining

whether the defendant's contacts constitute the transaction of business within this state, "we do not resort to a rigid formula [but] balance considerations of public policy, common sense, and the chronology and geography of the relevant factors." Id., 477.

In the present case, the court's findings do not support the conclusion that the defendant transacted business within this state. Although the discussion of the loan and the request for the loan both took place in Connecticut, we cannot say, on the basis of the record before us, that these contacts amounted to a single purposeful business transaction. The nonspecific nature of the court's findings do not permit us properly to analyze the defendant's contacts with this state or to balance considerations of public policy, common sense or the chronology and geography of the relevant factors. See, e.g., *Ryan* v. *Cerullo*, 282 Conn. 109, 120, 918 A.2d 867 (2007) (New York accountant not subject to jurisdiction in this state under § 52-59b (a) (1) even though he prepared plaintiff's Connecticut tax returns); *Rosenblit* v. *Danaher*, 206 Conn. 125, 138, 140–41, 537 A.2d 145 (1988) (Massachusetts attorney not subject to jurisdiction in this state under § 52-59b (a) (1) even though he had business meeting with plaintiff in Connecticut); *Green* v. *Simmons*, 100 Conn. App. 600, 607–608, 919 A.2d 482 (2007) (mailing of two letters to Connecticut insufficient); *Gaudio* v. *Gaudio*, 23 Conn. App. 287, 299–300, 580 A.2d 1212 (jurisdiction proper when defendant traveled to Connecticut to purchase stock and became sole stockholder of close corporation whose only asset was parcel of commercial real estate in Connecticut), cert. denied, 217 Conn. 803, 584 A.2d 471 (1990); *Hart, Nininger & Campbell Associates, Inc.* v. *Rogers*, 16 Conn. App. 619, 625, 548 A.2d 758 (1988) (jurisdiction proper when nonresident defendants came to plaintiff's principal office in Connecticut to negotiate

and sign individual employment contracts, came to Connecticut to attend quarterly business meetings pertaining to their employment, kept in telephone contact regularly with plaintiff's Connecticut office, filed weekly activity report sheets documenting business transacted on behalf of Connecticut corporation, sent all business account expenses to Connecticut office for payment, and had payroll checks drawn on Connecticut bank and mailed to defendants from Connecticut address); see also *Gerber Trade Finance, Inc.* v. *Davis, Sita & Co., P.A.*, 128 F. Sup. 2d 86, 91–92 (D. Conn. 2001) (jurisdiction proper when Maryland defendant performed substantial accounting work while physically in state). Accordingly, absent the necessary factual findings, we cannot say that the defendant transacted any business in this state.

Moreover, to the extent that the court did not make certain findings, the plaintiff sought no articulation of the court's ruling. See Practice Book § 66-5. "It is a well established principle of appellate procedure that the appellant has the duty of providing this court with a record adequate to afford review. . . . Where the factual or legal basis of the trial court's ruling is unclear, the appellant should seek articulation pursuant to Practice Book § [66-5]. . . . Accordingly, [w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will, in the absence of a motion for articulation, assume that the trial court acted properly." (Internal quotation marks omitted.) *Berglass* v. *Berglass*, 71 Conn. App. 771, 789, 804 A.2d 889 (2002). On the basis of the record before us, we conclude that the plaintiff failed to prove the statutory elements necessary for personal jurisdiction over the defendant under § 52-59b (a) (1).

B

The plaintiff also claims that long arm jurisdiction exists because the defendant committed a tortious act

in this state. See General Statutes § 52-59b (a) (2). Specifically, the plaintiff argues that the record reveals that the defendant made a fraudulent misrepresentation in this state. We disagree.

"The essential elements of a cause of action in [fraudulent misrepresentation] are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon the false representation to his injury." (Internal quotation marks omitted.) *Cadle Co.* v. *Ginsberg*, 70 Conn. App. 748, 769, 802 A.2d 137, cert. denied, 262 Conn. 905, 810 A.2d 271 (2002).

In the present case, the plaintiff argues that his testimony established that the defendant had made a fraudulent misrepresentation while in Connecticut. He asserts that the defendant, while physically in this state, told him that she intended to keep the loaned funds in a bank account and not to withdraw them. He argues that her subsequent withdrawal of the funds proves that her prior representation was fraudulent.

We conclude, however, that although the defendant withdrew the funds after telling the plaintiff that she would not do so, the withdrawal of the funds does not establish that the defendant's representations were untrue and known to be untrue by her when she made them. As the court noted, the plaintiff presented no evidence showing that the defendant had made any representations while knowing them to be false. The defendant's withdrawal of the funds only established that she failed to keep a promise not to withdraw the funds, not that she fraudulently had misrepresented her intention at the outset.[7]

[7] The plaintiff does not allege that § 52-59b (a) (2) provided a basis of jurisdiction for the breach of contract or conversion counts. Accordingly, our review is limited to whether the defendant committed the tort of fraudulent misrepresentation while in Connecticut.

Moreover, to the extent that the plaintiff asks us to make factual findings concerning the defendant's intent, we decline to do so. As an appellate court, we are not permitted to find facts. *Zitnay* v. *Zitnay*, 90 Conn. App. 71, 81, 875 A.2d 583, cert. denied, 276 Conn. 918, 888 A.2d 90 (2005). The plaintiff should have sought articulation of the court's decision pursuant to Practice Book § 66-5. See *Berglass* v. *Berglass*, supra, 71 Conn. App. 789. Accordingly, we cannot say that the plaintiff met his burden of showing that the defendant committed a tortious act in this state.

III

The plaintiff next claims that the court failed to afford him procedural due process. Specifically, the plaintiff argues that the court improperly expanded the scope of its hearing and denied him the right to present evidence. We decline to review this unpreserved constitutional claim.[8]

"[This] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . . Practice Book § 60-5. . . . To allow such a claim to be raised on appeal would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Ingels* v. *Saldana*, 103 Conn. App. 724, 730, 930 A.2d 774 (2007).

The plaintiff argues that the court's hearing violated his due process rights. Our review of the record, however, reveals that at no point during the hearing did the plaintiff object to the manner in which the hearing was

[8] Although we believe that a fair reading of the hearing transcript reveals that the plaintiff did not make any motions at trial relevant to his claim, the record does reveal that the plaintiff asked the court to call an additional witness after the close of evidence, which request the court denied. To the extent that this could be viewed as a motion to open the evidence, the plaintiff does not allege that the court impermissibly denied his motion to open the evidence. See *Pagliaro* v. *Jones*, 75 Conn. App. 625, 638–39, 817 A.2d 756 (2003). We therefore decline to review that aspect of the court's ruling.

conducted, claim that he was deprived of procedural due process or seek a continuance to permit him additional time to gather evidence pertaining to personal jurisdiction. The plaintiff, therefore, did not raise this claim at trial.

Although we previously have reviewed unpreserved claims of constitutional magnitude, "[i]t is well established . . . that parties must affirmatively seek to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or the plain error doctrine [embodied in Practice Book § 60-5] and bear the burden of establishing that they are entitled to appellate review of their unpreserved constitutional claims." (Internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 781, 894 A.2d 963 (2006). Here, the plaintiff has requested neither *Golding* nor plain error review. We do not engage in *Golding* or plain error review when it has not been requested by a party. *State* v. *Klinger*, 103 Conn. App. 163, 169, 927 A.2d 373 (2007). Accordingly, we decline to review this unpreserved constitutional claim.

IV

The plaintiff's final claim is that the court impermissibly treated the defendant's motion to dismiss as a motion for summary judgment, thereby improperly ruling on the merits of his fraudulent misrepresentation count. We disagree.

Our review of the record reveals that the court did not improperly rule on the merits of the case but, rather, properly conducted a hearing to determine whether it could exercise personal jurisdiction over the defendant. The plaintiff alleged that the court had jurisdiction over the defendant in regard to his fraudulent misrepresentation count because the defendant committed a tortious act in this state. As previously discussed in part II, the plaintiff bore the burden of establishing that long arm jurisdiction existed. Accordingly, the court necessarily

was required to determine whether the plaintiff had presented sufficient evidence of the defendant's having committed a tortious act in this state to support long arm jurisdiction. The court's conclusion that the plaintiff failed to meet his burden of proof is not a ruling on the merits of the fraudulent misrepresentation count but, rather, is a ruling that the plaintiff did not present sufficient facts to satisfy the statutory jurisdictional requirements. See *Olson* v. *Accessory Controls & Equipment Corp.*, 54 Conn. App. 506, 515, 735 A.2d 881 (1999), aff'd, 254 Conn. 145, 757 A.2d 14 (2000). Accordingly, we conclude that the court did not rule on the merits of the case.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANDRE A. MESSAM (AC 28414)

Flynn, C. J., and Lavine and Pellegrino, Js.

Syllabus

Convicted of the crime of possession of narcotics, the defendant appealed to this court. Prior to executing a warrant to search the defendant, which the police had obtained on the basis of information from a confidential informant, the police were conducting surveillance of the defendant and observed him drop a plastic bag containing narcotics when he saw the police. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion for disclosure of the identity of the confidential informant, in which the defendant claimed that the informant, who had participated in two controlled buys from the defendant that gave the police sufficient probable cause to obtain a search warrant, had knowledge relevant to his theory of defense of entrapment; the trial court reasonably could have concluded that the informant would not have provided any testimony relevant to the defendant's defense in light of the facts that the informant was not present at the time when the defendant dropped the drugs on the ground immediately preceding his arrest, that there was no indication that the informant had participated in that event and that the defendant's arrest on the possession of narcotics charge, which was based on the

officers' direct observation of the defendant's possessing and dropping drugs, was not related to either the confidential informant or the warrant.

2. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial, which was based on his claim that a police officer improperly commented on uncharged misconduct evidence relating to the defendant's participation in certain controlled buys; defense counsel's repeated questions invited the brief improper remark by the officer concerning police reports about two controlled buys, and the trial court took action to avoid any possible prejudice to the defendant by striking the remark and instructing the jury to disregard it.

This court declined to review the defendant's claim that his right to a fair trial was violated when the trial court's sequestration order was not followed by some of the witnesses, the defendant having failed to preserve his evidentiary claim for review by objecting at trial to the alleged violation.

Argued April 18—officially released July 1, 2008

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of possession of narcotics and, in the second part, with previously having been convicted of the crime of possession of narcotics, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the first part of the information was tried to the jury before *Tyma*, *J.*; thereafter, the court granted the defendant's motion for sequestration and denied the defendant's motions for disclosure of the identity of an informant and for a mistrial; verdict of guilty; subsequently, the court denied the defendant's motion for a judgment of acquittal; thereafter, the defendant was presented to the court on a plea of guilty to the second part of the information; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Mary H. Trainer, special public defender, for the appellant (defendant).

Rocco A. Chiarenza, special deputy assistant state's attorney, with whom, on the brief, were *David I. Cohen*,

state's attorney, and *Dina Urso*, deputy assistant state's attorney, for the appellee (state).

Opinion

FLYNN, C. J. The defendant, Andre A. Messam, appeals from the judgment of conviction, following a jury trial, of one count of possession of narcotics in violation of General Statutes § 21a-279 (a). On appeal, the defendant claims that (1) the court abused its discretion in denying his motion for disclosure of the identity of a confidential informant, (2) the court abused its discretion in denying his motion for a mistrial after a witness commented on uncharged misconduct and (3) his right to a fair trial was prejudiced when one of the state's witnesses violated the court's sequestration order. We affirm the judgment of the trial court because we conclude (1) that the defendant's arrest on a possession of narcotics charge was not directly related to the confidential informant but, rather, it was based on the defendant's possessing and dropping drugs in front of several police officers immediately prior to the officers' execution of a warrant to search him, (2) that the brief improper comment by one of the witnesses was invited by the defendant and (3) that the defendant failed to preserve for appellate review his claim that witnesses violated the court's sequestration order.

The jury reasonably could have found the following facts. Members of the Stamford police department had obtained a search warrant allowing them to search the defendant and 26 Orchard Street. On July 16, 2004, prior to executing the search warrant, Officer Steven Murphy observed the defendant leave 26 Orchard Street and walk toward Selleck Street. Murphy notified other officers via his police radio, and the other officers arrived at Selleck Street in their unmarked police vehicle, where they observed the defendant. As the officers, each wearing a "raid jacket" bearing the letters

"POLICE," turned into a driveway on Selleck Street, the defendant noticed them and dropped an item from his right hand. The officers exited the vehicle and approached the defendant. Sergeant James Matheny grabbed the defendant by the right arm, Officer Chris Baker grabbed him by the left arm and Officer Kevin Fitzgibbons picked up the item that the defendant had dropped to the ground. The item was a small plastic bag containing crack cocaine.

The defendant was handcuffed and transported to the Stamford police headquarters, where he was charged with possession of narcotics. The defendant's first trial ended in a mistrial; his second trial resulted in a conviction. After pleading guilty to a part B information, in which he was charged with being a second time offender, the court sentenced the defendant to a term of three years imprisonment, with three years special parole. This appeal followed.

I

On appeal, the defendant claims that the court abused its discretion in denying his motion for disclosure of the identity of a confidential informant. He argues that he "was entitled to disclosure of the identity of the informant because the informant had knowledge relevant to this defendant's theory of defense," which was entrapment. We do not agree.

The following additional facts are relevant to our resolution of the defendant's claim. The defendant filed a pretrial motion requesting disclosure of the identity of a confidential informant who had participated in two controlled drug buys from the defendant prior to the police obtaining the search warrant. The court conducted an evidentiary hearing on the motion. At the hearing, Baker testified that the confidential informant had contacted him stating that he could purchase drugs

from a black male named "Dre." This confidential informant previously had provided useful information to Baker, leading to numerous drug seizures and arrests. The confidential informant told Baker that he could walk to a house at 26 Orchard Street, whistle, and a man named "Dre" would come out of the house and sell him drugs. Baker and other officers conducted surveillance while the confidential informant made two controlled drug buys from the defendant. After the officers had witnessed these drug purchases, they applied for, and obtained, a search warrant for 26 Orchard Street and for the defendant. At the time the defendant was seized, the officers had not executed the warrant, and the confidential informant was not present. On the basis of this evidence, the court denied the defendant's motion for disclosure.

"As a threshold matter, we set forth the standard by which an appellate court may review the propriety of a trial court's decision [regarding a motion for] disclosure. It is a basic tenet of our jurisprudence that we afford deference to the trial court and assess the trial court's conclusions pursuant to an abuse of discretion standard. . . . [T]he determination of whether an informer's identity shall be revealed is reviewed as a matter involving the exercise of discretion by the court. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action." (Citations omitted; internal quotation marks omitted.) *State* v. *Hernandez*, 254 Conn. 659, 665, 759 A.2d 79 (2000).

"In *Roviaro* v. *United States* [353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)], the United States Supreme Court had occasion to define the nature and scope of the informant's privilege. What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of

persons *who furnish information of violations of law to officers charged with enforcement of that law.* . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens *to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.* . . .

"*Roviaro* established a test for assessing challenges to the applicability of the informant's privilege. This test involves the balancing of two competing interests: (1) the preservation of the underlying purpose of the privilege; and (2) the fundamental requirements of fairness. . . . The underlying purpose of the privilege is to protect the public interest in the flow of information to law enforcement officials. The fundamental requirements of fairness comprise the defendant's right to a fair trial, including the right to obtain information relevant and helpful to a defense. . . . Whether [disclosure is warranted depends] on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. . . .

"Once the state has invoked the privilege, it is then the defendant's burden to show that the balance of the evidence falls in favor of disclosure. . . . When the defendant demonstrates that disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense, or is essential to a fair determination of a cause, the government's privilege must yield. . . . Disclosure is essential to the defense where nondisclosure could hamper the defendant's right to a fair trial, such as where the informant is a key witness or participant in the crime charged, someone whose testimony would be significant in determining

guilt or innocence. . . . Specific defenses that may merit disclosure include entrapment, mistaken identity and lack of knowledge. . . . Mere speculation that the informant's information will be helpful to the defense is not sufficient to mandate disclosure." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Bunker*, 89 Conn. App. 605, 625–26, 874 A.2d 301 (2005), appeal dismissed, 280 Conn. 512, 909 A.2d 521 (2006). "Before a court will compel disclosure, the informant typically must be a participant in the alleged crime or an eyewitness thereto. . . . [C]ourts generally agree that if the informant provides information to law enforcement officers without any further involvement, disclosure must yield to the protection of the informant." (Citations omitted.) *State* v. *Lee*, 30 Conn. App. 470, 479, 620 A.2d 1303 (1993), aff'd, 229 Conn. 60, 640 A.2d 553 (1994).

The defendant argues that disclosure was required in this case because it would have assisted with his entrapment defense.[1] He asserts that this case is similar to *State* v. *Hernandez*, supra, 254 Conn. 668–69, which he characterizes as a case in which "the court found that the [confidential informant] had knowledge relevant to the defendant's theory of defense and ruled that disclosure of his identity was required." The defendant

[1] General Statutes § 53a-15, our entrapment statute, provides: "In any prosecution for an offense, it shall be a defense that the defendant engaged in the proscribed conduct because he was induced to do so by a public servant, or by a person acting in cooperation with a public servant, for the purpose of institution of criminal prosecution against the defendant, and that the defendant did not contemplate and would not otherwise have engaged in such conduct."

We note that in this case, the defendant does not appear to have put forth an entrapment defense. Rather, it appears that his defense was that he was set up or framed and never possessed the drugs. When questioned about this during oral argument before this court, the defendant's appellate counsel continued to state that the defense was one of entrapment, although she argued that the defendant did not possess the drugs and that he had been set up.

also argues that in *Hernandez*, "[d]espite the fact that it was not known how the [confidential informant] would testify—i.e., support the defendant's version of events—the court reasoned that the [confidential informant] had information crucial to key disputed issues as framed by the defendant. Therefore, fairness to the defendant's defense required disclosure." The defendant asserts that in the present case, "the [confidential informant] had information relevant to the defendant's defense of entrapment," and, therefore, the court abused its discretion in denying the defendant's motion for disclosure. We do not agree, and we conclude that *Hernandez* readily is distinguishable from the present case.

In *Hernandez*, our Supreme Court explained that the testimony of the informant in that case potentially could have established "when the drugs were brought into the defendant's home, who brought them there, and whether the defendant was present at that time." Id., 672. The trial court also had made a factual finding that the informant in *Hernandez* had been in the defendant's home and had observed what had transpired. Id., 664. In the present case, the confidential informant could not have provided any such testimony. He was not present at the time the defendant dropped the drugs on the ground immediately preceding the defendant's arrest, nor was there any indication at the hearing on the motion for disclosure that the confidential informant had participated in this event.

In *State* v. *Kiser*, 43 Conn. App. 339, 349, 683 A.2d 1021, cert. denied, 239 Conn. 945, 686 A.2d 122 (1996), cert. denied, 520 U.S. 1190, 117 S. Ct. 1478, 137 L. Ed. 2d 690 (1997), as in the present case, there was "no indication that the confidential informants were participants in the crimes with which the defendant was charged." The informants in *Kiser* had told the police about narcotics sales. This court stated in that case:

"The charges against the defendant did not include the sale of a narcotic or controlled substance but were limited to possession with intent to sell. Moreover, the defendant conceded at trial that the informants were neither witnesses to nor participants in the crimes with which the defendant was charged. Thus, the informants did nothing more than provide the police with information that was included in the application for a search and seizure warrant. It was the evidence that was discovered in the course of the search that gave rise to the defendant's convictions, not the information used to establish probable cause for the warrant. When the evidence discloses that the informer was merely an informer and nothing more the government is not compelled to disclose his identity." (Internal quotation marks omitted.) Id.

Similarly, in the present case, the confidential informant provided police with information and participated in two controlled buys that gave the police sufficient probable cause to secure a warrant. Once that warrant was secured, the confidential informant had nothing else to do with the later surveillance of the defendant. Additionally, the police arrested the defendant after they saw him drop an item in response to his realization that the police officers were present. The resulting arrest and possession of narcotics charge were based on the officers' direct observation of the defendant's possessing and dropping the drugs and, therefore, were unrelated to the confidential informant or the warrant. The defendant was not arrested or charged with any crime related to the two controlled buys in which the confidential informant participated. When the officers observed the defendant drop drugs on the ground, they had sufficient probable cause to arrest him on the basis of their observations. Because the confidential informant was not there to witness the defendant in possession of the drugs or his dropping the drugs, the court

reasonably concluded that the informant would not have had any relevant testimony to offer as to the defendant's defense. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion for disclosure.

II

The defendant next claims that the court abused its discretion in denying his motion for a mistrial. He argues that Baker improperly testified during cross-examination by defense counsel about his knowledge that the defendant had engaged in two controlled buys. The state argues that the testimony was invited by defense counsel. We agree with the state.

The following additional facts are relevant to our resolution of the defendant's claim. During the pretrial motion hearing, defense counsel questioned Baker and Fitzgibbons as to the contents of three police reports. Two of these reports related to the two separate controlled buys in which the defendant had engaged with the confidential informant. The other report related to the execution of the search warrant and the arrest of the defendant. Although the police reports regarding the controlled buys were not the subject of a pretrial motion, it appears that all parties agreed that information about these reports and the controlled buys would not be presented to the jury. The state also acknowledged to the court that it had "cautioned [Baker] that there is nothing to come in about the buys." Despite this caution, Baker did make reference to the two buys, which the defendant claims deprived him of a fair trial.

During cross-examination, the following colloquy occurred between defense counsel and Baker:

"Q. Let me show this document and ask you if you recognize it.

"A. Sure. Yes, sir. I recognize it.

"Q. Is that a fair and accurate representation of your report and the events that occurred in relation to [the defendant]?

"A. The end of the investigation. Correct.

"Q. Is there another report that you prepared?

"A. Yes.

"Q. Where is that?

"A. I don't know, sir.

"Q. So, there is another report. Is this the only one you gave to the state's attorney?

"A. All of the reports were in a file, sir.

"Q. In your file at police headquarters?

"A. In a file that goes to [the police] records division, sir.

"Q. Pardon?

"A. In a file that goes to [the police] records division. I don't personally give anything to the state's attorney.

"Q. So, there is another report other than this one?

"A. There [are] two buy reports.

"Q. All right."

Defense counsel immediately asked the court to excuse the jury, which it did, and defense counsel moved for a mistrial. Defense counsel argued that testimony regarding the controlled buys was not allowed and that a simple yes or no answer had been in order to this question. He further argued that Baker "knew we were talking about just the Selleck Street arrest, and [the questions] had absolutely nothing to do with the search warrant or the buys [that were] incident to that search warrant." The state argued that the comment was invited by the repeated questions, especially

when defense counsel fully knew the contents of the other reports. The court had the court reporter play back the tape of the colloquy between defense counsel and Baker several times, and, after allowing both sides to argue the merits of a mistrial, the court stated the following: "I listened to the tape a few times in order to clear my head [as to] just what the questions were. After . . . Baker discuss[ed] his report concerning Selleck Street, [defense counsel] asked . . . Baker, first: Is there another report? The answer was: Yes. There was an opportunity there, after the answer was yes, to ask the question about Selleck Street. [However, defense counsel] responded: So, there is another report? . . . Baker got into the colloquy about one in the police file and one that goes to records because he doesn't give a file directly to the state's attorney.

"And then [defense counsel] offered a third time, asked: There is—so, there is another, there is another other than this one? And in response to that third prompt as to the other report . . . Baker respond[ed] concerning the buy reports. I think [that] under those circumstances, with the prior knowledge that [defense counsel] had concerning the substance of the other report that concerned the non-Selleck Street matter . . . and with regard to the fact that, with regard to the first question: Is there another report? And . . . Baker's answer is: Yes. I believe that the response at that point became invited by [defense counsel] to some extent.

"I think that [defense counsel] had the opportunity to ask the follow-up question without getting into the response by . . . Baker. So, with a curative instruction, which I'm going to give, I'm going to deny the motion for a mistrial."

Defense counsel stated for the record that a curative instruction would not be adequate. The court noted the

exception and called the jury back in. The court then gave the following instruction to the jury: "[T]he question put to . . . Baker by [defense counsel] just before I recessed to let you go, concerned a report prepared by . . . Baker. Other than the report prepared by . . . Baker, concerning the Selleck Street incident, that other report or its subject matter is not evidence in this case. And I instruct you that you are not to consider, in determining the guilt or innocence of the defendant in this case . . . Baker's answer concerning the subject matter of that other report. You are only to consider whether or not on the date at issue the defendant possessed narcotics as claimed by the state in this case." The court also offered to give an additional curative instruction to the jury during its final charge, but defense counsel asked the court to refrain from doing so.

On appeal, the defendant argues that "[t]here is no doubt that that statement by . . . Baker, whether intentional or not, had a prejudicial effect on the jury and that the court should have granted the motion for a mistrial. . . . As a general rule, evidence of a defendant's prior crimes or misconduct is not admissible." We agree with the defendant's statement of the general rule; nevertheless, we conclude that the court did not abuse its discretion in denying the defendant's motion for a mistrial.

We begin our analysis by setting forth the appropriate standard of review. Although "the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . On appeal, we hesitate to disturb a decision not

to declare a mistrial. The trial judge is the arbiter of the many circumstances which may arise during the trial in which his function is to assure a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice. . . . The decision whether to grant a mistrial is within the sound discretion of the trial court. . . . Put another way, [o]n appeal, the defendant bears the burden of establishing that there was irreparable prejudice to the defendant's case such that it denied him a fair trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Coltherst*, 87 Conn. App. 93, 99, 864 A.2d 869, cert. denied, 273 Conn. 919, 871 A.2d 371 (2005).

On appeal, when we are asked to consider whether the court abused its discretion, we must be mindful that "[d]iscretion involves a choice by a court to do or not to do something that one cannot demand as an absolute right. Courts exercise discretion in cases where impartial minds could hesitate, which exercise usually entails a balancing of the relative gravity of the factors involved. . . . An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Citation omitted.) *In re Shaquanna M.*, 61 Conn. App. 592, 603, 767 A.2d 155 (2001).

In this case, we conclude that the court did not abuse its discretion in denying the defendant's motion for a mistrial after finding that defense counsel had invited Baker's brief remark concerning the "two buy" reports. "Action induced by an appellant cannot ordinarily be a ground of error. . . . When the claimed error is the result of a question posed by the defendant on cross-examination, [s]o long as the answer is clearly responsive to the question asked, the questioner may not later

secure a reversal on the basis of any invited error." (Citations omitted; internal quotation marks omitted.) *State* v. *Harrison*, 34 Conn. App. 473, 488, 642 A.2d 36, cert. denied, 231 Conn. 907, 648 A.2d 157 (1994); see also *State* v. *Polanco*, 26 Conn. App. 33, 37, 597 A.2d 830, cert. denied, 220 Conn. 926, 598 A.2d 367 (1991). Although the defendant argues that the final question required only a yes or no answer, he had been given a yes answer already on the same question. Despite this, counsel continued to press Baker as to whether there were additional reports, knowing that there were a total of three reports, two of which related to the controlled buys. Counsel's repeated questions opened the door to Baker's answer, which was responsive to the question.

Additionally, even though Baker's answer was invited by defense counsel, the court took action to remedy the situation and to avoid any possible prejudice to the defendant by striking the remark and telling the jury to disregard it. The court also offered to give an additional curative instruction during its final charge to the jury, but defense counsel declined the court's offer. Absent evidence to the contrary, we presume that the jury followed the court's limiting instruction. See *State* v. *Nash*, 278 Conn. 620, 659, 899 A.2d 1 (2006). "Such curative instructions are entitled to great weight and ordinarily prevent an appellate court from finding that [there was] reversible error." (Internal quotation marks omitted.) *State* v. *Youdin*, 38 Conn. App. 85, 94, 659 A.2d 728, cert. denied, 234 Conn. 920, 661 A.2d 100 (1995).

After reviewing the record, we conclude that Baker's brief statement, which was invited by defense counsel, did not rise to the level of denying the defendant the right to a fair trial. Furthermore, the defendant has failed to establish that any alleged prejudice that might have resulted from this induced error was not cured by the court's striking of the testimony and its curative instruction. Accordingly, the court did not abuse its

discretion in denying the defendant's motion for a mistrial.[2]

III

The defendant next claims that his right to a fair trial was violated when the court's sequestration order was not followed by some of the witnesses. He asserts that this claim was preserved by his filing of a postverdict motion for a judgment of acquittal. The state contends that this evidentiary claim was not preserved because (1) the defendant never objected at trial, and his motion for a judgment of acquittal made no mention of the sequestration order, and (2) even if the motion had been brought on this basis, "a motion for a judgment of acquittal following a guilty verdict by the jury is limited to a challenge as to the sufficiency of the evidence of an offense; Practice Book § 42-51; and, therefore, cannot possibly preserve this claim for appeal." We agree that the defendant offered no objection to this alleged violation, and, therefore, this claim was not preserved.[3]

Rulings related to the violation of a sequestration order are evidentiary in nature. *State* v. *Falby*, 187 Conn. 6, 25–28, 444 A.2d 213 (1982). As this court explained in *State* v. *Paris*, 63 Conn. App. 284, 775 A.2d 994, cert. denied, 257 Conn. 909, 782 A.2d 135 (2001), when a defendant offers no objection at trial to the admission of allegedly improper evidence, such a claim may not be preserved by the filing of a postverdict motion. Id., 294. We further stated that "this court will refrain from reviewing claims on evidentiary rulings in situations in which counsel has failed to make an objection. . . .

[2] We note, as well, that the reference to the "two buy reports" did not indicate explicitly that the defendant himself had been involved in two previous illicit drug transations.

[3] In so concluding, we find it unnecessary to consider whether such a claim ever could be preserved in a motion for a judgment of acquittal.

We are not persuaded that evidentiary claims, not made at trial, can be preserved for appeal by raising them in a motion for a new trial after a guilty verdict. The problems inherent in allowing counsel to wait until after an adverse verdict to raise such objections to evidence are too obvious to warrant discussion." (Citations omitted.) Id., 294–95. Accordingly, we conclude that the defendant's claim is unpreserved and we decline to review it.

Our rule of law has been clear: "In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005). Having failed to offer an objection at trial, the defendant has not preserved this claim for appellate review.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN VIOLA ET AL. *v.* FREDERICK O'DELL
(AC 28612)

DiPentima, Harper and Berdon, Js.

Syllabus

The plaintiffs sought to recover damages for legal malpractice from the defendant, who had represented the plaintiffs in connection with a zoning matter. The plaintiffs had appealed from the issuance of a cease and desist order to the zoning board of appeals, which denied the appeal. Thereafter, the plaintiffs appealed to the Superior Court from the board's decision, but because the defendant failed to file a timely appellate brief

with the Superior Court, the appeal was dismissed, and the action here followed. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court improperly concluded that no genuine issue of material fact existed as to whether the defendant's negligence had caused the plaintiffs any harm; that court's determination that the plaintiffs could not have prevailed in their underlying zoning appeal had the defendant filed a timely appellate brief was supported by substantial evidence in the record that the plaintiffs' landscaping business, which was inconsistent with the purposes of the downtown business district, was not a permitted use, as the board had determined.

2. The plaintiffs could not prevail on their claim that the trial court improperly failed to consider certain allegedly dispositive evidence, which concerned an alleged settlement between the plaintiff and the town that permitted the plaintiffs to continue operating their business in the same manner, there having been no evidence before the trial court to substantiate the plaintiffs' claim concerning the settlement.

Argued March 18—officially released July 1, 2008

Procedural History

Action to recover damages for legal malpractice, brought to the Superior Court in the judicial district of New Britain, where the court, *Schuman*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed*.

Paul A. Catalano, for the appellants (plaintiffs).

Deborah Etlinger, with whom, on the brief, was *Susan E. Evans*, for the appellee (defendant).

Opinion

HARPER, J. In this legal malpractice action, the plaintiffs, John Viola and Viola Realty, LLC, appeal from the summary judgment rendered by the trial court in favor of the defendant, Frederick O'Dell. The plaintiffs claim that the court improperly (1) concluded that they had failed to demonstrate that they could have succeeded on the merits of their underlying zoning appeal had the

defendant filed an appellate brief in a timely manner and (2) failed to consider certain allegedly dispositive evidence.[1] We affirm the judgment of the trial court.

The following undisputed facts gave rise to the plaintiffs' appeal. On October 23, 2001, a Cromwell zoning enforcement officer ordered the plaintiffs to "[c]ease and [d]esist the landscaping business from 310 Main Street. The landscaping business [is] not permitted in the downtown business zone." The plaintiffs retained the defendant to represent them with respect to their challenge of the order. The plaintiffs appealed from the order to the zoning board of appeals of the town of Cromwell (board). The board held a public hearing on the matter on March 5, 2002.

At that hearing Viola, the owner and operator of Viola Realty, LLC, testified as to the nature of the plaintiffs' business. He testified that the business conducts both retail and landscaping activities. The retail portion involves the sale of mulch, stone, wood ties, sand, ice, ice melt, gravel and bushes. No retail sales occur on-site, however. Customers thus do not walk in to browse products or place orders; rather, they place orders over the telephone. Generally, ordered items are then picked up by the plaintiffs from a third party wholesaler and delivered directly to the customer. Inventory items, however, are "sometimes" stored on trucks on-site. The landscaping portion of the business involves services conducted entirely off-site. The landscaping equipment, including trucks, mowers and other similar machinery, is stored on-site.

After the hearing, the board notified the plaintiffs, via letter, that "at its regular meeting of April 2, 2002,

[1] The plaintiffs also raised an equal protection claim at oral argument. This argument was not briefed, however, and we therefore decline to afford it review. See *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 100 Conn. App. 63, 78 n.12, 918 A.2d 889 (2007), aff'd, 286 Conn. 548, 944 A.2d 329 (2008).

[it] voted to deny [their] appeal of the [z]oning [e]nforcement [o]fficer's [c]ease and [d]esist [o]rder . . . ." The board's notice did not delineate any reasons for the board's decision to deny the appeal. The plaintiffs filed in the Superior Court an appeal from the board's decision. The defendant, however, failed to file a timely appellate brief with the Superior Court, and the plaintiffs' appeal was dismissed on this ground.

The plaintiffs thereafter filed this legal malpractice action against the defendant. The parties filed cross motions for summary judgment. After hearing oral argument, the court granted the defendant's motion and denied the plaintiffs' motion, reasoning that there was no genuine issue that the defendant's negligence had not caused any harm to the plaintiffs. This appeal followed.

I

The plaintiffs first claim that the court improperly concluded that no genuine issue existed as to whether the defendant's negligence had caused the plaintiffs any harm. In furtherance of this claim, they argue that the court improperly determined that they could not have prevailed in their underlying zoning appeal had the defendant filed a timely appellate brief. We disagree.

Before we address the merits of the plaintiffs' claim, we must first discuss the standard of review and legal principles that will guide our analysis.

"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 moving for summary judgment has the burden of showing the

absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Bagoly* v. *Riccio*, 102 Conn. App. 792, 796–97, 927 A.2d 950, cert. denied, 284 Conn. 931, 934 A.2d 245, 246 (2007). In turn, "the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." *Mayer* v. *Biafore*, *Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998).

The only element at issue on appeal is that of causation.[2] "An issue of causation [in a legal malpractice action] is whether the [claim] could have been pursued. . . . If the underlying [claim] was never tried, the client essentially has a double burden of proof. First, the client must show that the attorney was negligent. Second, the client must establish that the underlying claim was recoverable and collectible." (Citation omitted; internal quotation marks omitted.) *Alexandru* v. *Strong*, 81 Conn. App. 68, 76, 837 A.2d 875, cert. denied, 268 Conn. 906, 845 A.2d 406 (2004). Therefore, for the plaintiffs to demonstrate that the court improperly concluded that no genuine issue existed as to the element of causation, they must persuade us that the court improperly determined that they could not have prevailed in their underlying appeal from the board's decision that their business was engaged in a nonpermitted use.

To have prevailed in that appeal, the plaintiffs would have needed to demonstrate that there was not "substantial evidence in the record to support the [board's]

[2] The parties have not contested the court's findings that the plaintiffs and the defendant entered into an attorney-client relationship and that the defendant's failure to file a timely brief in the underlying matter amounted to negligent conduct.

determination. . . . The substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." (Citation omitted; internal quotation marks omitted.) *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 452, 908 A.2d 1049 (2006).

We begin our analysis by looking to the zoning regulations in effect at the time of the board's determination. Section 2.1 of the Cromwell zoning regulations divides the town into several use districts. The plaintiffs' business falls within the "downtown business" district. Section 4.2 contains a use regulation table (table), which lists 133 uses and indicates in which use district each listed use is permitted.[3] "Landscaping," the use that the cease and desist order had sought to prevent, is not among the 133 uses listed in the table. Section 4.1, however, provides in relevant part that "[t]he uses enumerated [in the table] are not exhaustive nor are they meant to cover all possible uses, thus acting as a restrictive table to prevent the development of the non-listed activities. They are to establish a pattern of development for the various use districts thus providing for a homogenous composition of the district." Thus, the regulations clearly indicate that the uses listed in the table are not exhaustive.

Cognizant of these regulation sections, the court concluded that substantial evidence existed for the commission to have determined that the plaintiffs' business

[3] For example, the table indicates that the first listed use, "Agency; Real Estate, Insurance" is permitted in the planned office, industrial park, business, industrial, downtown business and waterfront mixed districts but not permitted in the residential and planned residential development districts.

was most similar to two listed uses, greenhouses and nurseries, and because each of those uses was prohibited in the downtown business area, that landscaping would most likely be prohibited as well. Specifically, the court reasoned that the board may have considered evidence that "the plaintiffs' business [like greenhouses and nurseries] may have landscaping merchandise, such as plants or mulch, loaded in trucks found on the premises." We agree with the court.

Furthermore, § 5.6 explains that the purpose of the downtown business district is to "encourage high density, pedestrian-oriented commercial development of a type consistent with the historic character of the area." Viola testified that "no one walks in" to the plaintiffs' business and that sales are made exclusively via telephone. Clearly, substantial evidence thus existed to support the conclusion that the plaintiffs' business is inconsistent with the purpose of the downtown business district.

For these two reasons, it is clear to us that as a matter of law,[4] substantial evidence appears in the record to support the board's determination that the plaintiffs' business was engaged in a nonpermitted use. Therefore, we cannot say that the court improperly determined that the plaintiffs could not have succeeded in their underlying zoning appeal, and, a fortiori, we cannot say that the court improperly concluded that no genuine issue existed as to the element of causation. See *Mayer* v. *Biafore*, *Florek & O'Neill*, supra, 245 Conn. 92; *Alexandru* v. *Strong*, supra, 81 Conn. App. 76.

The plaintiffs nevertheless argue that their business operated so much like a corporate office, which is a

[4] The question of whether substantial evidence exists is a purely legal inquiry. See *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 106–107, 890 A.2d 104 (2006); *River Bend Associates*, *Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 70, 848 A.2d 395 (2004).

permitted use in the downtown business district, that it was improper for the board to conclude that their business was engaged in a nonpermitted use.[5] The plaintiffs support this argument by indicating that "[w]here more than one interpretation of language is permissible, restrictions upon the use of lands are not to be extended by implication . . . [and] doubtful language will be construed against rather than in favor of a [restriction] . . . ." (Internal quotation marks omitted.) *Farrior* v. *Zoning Board of Appeals*, 70 Conn. App. 86, 90, 796 A.2d 1262 (2002); *Daughters of St. Paul, Inc.* v. *Zoning Board of Appeals*, 17 Conn. App. 53, 66, 549 A.2d 1076 (1988).

Although this may be so, the objective in reviewing a decision of a zoning board of appeals is not to reassess the matter ab initio. See *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 452 ("reviewing court may not substitute its own judgment for that of the [board]"). A reviewing court rather must determine "whether the record before the [commission] supports the decision reached." (Internal quotation marks omitted.) Id.; see also *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 612, 893 A.2d 431 (2006) ("possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" [internal quotation marks omitted]). As we have already stated, substantial evidence existed, as a matter of law, to support the board's decision. Accordingly, the plaintiffs have failed to demonstrate that a genuine issue exists as to whether the negligence of the defendant caused them any harm.

[5] At oral argument before this court the plaintiffs further argued that their business operated like a bus depot, which also is a permitted use. The plaintiffs have failed to brief this argument, however, and we therefore decline to afford it review. See *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 100 Conn. App. 63, 78 n.12, 918 A.2d 889 (2007), aff'd, 286 Conn. 548, 944 A.2d 329, (2008).

II

The plaintiffs also claim that the court improperly failed to consider certain allegedly dispositive evidence. The plaintiffs argue that subsequent to the filing of their legal malpractice claim, they reached a settlement with the town of Cromwell under which they would be allowed to continue operating their business in the exact same manner, provided they raze and reconstruct the building within which the business operates. They contend that the court inexplicably and improperly failed to consider this fact in rendering summary judgment. Although we have doubts as to the merits of the plaintiffs' claim, we dispose of the claim on the ground that the only confirmation of this settlement presented to the trial court was an unsigned and unsworn affidavit. As such, an affidavit is of no evidentiary value. See, e.g., *Fogarty* v. *Rashaw*, 193 Conn. 442, 444, 476 A.2d 582 (1984). There was simply no evidence before the court to substantiate the plaintiffs' claim.

The judgment is affirmed.

In this opinion the other judges concurred.

RONNIE HOLLEY *v.* COMMISSIONER OF CORRECTION
(AC 28522)

Bishop, Gruendel and Beach, Js.

Argued May 1—officially released July 1, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Swords*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Gennaro Bizzarro, special public defender, for the appellant (petitioner).

Timothy F. Costello, deputy assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Ronnie Holley, appeals following the denial of certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the court abused its discretion in denying certification to appeal and improperly rejected his claim that his trial counsel provided ineffective assistance. He also claims that the habeas court made an improper evidentiary ruling that prevented him from proving his claim. We dismiss the petitioner's appeal.

The petitioner claimed, in his habeas trial, that his trial counsel rendered ineffective assistance because he failed (1) to conduct an adequate investigation into the victim's prior course of conduct, (2) to impeach the victim's testimony and (3) to inform the petitioner of the kidnapping charge against him. The court concluded that the petitioner failed to satisfy his burden under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in that he did not establish by a preponderance of the evidence that counsel's performance was deficient and that the deficient performance prejudiced the defense for any of these claims.

"The standard of review for a habeas court's denial of a petition for certification to appeal requires the petitioner to prove that the denial of the petition for certification was an abuse of discretion and also that the decision of the habeas court should be reversed on the merits." *Key* v. *Commissioner of Correction*, 106

Conn. App. 211, 212, 942 A.2d 417, cert. denied, 287 Conn. 904, 947 A.2d 342 (2008). To prove an abuse of discretion, the petitioner must demonstrate that the resolution of the underlying claim involves "issues [that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994).

The following facts and procedural history are relevant to our review of the petitioner's appeal. Following a five day trial, the jury found the petitioner guilty of the crimes of sexual assault in the first degree in violation of General Statutes § 53a-70 and assault in the third degree in violation of General Statutes § 53a-61 (a) (1). The jury found the petitioner not guilty of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A). The trial court imposed a total effective sentence of fifteen years imprisonment, suspended after ten years, and ten years probation. The petitioner's amended petition for a writ of habeas corpus was filed on April 15, 2005, alleging that his trial counsel was ineffective for not having adequately investigated the victim's prior course of conduct, for not having adequately impeached the victim's testimony and for not informing the petitioner of the kidnapping charge against him. The habeas court found that the petitioner's trial counsel sufficiently investigated the victim's prior course of conduct and that the petitioner failed to provide evidence in support of his claim that counsel did not adequately impeach the victim. Additionally, the court credited testimony that the petitioner was informed of the kidnapping charge against him despite his contrary testimony. The court denied the subsequent petition for certification to appeal, and this appeal followed.

After a careful review of the record and briefs, we agree with the court that the petitioner failed to satisfy his burden of proving that counsel's performance was deficient. The court's determination that the petitioner's trial counsel was not ineffective was a purely factual determination. "[T]he habeas court, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 107 Conn. App. 181, 187, 944 A.2d 429 (2008). Therefore, we defer to the court's findings.[1]

The petitioner also claims on appeal that the habeas court should have admitted records from Catholic Relief Services because those records would have revealed that the victim received or believed that she received rental assistance contingent on her filing domestic abuse complaints. We are unpersuaded. As asserted at trial, this claim was no more than a theory without any evidentiary basis.[2] Additionally, the regional coordinator for Catholic Relief Services' "Welfare-to-Work" program testified that although the victim did receive rental assistance from her organization, the assistance was not initiated because of, and was never contingent on, the victim's filing a domestic violence

[1] To the extent that the habeas court failed to address the petitioner's claim that his trial counsel was ineffective in impeaching the victim's testimony, the failure of the petitioner to request an articulation renders the record inadequate for review. When "the court's memorandum of decision is devoid of any findings or analysis on the issue, and . . . the petitioner [does] not seek an articulation, the record is inadequate and we cannot review [the petitioner's] claim." *Bowden* v. *Commissioner of Correction*, 93 Conn. App. 333, 342, 888 A.2d 1131, cert. denied, 277 Conn. 924, 895 A.2d 796 (2006).

[2] At the time of the assaults, the victim was the petitioner's girlfriend, and the assaults took place in the residence that they shared. *State* v. *Holley*, 90 Conn. App. 350, 352, 877 A.2d 872, cert. denied, 275 Conn. 929, 883 A.2d 1249 (2005). Therefore, the petitioner's claim that the victim believed, or that the rental assistance actually was, contingent on the victim's filing domestic violence complaints appears to be directed at undermining the credibility of the victim's testimony.

complaint. As there was no other testimony indicating a link between rental assistance and domestic violence claims, the court did not abuse its discretion by refusing to admit the records. Furthermore, even if the exclusion of the records was improper, any error was harmless because the regional coordinator testified that the records made no mention of domestic violence complaints, and she was available for cross-examination. Because there are no issues that are debatable among reasonable jurists, that a court could resolve differently or that deserve further proceedings, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

STATE OF CONNECTICUT *v.* CHARLES W. OUTLAW, JR.
(AC 28390)

Flynn, C. J., and Gruendel and Lavine, Js.

Syllabus

Convicted of the crime of failure to appear in the first degree, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion for a judgment of acquittal, there having been sufficient evidence from which the jury reasonably could have found that the defendant wilfully failed to appear for sentencing; the state presented evidence that the defendant had received notice to appear and failed to do so, and the jury was entitled to disbelieve the defendant's uncorroborated testimony that he was in the courthouse on the date in question but left because his attorney had told him he could leave.
2. The trial court did not abuse its discretion in permitting the state to introduce evidence of the defendant's guilty plea to two felonies, including the names of the felonies; the documents relating to his guilty plea contained circumstantial evidence of the defendant's familiarity with court proceedings that was relevant to the element of wilfulness, the names of the felonies were relevant to show that the defendant had been charged with serious crimes and that he thus had a reason for not appearing—to avoid incarceration—and even if it was improper for the trial court to admit the names of the felonies, any error was harmless

given that the state was required to prove that the defendant was charged with a felony and that the defendant was willing to stipulate that he had been charged with felonies at the time he failed to appear.

Argued January 10—officially released July 1, 2008

Procedural History

Substitute information charging the defendant with the crime of failure to appear in the first degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, and tried to the jury before *Espinosa*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Christopher Y. Duby, special public defender, for the appellant (defendant).

Kathryn Ward Bare, deputy assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Louis J. Luba*, *Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Charles W. Outlaw, Jr., appeals from the judgment of conviction, rendered after a jury trial, of failure to appear in the first degree in violation of General Statutes § 53a-172. On appeal, the defendant claims that the court improperly (1) denied his motion for a judgment of acquittal, as there was insufficient evidence from which the jury reasonably could have found that he wilfully failed to appear for sentencing, and (2) permitted the state to introduce evidence that he pleaded guilty to two felonies, including the names of the felonies. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In April, 2001, the defendant was charged with

attempt to commit assault in the first degree and assault of a police officer (2001 charges). On February 3, 2003, the defendant pleaded guilty to the 2001 charges under the *Alford* doctrine.[1] In exchange for his plea, the defendant agreed to be sentenced to ten years incarceration, execution suspended after four years, and three years of probation. During the plea canvass, the court, *Handy*, *J.*, advised the defendant that sentencing would take place on March 28, 2003, and that if he did not appear at sentencing, he faced potential penalties.[2] Judge Handy also informed the defendant that a member of the office of adult probation would interview him prior to sentencing to prepare a presentence investigation report and that if he failed to cooperate with the office of adult probation, the court would sentence him nonetheless. The defendant was represented by counsel at the plea proceeding.

On March 28, 2003, at 10:07 a.m., when Judge Handy called the defendant's case for sentencing, she heard no response from either the defendant or his counsel.[3] Judge Handy, therefore, ordered the defendant's $250,000 surety bond forfeited and that he be rearrested. The defendant was arrested pursuant to the court's order on June 10, 2003, and charged with failure to appear in the first degree. He was sentenced on the 2001 charges in accordance with the February 3, 2003 plea agreement on September 10, 2003.

The defendant was tried to the jury on the charge of failure to appear in May, 2004. During its case-in-chief,

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Pursuant to the *Alford* doctrine, a defendant is not required to admit guilt but consents to being punished in order to avoid the risks of a trial.

[2] Judge Handy stated to the defendant: "I just want you to be aware of the fact that you better be here on the day I sentence you. Do we understand each other?" The defendant responded, "Yes."

[3] Judge Handy stated that the defendant "did not show up for his presentence investigation."

the state placed in evidence the information and substitute information on the 2001 charges, the information on the charge of failure to appear, and the March 28, 2003 arrest warrant. The state also placed in evidence the appearance bond that the defendant had signed with regard to the 2001 charges.

The defendant testified that he was in the courthouse, outside Judge Handy's courtroom at 9:30 a.m. on March 28, 2003, waiting for his attorney, William Palmieri. According to the defendant, he waited for two hours before telephoning Palmieri, who was in another courthouse. The defendant further testified that Palmieri told him that he, Palmieri, would call the court, obtain a continuance of the sentencing and inform the defendant of the new sentencing date. The defendant also testified that Palmieri told him that he could leave the courthouse. The defendant testified that he left the courthouse, expecting that Palmieri would call and tell him when next to appear in court.[4] The defendant explained that he did not cooperate with the pretrial sentencing investigation because he intended to file a motion to withdraw his guilty plea.[5] On cross-examination, the

[4] By order of the Superior Court, *Silbert*, *J.*, Palmieri was suspended from the practice of law for one year effective April 1, 2003, three days after the defendant was to be sentenced. The parties, however, stipulated that Palmieri's suspension was not related to his representation of the defendant in this case. Nonetheless, in his appellate brief, the defendant makes much of Palmieri's suspension. The defendant, however, failed to call Palmieri to testify at trial.

[5] On cross-examination, the jury heard the following:

"[The Prosecutor]: So, again . . . as reflected . . . in the transcript, and you were there for the court hearing, right, on February 3, 2003?

"[The Defendant]: Yes.

"[The Prosecutor]: It says, page ten . . . . 'The Court. And you understand [that] once I impose and accept this . . . sir, you're not going to have an opportunity to change your mind; do you understand that?' And you answered, 'yes,' correct?

"[The Defendant]: (unintelligible answer)

"[The Prosecutor]: And then it says [that] the court states [that] 'the exception is the rule, that is, if . . . on the date that I sentence you, for any reason I cannot go along with this agreement, I will allow you to

defendant, having been convicted of felonies on three prior occasions, acknowledged that he knew that he was supposed to be in court on March 28, 2003. The defendant testified that prior to leaving the courthouse on March 28, 2003, he did not speak to any court personnel. At the close of evidence, the defendant moved for a judgment of acquittal. The court, *Espinosa*, *J.*, denied the motion. The jury found the defendant guilty of failure to appear in the first degree, and he was sentenced to two years in prison consecutive to the sentence he was then serving.

I

The defendant's first claim is that the court improperly denied his motion for a judgment of acquittal, claiming that there was insufficient evidence by which the jury could have found that he wilfully failed to appear for sentencing on March 28, 2003. We disagree.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded

withdraw your plea and continue to go to trial. Do you understand that?' Your answer was 'yes.' That's in the transcript. You were there for that, right?

"[The Defendant]: Yes.

"[The Prosecutor]: Okay. So, but . . . it's your claim that you went to court on March 28, 2008, with the intent of vacating your pleas, correct?

"[The Defendant]: Yes.

"[The Prosecutor]: Because [the] bottom line is [that] you just weren't happy—you weren't happy with the disposition that . . . had been arranged?

"[The Defendant]: No.

"[The Prosecutor]: You just didn't want to . . . follow through with that agreement, correct?

"[The Defendant]: That agreement, no."

that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proved and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Rice*, 105 Conn. App. 103, 107, 936 A.2d 694 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1101.

General Statutes § 53a-172 (a) provides in relevant part: "A person is guilty of failure to appear in the first degree when (1) while charged with the commission of a felony and while out on bail or released under other procedure of law, he *wilfully* fails to appear when legally called according to the terms of his bail bond or promise to appear . . . ." (Emphasis added.) "[T]he word wilful means doing a forbidden act *purposefully* in violation of the law. It means that the defendant acted *intentionally* in the sense that his conduct was *voluntary* and not inadvertent . . . . Thus, wilful misconduct is *intentional misconduct*, which is *conduct done purposefully* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Khadijah*, 98 Conn. App. 409, 415, 909 A.2d 65 (2006), appeal dismissed, 284 Conn. 429, 934 A.2d 241 (2007).

"In order to prove the 'wilful' element of General Statutes § 53a-172, the state must prove beyond a reasonable doubt either that the defendant received and

deliberately ignored a notice to appear or that he intentionally embarked on a course of conduct designed to prevent him from receiving such notice." (Internal quotation marks omitted.) *State* v. *Laws*, 39 Conn. App. 816, 819, 668 A.2d 392 (1995), cert. denied, 236 Conn. 914, 673 A.2d 1143 (1996).

"Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Internal quotation marks omitted.) *State* v. *Rice*, supra, 105 Conn. App. 108. "[I]t does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Internal quotation marks omitted.) Id., 107.

During its case-in-chief, the state placed in evidence transcripts of the defendant's plea proceeding before Judge Handy, during which she admonished the defendant to appear for sentencing or risk penalty. The appearance bond on the 2001 charges, which the state placed in evidence, was signed by the defendant and stated in relevant part: "IF I FAIL TO APPEAR . . . I will be committing the crime of FAILURE TO APPEAR and be subject to the following penalties . . . ONE YEAR IN PRISON OR $2,000 FINE OR BOTH, if I am charged with a Misdemeanor(s). FIVE YEARS IN PRISON or $5,000 FINE or BOTH, if I am charged with a Felony . . . ." The defendant was fully familiar with the criminal justice system, having been convicted of felonies on several occasions prior to the 2001 charges, and he admitted that he knew he was required to appear for sentencing on March 28, 2003.

In arguing to Judge Espinosa that the motion for a judgment of acquittal should be granted, defense counsel stated that the defendant was in the courthouse on the date in question but left because his counsel, who was not present, told him that he would obtain a continuance and notify him of the rescheduled date for sentencing. The state argued in response that the defendant's testimony as to why he did not appear in Judge Handy's courtroom or speak with court personnel was a matter of credibility for the jury to decide. In denying the defendant's motion for a judgment of acquittal, Judge Espinosa cited evidence that Judge Handy specifically told the defendant to appear on March 28, 2003, and that the defendant had experience with the criminal justice system and was aware of the consequences of failing to appear.

On the basis of our review of the record, we conclude that there was sufficient evidence by which the jury could have found that the defendant wilfully failed to appear for sentencing. The state presented evidence that the defendant received notice to appear, and the defendant testified that his counsel told him that he could leave.[6] It is not within the purview of appellate courts to analyze the process by which a jury reaches its verdict. Under the standard of review applicable to the facts of this case, the jury reasonably could have found, on the basis of the evidence presented and the reasonable inferences to be drawn therefrom, that the defendant's actions were intentional and that he therefore wilfully failed to appear for sentencing on March 28, 2003. Moreover, the jury was entitled to disbelieve the defendant's uncorroborated testimony that he was in the courthouse on that date. This court "must defer to

[6] Because we decide this appeal on the basis of the credibility determinations the jury was entitled to make, this case does not require us to consider whether reliance on the advice of counsel is a defense to a charge of failure to appear.

the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Pauling*, 102 Conn. App. 556, 564, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007). For these reasons, we conclude that the court did not improperly deny the defendant's motion for a judgment of acquittal.

II

The defendant's second claim is that the court improperly permitted the state to introduce the defendant's guilty plea to the charges of assault of a police officer and attempt to commit assault in the first degree, as the evidence was irrelevant and its prejudicial effect greatly outweighed its probative value.[7] We reject this claim.

The following facts are relevant to our review of the defendant's claim that Judge Espinosa improperly permitted into evidence the names of the felonies to which the defendant pleaded guilty. Prior to the start of evidence on May 7, 2004, the prosecutor informed the court that he intended to offer into evidence two transcripts of the court proceedings on the 2001 charges and asked whether he could read the transcripts into the record. Defense counsel inquired whether the state intended to put the defendant's entire February 3, 2003 guilty plea into evidence. The prosecutor responded

[7] The defendant's statement of this claim is unclear. The state contends that at trial, the defendant did not object to the fact that he pleaded guilty to two felonies from being placed in evidence and, therefore, that portion of his claim is not reviewable. Our review of the transcript reveals that the defendant objected only to the names of the 2001 charges to which he had pleaded guilty from being admitted in evidence. In his brief to this court, the defendant's argument is limited to the names of the felonies to which he pleaded guilty. Our review is confined to the court's permitting to be put into evidence the names of the felonies to which the defendant pleaded guilty, not the fact that he pleaded guilty.

that he did. Defense counsel argued that the entire plea was not probative of whether the defendant had violated § 53a-172 (a). The defendant was willing to stipulate that he was accused of a felony as required by the statute. Defense counsel further argued that the facts underlying the 2001 charges were not relevant. The court reviewed the transcript of the defendant's plea and ordered that the facts underlying the 2001 charges be redacted. The court also ordered the state to redact the penalties for the 2001 charges discussed in the defendant's plea canvass. The court refused to order the state to redact the names of the felonies with which the defendant was charged, stating, "That's part of the—the crime that he was on bail on was a felony."

The state's first witness was Gaynell Barrow, the acting deputy clerk in the geographical area number fifteen courthouse. Through Barrow, the prosecutor offered into evidence, as a business record, the "court information sheet on which information is recorded by the clerk of the procedures that happened in court." Defense counsel objected to certain information contained on the information sheet, arguing that it was prejudicial to the defendant. The prosecutor argued that all of the information on the sheet was relevant because it demonstrated that the defendant was familiar with court procedures. The defendant had been in court seventeen times on the 2001 charges, and he had failed to appear in the case once before. The information sheet documented that the first rearrest order had been vacated subsequently. In the prosecutor's words, the information sheet demonstrated that the defendant was familiar with the procedures to be followed if he failed to appear in court. The court permitted the state to put the entire information sheet into evidence. It was relevant to the defendant's familiarity with the court proceedings, the length of time the case had been pending, and the defendant's wilfulness and knowledge of

his obligation to appear. The court further found that its probative value outweighed any prejudice to the defendant.

The prosecutor indicated that he intended to place in evidence the defendant's appearance bond, the substitute information that reflected the defendant's *Alford* plea and the transcript of the March 28, 2003 proceeding. Defense counsel argued that the documents were prejudicial to the defendant and cumulative. The prosecutor argued that the documents were admissible in full to demonstrate that a substitute information was filed, that the charges against the defendant were still felonies and that the defendant was present in court on February 3, 2003, to enter a plea but was not present on March 28, 2003. The court overruled the objection, concluding that the evidence was relevant and that "the prejudice does not outweigh the probative value."

The prosecutor also indicated that he intended to enter into evidence the information sheet for the defendant's arraignment on June 11, 2003, for the purpose of showing that subsequent to Judge Handy's issuing a rearrest warrant, the defendant did not move to vacate the rearrest and that the 2001 charges were bifurcated from the charge of failure to appear. Defense counsel again argued that those documents were cumulative and being put into evidence to prejudice the defendant. The court overruled the objection, stating that the documents were relevant to the issue of wilfulness, as the defendant had an opportunity to appear in court and correct any misunderstanding about his failure to appear. The court ordered, however, that the sentence the defendant received was to be redacted.

The state also intended to put in evidence the defendant's rearrest warrant issued by Judge Handy. Defense counsel objected to the document because all of the crimes charged in connection with the 2001 charges

appeared on the warrant and in duplicate. Judge Espinosa ordered the state to redact all of the 2001 charges referred to in the warrant, including the statute designations and offense classifications.

The abuse of discretion standard applies to our review of the defendant's claim. "[T]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . .

"Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . The proffering party bears the burden of establishing the relevance of the offered [evidence]." (Citation omitted; internal quotation marks omitted.) *State* v. *Lemay*, 105 Conn. App. 486, 491–92, 938 A.2d 611, cert. denied, 286 Conn. 915, 945 A.2d 978 (2008).

"[E]vidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Internal quotation marks omitted.) *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 66, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004).

On the basis of our review of the record, including the transcript and the exhibits, we conclude that the court did not abuse its discretion in admitting the content of the documents at issue. The defendant argues that the names of the felonies are irrelevant and that all that was necessary for the state to prove the failure to appear charge was the fact that he had been charged with a felony or felonies. The defendant claims that naming the felonies was particularly harmful because one of the felonies was assault of a police officer. He supports his position with the fact that the court instructed the jury that the charges to which the defendant pleaded guilty were felonies, without naming them. He also claims prejudice because the evidence was cumulative.

In response, the state argues that the names of the 2001 charges were relevant, as the names of the crimes establish that they are felonies and that the defendant had a motive for not appearing, i.e., to avoid incarceration and other serious penalties, and for that reason his failure to appear was wilful. We agree with the state.

The state had the burden to demonstrate the relevance of the proffered evidence, namely, that the defendant's failure to appear was wilful. Ordinarily, "evidence concerning other crimes of which the defendant has been charged or convicted, due to its prejudicial nature, is inadmissible. . . . Such evidence is admissible, however, if it is probative of motive, intent, identity, a system of criminal activity, or the credibility of the defendant's testimony." (Citation omitted.) *State* v. *Candito*, 4 Conn. App. 154, 161, 493 A.2d 250 (1985) (claim that court improperly admitted specific crimes of which defendant found guilty). In *Candito*, this court concluded: "The state had to prove beyond a reasonable doubt that the defendant while charged with the commission of a felony, wilfully failed to appear. The five felony charges to which the defendant pleaded guilty

were serious crimes involving guns, drugs, and burglary for which he faced sentencing and probable incarceration when he failed to appear. Evidence of these underlying offenses was both relevant and material to two elements of the crime of failure to appear and was properly admitted by the trial court." (Internal quotation marks omitted.) Id.

As we noted in part I, generally, there is no direct evidence of a defendant's state of mind, and intent must be proved by circumstantial evidence. See, e.g., *State* v. *Salaman*, 97 Conn. App. 670, 677, 905 A.2d 739, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006). The documents at issue, as the court noted, contained circumstantial evidence of the defendant's familiarity with court proceedings that was relevant to the element of wilfulness. We are unable to conclude that the disputed information in the documents was more prejudicial than probative. The court was careful to redact any information in the documents that was not relevant to the charge of failure to appear, thus lessening the prejudicial effect. See *State* v. *Wild*, 43 Conn. App. 458, 464, 684 A.2d 720 (measures devised by court to reduce prejudicial effect of evidence militates against finding of abuse of discretion), cert. denied, 239 Conn. 954, 688 A.2d 326 (1996).

Moreover, even if the court improperly admitted the names of the 2001 charges, which we conclude was not the case, the error was harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . As [our Supreme Court has] recently noted, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Jacobson*, 283 Conn. 618, 641, 930 A.2d 628 (2007). Our determination of harmlessness is guided by various factors that have

been articulated as relevant to the question of evidentiary harmlessness, "such as the importance of the [evidence] in the prosecution's case, whether the [evidence] was cumulative, the presence or absence of evidence corroborating or contradicting the [evidence] on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) Id., 641–42.

Section 53a-172 required the state to prove that the defendant was charged with a felony and that he wilfully failed to appear. We note first that the defendant was willing to stipulate that at the time he failed to appear, he had been charged with felonies. The court instructed the jury that the defendant was charged with felonies at the time he failed to appear. Admission of the names of the felonies, therefore, was to some extent cumulative. The jury also heard evidence that the defendant had three prior felony convictions and that he knew that he would be punished if he failed to appear. The defendant has not persuaded us, given the state's strong case against him, that the claimed error substantially affected the verdict.

The judgment is affirmed.

In this opinion GRUENDEL, J., concurred.

FLYNN, C. J., concurring. I agree with the majority's conclusion that the judgment of the trial court must be affirmed and with much of its reasoning. I write separately, however, to explain a factor that was critical to my agreement with part I of the majority decision.

"[T]o secure a conviction for failure to appear. . . the state must prove beyond a reasonable doubt that the defendant was legally ordered to appear . . . that he failed to appear and that such failure was wilful. To

prove the wilful element of failure to appear the state must prove beyond a reasonable doubt . . . that the defendant received and deliberately ignored a notice to appear . . . .'' (Internal quotation marks omitted.) *State* v. *Pauling*, 102 Conn. App. 556, 568, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007).

In this appeal, the defendant, Charles W. Outlaw, Jr., claims that the court improperly denied his motion for a judgment of acquittal on the basis of insufficient evidence. I agree with the majority's conclusion that the evidence was sufficient to support a conviction under General Statutes § 53a-172 (a) (1) because the jury was free to make an independent assessment of the defendant's testimony. It did not have to believe that the defendant was present in the courthouse and that he left the courthouse on instruction from his attorney.[1]

My concern lies not in what the majority opinion says, but in what it does not say. On a daily basis, defendants are instructed by their attorneys, by court personnel and by prosecutors that their cases will not be going forward on that particular day or that a dismissal or nolle will be recommended and, therefore, that they need not be present and are free to leave. This avoids wasting the time of both the court and Connecticut citizens who are called to court when, for one good reason or another, cases cannot be heard or disposed of on that day or can be disposed of quickly without the presence of the defendant. Early every morning, lines form in the courthouses of our Superior

[1] There was no evidence before the jury that the attorney ever appeared in the New Britain courthouse on March 28, 2003, the day that the defendant was to be sentenced. Consequently, without his attorney present, the defendant could not have been sentenced on that day. See *State* v. *Williams*, 199 Conn. 30, 45, 505 A.2d 699 (1986) (under both federal and state constitutions, defendant has due process right to assistance of counsel during sentencing); *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 144, 712 A.2d 947 (1998) (sentencing process is critical stage of criminal proceeding).

Courts, filled with defendants waiting to meet with prosecutors on motor vehicle infractions. Many of these defendants are told that the case will be nolled for various reasons and that they should leave the courthouse. Unless the presiding judge has forbade such common practices a defendant should be able to rely on such statements without facing criminal charges.

In the present case, the defendant submitted to the court a request to charge the jury on the element of wilfullness, which provided in relevant part: "Wilfully, as in General Statutes § 53a-172, implies doing a forbidden act purposely in violation of the law. . . . In order to prove that the defendant wilfully failed to appear before the [c]ourt, the [s]tate must prove beyond a reasonable doubt that the defendant purposely ignored his obligation to appear in court. If you believe the defendant physically went to the courthouse on March 28, 2003, to meet his lawyer in order to attend court and thereafter, when his lawyer failed to appear in the courthouse, the defendant contacted his lawyer and was advised that his lawyer was in another court and would obtain a new court date for the defendant, then you must find that the defendant did not deliberately ignore his obligation to appear in court as scheduled." The court, however, did not include this request in its charge to the jury. In this appeal, the defendant does not claim that the court improperly failed to give this requested instruction. It is for this reason that I agree with the majority's decision.

STATE OF CONNECTICUT *v.* CLAUDE L. PERRY, JR. (AC 27289)

Gruendel, Robinson and Foti, Js.

Syllabus

Convicted of the crimes of assault in the first degree and attempt to commit assault in the first degree in connection with his alleged conduct in stabbing B in the face, neck and chest, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly referred to B as the "victim" in its final jury instructions in violation of his due process rights: the trial court began and ended its instructions by referring to B by name, did not refer specifically to her as the victim and used the term "victim" to describe the relationship of a defendant's body to a victim's body in defining physical force and in its instructions on kidnapping in the context of a definition in which there would be a perpetrator and a victim; furthermore, the jury having found the defendant not guilty of the robbery and kidnapping counts for which the trial court used the term "victim" in its final charge, that court's use of that term likely did not prejudice the defendant and it was not reasonably possible that the jury was misled thereby.

2. The defendant's claim that the trial court improperly instructed the jury on reasonable doubt in violation of several of his constitutional rights lacked merit, the Supreme Court previously having held that a trial court may use the language challenged by the defendant here.

Argued March 27—officially released July 1, 2008

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the first degree, and with the crimes of assault in the first degree, kidnapping in the first degree, attempt to commit assault in the first degree and attempt to commit robbery in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Hartmere*, *J.*; verdict and judgment of guilty of assault in the first degree and attempt to commit assault in the first degree, from which the defendant appealed to this court. *Affirmed.*

Lauren Weisfeld, senior assistant public defender, for the appellant (defendant).

Toni M. Smith-Rosario, senior assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Kevin S. Russo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. The defendant, Claude L. Perry, Jr.,[1] appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-59 (a) (1). On appeal, the defendant claims that the trial court improperly (1) referred to the complainant as "the victim" in its jury charge and (2) instructed the jury on reasonable doubt. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found that the defendant stabbed the victim, Annie Boddie, in the face, neck and chest, causing her right lung to collapse partially. On April 6, 2005, the defendant was charged by substitute long form information with (1) assault in the first degree with a dangerous instrument in violation of General Statutes § 53a-59 (a) (1), (2) robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), (3) robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), (4) kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), (5) attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-59 (a) (1), and (6) attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (1). Following a jury trial, the defendant was convicted of assault in the first degree and attempt to commit assault in the first degree. He was sentenced to twenty-three years incarceration, ten of which are mandatory, followed by ten years of special parole with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[1] The defendant was also referred to as Claude L. Perry II and Claude Perry in the proceedings at trial and on appeal. We rely on the long form substitute information in which the defendant was referred to as Claude L. Perry, Jr.

The defendant claims on appeal that the court improperly instructed the jury in referring to Boddie as "the victim" and in defining reasonable doubt, thereby depriving him of his constitutional rights to due process of law. He did not preserve these issues for appeal and therefore seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[2]

We conclude that the defendant's claims are reviewable under *Golding* because the record is adequate for review and the claims are of constitutional magnitude. "[A]s to unpreserved claims of constitutional error in jury instructions, we have stated that under the third prong of *Golding*, [a] defendant may prevail . . . only if . . . it is reasonably possible that the jury was misled . . . ." (Internal quotation marks omitted.) *State* v. *Aviles*, 107 Conn. App. 209, 230, 944 A.2d 994, cert. denied, 287 Conn. 922, 951 A.2d 570 (2008). We also conclude that his claims fail to satisfy *Golding*'s third prong.[3]

[2] Under *Golding*, a "defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

[3] The defendant also seeks plain error review of his claims. "The plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Smith*, 275 Conn. 205, 240, 881 A.2d 160 (2005); see also Practice Book § 60-5. We conclude that plain error review is not warranted under the circumstances presented. See *State* v. *Arroyo*, 284 Conn. 597, 615–16 n.13, 935 A.2d 975 (2007).

We now set forth the relevant legal principles that govern our resolution of the defendant's claims. The standard of review for claims of instructional impropriety is well established. "The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which [it] might find to be established . . . . When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety . . . and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party . . . . In this inquiry we focus on the substance of the charge rather than the form of what was said not only in light of the entire charge, but also within the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Blango*, 102 Conn. App. 532, 543, 925 A.2d. 1186, cert. denied, 284 Conn. 913, 931 A.2d 932 (2007).

I

The defendant first claims that the court's reference to Boddie as "the victim" in its final jury instructions violated his due process rights. He argues that the court used the term "the victim" to refer to Boddie at least eighteen times, thereby depriving him of his rights to be presumed innocent and to be tried fairly. We disagree.

The court gave the following instructions on the counts of robbery in the first degree: "Physical force is a common, readily understandable expression, which has its ordinary meaning in the everyday . . . use of language. It means the application of external physical power to the person. It can be effected by the hand or other part of the actor's body applied to the *victim's* body. It can be effected by the use of a weapon. In other words, the expression is general and unlimited in regard to the means by which it can be applied or

inflicted. Physical force against a person may take many forms, but must be for the purpose of committing a larceny.'' (Emphasis added; internal quotation marks omitted.)

The court gave the following instructions on the count of kidnapping in the first degree, in which it used the word ''victim'' eighteen times: ''The defendant is charged in the fourth count with the crime of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A) of our Penal Code, insofar as it is relevant here, which provides as follows: A person is guilty of kidnapping in the first degree when he abducts another person and he restrains the person abducted with intent to inflict physical injury upon her.

''For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: (1) that the defendant abducted *Annie Boddie*; (2) that the defendant unlawfully restrained the person he abducted; and (3) that he did so with the intent to inflict physical injury upon her.

''I shall now define for you the various terms used in this statute. The term abduct means to restrain a person with intent to prevent her liberation by either (A) secreting or holding her in a place where she is not likely to be found or (B) using or threatening to use physical force or intimidation. If the abduction is established by proof of hiding or secreting, there need be no specific proof of the use of force but merely proof that the defendant effectively secreted the *victim* or left that person in a place where she was not likely to be found. Abduction need not be proved by establishing the use of force if the proof establishes that the defendant threatened its use in such manner that the *victim* reasonably believed force would be applied to her if she sought to escape or to thwart the abductor's intention.

"The term restrain means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with her liberty by moving her from one place to another or by confining her either in the place where the restriction commences or in a place to which she has been moved without consent. As used herein, without consent means, but it is not limited to, deception.

"Physical injury means impairment of physical condition or pain.

"As you can see, the abduction and restraining must be intentional. There must be an intent to interfere intentionally with the *victim's* liberty and an intent to prevent the *victim's* liberation, either by secreting or hiding her in a place where she is not likely to be found or by using or threatening to use physical force or intimidation.

"Please recall that a person acts intentionally with respect to a result, defining an offense, when his conscious objective is to cause such result, as well as my other instructions on intent, which are applicable here.

"Thus, either the *victim* must have been moved from one place to another or the *victim* must have been confined in the place where the restriction first began or in the place to which she has been moved without her consent.

"There is no special requirement that the restraint be for any particular length of time or the *victim* may be moved over any—or that the *victim* be moved over any particular distance. Any time period of restraint and any distance of moving of the *victim* is sufficient to constitute these elements of kidnapping. You may, however, consider the length of time and distance together with all other circumstances in determining the question of intention.

"The law, which makes kidnapping criminal, punishes interference with personal liberty in restricting the *victim's* freedom of movement. So, you cannot find kidnapping until you first find it established that there was such restriction of movement and that it has been done intentionally; that is, has been done without right or authority of law and that it has had the effect of interfering substantially with the *victim's* liberty.

"Abduction may be established by satisfactory proof that the *victim* has been unlawfully restrained and that, with the intent to prevent her liberation, the defendant restrained her by using or threatening to use physical force or intimidation.

"Abduction need not be proved by establishing the use [of] force or intimidation if the proof establishes that the defendant threatened its use in such manner that the *victim* reasonably believed that force would be applied to her if she sought to escape or to thwart the abductor's intention.

"The essential nature of kidnapping requires that before you convict, you must find that the restraint and the abduction were done without the consent of the *alleged victim*. Thus, if the *victim* consented, this element of the offense would be negated, and a verdict of not guilty would be required.

"The consent required to negate this element, however, must be actual and real, and not just mere surface acquiescence induced by deception, force, fear or shock. In other words, it must be a truly voluntary and willing act of consent with no compulsion or deception. Consent may be expressed or it may be implied from all the circumstances.

"Whether or not the *victim* consented is a question of fact for you to determine from all the circumstances that have been proven to you. The defendant, however,

does not have to prove consent. The state has the burden to establish lack of consent beyond a reasonable doubt.

"The term physical force has its everyday meaning. It includes any violence or superior physical strength against the *victim*. It is for you to decide whether the evidence proves that physical force was used by the defendant, and whether it actually produced and resulted in the accomplishment of the restraint which is charged.

"But even the use of physical force need not be proved if the evidence in your estimation proves that the restraint was accomplished by intimidation. This requires that the defendant's words or acts placed the *victim* in a state of fear. Such intimidation may be found in a threat or threats to inflict injury made by one with the apparent power to carry out these threats. In any event, to constitute intimidation and thus remove the need to prove actual lack of consent, the proof must convince you that the defendant's words or acts, under the circumstances as they appeared at the time and place in question, enabled the defendant to carry out and effect the restraint or removal by placing the *victim* in terror.

"The next term to be defined is unlawfully. Unlawfully means simply without right, without the right to do so.

"The final element of this crime is that the defendant acted with the intent to inflict physical injury upon *Annie Boddie*, as I have defined physical injury.

"If you find that the state has proven all these elements beyond a reasonable doubt, your verdict would be guilty. If, however, you do not find all these elements proven beyond a reasonable doubt, your verdict would

be not guilty." (Emphasis added; internal quotation marks omitted.)

In the present case, the court began and ended its instructions by referring to Boddie by name and did not refer specifically to her as "the victim." With respect to its definition of physical force, the court used the term "victim" to describe the relationship of a defendant's body to the victim's body. With respect to the instructions for kidnapping, the court used the term "victim" in the context of a definition in which there would be a perpetrator and a victim. Finally, the jury's verdict suggests that the court's use of the term "victim" did not prejudice the defendant. The jury found the defendant not guilty of the robbery and kidnapping counts for which the court used the term "victim" in its final charge. Therefore, we conclude that it was not reasonably possible that the court's use of the term "victim" misled the jury.

II

The defendant next claims that the court improperly instructed the jury on reasonable doubt, thereby violating his constitutional rights to be presumed innocent, to have the state prove his guilt beyond a reasonable doubt, to due process of law and to a fair trial.[4] We disagree.

The defendant challenges the following language: "[Reasonable doubt] is such a doubt as in serious affairs

[4] The defendant further claims that the court's instructions violated his rights under article first, §§ 8 and 19, of the constitution of Connecticut. The defendant, however, has failed to provide an analysis of that claim independent of his claim under the analogous provisions of the United States constitution. "[W]e will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue. . . . Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim . . . ." (Internal quotation marks omitted.) *State* v. *Fauntleroy*, 101 Conn. App. 144, 159 n.5, 921 A.2d 622 (2007). Accordingly, we confine our analysis to the defendant's federal constitutional claim.

that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance. . . . It is, in other words, a real doubt, an honest doubt . . . that has its foundation in the evidence or lack of evidence."

We conclude that the defendant's claim is without merit. Our Supreme Court has held that a trial court properly may use the language challenged by the defendant to explain reasonable doubt. See, e.g., *State* v. *Colon*, 272 Conn. 106, 232–34 & 232 n.83, 864 A.2d 666 (2004) (rejecting constitutional challenge to instruction that reasonable doubt is "a real doubt, an honest doubt," and a kind of doubt "that in the serious affairs that concern you, you would heed" [internal quotation marks omitted]), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Ferguson*, 260 Conn. 339, 371, 796 A.2d 1118 (2002) ("[w]e consistently have held that the definition of reasonable doubt as a real doubt, an honest doubt, a doubt which has its foundation in the evidence or lack of evidence . . . and as a doubt which in the serious affairs which concern you in every day life you would pay heed and attention to does not dilute the state's burden of proof when such definitions are viewed in the context of an entire charge" [internal quotation marks omitted]); *State* v. *Griffin*, 253 Conn. 195, 207, 749 A.2d 1192 (2000) (noting that United States Supreme Court has upheld explanation that reasonable doubt is doubt "that would cause a reasonably prudent person to 'hesitate' to act in matters of importance").

The judgment is affirmed.

In this opinion the other judges concurred.

BECKY SUTCLIFFE *v.* FLEETBOSTON FINANCIAL CORPORATION ET AL.
(AC 27644)

Bishop, Lavine and Robinson, Js.

Syllabus

The plaintiff sought to recover damages from the defendant bank for, inter alia, conversion in connection with the payment of a check on which the plaintiff's signature was forged. The check, which was payable to the plaintiff, had been issued as a result of a $30,000 settlement in a workers' compensation matter in which she was represented by H. H forged the plaintiff's signature on the settlement check and appropriated all of the proceeds from the check for himself. H subsequently made payments to the plaintiff totaling $20,000, the amount of the plaintiff's interest in the settlement check. After the plaintiff brought an action against H, which was settled for $5000, the outstanding amount that was owed to the plaintiff's treating physician from the $30,000 settlement, the plaintiff brought the action here alleging conversion and that the bank negligently had paid the settlement check on a forged signature. The trial court rendered judgment in favor of the bank in accordance with a jury verdict, from which the plaintiff appealed to this court. *Held*:

1. The trial court did not abuse its discretion in admitting into evidence certain testimony and documents relating to H's payments to the plaintiff in the amount of her interest in the settlement check; the evidence, which showed that the plaintiff received payments equal to the amount of her interest in the settlement check, was relevant to the issue of whether the plaintiff sustained any damages as a result of the payment of the forged settlement check.
2. The plaintiff could not prevail on her claim that the trial court improperly instructed the jury on the bank's special defense that she had received her interest in the settlement check as a result of H's payments; the trial court's instructions as to the special defense, when read as a whole, were adapted properly to the law, provided the jury with sufficient guidance and were not improper.
3. The trial court did not abuse its discretion in denying the plaintiff's motion for a directed verdict; there was ample evidence to support the verdict of the jury, which reasonably could have found that H's payments were intended to pay the plaintiff her interest in the forged check, that the plaintiff received the full amount of her interest in that check and, thus, that the plaintiff was not damaged by the actions of the bank.

Argued March 14—officially released July 1, 2008

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Bozzuto, J.*, denied the plaintiff's motion to preclude certain evidence; thereafter, the matter was tried to the jury; subsequently, the court denied the plaintiff's motion for a directed verdict and granted the motion for a directed verdict filed by the defendant Sovereign Bank of New England; verdict for the named defendant; thereafter, the court denied the plaintiff's motion in arrest of judgment, to set aside the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Zbigniew S. Rozbicki, for the appellant (plaintiff).

Thomas J. Sansone, with whom, on the brief, was *Sherwin M. Yoder*, for the appellee (named defendant).

Opinion

ROBINSON, J. The plaintiff, Becky Sutcliffe, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant FleetBoston Financial Corporation.[1] On appeal, the plaintiff claims that the court improperly (1) admitted into evidence certain testimony and documents, (2) instructed the jury and

[1] Bank of America is the successor of the defendant FleetBoston Financial Corporation, which, in turn, is the successor institution to BankBoston, N.A., formerly known as Bank of Boston Connecticut, the bank where the check at issue was deposited. In this opinion, we will refer to BankBoston, N.A., and its successors simply as the defendant.

We also note that the plaintiff filed this action against Sovereign Bank of New England (Sovereign Bank). On February 28, 2006, the court granted the defendants' motion for a directed verdict in favor of Sovereign Bank. Specifically, the court stated that "there was not any evidence as to Sovereign Bank, and I am directing a verdict in their favor." The plaintiff does not challenge this ruling on appeal.

(3) denied her motion for a directed verdict. We disagree and, accordingly, affirm the judgment of the trial court.[2]

The following procedural history and facts reasonably found by the jury are necessary for our discussion. Attorney Edmund Hare represented the plaintiff in connection with a workers' compensation claim. Hare obtained a "full and final" settlement on behalf of the plaintiff in the amount of $30,000. The plaintiff was to receive $20,000 and Hare was to receive $5000 as the fee for his legal services. The remaining $5000 was to be paid to the plaintiff's treating physician, Mark Jay.

Hare received the $30,000 check, made payable only to the plaintiff, shortly after February 2, 1999. The plaintiff's signature on the check was forged, and Hare appropriated all of the proceeds from that check for his use. The plaintiff had not granted Hare any permission or authorization to sign the check or to deposit the money for his use. The plaintiff contacted Hare's office on several occasions to inquire as to when she would receive her settlement funds but had a difficult time speaking directly with Hare.

In response to the plaintiff's repeated inquiries, Hare eventually made four payments to the plaintiff, totaling $15,500, from March 25 through June 18, 1999. On March 3, 2000, the plaintiff executed an affidavit, as a part of her criminal complaint against Hare, indicating that Hare had failed to remit to her the outstanding balance of $4500 and to pay the $5000 owed to Jay. By way of a check dated March 6, 2000, Hare paid the plaintiff $4500 and on the "description" line of the check he

[2] As alternate grounds for affirming the judgment of the trial court, the defendant claims that the court improperly denied (1) its motion for a directed verdict and (2) its motion for summary judgment. As a result of our resolution of the issues raised by the plaintiff, we need not reach these claims. See *Connecticut Education Assn., Inc.* v. *Milliman USA, Inc.*, 105 Conn. App. 446, 448 n.2, 938 A.2d 1249 (2008).

wrote "W. Comp." This notation was his shorthand for "workers' compensation." During the time period from March 25, 1999, to March 6, 2000, Hare paid the plaintiff a total of $20,000, the amount of her interest in the settlement check.

The plaintiff commenced an action against Hare after receiving the $20,000. In her amended complaint, dated April 5, 2000, she alleged theft, intentional infliction of emotional distress, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and forgery. Hare informed the plaintiff that he was judgment proof and that he would declare bankruptcy. Hare then agreed to pay the plaintiff $5000 in exchange for a release by the plaintiff of all her claims against him.[3]

On February 13, 2001, the plaintiff commenced the present action against the defendant. In her amended complaint, dated September 14, 2001, the plaintiff alleged that the defendant negligently paid the settlement check on a forged signature and alleged conversion of the check pursuant to General Statutes § 42a-3-420. The defendant answered the complaint and pleaded the special defense that the "plaintiff has received payment, in whole or in part, of the sums to which she was entitled under the instrument in question."

The case was tried before the jury. The court, *Trombley*, *J.*, declared a mistrial on the basis of juror misconduct. Prior to the start of evidence in the second trial, the plaintiff renewed her prior motion in limine to preclude evidence of Hare's payments to her. The court, *Bozzuto*, *J.*, denied the motion and permitted the defendant to present evidence of Hare's payments. The jury returned a verdict in favor of the defendant. The court

[3] From this $5000 settlement, the plaintiff received $2746.44 after paying her legal fees.

rendered judgment accordingly and denied the plaintiff's postverdict motion to set aside the verdict and for a new trial. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly admitted into evidence certain testimony and documents. Specifically, she argues that the evidence of Hare's payments to her was presented to the jury improperly. We are not persuaded.

The following additional factual and procedural history is relevant to our discussion. During the first trial, the plaintiff filed a motion in limine to preclude any evidence regarding the payments made by Hare to the plaintiff. The court, *Trombley*, *J.*, granted the motion, stating, "I have instructed counsel, and I so instruct them now, and instruct all of the witnesses who might be in the courtroom, not to mention any issue of payment by attorney Hare, any recovery from any other source that [the] plaintiff might have received. . . . Again, I instruct everybody to stay away from the issue of payment."

A few days later, the court reconsidered its ruling. "So, payment is clearly central to this case, and, as a result, the court is going to allow testimony that it heard outside of the jury's presence to be given both by the plaintiff and attorney Hare. And anybody else counsel wants to call before the jury." The plaintiff objected to this ruling.

Following the mistrial, and prior to the start of the second trial, the plaintiff renewed her motion in limine, which the parties argued before the court, *Bozzuto*, *J.*, on February 23, 2006. The court denied this motion. It

first concluded that the defendant's argument pertaining to the law of the case doctrine was persuasive.[4] The court then identified a second basis for denying the motion. "But even putting that aside, the law of the case aside, I think payment is absolutely relevant with respect to the issue of—fundamental issue in this case, if the plaintiff is to prevail, that is, with respect to damages, and I also find the *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, 123 Conn. 616, 197 A. 766 (1938), case very persuasive and on point, and I am going to deny the motion in limine and I am going to allow that evidence before the jury in this case." The court noted the plaintiff's objection on the record.

As a preliminary matter, we set forth the applicable standard of review with respect to evidentiary claims. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse

[4] "Underlying the law of the case doctrine is the view that [a] judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . The doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . Nevertheless, [a] judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision." (Citation omitted; internal quotation marks omitted.) *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 327 n.12, 898 A.2d 197, cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006).

of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 365–66, 926 A.2d 1024 (2007); *Porter* v. *Thrane*, 98 Conn. App. 336, 339–40, 908 A.2d 1137 (2006).

Both parties agree that a determination of the applicability of our Supreme Court's decision in *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, supra, 123 Conn. 616, controls the outcome of the issues in the present case. Our analysis begins, therefore, with a discussion of that case. In October, 1929, the plaintiff, at the instruction of the Hartford Accident and Indemnity Company, made a draft in the amount of $2952, payable to the Chicago Live Stock Exchange. Id., 619. An individual, John Schmidt, Jr., forged the endorsement of the payee and deposited the draft to his credit with the defendant. Id. The plaintiff paid the draft to the defendant and commenced an action to recover the amount. Id. The defendant alleged that Schmidt, prior to the commencement of the action, had made restitution for any loss sustained by reason of his theft or embezzlement. Id., 621.

As part of its analysis, our Supreme Court considered the defendant's defense that "Schmidt paid and conveyed to the Hartford Accident and Indemnity Company moneys and property sufficient in amount and value to make full restitution for any loss sustained by reason of the alleged embezzlement or theft by him of the proceeds of the check or draft." Id., 627. The plaintiff had demurred to his defense on two grounds: first, that there was no privity between the Hartford Accident and Indemnity Company and the defendant; second, the Hartford Accident and Indemnity Company had not received full restitution. Id. The trial court sustained the plaintiff's demurrer on the first ground. Id. Our Supreme Court concluded that the trial court acted

improperly and that if the Hartford Accident and Indemnity Company had received restitution from Schmidt, the forger, then the defense of restitution would be available to the defendant. Id. "Such restitution would be satisfaction of the underlying obligation by the party primarily responsible and ultimately liable for the loss. The principle is the same that has been applied in an action by a drawer-depositor against a depositary-drawee bank for the amount paid by the latter upon a check upon which endorsement had been forged—that the depositor, *having been reimbursed*, *though indirectly*, *had suffered no damage*." (Emphasis added.) Id., 627–28. As a result of this conclusion, our Supreme Court determined that the "demurrer to [this defense] was not sustainable because of lack of privity or other discernible ground, and the ruling sustaining it deprived the defendant of an opportunity to show, if it could, that restitution was made and at a time which would render it available as a defense in this action. In this there was error [by the trial court]." Id., 628.

In the present case, the defendant sought to introduce evidence that the plaintiff received restitution from the forger, Hare. Specifically, the defendant intended to establish, through testimony and documentary evidence, that Hare had made payments totaling $20,000 to the plaintiff. These payments equaled the amount of her interest in the settlement check.[5] This evidence would support the defendant's claim that she did not sustain damages as a result of payment of the forged settlement check. Accordingly, this evidence was relevant under the *Hartford-Connecticut Trust Co*. precedent because the receipt of the total amount of the

[5] General Statutes § 42a-3-420 (b) provides: "In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, *but recovery may not exceed the amount of the plaintiff's interest in the instrument*." (Emphasis added.)

plaintiff's interest in the settlement check constituted a defense available to the defendant.[6]

Our conclusion is buttressed by decisions from other jurisdictions. For example, the Michigan Court of Appeals, in *Pamar Enterprises, Inc.* v. *Huntington Banks of Michigan*, 228 Mich. App. 727, 580 N.W.2d 11 (1998), stated that "[t]he mitigation of damages defense provides that *the liability of a drawee or depository bank* in a conversion action brought by an intended payee *is reduced to the extent that the intended payee receives the proceeds of the check applied to the specific obligation the check was intended to discharge*." (Emphasis added.) Id., 736–37. That court further explained that the mitigation of damages defense was intended to prevent unjust enrichment of the intended payee and to comport with the general intent of the Uniform Commercial Code remedies that an aggrieved party should be put in as a good a position, as if the other party had performed fully, but not in a better position. Id., 737. Courts from other jurisdictions have applied this defense. See, e.g., *Commercial Credit Corp.* v. *Empire Trust Co.*, 260 F.2d 132, 134 (8th Cir. 1958) (bank may be relieved of liability by reason of money reaching intended person); *Ambassador Financial Services, Inc.* v. *Indiana National Bank*, 605 N.E.2d 746, 752 (Ind. 1992) ("The mitigation of damages defense reduces the bank's liability to the extent the proceeds of the check were received by the payee and applied to the specific debt to which the payee intended they apply. . . . The mitigation of damages defense is aimed

[6] The plaintiff also claims that the payments from Hare could have been future credits against her potential damages from her theft, intentional infliction of emotional harm, CUTPA and forgery claims against Hare. We note that as a result of both the amount of Hare's payments, totaling the exact amount of the plaintiff's interest in the settlement check, and the fact that Hare's payments preceded the commencement of the plaintiff's lawsuit against Hare, the jury, as the finder of fact, was free to determine that the payments were to compensate the forgery of the settlement check.

at preventing unjust enrichment, and it exists to prevent a payee from recovering on a forged endorsement to the extent the payee did not suffer damages in the transaction." [Citation omitted.]); *Comerica Bank* v. *Michigan National Bank*, 211 Mich. App. 534, 538, 536 N.W.2d 298 (1995) (noting that bank may avoid liability for honoring check with improper endorsement when bank can prove intended payee received proceeds of check); *Bankers Trust of South Carolina* v. *South Carolina National Bank of Charleston*, 284 S.C. 238, 244, 325 S.E.2d 81 (S.C. App. 1985) (courts have developed equitable rule that when proceeds of forged check reach intended payee, generally there can be no cause of action because there are no damages).

On the basis of the foregoing, the court properly admitted the evidence of Hare's payments to the plaintiff in the amount of her interest in the settlement check.[7] We conclude that the court did not abuse its discretion by admitting into evidence the testimony and documents regarding Hare's payments to the plaintiff.

II

The plaintiff next claims that the court improperly instructed the jury on the defendant's special defense that she had received her interest in the settlement check as a result of Hare's payments. We are not persuaded.

We begin by establishing the applicable standard of review. "When we review a challenged jury instruction, [t]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court

[7] The plaintiff also claims that the defendant failed to plead its special defense. We conclude that this claim is without merit. As part of its answer, dated September 28, 2001, the defendant presented the following special defense as to both counts of the plaintiff's complaint: "The plaintiff has received payment, in whole or in part, of the sums to which she was entitled under the instrument in question."

of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Instructions are adequate if they give the jury a clear understanding of the issues and proper guidance in determining those issues. . . . The court should submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence. . . . [See also] 1 D. Wright & W. Ankerman, Connecticut Jury Instructions (Civil) (4th Ed. 1993) § 2, p. 3." (Citations omitted; internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 591, 945 A.2d 388 (2008); *Ravenwood Construction, LLC* v. *F. L. Merritt, Inc.*, 105 Conn. App. 7, 11–12, 936 A.2d 679 (2007).

The court charged the jury with respect to the plaintiff's causes of action, as well as the defendant's special defense.[8] In view of the evidence adduced at trial, which

[8] The court charged the jury in relevant part: "Furthermore, the [defendant] asserts the plaintiff has been paid—has been paid fully by Mr. Hare the sum of $20,000, which was the amount the plaintiff was to receive from the proceeds of the $30,000, which the [defendant] claims was the plaintiff's interest in that particular check. . . . The [defendant] claims that its responsibility, in the event that you find that the bank was negligent or committed conversion relative to the check to the plaintiff, was $20,000, which represents her interest in the $30,000, and that the plaintiff received the $20,000 from its depositor or customer, Mr. Hare. Therefore, the [defendant] asserts that the plaintiff received the sums to which she was entitled . . . and that the bank has no further monetary obligation to the plaintiff.

"The plaintiff generally responds to that defense, the [defendant's] assertion that she received the $20,000 to which she was entitled to the check—from the check proceeds by claiming that the several payments that she received from Mr. Hare were not for the workers' compensation case but were in partial payment for the emotional distress and other damages that she suffered as a result of Mr. Hare's unethical and tortious conduct. She, therefore, asserts that the bank remains liable to her for the full value of the check, that is the $30,000, as a result of the [defendant's] lack of ordinary care in conversion of the check. . . .

we set forth in greater detail in part III, and in light of our Supreme Court's decision in *Hartford-Connecticut Trust Co.* v. *Riverside Trust Co.*, supra, 123 Conn. 616, we conclude that the court's instructions, with respect to the defendant's special defense, read as a whole, were adapted properly to the law and provided the jury with sufficient guidance and that no injustice was done. See *Pickering* v. *Rankin-Carle*, 103 Conn. App. 11, 16, 926 A.2d 1065 (2007). The plaintiff has failed to establish that the court's instructions were improper.[9] After carefully reviewing the entire record, we determine that the instructions were adequate because they provided the jury with a clear understanding of the issues and proper guidance in determining those issues. See *Al-Janet, LLC* v. *B & B Home Improvements, LLC*, 101 Conn. App. 836, 840, 925 A.2d 327, cert. denied, 284 Conn. 904, 931 A.2d 261 (2007).

III

The plaintiff's final claim is that the court improperly denied her motion for a directed verdict. Specifically,

"The defendant in this case, in addition to denying the claims made by the plaintiff, has affirmatively asserted a special defense to the plaintiff's claim. The defendant had the burden of proof as to the allegation of its special defense upon which it relies. The plaintiff does not have the burden to disprove the allegations of the defendant's special defenses, rather each party has the burden of proving that party's own claims and no burden to disprove the claims of that party's adversary. So, the plaintiff has the obligation to prove negligence and statutory conversion. The defendant had the obligation to prove the special defense of payment. . . .

"The defendant asserts one special defense, and it reads as follows: The plaintiff has received payment in whole or in part of the sums to which she was entitled under the instrument in question, that being the check in question. If a plaintiff seeks recovery of the amount of a forged check or draft from the defendant bank and the plaintiff has received money from the actual forger, the defense of payment is available to the defendant bank."

[9] We also disagree with the plaintiff's claim that the court should have instructed the jury as to the statutory definition of payment set forth in General Statutes § 42a-3-602. As we have noted, the instructions, as given, were correct in law, adapted to the issues and sufficient for the guidance of the jury.

she argues that "[t]here was no genuine issue as to any material fact, and the plaintiff was entitled to judgment as a matter of law for the amount of the draft, $30,000." We disagree.

"Our standard of review of the court's refusal to grant [motions for directed verdicts and to set aside verdicts] requires us to consider the evidence in the light most favorable to the prevailing party, according particular weight to the congruence of the judgment of the trial judge and the jury, who saw the witnesses and heard their testimony. . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached [its] conclusion. . . . While it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . If the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Our standard of review, where the trial court's action on a motion to set aside a verdict is challenged, is whether the trial court clearly abused its discretion. . . . The decision to set aside a verdict is a matter within the broad legal discretion of the trial court and it will not be disturbed unless there has been a clear abuse of that discretion." (Internal quotation marks omitted.) *Mokonnen* v. *Pro Park, Inc.*, 96 Conn. App. 625, 631–32, 901 A.2d 725, cert. denied, 280 Conn. 924, 908 A.2d 1088 (2006); see also *Coniglio* v. *White*, 72 Conn. App. 236, 240, 804 A.2d 990 (2002).

As we noted previously, the defendant's claim that the plaintiff had received the full amount of her interest in the settlement check constituted a viable defense to the plaintiff's causes of action. After reviewing the evidence, in a light most favorable to the prevailing party, i.e., the defendant, we conclude that there was

ample evidence to support the jury's verdict. Accordingly, we conclude that the court's denial of the plaintiff's motion for a directed verdict did not constitute an abuse of discretion.

In her written admissions, her affidavit and her testimony in court, the plaintiff acknowledged that she was to pay $5000 to Hare and $5000 to Jay from her $30,000 settlement check, leaving a remainder of $20,000. From March 25 to June 18, 1999, Hare made four payments to the plaintiff totaling $15,500. By way of a check dated March 6, 2000, the plaintiff received $4500, for a total of $20,000 from Hare. This was the exact amount owed to the plaintiff for the workers' compensation settlement. Notably, the final check indicated that it was for the plaintiff's workers' compensation proceeds. At the time of the final payment to the plaintiff, Hare also made the $5000 payment to Jay, the plaintiff's treating physician, for her workers' compensation injuries. Finally, the plaintiff's affidavit indicated that as of March 3, 2000, she had not received the balance of her $20,000 settlement for her workers' compensation claim. This indicated that the prior payments were, in effect, repayment for Hare's improper use of the plaintiff's settlement funds.

On the basis of this evidence, viewed in a light most favorable to the defendant, we conclude that the court did not abuse its discretion in denying the plaintiff's motion for a directed verdict. It was well within the province of the jury to find that Hare's payments were intended to pay the plaintiff her interest in the forged check. As a result, the plaintiff received the full amount of her interest in the settlement check and, under the facts and circumstances of the present case, was not damaged by the actions of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

CINDY LOU WATROUS *v.* PAUL WATROUS
(AC 28039)
(AC 28839)

DiPentima, Beach and Robinson, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff. Thereafter, the trial court granted the plaintiff's motion for contempt, and the defendant filed a second appeal with this court. *Held*:

1. Because there was no evidence before the court concerning the availability or cost of life insurance to the defendant or concerning the cost of his employer's medical insurance program, the court was not in a position to evaluate the ability of the defendant to comply with the order to obtain and to maintain life insurance for himself and medical insurance for his daughter and, thus, the court's financial order requiring the defendant to obtain medical and life insurance lacked a reasonable basis in the facts and could not stand.
2. The trial court's finding that the plaintiff was unable to work was supported by sufficient evidence in the record, the plaintiff, who suffers from multiple sclerosis, having offered testimonial evidence about the state of her health and listed the receipt of social security disability benefits on her financial affidavit and the defendant not having been prevented from introducing evidence concerning the plaintiff's disability; moreover, there was sufficient evidence before the trial court to support its finding that the defendant had an earning capacity of $1000 per week, the court having been free to credit the plaintiff's testimony regarding the defendant's work history and to find not credible the defendant's testimony relating thereto.
3. The trial court did not abuse its discretion in ordering the plaintiff to retain sole custody of the parties' minor child; the defendant's claim that there was insufficient evidence before the court as to several of the factors enumerated in the statute (§ 46b-56 [c]) governing child custody orders was unavailing, as the court was not required by that statute to consider any particular factor or factors when determining the best interest of the child and was free to consider the factors it determined to be most appropriate under the facts of this case, and it properly considered the best interest of the child in its award of sole custody to the plaintiff.
4. The trial court did not abuse its discretion in denying the defendant's motion for a continuance to obtain counsel; the motion was made on the day trial was to commence, and given that the case had been pending for almost two years, that an attorney the defendant allegedly contacted had neither contacted the court nor filed an appearance and that the

defendant initially was represented by counsel, who withdrew from the case approximately six months before trial commenced, the defendant had adequate notice that trial was approaching and waited until the last possible moment to request a continuance to obtain counsel.

5. The defendant's unpreserved claim that he was denied due process and a fair trial as a result of his inability to represent himself and the trial court's failure, sua sponte, to raise the issue of his competency was not reviewable; there was nothing in the record that would have alerted the trial court to the defendant's objection to the trial proceedings because he believed he was incapable of representing himself, and the defendant failed to request review of his unpreserved claim under the plain error doctrine or the test set forth in *State* v. *Golding* (213 Conn. 233).

6. The defendant could not prevail on his claim that the trial court improperly found him in contempt of court and established a purge amount on the basis of an erroneous arrearage and for a time period not alleged in the motion for contempt; the plaintiff's motion for contempt, read broadly, encompassed a continuing course of conduct theory and, therefore, the trial court's contempt finding and corresponding purge amount were not at odds with the allegations contained in the motion.

7. The defendant's claim that the trial court was biased against him and his father lacked merit, the defendant having failed to meet his burden of proof required to prevail on a claim of judicial impropriety.

8. The record was inadequate to review the defendant's claim that the trial court improperly awarded the plaintiff attorney's fees, the record not having contained a memorandum of decision or a transcript signed by the trial court setting forth the court's findings of fact and conclusions of law and neither party having requested an articulation from the trial court.

Argued April 14—officially released July 1, 2008

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New London, where the defendant filed a cross complaint; thereafter, the matter was tried to the court, *Swienton*, *J.*; subsequently, the court denied the defendant's motion for a continuance; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Swienton*, *J.*, granted the plaintiff's motion for contempt, and the defendant filed a separate appeal to this court. *Dissolution judgment reversed in part; further proceedings; judgment of contempt affirmed.*

Keith Yagaloff, with whom, on the brief, was *Ryan P. Barry*, for the appellant (defendant).

Gary Traystman, for the appellee (plaintiff).

Opinion

BEACH, J. These two appeals arise from the dissolution of the parties' marriage. In AC 28039, the defendant, Paul Watrous, claims that the court improperly (1) entered certain financial orders without evidentiary support, (2) ordered that the plaintiff, Cindy Lou Watrous, retain sole custody of the parties' minor child, (3) denied his motion for a continuance to obtain trial counsel[1] and (4) failed to ensure a fair and impartial trial. In AC 28839, the defendant claims that the court improperly (1) found him in contempt of court and established a purge amount on the basis of an erroneous arrearage, (2) was biased against the defendant and his father and (3) awarded the plaintiff attorney's fees. We agree with the defendant only as to his challenge of the court's financial orders in AC 28039 and therefore reverse, in part, the judgment of dissolution and affirm the judgment of contempt.[2]

The following facts and procedural history are relevant to our discussion. The parties were married on March 4, 1978. On September 14, 2004, the plaintiff filed a complaint seeking, inter alia, dissolution of the marriage, sole custody of the parties' minor daughter

[1] Although the defendant appeared pro se at trial, he was represented by counsel shortly following the court's judgment, in the postjudgment matters and in these appeals.

[2] In AC 28839, the defendant additionally claims that the court improperly denied his motion for modification of the alimony order because it erroneously found that (1) he was not disabled and (2) payments made to him by his father were income under the child support guidelines. Because we agree with the defendant as to the financial orders entered and therefore reverse the court's orders and remand this case for a new trial on that issue, we need not address those two claims that challenge the court's denial of his subsequent motion to modify those original financial orders.

and financial relief. On August 23, 2006, a trial was held, following which the court rendered judgment of dissolution. Pursuant to the terms of the judgment, the plaintiff was awarded sole custody of the parties' minor daughter with the defendant having reasonable visitation rights and being ordered to pay to the plaintiff $50 per week in child support and $325 per week in alimony to be terminated on the plaintiff's remarriage or the death of either party. The court also ordered the defendant to obtain medical insurance for his minor child and life insurance in the amount of $150,000, naming the plaintiff as irrevocable beneficiary, until his support and alimony obligations terminate. The defendant thereafter filed an appeal from the court's judgment (AC 28039).

On November 1, 2006, the plaintiff filed an amended postjudgment motion for contempt. She alleged that the defendant had disobeyed the court's orders by, inter alia, failing to pay alimony, child support and attorney's fees, and failing to obtain life insurance. A hearing was held on March 23, 2007, after which the court issued an order finding the defendant in contempt of its August 23, 2006 orders. The court also awarded attorney's fees in favor of the plaintiff in the amount of $2500.[3] The defendant thereafter filed a motion to reconsider the court's March 23, 2007 orders. On April 30, 2007, following a hearing, the court denied the motion to reconsider. The defendant then filed an appeal challenging the court's contempt and attorney's fees orders (AC 28839). Further facts will be set forth as necessary.

We first set forth our standard of review. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in

[3] The defendant also filed a motion for modification of the alimony and support orders, which was denied by the court on April 30, 2007. In light of our decision as to the financial orders in the dissolution judgment, we need not address specifically the motion for modification of those orders.

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. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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.) *Daddio* v. *O'Bara*, 97 Conn. App. 286, 291, 904 A.2d 259, cert. denied, 280 Conn. 932, 909 A.2d 957 (2006).

I

AC 28039

A

The defendant first claims that the court improperly entered certain financial orders. Specifically, he argues that the court had insufficient evidence before it (1) to order him to obtain medical and life insurance, (2) to find that the plaintiff was unable to work and (3) to find that he had an earning capacity of $1000 per week.[4] We agree with the defendant as to his first claim of error.

[4] The defendant additionally claims that the court improperly ordered (1) lifetime alimony in the amount of $325 per week in favor of the plaintiff and (2) that he pay the plaintiff's obligation to the Social Security Administration. Other than setting forth these claims in the statement of the issues portion of his brief, the defendant devotes no further attention to them. The defendant's failure to brief these claims results in our deeming them abandoned. See *Rosier* v. *Rosier*, 103 Conn. App. 338, 340 n.2, 928 A.2d 1228 ("We are not required to review issues that have been improperly presented to this court

"A fundamental principle in dissolution actions is that a trial court may exercise broad discretion in awarding alimony and dividing property as long as it considers all relevant statutory criteria. . . . In reviewing the trial court's decision under [an abuse of discretion] standard, we are cognizant that [t]he issues involving financial orders are entirely interwoven. The rendering of judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Finan* v. *Finan*, 100 Conn. App. 297, 300, 918 A.2d 910, rev'd on other grounds, 287 Conn. 491, 949 A.2d 468 (2008). With that principle in mind, we address the defendant's claims in turn.

1

The defendant claims that the court abused its discretion by ordering him to obtain medical and life insurance without evidence as to its cost and availability. In particular, he maintains that, at the time of the order, he had no medical or life insurance policy in effect and no evidence was introduced at trial as to their potential cost or availability. We agree.

"An order for life insurance is very often an appropriate and necessary component of a judgment of dissolution of marriage. . . . Such an order, however, must have a reasonable basis in the evidence. . . . We have held that it is reversible error for the court to order a party to obtain new or additional life insurance without evidence of the availability and cost of that insurance." (Citation omitted; internal quotation marks omitted.) *Kunajukr* v. *Kunajukr*, 83 Conn. App. 478, 486, 850 A.2d 227, cert. denied, 271 Conn. 903, 859 A.2d 562 (2004); see also *Quindazzi* v. *Quindazzi*, 56 Conn. App.

through an inadequate brief. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." [Internal quotation marks omitted.]), cert. denied, 284 Conn. 932, 934 A.2d 247 (2007).

336, 338, 742 A.2d 838 (2000); *Lake* v. *Lake*, 49 Conn. App. 89, 92, 712 A.2d 989, cert. denied, 246 Conn. 902, 719 A.2d 1166 (1998). The same principle applies to an order to obtain medical insurance. *Lake* v. *Lake*, supra, 93–94.

After thoroughly reviewing the record, we find that there was no evidence before the court of the availability or cost of life insurance to the defendant. The only reference to life insurance was the defendant's testimony during the dissolution trial that he "didn't believe [he] had any life insurance." As to medical insurance, the defendant testified that medical insurance would be available through his employer after he had been working there for four months. At the time of the trial, he had been working for that employer for three months. There was no evidence presented, however, concerning the cost of his employer's medical insurance program. Without sufficient evidence, the court was not in a position to evaluate the ability of the defendant to comply with the order to obtain and to maintain life insurance for himself and medical insurance for his daughter. Without knowing the cost of such insurance, the court entered other financial orders that may be inappropriate, that is, too high or too low depending on the funds required to obtain such insurance. Under these circumstances, we must conclude that the court's orders regarding insurance lack a reasonable basis in the facts.

Because the financial orders in an action for dissolution of marriage are of necessity interwoven and because the rendering of a judgment in an action for the dissolution of marriage is "a carefully crafted mosaic"; *Ehrenkranz* v. *Ehrenkranz*, 2 Conn. App. 416, 424, 479 A.2d 826 (1984); we must remand the case to the trial court for a new trial on all financial matters. See *Quindazzi* v. *Quindazzi*, supra, 56 Conn. App. 339. Because of our conclusion that the financial orders entered in this case must be retried, it is appropriate for us to give guidance on related issues that are likely to recur on

retrial. See *Allison* v. *Manetta*, 284 Conn. 389, 402, 933 A.2d 1197 (2007). For that reason, we turn our attention to the defendant's other claims concerning the court's financial orders.[5]

2

The defendant next claims that the court had insufficient evidence before it to find that the plaintiff was unable to work. We disagree.

The court found, following the August 23, 2006 trial, that "[t]he plaintiff is just shy of her forty-fifth birthday. She is in very poor health, and suffers from multiple sclerosis, although the defendant stated that he believes she is no longer suffering from said ailment due to her receiving acupuncture. She operated the couple's catering business with the defendant for most of the marriage. She did not reveal any other skills. She is currently receiving social security disability [benefits], which has been reduced due to the defendant, or the defendant's father, reporting some gambling income to the state . . . which has in turn reduced her benefits. There was no evidence to indicate that she could do any other work." The plaintiff testified at trial about her experience with multiple sclerosis and how it had affected her life generally, as well as her ability to work. The defendant also cross-examined her about prescription medication she had been taking to treat her condition. The record further reveals that on July 11, 2006, the plaintiff filed a financial affidavit listing her weekly social security income.

The defendant argues that the court had insufficient evidence before it to find the plaintiff unable to work because "there was no evidence as to the frequency of

[5] We note that neither party briefed or argued the question of whether any statutory or regulatory provision allowed or required the court to enter orders concerning health or life insurance, regardless of evidence of cost, nor did either party address the question whether any statutory or regulatory provision affected the burden of production or proof on the issue. We accordingly express no opinion on these issues.

treatment for multiple sclerosis, the name of her treating physician, whether any of her prescription medication was related to multiple sclerosis, the severity of multiple sclerosis [or] whether multiple sclerosis was the cause of her claimed symptoms." To support his argument, the defendant cites *Tevolini* v. *Tevolini*, 66 Conn. App. 16, 783 A.2d 1157 (2001). In *Tevolini*, this court concluded that the trial court had abused its discretion when it presumed that the defendant was unable to work *solely* because she qualified for social security disability benefits without any further evidence of her disability presented at trial. Id., 28–31. When the plaintiff attempted to contest the defendant's claim at trial with his evidence, the court refused him that opportunity; it also denied his motion to have the defendant undergo a physical examination. Id., 19–20. This court further concluded that "because the defendant placed her health at issue in her claim for alimony, the plaintiff then had a right under [General Statutes] § 46b-82 to be heard and to offer evidence to refute that claim. That right to be heard, to be meaningful, included, inter alia, the right not only to argument, but also to present evidence at the trial regarding that issue." *Tevolini* v. *Tevolini*, supra, 24.

The circumstances of *Tevolini* are distinguishable from those in the present case. Here, the plaintiff offered testimonial evidence about the state of her health in addition to listing the receipt of social security disability benefits on her financial affidavit. She testified about having multiple sclerosis and how it had affected her life and, specifically, her ability to work. Furthermore, unlike in *Tevolini*, the defendant in this case was not prevented from introducing evidence concerning the plaintiff's disability. On the contrary, he testified about his belief that the plaintiff's multiple sclerosis had been cured by acupuncture. In light of the testimony and evidence presented at trial, we conclude

that there was sufficient evidence before the court for it to determine that the plaintiff was unable to work.

3

We next address the defendant's claim that there was insufficient evidence to support the court's finding that he has an earning capacity of $1000 per week. We are not persuaded.

The court found, following the August 23, 2006 trial, that "[b]ased upon the credible testimony of the plaintiff, and other credible evidence offered to the court, he is a skilled carpenter. The court previously found his earning capacity to be $1000 per week, and this court finds his earning capacity at $1000 per week." The plaintiff testified at trial that the defendant had been a skilled carpenter for at least twenty-six years, had worked extensively for his father renovating houses, had worked for Electric Boat earning approximately $1000 per week and had worked for a company on Fishers Island, which is near the eastern Connecticut coastline, earning more than $1000 per week. The plaintiff's brother, Fred Anderson, and a longtime family friend, Vicky Mather, also testified that the defendant was a skilled carpenter who had worked for his father as a carpenter for many years. Anderson also testified that the defendant was paid "under the table" by his father when the renovated houses were sold.

"In a marital dissolution proceeding, the court may base financial awards on earning capacity rather than actual earned income of the parties. . . . While there is no fixed standard for the determination of an individual's earning capacity . . . it is well settled that earning capacity is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . [T]he

court may consider earning capacity from employment when the evidence shows that the reported amount of earnings is unreasonable. Thus, for example, when a person is, by education and experience, capable of realizing substantially greater earnings simply by applying himself or herself, the court has demonstrated a willingness to frame its orders on capacity rather than actual earnings." (Citation omitted; internal quotation marks omitted.) *Dees* v. *Dees*, 92 Conn. App. 812, 816, 887 A.2d 429 (2006).

The defendant argues that the plaintiff's testimony regarding his work history is misleading. In support of that argument, he refers to his testimony that he merely performed maintenance duties for his father and only temporarily was employed at Electric Boat in a training program that he did not complete. The defendant's argument is undermined by the court's determination that "[t]he defendant was not credible as to almost all of his testimony. Although he indicated on numerous occasions that he wanted the truth to come out, he continually changed his testimony, and it was difficult for the court to determine what, if anything, he said was in fact the truth. The plaintiff, on the other hand, appeared credible, and the court makes that finding." "It is the sole province of the trial court to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Doody* v. *Doody*, 99 Conn. App. 512, 519–20, 914 A.2d 1058 (2007). The court is therefore free to reject testimony it does not find credible. *Emanuelson* v. *Emanuelson*, 26 Conn. App. 527, 532, 602 A.2d 609 (1992). The defendant's argument in this regard fails because it is based primarily on his testimony, which the court found not credible.

The defendant further argues that the court's reliance on its previous determination as to his earning capacity was clearly erroneous in light of his social security

statement, which was offered into evidence at trial. The defendant contends that the yearly income figures listed on his social security statement prove his assertion that he was not a long-term employee of Electric Boat earning $1000 per week. Although relevant, the length of the defendant's employment at Electric Boat was but one piece of evidence before the court relating to his earning capacity. Also before the court was the testimony of the plaintiff and Anderson that the defendant was a skilled carpenter who received money from his father in exchange for his work renovating his father's houses. Anderson also specifically stated that the money received was "under the table." We conclude that there was sufficient evidence before the court to support its finding that the defendant was capable of earning $1000 per week.

B

The defendant next claims that the court abused its discretion when it ordered that the plaintiff retain sole custody of the parties' minor child without reasonable evidence of the child's best interests. We disagree.

The guiding principle in determining custody is the best interest of the child. "In making or modifying any order [with respect to custody or visitation] . . . the court shall consider the best interests of the child . . . ." General Statutes § 46b-56 (c); see *Schult* v. *Schult*, 241 Conn. 767, 777, 699 A.2d 134 (1997). "Among the various factors the court may consider when determining the best interest of the child are the parties' parenting skills . . . the child's emotional ties to each parent . . . the psychological instability of the parent and whether the child is in a stable and loving environment." (Citations omitted.) *Janik* v. *Janik*, 61 Conn. App. 175, 181, 763 A.2d 65 (2000), cert. denied, 255 Conn. 940, 768 A.2d 949 (2001); see also General Statutes § 46b-56 (c) (enumerating factors to be considered). "In reaching a decision as to what is in the best

interests of a child, the court is vested with broad discretion and its ruling will be reversed only upon a showing that some legal principle or right has been violated or that the discretion has been abused." (Internal quotation marks omitted.) *Stahl* v. *Bayliss*, 98 Conn. App. 63, 68, 907 A.2d 139, cert. denied, 280 Conn. 945, 912 A.2d 477 (2006).

The essence of the defendant's custody argument is that there was scant evidence before the court concerning several of the factors enumerated in § 46b-56 (c). The language of § 46b-56 (c), however, does not compel the consideration of any particular factor or factors when determining the best interest of a child. See General Statutes § 46b-56 (c) ("[i]n making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so *may consider, but shall not be limited to*, one or more of the following factors" [emphasis added]). Rather, the court is free to consider the factors it determines to be most appropriate given the facts of each individual case. Therefore, the argument that there was insufficient evidence before the court as to specific factors under § 46b-56 (c) is unavailing as long as there is adequate support in the record for the custody determination.

We conclude that the court did, in fact, properly consider the best interest of the child in its award of sole custody to the plaintiff. The court found, following the trial, that the defendant's father had evicted the plaintiff and the minor child from the marital home, which was owned by the defendant's father. Both of the parties' testimony indicates that the defendant, at the least, knew about his father's intention to evict the plaintiff and the minor child, yet did nothing. The court's findings and the plaintiff's testimony indicate that the defendant has a problem with anger and hostility. The plaintiff also testified that the defendant had taken the minor

child to a family court proceeding without her knowledge. In light of the testimony of both the plaintiff and the defendant, as well as the court's conclusions concerning all of the evidence before it, we cannot conclude that the court abused its discretion. The evidence was sufficient for the court to find that it was in the best interest of the minor child for the plaintiff to have sole custody, with the defendant having reasonable visitation rights.

C

The defendant next claims that he "was denied procedural due process when the court denied his motion for a continuance . . . ." Specifically, the defendant argues that because he was incapable of representing himself, the court's custody and financial orders constituted an unconstitutional interference with his right to raise his children and to his property. We are not persuaded.

Immediately before the trial began on August 23, 2006, the court inquired whether the defendant had counsel or was representing himself. The defendant responded that he was not representing himself and that he had contacted an attorney who had not yet returned his call. The court noted that no attorney had contacted the court or filed an appearance on behalf of the defendant and, further, that the defendant had not requested a continuance until that morning. The court then denied the motion for a continuance, and the defendant proceeded pro se at the trial. The defendant preserved his objection to the court's denial but stated no grounds for his objection other than his belief that the plaintiff's counsel was "railroading" him.

Because the defendant did not assert a constitutional claim before the court and does not seek review of his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), we employ the abuse of

discretion standard in reviewing the court's refusal to grant his motion for a continuance and, in doing so, conclude that the court did not abuse its discretion.[6] See *Kelly* v. *Kelly*, 85 Conn. App. 794, 799, 859 A.2d 60 (2004) (holding that abuse of discretion standard is appropriate standard of review of defendant's claim that court's refusal to grant her motion for continuance was constitutional violation because defendant neither asserted constitutional claim before trial court nor sought review of unpreserved claim pursuant to *Golding*).

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Citations omitted.) *Ungar* v. *Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). "[I]f the reasons given for the continuance do not support any interference with [a] specific constitutional right, the [reviewing] court's analysis will revolve around whether the trial court abused its discretion." *In re Shaquanna M.*, 61 Conn. App. 592, 602, 767 A.2d 155 (2001); see also *Foster* v. *Foster*, 84 Conn. App. 311, 316–17, 853 A.2d 588 (2004).

"Decisions to grant or to deny continuances are very often matters involving judicial economy, docket management or courtroom proceedings and, therefore, are particularly within the province of a trial court. . . .

[6] Cf. *Foster* v. *Foster*, 84 Conn. App. 311, 316–18, 853 A.2d 588 (2004) (employing *Golding* review upon request of appellant regarding claim that denial of continuance constituted due process violation).

Whether to grant or to deny such motions clearly involves discretion, and a reviewing court should not disturb those decisions, unless there has been an abuse of that discretion, absent a showing that a specific constitutional right would be infringed." (Citation omitted.) *In re Shaquanna M.*, supra, 61 Conn. App. 604.

Our Supreme Court has "articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the defendant's personal responsibility for the timing of the request . . . ." (Internal quotation marks omitted.) *State* v. *Rivera*, 268 Conn. 351, 379, 844 A.2d 191 (2004).

In the present case, the defendant requested a continuance the morning the trial was to begin. The court noted, however, following the defendant's motion for a continuance, that the case had been pending for almost two years and that the attorney the defendant alleged he had contacted had neither contacted the court nor filed an appearance. The record also reflects that the defendant was represented by counsel until February 14, 2006, when his counsel's motion to withdraw appearance was granted. "We are especially hesitant to find an abuse of discretion when the motion is made on the day of trial. . . . Every reasonable presumption in favor of the proper exercise of the trial court's discretion will be made." (Internal quotation marks omitted.) *O'Connell* v. *O'Connell*, 101 Conn. App.

516, 526, 922 A.2d 293 (2007). Because the defendant had adequate notice that trial was approaching and waited until the last possible moment to request a continuance to obtain counsel, we conclude that the court's denial of his request for a continuance was not arbitrary and was not an abuse of discretion.

D

We next address the defendant's claim that the trial was not fair and impartial because he was incapable of representing himself. Specifically, the defendant argues that because the court failed to raise the issue of his competency sua sponte, he was denied due process of law. We decline to review the defendant's unpreserved claim.

The defendant did not raise any objection to the trial court proceedings on the ground that he believed he was incapable of representing himself. There were scant, if any, allusions to the defendant's competency at trial. Our review of the record reveals that the only possible such allusions were, first, the defendant's testimony that he did not understand the word "gratuitous" when it was used by the plaintiff's counsel. Second, the defendant stated, "I can't read, and I can't write," in response to a question posed by the plaintiff's counsel regarding a job application.[7]

[7] This statement is contradicted by the defendant's testimony, as well as by exhibits introduced at trial. Exhibits introduced at trial included the defendant's handwritten financial affidavit and a handwritten letter he wrote to the department of revenue services.

The following colloquy also occurred at trial:

"[The Plaintiff's Counsel]: . . . [I]s that what the document says?

"[The Defendant]: Where would you want me to read that?

"[The Plaintiff's Counsel]: Right by your left thumb, the last paragraph.

"[The Defendant]: This is something that [the plaintiff] made up, and I'm . . .

"[The Plaintiff's Counsel]: Is that what the document says?

"[The Defendant]: I have been working with my father for the last four years.

"[The Plaintiff's Counsel]: Okay.

"[The Defendant]: Yep.

"When a party raises a claim for the first time on appeal, our review of the claim is limited to review under either the plain error doctrine as provided by Practice Book § 60-5, or the doctrine set forth in *State* v. *Golding*, [supra, 213 Conn. 239–40]." (Internal quotation marks omitted.) *Irizarry* v. *Irizarry*, 90 Conn. App. 340, 343, 876 A.2d 593 (2005). In his appellate brief, however, the plaintiff has not sought review under either of those doctrines. Although the defendant appeared pro se at trial, and we allow pro se litigants some latitude; see *Solomon* v. *Connecticut Medical Examining Board*, 85 Conn. App. 854, 861, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005); we have found nothing in the record that necessarily would have alerted the court to the defendant's objecting to the trial proceedings because he believed he was incapable of representing himself. "As this court has previously noted, it is not appropriate to engage in a level of review that is not requested." (Internal quotation marks omitted.) *Irizarry* v. *Irizarry*, supra, 343. Accordingly, we decline to review the defendant's unpreserved claim of error.

II

AC 28839

A

The defendant next claims that court improperly found him in contempt of court and established a purge amount on the basis of an erroneous arrearage. The defendant argues that because there was no arrearage at the time the motion for contempt was filed, the court improperly found him in contempt on the basis of arrearages accrued beyond the date the motion was filed and improperly established a purge amount on the

"[The Plaintiff's Counsel]: All right.

"[The Defendant]: That's what it says."

basis of those later arrearages. The defendant further argues that finding him in contempt on the basis of arrearages not in existence at the time the motion for contempt was filed defeats the purpose of civil contempt, which is coercive, rather than punitive. We are not persuaded.[8]

The essence of the defendant's argument is that contempt was found and a purge amount established for a time period not alleged in the motion for contempt. "[T]he interpretation of pleadings is always a question of law for the court. . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [A pleading] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Citation omitted;

[8] We note that as to the defendant's claim of error regarding the court's contempt finding, the record does not contain a memorandum of decision or a signed transcript of the court's oral decision in compliance with Practice Book § 64-1. When the record does not contain a memorandum of decision or signed transcript of the court's oral decision, this court has declined to review the claims on appeal because the record is inadequate for review. *Chase Manhattan Bank/City Trust* v. *AECO Elevator Co.*, 48 Conn. App. 605, 607–608, 710 A.2d 190 (1998). When there is an unsigned transcript on file in connection with the appeal, this court may review the claims if the transcript adequately reveals the court's findings and conclusions in connection with its decision. *Tisdale* v. *Riverside Cemetery Assn.*, 78 Conn. App. 250, 254 n.5, 826 A.2d 232, cert. denied, 266 Conn. 909, 832 A.2d 74 (2003). Here, the record contains a court order as quoted from the March 23, 2007 hearing, as well as an unsigned transcript containing the court's findings and conclusions concerning its contempt finding. We will, therefore, review the defendant's claim on appeal.

internal quotation marks omitted.) *Gil* v. *Gil*, 94 Conn. App. 306, 312–13, 892 A.2d 318 (2006).

This court in *Gil* addressed a similar claim regarding the allegations contained in a motion for contempt. In that case, the plaintiff claimed that the court improperly found her in contempt for acts and time periods that were not pleaded in the defendant's motion for contempt. Id., 311. In response to the plaintiff's claim, this court noted that "[t]he defendant's motion for contempt recites that the 'plaintiff . . . has disobeyed the court order in the following ways . . . . From 2000 to present, the plaintiff has shortened my hours of visitation. At other times, I have not received my visitation at all . . . .' Read broadly and realistically, as well as in the context of this dispute, the motion encompassed a continuing course of conduct theory. The court issued its original order in April, 2000. The defendant's motion clearly alleged that the plaintiff had engaged in a continuous course of contemptuous conduct from the inception of the order to the date of filing, with no indication that such conduct would cease absent the court exercising its coercive power. The plaintiff cannot complain now that she was not on notice that the court would find her in contempt for the allegedly contemptuous conduct that continued even after the motion was filed." Id., 313.

We find little difference between the circumstances in *Gil* and those in the present case. The plaintiff's November 1, 2006 amended motion for contempt first recites the court's August 23, 2006 financial orders and then states that "[s]ince that time, the defendant has failed and refused to abide by said orders of the court." Read broadly and realistically, as well within the context of the heavily disputed financial orders in this case, the plaintiff's motion in this case also encompassed a continuing course of conduct theory. Furthermore, the record reveals that the court already had found the

defendant in contempt on October 2, 2006, for his failure to comply with the court's August 23, 2006 financial orders. We conclude that the plaintiff's motion pleaded a continuous course of conduct and, therefore, that the court's contempt finding and corresponding purge amount were not at odds with the allegations contained in the motion.[9]

We add that the defendant's assertion is "contrary to both common sense and the well settled principle that pleadings must be construed broadly and realistically, rather than narrowly and technically." *Gil* v. *Gil*, supra, 94 Conn. App. 314. "When a party has drafted a motion for contempt that may reasonably be read to include a continuing course of conduct theory, imposing a requirement that the party file additional motions, pleading essentially the same facts, until the original motion is adjudicated wastes the resources of both the court and the filing party. In addition, it requires a hypertechnical interpretation and an exceptionally formalistic application of due process requirements." Id., 314 n.6.[10]

B

The defendant next claims that the trial court was biased against him and his father. We disagree.[11]

[9] We note additionally that on March 23, 2007, the court found that the defendant had the ability to pay alimony and child support and, therefore, was in wilful contempt of the court's financial orders. We further note that our reversal of the financial orders in part I does not, by itself, require reversal of the court's contempt finding. See *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 148, 496 A.2d 476 (1985) ("[w]e emphasize again that the court orders must be obeyed; there is no privilege to disobey a court's order because the alleged contemnor believes that it is invalid").

[10] Because we conclude that the court's contempt finding did not run astray of the allegations in the plaintiff's motion, we need not address the defendant's further assertion that because the contempt finding went beyond the allegations, it was improperly punitive in nature.

[11] We note that the defendant's briefing of this claim merely contains a list of references to the transcript of the March 23, 2007 hearing that allegedly support his claim of partiality. The defendant provides no legal authority or analysis to support his claim. We reiterate that analysis, rather than mere

"Accusations of judicial bias or misconduct implicate the basic concepts of a fair trial. . . . The appearance as well as the actuality of [partiality] on the part of the trier will suffice to constitute proof of bias sufficient to warrant disqualification. . . . Canon 3 (c) (1) [of the Code of Judicial Conduct] provides in relevant part: A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party . . . .

"To prevail on [his] claim of a violation of this canon, the [defendant] need not show actual bias. The [defendant] has met [his] burden if [he] can prove that the conduct in question gave rise to a reasonable appearance of impropriety." (Internal quotation marks omitted.) *Lucas* v. *Lucas*, 88 Conn. App. 246, 258, 869 A.2d 239 (2005).

The defendant asserts that "the court's failure to forestall the plaintiff's counsel from making repeated comments about [the] defendant's credibility, over the repeated objections of the defendant's counsel, is indicative of the bias shown by the court against the defendant." Although he cites several passages from the March 23, 2007 hearing that purportedly support that assertion, the defendant fails to explain how comments made by the plaintiff's counsel signify bias on the part of the court. The defendant has not met the burden of proof required to prevail on a claim of judicial impropriety, and we find no merit to this claim.

C

The defendant finally claims that the court improperly awarded the plaintiff attorney's fees. We conclude that the record is inadequate to review this claim.

abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. *Misata* v. *Con-Way Transportation Services, Inc.*, 106 Conn. App. 736, 740 n.4, 943 A.2d 537 (2008).

"Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . *Koizim* v. *Koizim*, 181 Conn. 492, 501, 435 A.2d 1030 (1980). An exception to the rule announced in *Koizim* is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders. . . . Whether to allow counsel fees [under General Statutes §§ 46b-62 and 46b-82], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Kunajukr* v. *Kunajukr*, supra, 83 Conn. App. 488–89.

The record does not contain a memorandum of decision or a transcript signed by the court setting forth the court's findings of fact and conclusions of law, as required by Practice Book § 64-1. We cannot review whether the award was proper because the record does not reveal the court's reasoning, specifically, whether or to what extent it considered the parties' ability to pay, as well as the criteria set forth in §§ 46b-62 and 46b-82. "It is a well established principle of appellate procedure that the appellant has the duty of providing this court with a record adequate to afford review. . . . Where the factual or legal basis of the trial court's ruling is unclear, the appellant should seek articulation pursuant to Practice Book § [66-5]. . . . Accordingly, [w]hen the decision of the trial court does not make the factual predicates of its findings clear, we will, in the absence of a motion for articulation, assume that the trial court acted properly." (Internal quotation marks omitted.)

Moreira v. *Moreira*, 105 Conn. App. 637, 641, 938 A.2d 1289 (2008). In the present case, neither party requested articulation from the court. Because the defendant has failed to provide this court with a sufficient record, we decline to review the issue of whether the court improperly awarded the plaintiff attorney's fees.

On the appeal designated AC 28039, the judgment is reversed as to the financial orders only and the case is remanded for a new hearing on all financial issues in accordance with law; the judgment is affirmed in all other respects. The judgment in AC 28839 is affirmed.

In this opinion the other judges concurred.

CHARLES COLEMAN *v.* COMMISSIONER OF CORRECTION
(AC 28022)

McLachlan, Lavine and Berdon, Js.

Argued April 30—officially released July 1, 2008

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Anthony V. DeMayo*, judge trial referee; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

David J. Reich, special public defender, for the appellant (petitioner).

Melissa Patterson, deputy assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Linda N. Howe*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Charles Coleman, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion when it denied his petition for certification to appeal. We dismiss the appeal.

The petitioner was charged with and convicted of burglary in the first degree, assault in the first degree and attempt to commit robbery in the first degree. He was sentenced to a total effective term of twenty years imprisonment. The petitioner's conviction was upheld by this court in *State* v. *Coleman*, 35 Conn. App. 279, 646 A.2d 213, cert. denied, 231 Conn. 928, 648 A.2d 879 (1994).

The petitioner subsequently filed an amended petition for a writ of habeas corpus, alleging that his trial counsel rendered ineffective assistance. Specifically, the petitioner alleged that counsel failed to obtain and to call a palm print expert to challenge the state's palm print evidence.[1] After a trial, the habeas court concluded that the petitioner failed to demonstrate that counsel's performance was deficient. See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"In a habeas appeal, although this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quota-

[1] In its May 18, 2006 memorandum of decision, the court concluded that trial counsel retained a palm print expert who confirmed that the palm prints from the scene matched the petitioner's prints. The petitioner has not demonstrated that this finding was clearly erroneous.

tion marks omitted.) *Klinger* v. *Commissioner of Correction*, 94 Conn. App. 579, 581, 893 A.2d 493, cert. denied, 278 Conn. 919, 901 A.2d 44 (2006). "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Bailey* v. *Commissioner of Correction*, 107 Conn. App. 362, 365–66, 947 A.2d 2, cert. denied, 287 Conn. 922, 951 A.2d 568 (2008).

After a thorough review of the record and briefs, we conclude that the petitioner has not demonstrated that the issues he has raised in the petition for certification to appeal are debatable among jurists of reason, that a court could resolve those issues differently or that the questions raised deserve encouragement to proceed further. Consequently, the petitioner has failed to demonstrate that the court abused its discretion in denying his petition for certification to appeal. See *Simms* v. *Warden*, supra, 230 Conn. 616.

The appeal is dismissed.

IN RE EMERALD C.*
(AC 28573)

Bishop, McLachlan and Gruendel, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child, E. *Held*:

1. The respondent father could not prevail on his claim that because he had completed all of the steps ordered by the trial court for reunification with E, that court improperly considered his noncompliance with additional requirements mandated by the department of children and families in terminating his parental rights; the trial court did not find that the father had complied fully with the court-ordered specific steps and made multiple findings to the contrary, and because it was undisputed that the department repeatedly instructed the father that he was not to have any contact with the respondent mother and not to allow E to have any contact with the mother, and because the father testified that he was aware of those restrictions and that his failure to comply with them could jeopardize his reunification with E, the court was free to consider the evidence of his noncompliance with those requirements in evaluating his rehabilitation.
2. The trial court's finding that the department made reasonable efforts to reunify the respondent father with E was not clearly erroneous and was supported by sufficient evidence in the record showing that the department had procured a number of services for the father and had arranged numerous visits between the father and E despite consistent reports that the visits were detrimental to E's well-being, despite that no meaningful bond between E and the father existed and despite the father's conduct in violating the department's instructions that he was not to have any contact with the mother and that he was to prohibit any contact between E and the mother.
3. The trial court's finding, pursuant to statute (§ 17a-112 [j] [3] [B] [ii]), that the respondent father had failed to achieve a degree of personal rehabilitation sufficient to warrant the belief that at some time in the foreseeable future, he would be capable of assuming a responsible position with respect to the care of E was supported by sufficient

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-3, 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 Appellate Court.

evidence in the record, which showed that the father had failed to comply fully with several of the specific steps ordered by the court and with certain instructions of the department, that he had exposed E to domestic violence, that he lacked a relationship with E, who exhibited fear of the father and was unresponsive to him, and that he was unable to parent E even after extensive participation in the services made available to him and was incapable of providing a safe and nurturing environment for his child.

(*One judge dissenting*)

Argued March 24—officially released July 1, 2008

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, where the matter was tried to the court, *Hon. William L. Wollenberg*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Marcia McCormack, for the appellant (respondent father).

Philip Miller, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *Susan Quinn Cobb*, assistant attorney general, for the appellee (petitioner).

Trudy Condio, for the minor child.

Opinion

GRUENDEL, J. The respondent father appeals from the judgment of the trial court terminating his parental rights with respect to E, his minor child.[1] He claims that

[1] The court also terminated the parental rights of E's mother, whom we refer to by that designation. Because she has not appealed, we refer in this opinion to the respondent father as the respondent.

We also note that pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioner in this appeal.

the court (1) improperly considered his noncompliance with requirements mandated by the department of children and families (department), (2) improperly found that the department made reasonable efforts to reunify him with E and (3) improperly found that he had failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3). We affirm the judgment of the trial court.

E was born on June 14, 2003. Weighing a mere three pounds, she spent her first month clinging to life at Saint Francis Hospital and Medical Center in Hartford due to her mother's admitted substance abuse while E was in utero. E's mother had a history of involvement with the department regarding substance abuse, prostitution, physical neglect, medical neglect and risk of injury concerning her four older children. She also had a history of depression and suicidal ideation for which she required hospitalization. As a result, an order of temporary custody and a petition alleging that E was neglected and uncared for was filed on her behalf when she was born. On March 25, 2004, E was adjudicated neglected and was committed to the care and custody of the petitioner, the commissioner of children and families. The order of temporary custody was sustained shortly thereafter.

For the first ten months of her life, the identity of E's father was unknown. On April 29, 2004, a paternity test confirmed that the respondent was E's father.

The respondent was born in the African nation of Ghana. In 2000, he relocated to the United States. At that time, the respondent had two daughters in Ghana, aged two and four. As the court found, "[w]hen he left Ghana, [the respondent] abandoned his daughters . . . and has not seen them since." The respondent met E's mother in the summer of 2002. The respondent maintained that their relationship never was serious,

describing it as "nothing more than a sexual relationship on a few occasions that led to the conception of [E]."

In an effort to gain custody of E, the respondent on August 19, 2004, voluntarily agreed to comply with thirteen specific steps issued by the court. That court order required the respondent (1) to keep all appointments set by or with the department and to cooperate with department home visits, announced or unannounced, and visits by E's court-appointed attorney or guardian ad litem; (2) to keep E's whereabouts and his own whereabouts known to the department, his attorney and the attorney for E; (3) to participate in counseling and to make progress toward the "identified treatment goals" regarding his parenting skills; (4) to submit to substance abuse assessment and to follow recommendations regarding treatment; (5) to submit to random drug testing, the time and method of which shall be at the department's discretion; (6) to engage recommended service providers for parenting, individual and family counseling, in-home support services or substance abuse treatment; (7) to sign releases authorizing the department to communicate with service providers to monitor attendance, cooperation and progress toward identified goals, and for use in future proceedings before the court; (8) to secure or maintain adequate housing and legal income; (9) to have no substance abuse; (10) to have no involvement with the criminal justice system; (11) immediately to advise the department of any changes in the composition of the household so as to ensure that the change does not compromise the health and safety of E; (12) to maintain E within the state of Connecticut for the duration of this case except for temporary travel out of state with the authorization of the department or the court in advance; and (13) to visit E as often as the department permits.

In its memorandum of decision, the court chronicled the various efforts made by the department to reunify the respondent with E: "From April 29, 2004, to April 22, 2005, the following service providers were contacted on the [respondent's] behalf: Family Development Center, Community Child Guidance Center, New Hope and Planned Parenthood. [The respondent] was either unable or unwilling to adjust his work schedule to accommodate an intake for any of these services; therefore, these services could not be put in place. [The respondent] began having supervised visits with [E] at [the department] in July, 2004. From July 2, 2004, to April 8, 2005, these visits continued even though they were reported as being detrimental to the well-being of [the] child. On December 8, 2004, [the mother] was seen in [the respondent's] apartment. On December 17, 2004, [the respondent] was instructed by [the department] that he was not to have contact with [the mother] and [that] if he were to continue to maintain contact, it would jeopardize reunification efforts with [the] child. On April 29, 2005, [the respondent] was asked if he had any contact with [the mother], but he denied such contact. He was aware that any contact with [the mother] would jeopardize his reunification with [the] child.

"From April 22, 2005, to February 8, 2006, [the respondent and E] engaged in reunification and parenting programs with Abundant Families and [the Parent Infant Program]. Abundant Families characterized [E] as being 'hysterical' but reported that the interaction was appropriate. The Parent Infant Program reported visits between [E and the respondent] as being appropriate. These reports appear to be contradictory. On February 8, 2006, [E] was reunified with [the respondent]. On March 14, 2006, [the respondent and the mother] were involved in domestic violence, and [the respondent] was arrested for disorderly conduct and unlawful

restraint.[2] On March 15, 2006, [E] was removed from the care of [the respondent]. From April 19 to May 25, 2006, [the respondent] submitted to one urine screen out of eight.

"After [E] was removed from [the respondent's] care on March 15, 2006, she and [the respondent] engaged in four supervised visits in the community. Two social workers and [E's] attorney were present for three out of the four visits. These visits were observed as being extremely detrimental to the well-being of [the] child. On June 8, 2006, the Juvenile Court in Hartford ceased visitation between [the] child and [the respondent] because the child was having significant adverse reaction to the visits. On June 9, 2006, it was reported to [the department by R, one of the mother's older children], that [the respondent and the mother] were living together and planning on getting married at the time of [the respondent's] reunification with [E]. [The respondent] was fully aware that any contact with [the mother] would jeopardize reunification efforts with [E] and yet he chose to withhold this information from [the department]."

On June 23, 2006, the petitioner filed a petition for termination of parental rights as to both the respondent and the mother. The ground for the petition was the failure to achieve sufficient rehabilitation pursuant to § 17a-112 (j) (3) (B) (ii).[3] The court held a trial on

[2] As the court recounted: "[O]n March 15, 2006, [E] was removed from [the respondent's] care due to a traumatic domestic violence situation between [the respondent and the mother at the respondent's] apartment on March 14, 2006. According to the Manchester police department report, [E] was present as [the respondent] drank a pint of gin and several beers, then engaged [the mother] in a physical altercation. This altercation included [the respondent's] punching, pushing and screaming at [the mother and the mother's] stabbing [the respondent], all with [E] present."

[3] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition [to terminate parental rights] if it finds by clear and convincing evidence that . . . the child . . . has been found by the Superior Court . . . to have been neglected . . . in a prior proceeding . . . and the parent of such child has been provided specific steps to take

November 13 and 17, 2006.[4] At trial, the petitioner submitted five exhibits and six witnesses, and eight exhibits were submitted on behalf of E. The respondent submitted two exhibits and testified on his own behalf.

In its January 31, 2007 memorandum of decision, the court found that the department had made reasonable efforts to reunify the petitioner and E, and that the respondent had failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B). It further found that termination of the respondent's parental rights was in the best interest of E.[5] Accordingly, the court granted the petition and this appeal followed.

I

Although not a model of precision, the respondent's first claim appears to be that because he "completed all of the steps required," the court improperly considered his noncompliance with additional requirements mandated by the department. For two reasons, that claim is flawed.

First, the court never found that the respondent fully complied with the court-ordered specific steps. Rather, it made multiple findings to the contrary.[6] For example, the court found that although he was required to submit to random drug testing conducted at the discretion of

to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[4] The mother was not present at trial and a default entered for failure to appear.

[5] Only the adjudicative phase of the proceeding is at issue in this appeal.

[6] In evaluating the reunification efforts made by the department, the court noted the respondent's "proven inability to fully comply with court-ordered specific steps . . . ."

the department, the respondent failed to submit to several urine tests.[7] The court found that although the petitioner was required to participate in counseling and to make progress toward the identified treatment goal of improving his parenting skills, "he was either unable or unwilling to adjust his work schedule to accommodate an intake" for multiple services initiated by the department, including those offered by the Family Development Center, Community Child Guidance Center, and New Hope and Planned Parenthood.[8] The court found that although he was required to visit E "as often as the department permits," the respondent did not comply. Instead, "[w]hen visits were increased from one hour to two hours on December 21, 2004, [he] cancelled the first two visits, and, thereafter, he did not adhere to the increased hours. He either arrived one hour late or left one hour early." The respondent also cancelled scheduled visits with E on May 11 and June 1, 2006. Although he was required to secure and to maintain adequate housing, the respondent refused to provide the department with a copy of his apartment lease to verify occupancy and refused to provide his landlord's telephone number to verify rent information. The respondent additionally was required to have no involvement with the criminal justice system. Nevertheless, on March 14, 2006, he was arrested on charges of disorderly conduct and unlawful restraint stemming from the domestic violence dispute with the mother in which "[a]fter a night of drinking and domestic violence, [the respondent] was stabbed by the mother in the

[7] The department's social study for termination of parental rights that was offered into evidence at trial indicated that the respondent failed to submit to urine tests on April 19 and 24, and May 2, 9, 15 and 23, 2006, all of which were scheduled after the March 14, 2006 domestic violence dispute.

[8] Although the respondent initially participated in certain parenting services, once he reunified with E, "he was not compliant" and failed to keep his scheduled appointments with the reunification worker at Abundant Families. As a result, Abundant Families closed the respondent's file.

presence of [E].'' See footnote 2. In light of the foregoing, the respondent's claim that he complied fully with all of the required steps is untenable.

Furthermore, to the extent that the petitioner contends that the court could not properly consider his noncompliance with additional requirements mandated by the department, his argument is contrary to Connecticut law. As this court observed in *In re Vincent D.*, 65 Conn. App. 658, 783 A.2d 534 (2001), ''[i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, *regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department.*'' (Emphasis added.) Id., 670. In that case, the respondent mother ''had received explicit advice from the department, which she understood, that regaining custody of her child depended on her living apart from [the child's] father until he was drug free.'' Id. On appeal, this court held that the trial court properly considered the respondent mother's noncompliance with that requirement in finding that she had not achieved a sufficient degree of personal rehabilitation. Id.

It is undisputed that the department repeatedly instructed the respondent that he was not to have any contact with the mother. The department further instructed the respondent not to allow E to have any contact with the mother. At trial, the respondent testified that he was aware of those restrictions and the fact that his failure to comply therewith could jeopardize his reunification with E. The court was free to consider the evidence of his noncompliance with those requirements in evaluating his rehabilitation. His claim, therefore, is without merit.

II

The respondent next claims that the court improperly found that the department made reasonable efforts to reunify him with E. We conclude that there was adequate evidence in the record to support the court's determination.

"In order to terminate parental rights under § 17a-112 (j), the department is required to prove, by clear and convincing evidence, that it has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification. . . . [Section 17a-112] imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . The trial court's determination of this issue will not be overturned on appeal unless, in light of all of the evidence in the record, it is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 632, 847 A.2d 883 (2004). "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so . . . [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine

whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) Id., 627–28.

In its memorandum of decision, the court found that the department made reasonable efforts to reunify the respondent with E. The court detailed various efforts, including procuring services from the following providers: "Family Development Center, Community Child Guidance Center, New Hope and Planned Parenthood, the Vernon Family Center, Abundant Families, Preschool Intervention Program, psychological and interactional evaluations, ADRC and Genesis." That finding is supported by the department's social study for termination of parental rights that was offered into evidence at trial.

In addition, the court had before it evidence that the department arranged supervised visits between the respondent and E that began in July, 2004, and continued for more than one year. When those visits proved unproductive, the department implemented additional services that provided even more time for the respondent to interact with E. The department also scheduled unsupervised overnight visits at the respondent's home. Furthermore, on February 8, 2006, while maintaining custody of E, the department reunited her with the respondent. The department arranged for day care on behalf of the respondent and agreed to pay half of that expense. The department also contacted Abundant Families, which provided the respondent with furniture for his apartment.

When the petitioner removed E from the respondent's care one and one-half months later in the wake of the domestic violence dispute, the department continued

its attempt at reunification by arranging multiple supervised visits with E. The department did so despite consistent reports that the visits were detrimental to E's well-being and that no meaningful bond between E and the respondent existed. As the attorney for the minor child emphasized in her statement filed pursuant to Practice Book § 67-13, "[t]he department worked with [the respondent] for nineteen months, well beyond the suggested time frame spelled out in the Adoption and Safe Families Act, 42 U.S.C. § 620 et seq. . . ."

The respondent faults the department for failing to offer him "any services regarding his position as the victim in a domestic violence situation." The record indicates, however, that the respondent was a perpetrator of domestic violence. The court specifically found that on March 14, 2006, the respondent "drank a pint of gin and several beers, then engaged [the mother] in a physical altercation. This altercation included [the respondent's] punching, pushing and screaming at [the mother and the mother's] stabbing [the respondent], all with [E] present." That finding is supported by the report filed by the Manchester police department following his arrest and introduced into evidence. By his actions, the respondent violated the department's instructions that he was not to have any contact with the mother and that he was to prohibit any contact between E and the mother. Notwithstanding that conduct, the department thereafter *continued* its efforts to reunify the respondent and E.

As we earlier noted, "[r]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Samantha C.*, supra, 268 Conn. 632. Examining the department's efforts in light of the particular circumstances of the present case, we conclude that there was adequate evidence from which the court could have concluded that the department made reasonable efforts to reunify the respondent with E. That determination is not clearly erroneous.

III

The respondent contends that the court improperly found that he failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (ii). We disagree.

"On appeal, we review a trial court's finding that a parent has failed to rehabilitate herself in accordance with the rules that apply generally to a trier's finding of fact. We will overturn such a finding of fact only if it is clearly erroneous in light of the evidence in the whole record. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [O]n review by this court every reasonable presumption is made in favor of the trial court's ruling."[9] (Citation omitted; internal quotation marks omitted.) *In re Vincent D.*, supra, 65 Conn. App. 669.

[9] It is well established that review of a trial court's determination that a parent has failed to achieve rehabilitation is governed by the clearly erroneous standard. See, e.g., *In re Jeisean M.*, 270 Conn. 382, 397, 852 A.2d 643 (2004); *In re Samantha C.*, supra, 268 Conn. 627; *In re Eden F.*, 250 Conn. 674, 705, 741 A.2d 873, reargument denied, 251 Conn. 924, 742 A.2d 364 (1999). "Appellate review of a factual finding . . . is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court." (Internal quotation marks omitted.) *Gorton* v. *Gorton*, 80 Conn. App. 52, 55, 832 A.2d 675 (2003). "The trial court's findings of fact are entitled to great deference and will be overturned only on a showing that they were clearly erroneous." *State* v. *Moreno-Cuevas*, 104 Conn. App. 288, 291, 934 A.2d 260 (2007), cert. denied, 287 Conn. 901, 947 A.2d 344 (2008). "Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached." (Internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P.* v. *Ashford*, 98 Conn. App. 556, 560–61, 909 A.2d 964 (2006). Rather, "[i]n making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Blow* v. *Konetchy*, 107 Conn. App. 777, 788, 946 A.2d 943 (2008).

Although the dissent concedes in a footnote that the clearly erroneous standard of review is the applicable standard by which an appellate court reviews a trial court's determination that a parent has failed to achieve rehabilitation, its analysis does not apply that deferential standard. In granting review to the respondent's unpreserved due process challenge to the court's determination that he failed to achieve a sufficient degree of personal

rehabilitation, the dissent frames its analysis in terms of the respondent's "liberty interest" and, relying on Justice Thomas' concurring opinion in *Troxel* v. *Granville*, 530 U.S. 57, 80, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), strictly scrutinizes the record in a light most favorable to the respondent.

Appellate review of the respondent's due process challenge is unwarranted and improper. At no time did the respondent distinctly allege a due process claim before the trial court. See Practice Book § 60-5 (court not bound to consider claim "unless it was distinctly raised at the trial"). Rather, during closing argument, counsel for the respondent generally alleged that "his rights, as guaranteed by the fourteenth amendment to the United States constitution, have been violated." Indeed, the words "due process" never were uttered at trial, nor were they discussed in any motion or memorandum of law submitted to the court. Under our rules of practice, "[a]ny party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief under Section 5-1 or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question. If the party fails to do this, the judicial authority will be under no obligation to decide the question." Practice Book § 5-2; see also *Weinstein* v. *Weinstein*, 275 Conn. 671, 743, 882 A.2d 53 (2005). The respondent failed to comply with that rule of practice.

Most importantly, the trial court did not address the respondent's alleged due process claim in its memorandum of decision. The respondent thereafter did not seek an articulation of that decision. See Practice Book §§ 66-5 and 61-10. "We have repeatedly held that this court will not consider claimed errors on the part of the trial court unless it appears on the record that the question was distinctly raised at trial *and was ruled upon and decided by the court* adversely to the appellant's claim." (Emphasis added; internal quotation marks omitted.) *McGuire* v. *McGuire*, 102 Conn. App. 79, 87, 924 A.2d 886 (2007); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims neither addressed nor decided by trial court are not properly before appellate tribunal); *Keating* v. *Glass Container Corp.*, 197 Conn. 428, 431, 497 A.2d 763 (1985) (same); *State* v. *Simms*, 170 Conn. 206, 208, 365 A.2d 821 (same), cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976); *State* v. *Kelly*, 100 Conn. 727, 729, 125 A. 95 (1924) ("so far as the record before us shows, the trial court never passed on the motion, and although assigned among the errors it is not properly before us"); *Atwood* v. *Jarrett*, 81 Conn. 532, 533, 71 A. 569 (1909) ("[t]he record nowhere . . . discloses that the claim embodied in the remaining assignment of error was . . . passed upon by the court below [and] therefore [it is] not properly before us for consideration"). Our Supreme Court has held that this rule "applies to constitutional issues." *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 846, 633 A.2d 296 (1993); *Berry* v. *Loiseau*, 223 Conn. 786, 828, 614 A.2d 414 (1992). Accordingly, the respondent's due process challenge to the court's determination that he failed to achieve a sufficient degree of personal rehabilitation is not properly before this court.

Failure to achieve a sufficient degree of personal rehabilitation is one of the seven statutory grounds on which parental rights may be terminated under § 17a-112 (j) (3). Section § 17a-112 (j) permits a court to grant a petition to terminate parental rights "if it finds by clear and convincing evidence that . . . the child . . . has been found by the Superior Court . . . to have been neglected . . . in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." In making that determination, the proper focus is on the parent's demonstrable development in relation to the needs of the child. As we have observed: "[I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue." (Internal

In reaching this unpreserved constitutional claim, the dissent ignores the fact that (1) the respondent did not distinctly raise the claim at trial as required by Practice Book § 5-2, (2) the trial court did not rule on that claim, (3) the respondent did not file either a motion for articulation with the trial court or a motion for review with this court, (4) the respondent has not requested review of the claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and (5) the respondent has not requested review under the plain error doctrine. See Practice Book § 60-5. "Connecticut law is clear that a party seeking review of unpreserved claims under either the plain error doctrine; Practice Book § 60-5; or *State* v. *Golding*, [supra, 239–40], must affirmatively request such review." *State* v. *Wheatland*, 93 Conn. App. 232, 243–44, 888 A.2d 1098, cert. denied, 277 Conn. 919, 895 A.2d 793 (2006); see also *State* v. *Ramos*, 261 Conn. 156, 171, 801 A.2d 788 (2002) ("[a] party is obligated . . . affirmatively to request review under [the *Golding* or plain error] doctrines"). As a result, "we do not engage in a level of review, such as *Golding* or plain error, when it has not been requested by a party." *State* v. *Longo*, 106 Conn. App. 701, 709, 943 A.2d 488 (2008). The dissent offers no explanation for its departure from those well established prerequisites to appellate review.

quotation marks omitted.) *In re Alejandro L.*, 91 Conn. App. 248, 260, 881 A.2d 450 (2005). Furthermore, our courts are required to construe liberally the provisions of § 17a-112 in the best interest of the child for whom a petition has been filed, rather than the parent thereof. See General Statutes § 17a-112 (q).

" 'Rehabilitate' means 'to restore [a handicapped or delinquent person] to a useful and constructive place in society through social rehabilitation.' Webster, Third New International Dictionary." *In re Juvenile Appeal (84-3)*, 1 Conn. App. 463, 477, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984). Likewise, "[f]ailure to rehabilitate is defined as the failure of a parent to achieve expectations following the adjudication and disposition of the prior neglect petition." *In re Jessica M.*, 49 Conn. App. 229, 248, 714 A.2d 64 (1998), appeal dismissed, 250 Conn. 747, 738 A.2d 1087 (1999). Our review of the record reveals that the evidence credited by the court supports its conclusion that the respondent failed to attain a degree of rehabilitation sufficient to warrant the belief that at some time in the foreseeable future, he would be capable of assuming a responsible position with respect to the care of E.

The respondent's paternity was discovered months after the birth of E, her adjudication as a neglected child and her commitment to the custody of the petitioner. Both the respondent and the petitioner acknowledge that the term "reunification" is something of a misnomer, as E has been in the care of the department since she was one month old. Upon confirmation of his paternity of E, the respondent told the department that "he could not care for her due to his work schedule but would speak to his family about caring for her."[10]

[10] In its memorandum of decision, the court found that the respondent had "informed the department on two separate occasions that he may have relatives who would be willing to adopt [E]. Each time [the respondent] was asked for their names and contact information, he stated that he would need a few weeks to get the information together. Each time [the respondent]

At that time, the respondent had abandoned two daughters in Ghana and had no relationship with E. He thereafter voluntarily entered into an agreement with the department to take certain steps to improve his ability to care for E. Indulging every presumption in favor of the court's ruling, as we must, the court reasonably could determine that in agreeing to comply with the specific steps in light of the aforementioned parenting history, the respondent sought to restore himself to the position of a capable parent.[11] Pursuant to General Statutes § 46b-129 (j), the court provided the respondent with specific steps that included measures targeting the "identified treatment goals" regarding his parenting abilities.

The record indicates that the respondent's efforts largely were unsuccessful. As previously noted, the respondent failed to comply fully with several of the specific steps ordered by the court. See part I. That determination finds support in the social study for termination of parental rights that was offered into evidence and the testimony adduced at trial. In addition,

said he would obtain the information needed, he did not follow through." That finding is supported by the social study for termination of parental rights.

[11] In his appellate brief, the respondent questions precisely from what was he to be rehabilitated, a refrain repeated in the dissent. Under our rules of practice, it is the sole responsibility of the appellant to provide this court with an adequate record for review. Practice Book § 61-10. Practice Book § 66-5 permits an appellant to seek an articulation by the trial court of the factual and legal basis on which it rendered its decision. "[A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . An articulation may be necessary where the trial court fails completely to state any basis for its decision . . . or where the basis, although stated, is unclear. . . . The purpose of an articulation is to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Citations omitted; internal quotation marks omitted.) *Fantasia* v. *Milford Fastening Systems*, 86 Conn. App. 270, 283, 860 A.2d 779 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005). Nevertheless, despite his puzzlement, the respondent failed to seek an articulation of the trial court's decision in the present case.

the respondent failed to comply with the department's instructions that he was not to have any contact with the mother and that he was not to allow E to have any contact with the mother. The respondent testified that he was aware of the mother's drug addiction and history with the department and the fact that failure to comply with the department's instructions could jeopardize his reunification with E. He nevertheless ignored those instructions. The court also had before it the statement of R, one of the mother's older children, that the respondent and the mother "were living together and planning to get married at the time of the respondent's reunification with E." Similarly, in the police report introduced into evidence, the mother referred to the respondent as "her boyfriend" and stated that she had her own key to the respondent's apartment.

In addition, the respondent exposed E to domestic violence.[12] The police report indicated that on the evening of that dispute, E was removed from the apartment *after* the altercation between the respondent and the mother. Also, E's foster mother testified that in the days following the domestic violence dispute, E recounted how her "daddy was screaming" because "he was bleeding." That testimony belies the respondent's statement that E was not present during the stabbing.[13] Further,

[12] We disagree with the dissent's factual finding attributing to the respondent a "clean record." First and foremost, "this court does not find facts." *Branford* v. *Van Eck*, 86 Conn. App. 441, 447, 861 A.2d 560 (2004), cert. denied, 272 Conn. 922, 867 A.2d 839 (2005). Second, the trial court found that prior to the birth of E, the respondent abandoned two minor children in Ghana, a finding the respondent does not contest on appeal. The court further found that months before the termination petition was filed, the respondent was arrested on charges of disorderly conduct and unlawful restraint stemming from the domestic violence dispute and that he engaged in substance abuse at that time. See footnote 2.

[13] In its memorandum of decision, the court indicated that it did not find the respondent's testimony credible. It stated: "The court questioned [the respondent] extensively during the trial and is mindful of the examination by others. At that time and also prevailing throughout the court's viewing of the evidence, the court has observed a reluctance of [the respondent] to respond in a forthright, positive manner. Rather, he responded in most

it supports the court's finding that the respondent "exhibited poor judgment in the upbringing of [E]."

The court was presented with ample evidence documenting the respondent's inability to interact with E. As social worker Lourdes Gerena testified, during the supervised visits prior to the domestic violence dispute, E "would shut down. She didn't show any emotion; she wouldn't interact with the respondent. She wouldn't look at him or really even let him touch her hand or anything." Multiple social workers present at those supervised visits confirmed that E cried throughout the visits and was unresponsive to the respondent.[14]

instances reluctantly with an inordinate amount of hesitation, pausing to seemingly prepare a response that he felt would curry favor in the particular situation but not necessarily truly factual. This was the distinct impression of the court, and this character of [the respondent] to somewhat fabricate, explains the impression this man had given to [department] workers and supervisors, counsel for the department and others to lead them down a path for proposing reunification for a long period. He put on a good facade for all, but beyond the front there was lacking a firm resolve to accomplish the satisfactory completion of the services in order to be able to serve as a safe, responsible and nurturing parent within a reasonable time."

We note that the police report indicates that on the evening of the domestic violence dispute, the respondent averred that the dispute was with "his girlfriend," who he claimed attacked him in his apartment. The respondent further stated that the mother was "not at his home when this argument happened." At trial, the respondent acknowledged that his statements were not truthful.

[14] We agree with the dissent's observation that the evidence in the record suggests the lack of an ongoing parent-child relationship. Although we agree that "punctilious adherence to procedural guidelines" is required in termination proceedings; *In re Vincent D.*, supra, 65 Conn. App. 668; we are also mindful that "whether to terminate parental rights is a highly fact-specific process." *In re Shane P.*, 58 Conn. App. 244, 254, 754 A.2d 169 (2000). In the present case, our analysis is predicated on a multitude of factors, including (1) the respondent's abandonment of his two minor children in Ghana; (2) the fact that upon confirmation of his paternity of E, the respondent told the department that "he could not care for her due to his work schedule"; (3) the respondent's failure to comply fully with several of the specific steps ordered by the court; (4) the respondent's failure to comply with the department's instructions that he was not to have any contact with the mother and that he was not to allow E to have any contact with the mother; (5) the fact that the respondent and the mother were planning to get married

Following the domestic violence dispute, the department arranged five supervised visits between the respondent and E. The respondent cancelled the visits scheduled on May 11, 2006, and June 1, 2006. During the visits that he attended, E exhibited a fear of the respondent. A social worker present at one of those visits stated that E "totally shut down and cried in the respondent's presence. She appeared frightened, uneasy, would not respond and would not interact with the respondent throughout the visit. E shook her head 'no' when asked if she wanted to have any more visits with the respondent." Another social worker described the visits to the court as "the saddest visits I've ever seen."

The court also was presented with evidence concerning the respondent's children in Ghana, whom it found he had abandoned in 2000 and "has not seen them since."[15] In assessing rehabilitation, the court is required

at the time of the respondent's reunification with E; (6) the fact that the respondent exposed E to domestic violence; (7) the respondent's inability to interact with E; and (8) the testimony of psychologist Kelly F. Rogers, who opined that he questioned the respondent's fitness as a parent. Considering those factors under the applicable standard or review, which requires this court to make every reasonable presumption in favor of the trial court's ruling; *In re Vincent D.*, supra, 669; we cannot say that it was clearly erroneous for the court to conclude that the respondent had failed to attain a degree of rehabilitation sufficient to warrant the belief that at some time in the foreseeable future, he would be capable of assuming a responsible position with respect to the care of E.

[15] The respondent has not disputed that factual finding on appeal and made no mention of his Ghanaian children in either his appellate brief or at oral argument before this court. In questioning, sua sponte, that finding in footnote 6 of its opinion, the dissent fails to accord appropriate deference to the trial court as "the appropriate forum for the resolution of factual disputes"; *First National Bank of Litchfield* v. *Miller*, 285 Conn. 294, 302, 939 A.2d 572 (2008); in derogation of the "well established [principle] that [appellate] review is limited to claims raised by the parties in their briefs." *Payton* v. *Payton*, 103 Conn. App. 825, 841, 930 A.2d 802 (*Schaller*, *J.*, concurring), cert. denied, 284 Conn. 934, 935 A.2d 151 (2007). In so doing, the dissent credits the testimony of the respondent despite the fact that the trial court, as the sole arbiter of credibility, found him not credible. See footnote 13 of this opinion; see also *In re Davonta V.*, 285 Conn. 483, 488–89,

to obtain a historical perspective of the respondent's child caring and parenting abilities. *In re Daniel C.*, 63 Conn. App. 339, 354, 776 A.2d 487 (2001). The court heard detailed testimony from the respondent regarding his relationship with his daughters. As it stated in its memorandum of decision: "[T]he court questioned [the respondent] at length with regard to his relationship with his two daughters who are living in Ghana with their maternal grandmother. [The respondent] left Ghana in 2000 when his daughter, [J], was two years old and is now eight years old and his daughter, [P], was four years old and is now ten years old. He has not seen these children in six years, talks to them occasionally on the telephone and from time to time sends small sums of money to them. While he has had an income since 2000 and has seemingly had no obligation to anyone other than himself until August 18, 2004, when his paternity of [E] was determined, he has offered little, if any, support to those two children. He never attempted to bring his daughters to this country even for a visit nor saw fit to visit with them in Ghana." In light of that historical perspective, the court concluded

940 A.2d 733 (2008) (appellate tribunal does not retry facts or pass on credibility of witnesses); *Gallo* v. *Gallo*, 184 Conn. 36, 38, 440 A.2d 782 (1981) ("[w]eighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role"); *Highstead Foundation, Inc.* v. *Fahan*, 105 Conn. App. 754, 762, 941 A.2d 341 (2008) ("[i]t is the function of the trial court to weigh the evidence and the credibility of the parties and to find the facts; we cannot retry the case on appeal" [internal quotation marks omitted]); *Feen* v. *New England Benefit Cos.*, 81 Conn. App. 772, 780, 841 A.2d 1193 ("[i]n recognition of its superior position to evaluate those factors as they coalesce at trial and the disparate ability of a reviewing court to glean such things from the written record, we have held that the trial court is vested with the sole discretion to make credibility assessments and to assign the weight to be given testimony"), cert. denied, 269 Conn. 910, 852 A.2d 739 (2004). Although the dissent states that the record does not provide enough information about the circumstances of the respondent and his family in Ghana to determine whether his abandonment of the minor children "is relevant to his ability to raise E," the trial court expressly concluded otherwise.

that "[i]t is remarkable to the court that [the respondent's] inattention to his two daughters in Ghana can be reconciled with a serious intention to father [E]."

The court also heard the testimony of psychologist Kelly F. Rogers. "Courts are entitled to give great weight to professionals in parental termination cases." *In re Christina V.*, 38 Conn. App. 214, 221, 660 A.2d 863 (1995); see also *In re Shyliesh H.*, 56 Conn. App. 167, 176, 743 A.2d 165 (1999) ("[p]sychological testimony from professionals is appropriately accorded great weight in termination proceedings"). Rogers evaluated the respondent and E in July, 2005, during which he conducted interactional studies of the child with the respondent, as well as with her foster parents. Rogers testified that although he originally recommended reunification of the respondent with E in August, 2005, he opposed it at the time of trial. Rogers based his opinion on a variety of factors that included (1) the respondent's lack of a relationship with E, (2) the respondent's ongoing relationship with the mother, (3) the domestic violence dispute, (4) the respondent's substance abuse that was documented in the police report, (5) E's strong bond with her foster family and the "risk of trauma of another removal," (6) his concerns about E's long-term emotional and social development, and (7) his concerns about the respondent's credibility and "ability to correctly report to authorities on the status of his daughter." As a result, Rogers testified that he questioned the respondent's fitness as a parent.

In its summary of the adjudicatory findings, the court stressed the respondent's "inability to parent E even after extensive participation in the services made available" and his "poor judgment in the upbringing" of E. It found that "[t]he clear and convincing evidence indicates that [the respondent has] failed to improve [his] parenting ability to acceptable standards. . . . [D]espite [the department's] efforts on [his] behalf and

[his] own efforts, [the respondent remains] incapable of providing a safe and nurturing environment for [his] child. When one considers the level of care, patience and discipline that children require from their caregivers, it is patently clear that [the respondent is] not in a better position to parent [E] now than [he was] at any other time during these proceedings, and that [he remains] without the qualities necessary to successfully parent [E]."[16] It therefore found that considering E's age, needs and special needs, the respondent could not within a reasonable time assume a responsible position in the child's life.

It is well settled that the critical issue in assessing rehabilitation is whether the parent has gained the ability to care for the particular needs of the child at issue. *In re Halle T.*, 96 Conn. App. 815, 836, 902 A.2d 670 (2006); *In re Alejandro L.*, supra, 91 Conn. App. 260; *In re Kristy A.*, 83 Conn. App. 298, 317, 848 A.2d 1276, cert. denied, 271 Conn. 921, 859 A.2d 579 (2004); *In re Ashley M.*, 82 Conn. App. 66, 72, 842 A.2d 624 (2004); *In re Victoria B.*, 79 Conn. App. 245, 255, 829 A.2d 855 (2003); *In re Amneris P.*, 66 Conn. App. 377, 384, 784 A.2d 457 (2001); *In re Gary B.*, 66 Conn. App. 286, 292, 784 A.2d 412 (2001); *In re Daniel C.*, supra, 63 Conn. App. 354; *In re Sheila J.*, 62 Conn. App. 470, 480, 771 A.2d 244 (2001); *In re Sarah Ann K.*, 57 Conn. App. 441, 448, 749 A.2d 77 (2000); *In re Shyliesh H.*, supra, 56 Conn. App. 180; *In re Danuael D.*, 51 Conn. App. 829, 840, 724 A.2d 546 (1999). The record amply supports the conclusion that the respondent has not gained that

[16] After acknowledging the "limited parenting skills" of the respondent, the dissent opines that "this is not a condition from which he had to be rehabilitated." It cites no authority to support that assertion. If the inquiry under § 17a-112 (j) (3) (B) (ii) centers on whether "considering the age and needs of the child, such parent could assume a responsible position in the life of the child," we perceive no reason why the inability to parent a child cannot, in certain circumstances, constitute such a condition.

essential ability. Indulging every reasonable presumption in favor of the court's ruling, as our standard of review requires, we conclude that the evidence credited by the court supports its conclusion that the respondent failed to attain a degree of rehabilitation sufficient to warrant the belief that at some time in the foreseeable future, he would be capable of assuming a responsible position with respect to the care of E, as required by § 17a-112 (j) (3) (B) (ii).

The judgment is affirmed.

In this opinion BISHOP, J., concurred.

McLACHLAN, J., dissenting. Termination of parental rights has been called the civil equivalent of the death penalty. See *Matter of Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759 (2006). "The termination of parental rights is defined as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . . It is a most serious and sensitive judicial action. *Anonymous* v. *Norton*, 168 Conn. 421, 430, 362 A.2d 532, cert. denied, 423 U.S. 935, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975). Although that ultimate interference by the state in the parent-child relationship may be required under certain circumstances, the natural rights of parents in their children undeniably warrants deference and, absent a powerful countervailing interest, protection." (Citation omitted; internal quotation marks omitted.) *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 640, 436 A.2d 290 (1980).

The Supreme Court of the United States has long recognized this fundamental right of parents. Writing for the majority in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), Justice O'Connor stated: "The Fourteenth Amendment provides that no

State shall deprive any person of life, liberty, or property, without due process of law. We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. . . . The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (Citation omitted; internal quotation marks omitted.) Id., 65. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." Id. Thus, any statute which interferes with the parent's right to raise a child free from interference of the state as well as any procedure implementing it will be subject to strict scrutiny.[1] Id., 80 (Thomas, J., concurring).

I agree with the trial court and the majority that the department of children and families (department) made reasonable efforts to reunify the minor child, E, with

[1] Generally, when a statutory classification affects a fundamental liberty interest, that statute is subject to strict scrutiny. See *Keogh* v. *Bridgeport*, 187 Conn. 53, 66, 444 A.2d 225 (1982). In the present case, the parties do not assert, nor do I, that the statute in this case should be examined or challenged. I simply emphasize the fundamental nature and importance of a parent's right to raise his or her children, which, because of the statutory scheme, must be properly applied. I agree with the majority that in the present case, the court's decision is governed by the clearly erroneous standard of review. I am of the opinion, however, that a mistake was committed. See *Shapero* v. *Mercede*, 66 Conn. App. 343, 346–47, 784 A.2d 435 (2001) ("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. . . . A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . The conclusions drawn by the trial court will be upheld unless they are legally and logically inconsistent with the evidence." [Citation omitted; internal quotation marks omitted.]), rev'd on other grounds, 262 Conn. 1, 808 A.2d 666 (2002). Here, the evidence does not support a finding of failure to rehabilitate.

the respondent father and that he was unwilling or unable to benefit from such efforts, and I agree that a termination of the respondent's parental rights is in the child's best interest. I regrettably cannot agree, however, with the conclusion that the respondent's parental rights appropriately were terminated on the stated statutory ground of failure to achieve personal rehabilitation.[2] If the state is going to intervene and terminate an individual's parental rights, it is paramount that the state allege and prove the appropriate statutory ground.

"Compliance with the statutory criteria for termination cannot be dismissed by an all-encompassing best interests standard. *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 672, 420 A.2d 875 (1979). Insistence upon strict compliance with the statutory criteria before termination of parental rights and subsequent adoption proceedings can occur is not inconsistent with concern for the best interests of the child. Rather, it enhances the child's best interests by promoting autonomous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusion disguised under the rubric of the child's best interests. Id. [*T*]*he risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on such comparisons rather than on the statutory criteria requires the court, in considering a petition to terminate parental rights, to sever completely the issue of whether termination is statutorily warranted and whether a proposed adoption is desirable* . . . ." (Citation omitted; emphasis

[2] A reversal of the judgment here would not automatically reunify E with the respondent; rather, she would remain committed to the custody of the petitioner until the petitioner petitioned the court for termination of the respondent's parental rights on the proper statutory ground or made an appropriate permanency plan.

added; internal quotation marks omitted.) *In re Juvenile Appeal*, 1 Conn. App. 463, 467, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984). While it may have been in the best interest of E that the court terminated the respondent's parental rights, it is in the best interest of the public that the petitioner, the commissioner of children and families, select the appropriate statutory ground. Here, the court applied an improper statutory ground, which was alleged by the petitioner, in order to do what was in the best interest of E.

The respondent argues that the termination of his parental rights on the sole basis that he failed to achieve a sufficient degree of personal rehabilitation as would encourage a belief that within a reasonable time, considering the age and needs of the child, he could assume a responsible position in the life of the child, denied him due process.[3] That claim is supported by the follow-

[3] The respondent's first issue on appeal was that "[t]he trial court erred in finding that the respondent father had failed to rehabilitate. . . . The respondent father was not accorded his due process rights as provided by the due process clause of the fourteenth amendment to the United States Constitution." The respondent further enunciated his due process argument in his brief before this court.

Although the majority has determined that the respondent's due process claim is not preserved, I believe that the claim is preserved and should be addressed due to the fundamental right involved in the present case.

Practice Book § 5-2 provides: "Any party intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief under Section 5-1 or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an opportunity to discuss the question. If the party fails to do this, the judicial authority will be under no obligation to decide the question." The respondent satisfied Practice Book § 5-2.

In his closing argument at trial, the respondent asserted "his position that his rights, as guaranteed by the fourteenth amendment to the United States constitution, have been violated." He made this argument by stating that the department conducted a background check, in which it found that he did not have a criminal history and did not have a history with the department.

The following language excerpted from the respondent's closing argument expands on his due process claim: "[A] police report of a single incident of

ing facts in the record. At the time the respondent was identified as E's father, he had a clean record. He had no history of substance abuse, no criminal history, no history of domestic violence, no history with the department, and he was gainfully employed and had housing during most of the time in question. In fact, E's social worker testified that the respondent had a "clean record" and that she did not make referrals for a sub-

domestic violence. That is not a failure to rehabilitate. Rehabilitate means to restore to a prior level. [The respondent] doesn't have any history of domestic violence. . . . [The department social worker] said there was no concern about substance abuse. She never made a referral for an evaluation in the two years that they were working on sending [E] home. No evidence of alcohol abuse at all. . . . In any event, he submitted to the substance abuse [testing], and it was negative. Both urine screens and the hair test were negative. So, he's not rehabilitating from substance abuse. . . . *This is a violation of our laws*. There's one ground for termination, and that's failure to rehabilitate. When asked from what [the respondent] was rehabilitating, [another social worker from the department] had trouble identifying it. I believe she said, well, ah—I guess severe domestic violence or maybe substance abuse. But it can't be either one of those." (Emphasis added.)

Furthermore, Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." The predecessor to Practice Book § 60-5, before it was amended in 1979, provided: "The supreme court shall not be bound to consider any errors on an appeal unless they are specifically assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial *and was ruled upon and decided by the court* adversely to the appellant's claim, or that it arose subsequent to the trial." (Emphasis added.) Therefore, even though the majority claims that unless the issue is distinctly raised and *decided* by the court, it is not preserved and review is precluded absent review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), or plain error review, I believe it was sufficiently raised. Furthermore, Practice Book § 60-5 does not preclude a claim that was raised imperfectly from being reviewed; it merely states that the court is not bound to afford it review.

Moreover, the petitioner did not object to the respondent's due process argument by claiming that it was not preserved; rather, the petitioner asserted only that the claim was briefed inadequately. The respondent's due process claim, however, is ten pages long, and the respondent has analyzed his claim and provided case law in support of such claim. See generally *State* v. *Linarte*, 107 Conn. App. 93, 118, 944 A.2d 369 (2008).

stance abuse evaluation previous to returning E to him because she was not concerned about substance abuse.[4]

The petitioner sought to terminate the respondent's parental rights on the basis of a failure to achieve a sufficient degree of rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (ii). "Rehabilitate" means to restore a handicapped or delinquent person to a useful and constructive place in society through social rehabilitation. *In re Heather L.*, 49 Conn. Sup. 287, 308, 877 A.2d 27 (2004), aff'd, 274 Conn. 174, 874 A.2d 796 (2005). Webster's defines "rehabilitate" as "to restore to a former capacity . . . to restore to good repute . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Numerous Connecticut decisions have used the language that "[p]ersonal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent." (Internal quotation marks omitted.) *In re Alejandro L.*, 91 Conn. App. 248, 259, 881 A.2d 450 (2005).[5] Moreover,

[4] During the reunification process, however, the respondent, when he had custody of E, was involved in a domestic violence altercation with E's mother in which he reportedly consumed alcohol to the point of inebriation and was stabbed. While I make no excuses for such reckless behavior, it nevertheless does not indicate a pattern of substance abuse or domestic violence from which the respondent needed to be rehabilitated.

[5] See *In re Nasia B.*, 98 Conn. App. 319, 908 A.2d 1090 (2006) (court affirmed termination of mother's parental rights on several grounds, including failure to rehabilitate because mother had history of substance abuse and mental health issues, and chose to attend sporadically various programs and take advantage of opportunities to address both of those issues as well as her parenting skills); see also *In re Shaun B.*, 97 Conn. App. 203, 903 A.2d 246 (2006) (court affirmed termination of mother's parental rights on basis of failure to rehabilitate when mother had anger management and mental health issues, and did not take advantage of specific steps and programs offered that would have addressed issues); *In re Vanna A.*, 83 Conn. App. 17, 847 A.2d 1073 (2004) (court affirmed termination of mother's parental rights on ground of failure to rehabilitate because mother had been arrested several times, incarcerated, there were abuse allegations, and court found mother's continued involvement in criminal justice system and lack of progress in therapy demonstrated inability to reunify with child).

courts in other states have determined that rehabilitation is "remov[ing] the circumstances, conditions, or conduct that caused the parent's inability or unwillingness to properly care for the child." *M.E.* v. *Shelby County Dept. of Human Resources*, 972 So. 2d 89, 102 (Ala. Civ. App. 2007).

Whatever definition is used, all have in common the concept of restoration from something. Here, the respondent poses the question: from what was he to be rehabilitated? The record in this case does not support the fact that the respondent suffered from some condition or disability from which he needed to be restored or rehabilitated. Admittedly, he had limited parenting skills, but this is not a condition from which he had to be rehabilitated. In order to prove a failure to achieve rehabilitation as a ground for termination of parental rights, a two-pronged test for rehabilitation must be satisfied: The state must prove by clear and convincing evidence that the parent has failed to achieve rehabilitation and that there is no reason to believe that a parent could assume a responsible position in the life of a child within a reasonable time, considering the child's age and needs. See General Statutes § 17a-112 (j) (3) (B); *In re Danuael D.*, 51 Conn. App. 829, 843, 724 A.2d 546 (1999); see generally *In re Migdalia M.*, 6 Conn. App. 194, 203, 504 A.2d 533, cert. denied, 199 Conn. 809, 508 A.2d 770 (1986); *In re Heather L.*, supra, 49 Conn. Sup. 308.[6]

[6] The majority states that the respondent should have filed a motion for articulation if he was unclear as to the grounds for his failure to rehabilitate. In its opinion, however, the majority appears to conclude that the respondent's failure to rehabilitate was supported by the court's finding that he had abandoned his two daughters in Ghana when he first came to the United States and his involvement in a domestic violence incident in which he had been stabbed. The respondent testified that he was trying to work with immigration authorities to bring his daughters to the United States. He also informed the court that he spoke with his daughters on a regular basis. While the court found it "remarkable" that the respondent had been so inattentive to his daughters in Ghana, the facts and circumstances surrounding his departure from Ghana, leaving his daughters behind, are unclear. Moreover, neither the petitioner nor the court claimed that the

The majority relies on *In re Alejandro L.* and particularly language in which the court stated: "[I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue."[7] (Internal quotation marks omitted.) *In re Alejandro L.*, supra, 91

respondent, in order to reunify with E, should have taken measures to bring his other daughters to the United States. I am not attacking the finding of the court that the respondent abandoned his daughters in Ghana. I raise this issue because the record does not provide us with enough information about the circumstances of the respondent and his family in Ghana for us to determine whether leaving his children in another country, more than six years earlier, is relevant to his ability to raise E.

[7] *In re Alejandro L.* is but one example of a litany of cases in which the facts clearly demonstrate the conditions from which the parent failed to rehabilitate. There, the respondent was discharged repeatedly from substance abuse, mental health and domestic violence counseling. *In re Alejandro L.*, supra, 91 Conn. App. 250–53. For example, the respondent was admitted to Manchester Memorial Hospital for attempted suicide and was admitted to River East, the intensive outpatient treatment program at Natchaug Hospital, but was discharged for not attending her therapy sessions. Id., 252. She was then referred to an outpatient program with Hockanum Community Valley counseling outpatient mental health and substance abuse treatment center (Hockanum Valley), but was once again discharged because of her failure to attend programs. Id.

After the court adjudicated all of her four children neglected, she began receiving counseling from Hockanum Valley but once again was discharged for failure to attend programs. Id. Additionally, she failed to report for drug testing and, when she was tested, the test indicated that she had recently used drugs. Id., 252–53. She was arrested for burglary and was admitted to River East again but was subsequently discharged for failure to comply with recommended treatment for cocaine addiction. Id., 253. She also refused to attend recommended intensive treatment at the Teamworks partial hospitalization program, saying instead that she intended to enroll in a New Direction program but failed to enroll. Id. She was then referred for the third time to another intake appointment at Hockanum Valley and, for the third time, was discharged for failure to comply with the program. Id. The department referred her to Stafford Family Services for counseling and provided transportation, but she failed to attend. Id., 254. There was a domestic violence protective order entered in her favor against L, the children's father, but she chose to live with him. Id. Last, her burglary charge resulted in a criminal conviction with probation requiring her to attend substance abuse counseling with which she failed to comply. Id. The facts of all of the cases used as precedent support the position of this dissent that "failure to rehabilitate" is not appropriate in this case.

Conn. App. 260. The majority's use of this language changes the meaning of the termination ground from "failure to rehabilitate" to "[gaining] the ability to care for the particular needs of the child at issue." (Internal quotation marks omitted.) Id.

The actual petition for termination of parental rights is a preprinted form on which the jurisdictional facts and grounds are set forth with a number of boxes to be checked when applicable. In the space reserved for grounds of termination, the form has the seven grounds set forth in § 17a-112 (j). For each of the seven subcategories there is box. The only box checked in this case was that next to the language for ground (B), the so-called failure to rehabilitate ground. No other box was checked. Evidence in the record may have supported several other grounds, such as ground (D), which is that there is no ongoing parent-child relationship. The procedure to prepare a termination of parental rights petition is simple, but the parent-child relationship is so important that great care and attention should be taken to ensure that viable grounds of termination, if they exist, are alleged. Unfortunately, the effort was not made to match the facts and evidence of this case to the statutory grounds, nor was any motion ever made to amend the petition to allege viable grounds.

"Pleadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted at trial . . . ." (Citations omitted; internal quotation marks omitted.) *Birchard* v. *New Britain*, 103 Conn. App. 79, 83, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007). Practice Book § 33a-1 (a), concerning the initiation of judicial proceedings for the termination of parental rights, provides in relevant part: "The petitioner shall set forth with reasonable

particularity, *including statutory references*, the specific conditions which have resulted in the situation which is the subject of the petition." (Emphasis added.) The facts adduced at this trial do not support, in my opinion, a finding by clear and convincing evidence that the respondent has failed to rehabilitate. A reasonable person in the respondent's position when presented with this petition would not have the belief that he would have his relationship with his child completely severed. In this case, it is not the finding of facts that is clearly erroneous but the application of the law. The improper statutory ground was alleged.

The department checked the wrong box.

I respectfully dissent.

Note

Appellate Court Memorandum Decisions begin at page 901. Page numbers 872 to 900 are intentionally omitted.

Reporter of Judicial Decisions

MEMORANDUM DECISIONS

VERNAL MORGAN *v.* COMMISSIONER OF CORRECTION
(AC 28449)

McLachlan, Gruendel and Beach, Js.

Argued April 17—officially released May 27, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Swords*, *J.*

Per Curiam. The appeal is dismissed.

JOSEPH MOONEY *v.* COMMISSIONER OF CORRECTION
(AC 28628)

DiPentima, Robinson and Peters, Js.

Argued April 17—officially released May 27, 2008

Petitioner's appeal from the Superior Court in the judicial district of New Haven, *Hon. William L. Hadden, Jr.*, judge trial referee.

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* ERNEST FRANCIS
(AC 28091)

DiPentima, Harper and Lavery, Js.

Argued April 22—officially released May 27, 2008

Defendant's appeal from the Superior Court in the judicial district of Hartford, *Espinosa*, *J.*

Per Curiam. The judgment is affirmed.

DARLENE M. MACLINA *v.* RICHARD M. MACLINA
(AC 28141)

Bishop, Harper and Hennessy, Js.

Submitted on briefs April 23—officially released May 27, 2008

Defendant's appeal from the Superior Court in the judicial district of Litchfield, *Prescott, J.*

Per Curiam. The judgment is affirmed.

ROBERT E. HALL *v.* DOUGLAS NEUMAN
(AC 28570)

Flynn, C. J., and Lavine and Pellegrino, Js.

Argued April 18—officially released May 27, 2008

Defendant's appeal from the Superior Court in the judicial district of Ansonia-Milford, *Hon. George W. Ripley II*, judge trial referee.

Per Curiam. The judgment is affirmed.

KELLY FREELOVE *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 28686)

Bishop, Gruendel and Beach, Js.

Argued May 1—officially released May 27, 2008

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Levine, J.*

Per Curiam. The judgment is affirmed.

TODD M. NAGY *v.* COMMISSIONER OF CORRECTION
(AC 28184)

Bishop, Lavine and Peters, Js.

Argued May 27—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *T. Santos*, *J.*

Per Curiam. The appeal is dismissed.

KEVIN LUCAS *v.* COMMISSIONER OF CORRECTION
(AC 28438)

McLachlan, Gruendel and Harper, Js.

Argued May 28—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* JOSE POLANCO
(AC 28182)

Flynn, C. J., and Robinson and Berdon, Js.

Argued May 20—officially released June 17, 2008

Defendant's appeal from the Superior Court in the judicial district of New Haven, *Levin*, *J.*

Per Curiam. The judgment is affirmed.

DAVID BJORKLUND *v.* COMMISSIONER OF CORRECTION
(AC 28011)

Bishop, Robinson and Lavery, Js.

Argued May 22—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *T. Santos*, *J.*

Per Curiam. The judgment is affirmed.

JAMES PINDER *v.* COMMISSIONER OF CORRECTION
(AC 28768)

DiPentima, McLachlan and Peters, Js.

Argued May 23—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Corradino*, *J.*

Per Curiam. The judgment is affirmed.

CHRISTOPHER J. LEWIS *v.* COMMISSIONER OF CORRECTION
(AC 27777)

Flynn, C. J., and DiPentima and Dupont, Js.

Argued May 27—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The appeal is dismissed.

MARGARET PIERRE-LOUIS *v.* JULES D. PIERRE-LOUIS
(AC 28729)

Bishop, Beach and Foti, Js.

Submitted on briefs May 28—officially released June 17, 2008

Defendant's appeal from the Superior Court in the judicial district of Ansonia-Milford, *Turner*, *J.*

Per Curiam. The judgment is affirmed.

ACORN HOMES, INC. *v.* COMMISSIONER OF TRANSPORTATION
(AC 28879)

McLachlan, Harper and Foti, Js.

Argued June 2—officially released June 17, 2008

Plaintiff's appeal from the Superior Court in the judicial district of Danbury, *Shaban*, *J.*

Per Curiam. The judgment is affirmed.

JERI KOLLOCK *v.* COMMISSIONER OF CORRECTION
(AC 27783)

Bishop, Lavine and Robinson, Js.

Argued May 19—officially released June 17, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger*, *J.*

Per Curiam. The judgment is affirmed.

RONALD SAVIN *v.* CHANDRA BOZELKO
(AC 29042)

Gruendel, Harper and Lavine, Js.

Submitted on briefs June 3—officially released July 1, 2008

Defendant's appeal from the Superior Court in the judicial district of Ansonia-Milford, *Hon. John W. Moran*, judge trial referee.

Per Curiam. The judgment is affirmed.

RAYMOND WEST *v.* COMMISSIONER OF CORRECTION
(AC 28516)

Gruendel, Harper and Lavine, Js.

Submitted on briefs June 3—officially released July 1, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Swords, J.*

Per Curiam. The appeal is dismissed.

SHAWN CARTER *v.* COMMISSIONER OF CORRECTION
(AC 28388)

Flynn, C. J., and DiPentima and Robinson, Js.

Submitted on briefs June 3—officially released July 1, 2008

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Fuger, J.*

Per Curiam. The judgment is affirmed.

APPENDIX

HONORABLE SIDNEY S. LANDAU[1]
April 19, 1935 - June 10, 2008

We gather today bound by bonds of family and friendship for a person who knew well that life is not forever and that as time passes there is a day appointed for all of us when we will pass from this life.

Judge Sidney Landau was that man. After a long illness, he died on June 10, 2008.

Little that we say here can beguile those closest to Judge Sidney Landau from such a loss. Family and friends of Judge Landau, I know I speak for all of you and for all the members of the Connecticut Appellate Court when I say to Judy, Cara Beth, Deena and Amy, the grandchildren, Rachel Elise Graber, Sarah Rose Graber, Genna Ashley Levison and Hank Benjamin Levison, sons-in-law Gary and my former clerk Howard, and other close family members and lifelong friends, that we are truly sorry and hope that a few words spoken on behalf of the Appellate Court may be of some comfort to you, and that both your faith and time, the great healer, will assuage your sadness in the parting.

Judge Landau spent sixteen years in private practice and as a prosecutor. In 1976, he was appointed a Judge of the Court of Common Pleas, in 1978 to the Superior Court, and in 1990 to the Appellate Court. He sat on almost 1900 three-judge panels, and authored more than 400 Appellate Court opinions, dissents and concurrences.

Many things could be said about Sidney Landau's long career at the bench and bar, but constraints of time will limit me to but a few.

He was a great teacher. His law clerks, and his students at the law schools of the University of Bridgeport, and Quinnipiac and at Cambridge University, England, benefited from this skill.

He had a heart. Legal doctrines traditionally limited recovery for bystander emotional distress and cases under the Dram Shop Act. In an important scholarly and groundbreaking appellate decision, Judge Landau determined that despite those traditional limitations the parents and brother who had witnessed the death of their son

[1] Eulogy by Chief Judge Joseph P. Flynn, Connecticut Appellate Court, at Services on June 13, 2008.

and brother caused by an intoxicated driver could recover damages under the common law for the resulting emotional trauma. In *Craig* v. *Driscoll*, 262 Conn. 312 (2003), the Connecticut Supreme Court affirmed him, overruling one of its precedents, as it did so.

He could bring people together. I saw this personally when serving with Sidney in Stamford in the late 1980's. He was often able to sit down with warring sides in bitter litigation, lead them to some common ground and resolve very bitter disputes. Appellate judges can often differ strongly about disposition of some of the appeals before them. On the appellate panels on which he served, he could calmly seek out that common ground and bring opposing points of view together.

Finally, he cared about people. As a trial judge, Sidney Landau upheld his oath of office and meted out sentences which the legislature had ordained for crimes arising out of the use and sale of narcotics. This waste of human talent and promise bothered him. However, he understood that at one time or another all of us have flown with broken wings, and he participated in and helped coordinate a youth program in Bridgeport, our largest city, and elsewhere aimed at keeping the young from addiction and the criminal conduct and wasted lives that accompany such dependency.

Like Tennyson's "Ulysses," Sidney's life took him many places, and, like Ulysses, he was part of all that he had met.

He was a man who understood that sometimes important work in life occurs far from where the trumpet sounds. He understood that in a world where truth is often difficult to determine, we must seek after it. He understood that real justice is inseparably linked to the truth.

On life's journey, not all is calm. Winds can blow. The storm follows. We remember today a man who stuck his chin into the winds which came his way and with his wife, children, family and some faithful friends at his side, weathered the storms. That is the example the life he led gives us.

His life will be a daily reminder to all of us to enjoy the good things life brings and to persevere in the face of the harsh winds that at one time or another beset us all.

The inevitable setbacks which come along need to be faced with courage. His life embodied the poet's lines:

"In the fell clutch of circumstance
I have not winced or cried aloud
Under the bludgeoning of chance
My head is bloody, but unbowed."

Sidney labored in the judicial vineyard long after he could have gone into a comfortable retirement.

So too, Tennyson wrote his poem, Ulysses, long into his career. Perhaps it is his greatest work and perhaps he thought of himself when he wrote, "Old age hath yet his honor and his toil." But he could have been writing about Judge Sidney Landau when he wrote those other lines President Kennedy loved so well about Ulysses setting out on another voyage with his trusted shipmates:

"The lights begin to twinkle from the rocks;
The long day wanes; the slow moon climbs; the deep
Moans round with many voices. Come my friends,
Tis not too late to seek a newer world. . . .
Though much is taken, much abides; and though
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are;
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield."

As we take leave of the Judge, we remember the teacher, who had a heart, brought people together, and cared about those among us who are most at risk. From all of us, we say goodbye old friend.