OFFICIAL

CONNECTICUT APPELLATE REPORTS Volume 138

PROCEEDINGS

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

SEPTEMBER, 2012—OCTOBER, 2012

BY

THOMAS G. SMITH
Reporter of Judicial Decisions

PUBLISHED BY
THE STATE OF CONNECTICUT
2016

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* See General Statutes § 52-434c.

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HON. SAMUEL J. SFERRAZZA

ATTORNEY GENERAL

HON. GEORGE JEPSEN

NOTES

[1] Retired October 19, 2012, under constitutional limitation as to age.
[2] Retired September 17, 2012, 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 2011; 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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Quiet title (§ 47-31); claim that trial court lacked subject matter jurisdiction to quiet title in land to three counterclaim plaintiffs in absence of necessary party; whether failure to join party infringed on party's due process rights; whether trial court improperly allowed parties to continue as counterclaim plaintiffs based only on their respective answers to withdrawn complaint; claim that once plaintiff withdrew complaint, trial court lacked subject matter jurisdiction to consider motions to amend answers; whether trial court's consideration of motion to amend effectively restored case to docket; whether trial court properly construed pleadings to contain viable counterclaims under § 47-31 (d) that survived withdrawal of complaint; whether trial court committed plain error in not requiring counterclaim plaintiffs to amend pleadings to include party who was joined as party defendant; claim that party was not able to defend interest in disputed land via answer because court did not require counterclaim plaintiffs to amend pleadings; whether trial court improperly used heightened standard in construing open and visible requirement for adverse possession counterclaim.

O'Brien *v.* O'Brien 591

Dissolution of marriage; whether defendant's appeal challenging denial of motion to terminate appellate stay with regard to order in dissolution judgment was moot because this court, in appeal by plaintiff from dissolution judgment, reversed judgment and remanded matter for new trial; subject matter jurisdiction.

O'Brien *v.* O'Brien 544

Dissolution of marriage; whether trial court abused discretion by entering unallocated alimony and child support order without considering and applying child support guidelines; whether trial court improperly failed to determine presumptive amount of child support to be awarded, to make finding as to whether application of guidelines would be inappropriate or inadequate in this case, and to explain basis for deviating from guidelines; claim that

guidelines did not apply because case involved award of unallocated alimony and child support; whether new trial on all financial issues was necessary; remand of order requiring plaintiff to pay defendant $50,000 in appellate attorney's fees for reconsideration in light of new financial orders issued on remand.

One Hundred Lords Highway, LLC, 98 Lords Highway, LLC *v.* . . . 776
O'Neil *v.* Commissioner of Correction (Memorandum Decision) 902
O'Reilly, Acadia Ins. Co. *v.* 413
Osbourne, State *v.* 518
O'Such *v.* Commissioner of Correction (Memorandum Decision) 901

Perez *v.* Cumba 351
Negligence; wrongful death; whether general verdict rule precluded review of claim of instructional error on appeal; whether trial court improperly instructed jury that to find defendant homeowner liable, it must find that defendant possessed notice of specific dangerous condition that caused decedent's death; whether complaint advanced traditional defective premises theory of liability or alleged negligence claim predicated on social invitee liability arising from intentional acts of third party; whether improper jury instruction was harmless error.
Pond, State *v.* 228

Rodriguez *v.* Commissioner of Correction (Memorandum Decision) 905
Rosario, Cornelius *v.* 1
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Rychling, Lebanon *v.* (Memorandum Decision) 902

Sanchez *v.* Commissioner of Correction 594
Habeas corpus; claim that trial counsel provided ineffective assistance by failing to call certain witnesses; whether habeas court abused discretion in denying petition for certification to appeal; whether finding that it was unlikely that jury would have found witnesses credible was clearly erroneous.
Schaghticoke Indian Tribe *v.* Rost 204
Summary process; claim that trial court lacked personal jurisdiction over defendant because he is "sovereign human being" and "common law free man"; whether defendant waived right to challenge personal jurisdiction; claim that trial court's exercise of jurisdiction constituted undue infringement of tribal sovereignty of Schaghticoke Indians; whether defendant lacked authority to assert Schaghticoke Indians' sovereignty on his own behalf; claim that trial court improperly decided dispute over tribal leadership; reviewability of claim that trial court improperly rendered judgment without one of plaintiffs being represented at summary process trial; aggrievement; whether claim that trial court ignored

prior judicial decisions that impacted tribal nation's claim of authority to represent interests of Schaghticoke Indians was moot.

Smigelski *v.* Kosiorek 728

Contracts; whether trial court improperly granted motion for summary judgment as to breach of contract, breach of implied covenant of good faith and fair dealing and indemnity claims and determined that those claims were barred by res judicata; claim that defendant in his individual capacity was separate party and not in privity with defendant in his fiduciary capacity; whether trial court properly dismissed counts of complaint seeking declaratory judgment to set aside decrees of Probate Court; whether plaintiff lacked standing to bring claims; whether trial court abused discretion in denying plaintiff's motion to disqualify defendant's counsel; whether plaintiff had standing to claim that defendant's attorney had conflict of interest.

Smigelski, Kosiorek *v.* 695

Smith, State *v.* (Memorandum Decision) 901

Solution, LLC, Mills *v.* 40

Spilke *v.* Wicklow 251

Vexatious litigation; whether trial court improperly determined that one defendant did not participate in filing of motion for contempt that formed basis for vexatious litigation action; whether trial court improperly limited proximate cause for vexatious litigation claim to motion for contempt; whether trial court abused discretion in awarding nominal damages as to one defendant; whether trial court's award of $10,001 in damages against other defendant was abuse of discretion; whether trial court improperly denied motion to strike case from hearing in damages list; claim that default against defendants was extinguished when plaintiff filed amended complaint after default was entered; whether trial court abused discretion in failing to set aside default judgment.

State *v.* Brundage 22

Sexual assault first degree; risk of injury to child; whether trial court abused discretion in denying motions to dismiss sexual assault charges; whether trial court misconstrued current version of applicable statute (§ 54-193a) and improperly concluded that it applied retroactively; whether trial court, by erroneously concluding that current version of § 54-193a applied retroactively, foreclosed defendant from offering proof regarding dates of offenses in support of affirmative statute of limitations defense; remand for new trial as to charges that were not time barred; whether trial court abused discretion in permitting state's expert witness to give opinion in response to hypothetical question regarding behavior of child who has been sexually abused; whether hypothetical elicited improper testimony as to victim's credibility.

State *v.* Crawley 124

Failure to obey traffic signals; interfering with officer; operating motor vehicle while license under suspension; possession of marijuana; possession of drug paraphernalia; possession of narcotics; possession of narcotics with intent to sell by person who is not

drug-dependent; claim that trial court improperly continued trial in defendant's absence without ascertaining that he validly waived sixth amendment right to confrontation; whether defendant waived right to be present during trial; whether trial court abused discretion in refusing to grant defendant continuance to allow him to obtain alternate counsel; whether trial court abused discretion and denied defendant due process of law by proceeding with trial without further determining whether defendant was competent to stand trial.

State *v.* Dort 401

Burglary first degree; kidnapping first degree; whether trial court abused discretion in disregarding defense counsel's request for second competency evaluation of defendant without conducting independent inquiry into defendant's competence and thereby violated defendant's due process rights; whether trial court was required to conduct independent inquiry to determine if competency evaluation of defendant was justified.

State *v.* James R. 181

Sexual assault first degree; kidnapping second degree; burglary second degree; risk of injury to child; whether defendant was deprived of fair trial as result of prosecutorial impropriety; reviewability of claim that trial court demonstrated judicial bias in state's favor and thereby deprived him of fair trial.

State *v.* Lee. 420

Operating motor vehicle while under influence of intoxicating liquor or drugs; operation of motor vehicle while license under suspension; conspiracy to make false statement second degree; conspiracy to fabricate physical evidence; tampering with witness; claim that trial court improperly admitted medical record, pursuant to statute (§ 14-227a [k]), that contained results of defendant's blood alcohol test without requiring any authentication or foundation for document; whether trial court properly determined that document containing results of defendant's blood alcohol test met conditions specified in § 14-227a (k) and that it was admissible and competent evidence; claim that requirement that blood sample be taken in accordance with regulations adopted under § 14-227a (d) was not met because commissioner of public safety declined to enact regulations to cover instances where blood alcohol testing is done as part of medical diagnosis and treatment; whether evidence was sufficient to support conviction on charges of operating motor vehicle while under influence of intoxicating liquor and operating motor vehicle while license under suspension; whether jury reasonably could have found that defendant operated vehicle; claim that there was no evidence that defendant induced, attempted to induce or directly caused witness to testify falsely to support conviction of charge of tampering with witness pursuant to statute (§ 53a-151); whether jury reasonably could have found beyond reasonable doubt that defendant was guilty of conspiring with witness to fabricate evidence and to make false statement; whether trial court improperly granted motion of defense

counsel to withdraw; whether conviction of conspiracy to make false statement second degree and conspiracy to fabricate physical evidence violated constitutional prohibition against double jeopardy; whether defendant waived claim that trial court's jury instructions on both conspiracy counts improperly misled jury on element of intent; claim that defense counsel was not given meaningful opportunity for review of proposed jury instructions.

State *v.* Little 106

Assault second degree; interfering with emergency call; whether evidence was sufficient to support conviction of assault second degree and interfering with emergency call; credibility of witnesses; whether state adduced sufficient evidence to demonstrate that defendant had specific intent to interfere with emergency call; whether trial court abused discretion in admitting recording of 911 call of witness, in addition to witness' written statement to police; whether defendant was unfairly prejudiced by admission of allegedly cumulative evidence.

State *v.* Morquecho 841

Murder; whether trial court improperly admitted expert testimony concerning domestic violence; whether trial court abused discretion in concluding that expert's testimony would be helpful to jury in assessing evidence and nature of victim's behavior in relation to defendant; whether expert's testimony concerned battered woman's syndrome; reviewability of challenges to admission of expert's testimony on relevance grounds and on ground that it improperly implicated defendant in crime; whether prejudicial effect of evidence outweighed probative value; whether trial court improperly permitted state to present prior testimony of witness; whether trial court improperly determined that witness was unavailable; whether trial court's determination that state made reasonable efforts to secure live testimony from witness reflected abuse of discretion.

State *v.* Osbourne 518

Attempt to commit assault first degree; carrying pistol without permit; criminal possession of firearm; reckless endangerment first degree; interfering with officer; whether evidence was sufficient to support conviction of three counts of attempt to commit assault first degree; whether jury reasonably could have found that defendant acted deliberately when he reached for and grabbed cocked and loaded pistol in his pocket between tasing cycles; claim that video of incident with officers raised reasonable doubt as to whether defendant actually grabbed gun or pulled it from his pocket; whether trial court improperly failed to allow jury to take video of events at issue, which had been admitted as exhibit, into deliberating room; failure to preserve claim at trial; whether claim was constitutional in nature so as to qualify for review under State *v.* Golding *(213 Conn. 233); whether claim warranted review under plain error doctrine; whether defendant implicitly waived claim that trial court improperly failed to instruct jury as to intent element of charge of interfering with peace officer.*

State *v.* Pond 228
Conspiracy to commit robbery second degree; whether evidence was sufficient to support verdict on conspiracy charge; whether state produced sufficient evidence for jury reasonably to have concluded that defendant specifically intended that dangerous instrument or deadly weapon would be displayed; whether trial court improperly failed to instruct jury that, with respect to conspiracy charge, state was required to prove that defendant specifically intended that, in course of robbery, what was represented to be deadly weapon or dangerous instrument would be used or displayed; harmful error.
State *v.* Smith (Memorandum Decision) 901
State *v.* Vlahos 379
Operating motor vehicle without driver's license in violation of statute (§ 14-36 [a]); sentence enhancement pursuant to statute (§ 14-36 [h] [2]); claim that information failed to state offense because element of § 14-36 (a), operation on public highway, was omitted; claim that state improperly charged defendant with operating motor vehicle without driver's license in violation of § 14-36 (a), rather than driving with expired license (§ 14-41 [c]) or driving after expiration of period of suspension (§ 14-215b); whether language of § 14-36 (a) limits applicability to only those persons who have not obtained initial driver's license; whether jury was likely to have been misled by trial court's jury instructions as to elements of § 14-36 (a); whether trial court abused discretion in denying motion for bill of particulars; whether trial court improperly denied motion for judgment of acquittal on amended part B information.
State Board of Education, Mangiafico *v.* 677
Steinegger, James *v.* (Memorandum Decision) 901

Tiber Holding Corp. *v.* DiLoreto (Memorandum Decision). 903
Trenwick America Reinsurance Corp. *v.* W. R. Berkley Corp.. . . . 741
Declaratory judgment; action seeking judgment declaring that certain reinsurance agreement of parties was subject to commutation agreement of parties; claim that trial court improperly determined that there was no mutual mistake regarding inclusion of reinsurance agreement in commutation agreement; whether trial court improperly failed to reform contract; claim that term "reinsurance agreements" as used in commutation agreement was ambiguous and that trial court should have considered extrinsic evidence; whether trial court improperly concluded that plaintiff was not entitled to restitution; whether trial court correctly denied motion for attorney's fees.

Vlahos, State *v.* 379

Waterbury Realty, LLC, Chase & Chase, LLC *v.* 289
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W. R. Berkley Corp., Trenwick America Reinsurance Corp. *v.* . . 741
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Yale-New Haven Hospital, Inc., Desmond *v.* 93

Zoning Board of Appeals of Montville, Green Falls Associates, LLC *v.* 481

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

FREDERICK CORNELIUS *v.* LYDIA ROSARIO ET AL.
(AC 33178)

Gruendel, Beach and Flynn, Js.

Syllabus

The plaintiff brought this action seeking to quiet title to certain real property and to nullify a tax sale of the parcel, which he claimed was illegally seized and sold without providing him with notice of the tax sale as required by statute (§ 12-157). After the taxes were not paid, the defendant city of Hartford and its tax collector filed tax liens against the property, executed a tax levy, and sold the property at a tax sale. Prior to the sale, the defendants attempted to provide notice to all record owners, but there was no record of the plaintiff's interest in the property because he had not recorded the warranty deed on the land records. The plaintiff filed a motion for summary judgment claiming that the defendants had not provided notice to M Co., the plaintiff's predecessor in title, in accordance with § 12-157 (a). The defendants had attempted to provide notice of the tax sale by certified mail to M Co., but the notice was returned as undeliverable, and the defendants thereafter provided notice to M Co.'s attorney. The trial court denied the plaintiff's motion for summary judgment, determining that the plaintiff lacked standing to assert M Co.'s rights, and granted a motion for summary judgment filed by the defendants, and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court improperly determined that the plaintiff lacked standing to challenge the adequacy of the defendants' notice to M Co.; the plaintiff was within the class of persons protected by the statute (§ 12-159) that permits a person to contest the validity of a tax sale by showing that

notice was not properly provided to the predecessor in title in accordance with § 12-157 (a), and, thus, the plaintiff had statutory standing to contest the adequacy of M Co.'s notice.

2. The plaintiff could not prevail on his claim that the trial court improperly determined that the defendants satisfied the notice requirement of § 12-157 (a) with respect to M Co.; § 12-157 (a) provides that notice of the tax sale be given via certified mail three times to the taxpayer, and although M Co. attempted notice by certified mail only once, the trial court properly found that subsequent notices to M Co. were not required because they would have been futile, as it was unlikely that additional notices sent to an unworkable address would have reached M Co., and the defendants took additional steps to provide M Co. with notice by sending the remaining notices to M Co.'s attorney, which satisfied the statutory requirements.

3. The trial court properly concluded that the additional steps taken by the defendants to provide M Co. with notice satisfied due process, the defendants having substantially complied with both the actual and constructive notice provisions of § 12-157 (a): in light of the fact that the certified notice was returned to the defendants marked undeliverable, additional mailings to the same unworkable address most likely would have been futile, and the defendants nevertheless took additional steps by searching to discover whether M Co.'s mailing address was accurate, attempting to locate M Co.'s agent of service and, upon learning that M Co.'s agent of service had resigned and no new agent had been appointed, sending all other notices to persons who had been M Co.'s attorneys; moreover, the further additional steps suggested by the plaintiff were not required by due process, and the plaintiff failed to present evidence to support the argument that the defendants should have taken additional steps to discover his unrecorded interest.

4. The trial court properly concluded that the plaintiff's unrecorded interest in the property was not reasonably ascertainable and, thus, obviated any obligation of the defendants to have provided him with notice of the tax sale; the plaintiff, as a sophisticated real estate investor, should have known and had the ability to record his interest, the additional steps proposed by the plaintiff for the defendants to take in order to ascertain his interest in the property exceeded the scope of § 12-157 (a), and the defendants complied with the constructive notice provisions of the statute by posting a notice at city hall and publishing a notice in the newspaper.

5. The plaintiff could not prevail on his claim that the trial court improperly denied him the opportunity to testify in defense of the defendants' motion for summary judgment or by not continuing the matter to allow him to submit affidavits in the matter in lieu of his proffered testimony; under the rule of practice (§ 17-45) governing motions for summary judgment, only documentary evidence is appropriate to support a motion

for summary judgment, and the plaintiff not having asked for a continuance during oral argument on the motion for summary judgment, the trial court did not err in failing to sua sponte order a continuance.

Argued April 16—officially released September 11, 2012

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 Edward Baum; thereafter, the court, *Hon. Robert Satter*, judge trial referee, granted the motion to strike filed by the defendant Albertina Ward et al.; subsequently, the court, *Aurigemma, J.*, denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James Colin Mulholland, for the appellant (plaintiff).

Joseph A. Marotti, for the appellees (named defendant et al.).

Opinion

BEACH, J. The plaintiff, Frederick Cornelius, appeals from the trial court's granting of a motion for summary judgment in favor of the defendants, the city of Hartford (city) and Lydia Rosario, the city's then tax collector,[1] and denial of his motion for summary judgment.[2] The

[1] Albertina Ward and Patricia Franklin, the purchasers of the property at the tax sale, Edward Baum and J&E Investment were also named as defendants. The action was withdrawn as to Baum. The court granted a motion to strike the action as to Ward, Franklin and J&E Investment. Only the city of Hartford and Rosario are involved in this appeal; for simplicity we will refer to the city of Hartford and Rosario as the defendants.

[2] "[I]f parties file cross motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal." *Hannaford* v. *Mann*, 134 Conn. App. 265, 267 n.2, 38 A.3d 1239, cert. denied, 304 Conn. 929, 42 A.3d 391 (2012).

plaintiff claims that the court erred in (1) determining that he lacked standing to challenge the adequacy of notice to a predecessor in title of the real property at issue, (2) determining that the defendants satisfied the notice requirement of General Statutes § 12-157 (a), (3) concluding that the steps taken by the defendants to notify the plaintiff's predecessor in interest of the tax sale of that property, when the plaintiff failed to record his interest in the property, satisfied due process, (4) concluding that the defendants were not obligated to provide him with notice of the tax sale because his interest in the property was not reasonably ascertainable and (5) denying his request to testify at the hearing on the motions for summary judgment and then failing to continue the matter to allow him to submit affidavits. We agree with the plaintiff that he has standing to challenge the adequacy of notice to his predecessor in title. We disagree with his remaining claims and, therefore, affirm the judgment of the trial court.

The plaintiff initiated an action in 2008, in which he sought to quiet title and to nullify a tax sale of a parcel of real estate located at 78 Beacon Street in Hartford (property). The plaintiff claimed that the property was illegally seized and sold without providing him with notice of the tax sale as required by § 12-157. The defendants filed a motion for summary judgment in which they argued that the plaintiff undeniably failed to record his warranty deed, and, thus, the tax sale of the property was conducted consistently with the requirements of § 12-157 (a), which required that notice be provided only to those with recorded interests in the property. The plaintiff, on the other hand, filed a motion for summary judgment as to the city on the ground that it had not provided notice to Mercury Mortgage Company, Inc. (Mercury), the plaintiff's predecessor in title, in accordance with § 12-157 (a).

The following facts are undisputed. On November 22, 2004, the plaintiff, a sophisticated real estate investor, purchased the property from Mercury, as an investment property. Neither the plaintiff nor his attorney recorded the warranty deed reflecting the sale in Hartford's land records. The real estate taxes were not paid on the property from January 1, 2004 through July 1, 2007. The defendants filed tax liens against the property on June 11, 2004, May 2, 2005, June 16, 2006, and May 25, 2007. On July 12, 2007, the defendants executed a tax levy on the property for unpaid taxes in the amount of $18,698.94, and sold the property to the highest bidders at the tax sale. Prior to executing the tax sale, the defendants attempted to provide notice to all record owners/taxpayers, lienholders, mortgagees and encumbrancers of the property after performing a search of the Hartford land records, city assessor's records and the tax division records to determine who was entitled to receive notice. The search of the records revealed that the owner of record was Mercury and that the law firm Hunt, Leibert, Chester & Jacobson, P.C. (Hunt Leibert), the Metropolitan District Commission (Metropolitan) and the city held liens on the property. There was no record of the plaintiff's interest in the property on Hartford's land records or in the assessor's records. Additionally, there was no record of the plaintiff ever having paid taxes on the property.

The defendants provided notice of the tax sale via certified mail to Mercury, Hunt Leibert and Metropolitan. Hunt Leibert and Metropolitan received notice of the tax sale. The notice to Mercury was returned as undeliverable. Attached to the defendants' motion for summary judgment was a copy of the undelivered letter, the authenticity of which was not contested. The letter was stamped: "RETURN TO SENDER NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The

defendants attempted to find another address for Mercury and to locate an agent of Mercury. Ultimately, the defendants sent notice to Mercury's attorney, Hunt Leibert. The defendants did not provide notice to the plaintiff because his interest in the property did not appear of record. The court granted the defendants' motion for summary judgment and denied the plaintiff's motion for summary judgment. This appeal followed.

We first set forth the applicable standard of 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 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. . . . 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 [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 318, 984 A.2d 676 (2009).

I

The plaintiff first claims that the court erred in holding that he lacked standing to challenge the adequacy of notice to Mercury. We agree.

The ground presented by the plaintiff in his motion for summary judgment was that the defendants had not

provided notice to Mercury in accordance with § 12-157 (a). In denying the plaintiff's motion for summary judgment, the court determined that the plaintiff lacked standing to assert Mercury's rights.

The plaintiff argues that in ruling that he lacked standing to challenge the adequacy of Mercury's notice, the court overlooked General Statutes § 12-159. He argues that § 12-159 authorizes a person whose predecessor in title was entitled to notice of the tax sale under § 12-157 to contest the validity of the notice given to his or her predecessor in title.

"It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. If a party is found to lack [aggrievement], the court is without subject matter jurisdiction to determine the cause. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Citations omitted; internal quotation marks omitted.) *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 91–92, 971 A.2d 1 (2009). "[T]o determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . The plaintiff must be within the zone of interests protected by the statute. . . . It has been [noted] that the zone of interests test bears a family resemblance to the scope of the risk doctrine in the law of torts.

. . . In tort law, it is not enough that the defendant's violation of the law caused injury to a plaintiff. The defendant must also owe that plaintiff a duty. Similarly, with respect to the law of [statutory] standing, it is not enough that a party is injured by an act or omission of another party. The defendant must also have violated some duty owed to the plaintiff." (Internal quotation marks omitted.) *Albuquerque* v. *State Employees Retirement Commission*, 124 Conn. App. 866, 873–74, 10 A.3d 38 (2010), cert. denied, 299 Conn. 924, 11 A.3d 150 (2011).

We must determine whether the plaintiff was within the class of persons whom § 12-159 was designed to protect. This raises a question of statutory construction, which is a "[question] 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, [we first 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." (Citation omitted; internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic*

District Commission, 284 Conn. 838, 847, 937 A.2d 39 (2008).

Section 12-159 provides in relevant part: "Any deed, or the certified copy of the record of any deed, purporting to be executed by a tax collector and similar, or in substance similar, to the above, shall be prima facie evidence of a valid title in the grantee to the premises therein purported to be conveyed . . . . No act done or omitted relative to the assessment or collection of a tax, including everything connected therewith . . . including the . . . sale of property therefor, shall in any way affect or impair . . . the validity of such sale, unless the person contesting the validity of such sale shows that the collector neglected to provide notice pursuant to section 12-157, to such person or to the predecessors of such person in title, and who had a right to notice of such sale . . . ."

Section 12-159 plainly and unambiguously provides that a person may contest the validity of a tax sale by showing that notice was not properly provided to the plaintiff's predecessor in title in accordance with § 12-157 (a). The statute contemplates situations in which a property owner's predecessor in title has a right to notice of a tax sale and was given inadequate notice of the tax sale. It permits plaintiffs to contest the validity of notice given to a predecessor in title under those circumstances. The statute protects property owners from having a tax sale presumed valid without having proper notice of the tax sale given to, inter alia, the property owner's predecessor in title in cases in which the predecessor in title has a right to notice of the tax sale. In the present case, the plaintiff is within the zone of interests meant to be protected by the statute and, thus, has statutory standing to contest the adequacy of Mercury's notice.

II

The plaintiff next claims that the court erred in determining that the defendants satisfied the notice requirement of § 12-157 (a) as to Mercury. We disagree.

The court concluded that the defendants presented the following unrefuted evidence that they had complied with the requirements of § 12-157 (a). The defendants, via certified mail, mailed to Mercury notice of the tax sale on May 10, 2007, which date was not more than twelve weeks and not less than nine weeks before the tax sale as required by § 12-157 (a). The notice was returned as undeliverable. The defendants performed two Accurint[3] searches to confirm that Mercury's mailing address was accurate. The defendants also attempted to locate Mercury's agent of service through the California secretary of state website and discovered that the agent of service had resigned and a new agent had not been appointed. Additionally, the defendants posted a notice at city hall and published notice in the Hartford Courant. The court concluded that "[s]ubsequent notices to Mercury were clearly not required because they would have been futile. Instead, the defendants sent all other notices required by § 12-157 (a) to Hunt Leibert, Mercury's counsel, complying with the requirements of § 12-157 (a)."

Section 12-157 (a) describes the method for selling a parcel of real estate for taxes and provides in relevant part that "[w]hen a collector levies one or more tax warrants on real estate, he shall prepare notices thereof . . . . [O]ne shall be sent by certified mail, return receipt requested, to the taxpayer and each mortgage[e], lienholder and other record encumbrancer of record whose interest will be affected by the sale. . . .

[3] The trial court noted: "Accurint is a search tool that provides investigative tools to government entities, enabling them to locate people, detect fraud, uncover assets and verify identity."

Such . . . mailing shall be done not more than twelve and not less than nine weeks before the time of sale and shall constitute a legal levy of such warrant or warrants upon the real estate referred to in the notice. . . . He shall also send by certified mail, return receipt requested, to the delinquent taxpayer and to each mortgagee, lienholder and other record encumbrancer whose interest in such property will be affected by such sale, a similar notice which shall not be required to list information pertaining to properties in which the person to whom the notice is directed has no interest. The notice shall be sent at least twice . . . .'' ''The power to sell land for delinquent taxes is strictly construed; the tax collector must substantially, if not strictly, comply with all statutory provisions.'' (Internal quotation marks omitted.) *Associates Financial Services of America, Inc.* v. *Sorensen*, 46 Conn. App. 721, 726–27, 700 A.2d 107 (1997), appeal dismissed, 245 Conn. 168, 710 A.2d 769 (1998).

''[T]he application of a statute to a particular set of facts is a question of law to which we apply a plenary standard of review . . . .'' (Citation omitted; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010).

The plaintiff argues that the defendants were required under § 12-157 (a) to mail additional notices to Mercury and that the court erred in excusing the defendants from strictly complying with the notice requirements of § 12-157 (a) on the basis of futility. The plaintiff contends that regardless of whether additional mailings would have been futile, they were obligated to make such mailings in order to comply with the notice requirements of § 12-157 (a). The plaintiff further contends that additional mailings may not have been futile and may have reached Mercury.[4]

[4] The plaintiff also argues that, in any event, the court's finding of futility is a factual finding that is inappropriate for summary judgment. The facts supporting the court's determination of futility were undisputed. The court's

We do not agree with the plaintiff's argument that the defendants were required to send the remaining two notices to an unworkable address in order to satisfy § 12-157 (a). Section 12-157 (a) provides that notice of the tax sale be given via certified mail three times to the taxpayer; under the circumstances of this case, a title search would indicate Mercury as the record owner. Contrary to the plaintiff's assertion, it is unlikely that additional notices sent to an unworkable address would have reached Mercury. Rather than send the additional notices to an unworkable address,[5] the defendants took additional steps to provide Mercury with notice. When the defendants were unable to find

determination of whether the undisputed facts satisfied § 12-157 (a) was a question of law. See *Maturo* v. *Maturo*, supra, 296 Conn. 88 (application of statute to particular set of facts is question of law).

[5] It should be noted that the certified letter was returned as "undeliverable" and that there was no forwarding address. This presents a different situation from one in which, for example, a certified letter is simply ignored by the addressee. Cf. *Jones* v. *Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). Additionally, no evidence was presented to the court to show that further mailings may have provided actual notice to Mercury. Where substantial compliance has been achieved, the lack of discernable prejudice is relevant. See *First Constitution Bank* v. *Harbor Village Ltd. Partnership*, 230 Conn. 807, 821–22, 646 A.2d 812 (1994) (mechanic's lien valid against subsequent encumbrancer despite failure strictly to comply with notice requirement of General Statutes § 49-34 where mistake was made in good faith and no prejudice resulted); *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 418, 538 A.2d 219 (1988) (strict compliance with contract notice terms may be excused to avoid forfeiture, as long as there is no prejudice to insurer); *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, 110 Conn. App. 367, 376, 955 A.2d 544 ("[l]iteral enforcement of notice provisions when there is no prejudice is no more appropriate than literal enforcement of liquidated damages clauses when there are no damages" [internal quotation marks omitted]), cert. denied, 289 Conn. 956, 961 A.2d 420 (2008); *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 620–25, 902 A.2d 24 (2006) (statutory lien not invalid where notice sent late under notice requirements of bylaws where delay in notice did not prejudice defendant); but see, e.g., *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 394–96, 618 A.2d 1340 (1993) (no merit to claim that any delay in notice to custodian of second injury fund under General Statutes § 31-349 should be excused because delay did not cause prejudice to fund).

another address for Mercury and were unable to locate an agent of Mercury, the defendants sent the remaining notices to Mercury's attorney. Section 12-157 (a) does not specify that notice be sent to the property subject to the tax sale; rather, it states the persons or entities to which notice must be sent. The defendants, after taking additional steps to locate Mercury and/or Mercury's agent to no avail, sent notice to Mercury through its former attorney of record. Such steps satisfied the requirements of § 12-157 (a).

III

The plaintiff next claims that the court erred in concluding that the defendants took additional reasonable steps as required by due process to notify Mercury of the sale. We disagree.

The plaintiff argues that the additional steps taken by the defendants to contact Mercury, namely, performing Accurint searches to confirm the accuracy of Mercury's mailing address and attempting to locate Mercury's agent of service through the California secretary of state website, did not satisfy due process. He contends that the defendants should have taken one or more of the following steps to locate Mercury in order to satisfy due process: sent the subsequent mailings to Mercury's unworkable California address, mailed notice to Mercury's Oklahoma address as stated on the California secretary of state website, searched the Connecticut secretary of the state's website for a then current address for Mercury, posting notice of sale on the property, mailing notice to the property address addressed to "occupant," and/or verify the occupancy of the property.[6]

[6] To the extent that the plaintiff suggests that the city should have taken additional steps to notify him of the tax sale, as opposed to notice to Mercury, that argument is addressed in part IV of this opinion.

In *Jones* v. *Flowers*, 547 U.S. 220, 226–27, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), the Supreme Court stated that "[d]ue process does not require that a property owner receive actual notice before the government may take his property. . . . Rather, we have stated that due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [T]his Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. . . . But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." (Citations omitted; internal quotation marks omitted.) The court determined that when the government becomes aware prior to the taking that notice has failed, "the [s]tate must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." Id., 225. The court determined that, under the facts in *Jones*, there were reasonable steps available to the respondent, and, thus, the effort to provide notice was not sufficient to satisfy due process. Id., 235. The court stated that "[w]hat steps are reasonable in response to new information depends upon what the new information reveals." Id., 234. The fact that the letter at issue in *Jones* was marked " 'unclaimed' " could have meant that the petitioner was not home when the letter arrived, that the petitioner did not retrieve the letter from the post office, or that he no longer resided at the subject property. Id. The court suggested that one possible reasonable step would be to send the letter so that no signature was required. Id.

In the present case, the letter was not returned marked "unclaimed," but rather "undeliverable." Further, the marking indicated that the post office was

unable to forward the notice. Under those circumstances, additional mailings to the same unworkable address most likely would have been futile. The defendants took additional steps, however. They searched to discover whether Mercury's mailing address was accurate and, upon discovering that the unworkable address was, nonetheless, the apparently correct mailing address, attempted to locate Mercury's agent of service. Upon discovering that Mercury's agent of service had resigned and no new agent had been appointed, the defendants sent all other notices to persons who had been Mercury's attorneys. These additional steps satisfied the due process considerations mandated by *Jones* v. *Flowers*, supra, 547 U.S. 220.

The further additional steps suggested by the plaintiff were not required by due process. As the trial court found, the plaintiff presented "no evidence . . . either in his motion for summary judgment or in opposition to the defendants' motion for summary judgment" to support the argument that the defendants should have taken additional steps to discover his unrecorded interest. Additionally, Mercury, as a mortgage company that purchased the property as an investment property, was presumably not inexperienced, or trying to avoid notice. See *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 799, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) ("[i]t is true that particularly extensive efforts to provide notice may often be required when the [s]tate is aware of a party's inexperience or incompetence").

Furthermore, we have determined in part II of this opinion that the defendants complied substantially with the requirements of § 12-157 (a). The defendants substantially complied with the actual notice provisions, and complied with the constructive notice provisions of § 12-157 (a) by posting a notice at city hall and publishing notice in the Hartford Courant. In *Associates Financial Services of America, Inc.* v. *Sorensen*, supra,

46 Conn. App. 728, we determined that the notice requirements of § 12-157 (a) satisfy the due process clause of the fourteenth amendment. In *Associates Financial Services of America, Inc.*, we noted that "[i]n *Mennonite Board of Missions* v. *Adams*, [supra, 462 U.S. 795], the United States Supreme Court held that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Internal quotation marks omitted.) *Associates Financial Services of America, Inc.* v. *Sorensen*, supra, 725. We concluded in *Associates Financial Services of America, Inc.*, that the notice requirements of § 12-157 (a) are "reasonably calculated to apprise all interested parties of the tax sale" in accordance with the due process requirements set forth in *Mennonite Board of Missions*. Id., 726. We conclude that the court did not err in concluding that the additional steps taken by the defendants to provide Mercury with notice satisfied due process.

IV

The plaintiff next claims that the court erred in concluding that his own interest in the property was not reasonably ascertainable and thus obviated any obligation of the defendants to have provided him with notice of the tax sale. We disagree.

The plaintiff argued before the trial court that due process required the defendants to do more to ascertain his unrecorded interest in the property than to satisfy the requirements of § 12-157 (a). The court disagreed and concluded that the plaintiff's interest was not reasonably ascertainable and, thus, he was not entitled to

mail notice under § 12-157 (a). Because of his own failure to record his deed, he was not an owner of record and, of course, did not pay taxes. The court noted that the plaintiff received constructive notice of the tax sale via publication in the Hartford Courant and a posting at city hall.

The plaintiff argues that his interest in the property was reasonably ascertainable under *Mennonite Board of Missions* v. *Adams*, supra, 462 U.S. 791, and, accordingly, the defendants were constitutionally bound to mail him notice of the tax sale. He contends that his interest was reasonably ascertainable given his longstanding continuous occupation of the property and knowledge of his name and address by other city agencies and employees who had interacted with the plaintiff while he occupied the property.

The United States Supreme Court has stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In *Mennonite Board of Missions* v. *Adams*, supra, 462 U.S. 800, the Supreme Court held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, *if its name and address are reasonably ascertainable*." (Emphasis added.)

Cases in sister jurisdictions have held that unrecorded interests are not reasonably ascertainable. See *Johnson* v. *Michigan Dept. of Treasury*, United States

Court of Appeals, Docket No. 99-1730, 2000 U.S. App. LEXIS 9660 (6th Cir. May 4, 2000) (no denial of due process where homeowner not notified of tax foreclosure on home because he did not record deed in his name); *Sterling* v. *Block*, 953 F.2d 198, 200 n.2 (5th Cir. 1992) (unrecorded interests not reasonably ascertainable); *Bender* v. *Rochester*, 765 F.2d 7 (2d Cir. 1985) (after balancing burden on city to identify interests with claimant's ability to protect interests, court determined interests of heirs of deceased property owner not reasonably ascertainable where no death certificate or any other notification on land records that owner was deceased); *Sallie* v. *Tax Sale Investors, Inc.*, 998 F. Supp. 612 (D. Md. 1998) (leasehold interest in property not reasonably ascertainable where leasehold interest not recorded on land records).

The plaintiff's unrecorded interest in the property was, then, not reasonably ascertainable. The plaintiff, a sophisticated real estate investor, should have known and had the ability to record his interest. The additional steps proposed by the plaintiff for the defendants to take in order to ascertain the plaintiff's interest in the property exceed the scope of § 12-157 (a). Section 12-157 (a) requires mail notice to be sent to "the taxpayer and each mortgage[e], lienholder and other record encumbrancer of record whose interest will be affected by the sale . . . ." The statute does not require that persons or entities with unrecorded interests be notified, nor does it require a city to search its departments for unrecorded interests. Section 12-157 (a) requires notice only to persons with a recorded interest in the property, and that limitation is consistent with due process. See General Statutes § 12-157 (a). Furthermore, the plaintiff was not entirely without notice because the defendants complied with the constructive notice provisions of § 12-157 (a) and posted a notice at city hall and published notice in the Hartford Courant.

V

The plaintiff last claims that the "court erred in denying [him] the opportunity to testify in defense of the defendants' motion for summary judgment or by not continuing the matter to allow the plaintiff, then acting pro se, to submit affidavits in the matter in lieu of his proffered in-person testimony." We disagree.

At the hearing on the parties' motions for summary judgment, the then self-represented plaintiff informed the court that he disagreed with the content of the defendants' affidavits and that affidavits are not sufficient for evidence on a motion for summary judgment. The court replied that, according to the rules of practice, affidavits are proper on summary judgment and that if the plaintiff wanted to dispute the content of the defendants' affidavits, he was required to file his own affidavit. The plaintiff stated that he wanted to testify in lieu of an affidavit. The court informed the plaintiff that testimony is not appropriate at hearings on motions for summary judgment.

In his brief to this court, the plaintiff notes that he was unable to find a Connecticut case addressing whether testimony is allowable on a motion for summary judgment. He argues, however, that Practice Book § 11-18 (a) (2)[7] and (b)[8] "suggest that testimony is allowed on

[7] Practice Book § 11-18 (a) provides in relevant part: "Oral argument is at the discretion of the judicial authority except as to motions to dismiss, motions to strike, motions for summary judgment, motions for judgment of foreclosure, and motions for judgment on the report of an attorney trial referee and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right provided . . .

"(2) a nonmoving party files and serves on all other parties . . . a written notice stating the party's intention to argue the motion or present testimony. . . ."

[8] Practice Book § 11-18 (b) provides: "As to any motion for which oral argument is of right and as to any other motion for which the judicial authority grants or, in its own discretion, requires argument or testimony, the date for argument or testimony shall be set by the judge to whom the motion is assigned."

any motion filed with the court." Section 11-18 sets forth the proper procedure for, inter alia, requesting oral argument or testimony with respect to various motions in civil matters. This section does not state or indicate that oral testimony is permitted or required on a motion for summary judgment; rather, it provides the procedure for requesting oral argument or testimony on motions on which either or both is appropriate.

Practice Book § 17-45, which directly addresses motions for summary judgment, provides in relevant part: "A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like. . . . Any adverse party shall at least five days before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence. . . ." This section indicates that only documentary evidence is appropriate to support a motion for summary judgment. It states that the motion shall be supported by "documents" and provides a nonexhaustive list of documentary evidence. The catchall phrase, "and the like," indicates that the additional permissible evidence must be similar to affidavits, certified transcripts of testimony under oath, disclosures, and/or written admissions—all of which are documentary evidence.

Additionally, our well settled standard of review of trial court rulings on motions for summary judgment references only documentary evidence in support of motions for summary judgment. See, e.g., *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 46–47, 881 A.2d 194 (2005) ("[w]hen 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"

[internal quotation marks omitted]); *Little* v. *Yale University*, 92 Conn. App. 232, 235, 884 A.2d 427 (2005) ("[i]f the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment" [internal quotation marks omitted]), cert. denied, 276 Conn. 936, 891 A.2d 1 (2006); *Mozeleski* v. *Thomas*, 76 Conn. App. 287, 290, 818 A.2d 893 ("[w]hen a party files a motion for summary judgment and there [are] no contradictory affidavits, the court properly [decides] the motion by looking only to the sufficiency of the [movant's] affidavits and other proof" [internal quotation marks omitted]), cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003); *Pion* v. *Southern New England Telephone Co.*, 44 Conn. App. 657, 663, 691 A.2d 1107 (1997) ("[t]o oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents" [internal quotation marks omitted]). We conclude that the court did not err in not permitting the plaintiff to testify in support of his motion for summary judgment.

The plaintiff also argues that the court erred in failing to continue the matter to allow him to submit affidavits. The plaintiff did not ask for a continuance during oral argument on the motion for summary judgment. "Our Supreme Court expressly has declined to impose on the trial courts the duty to order a continuance sua sponte. See *State* v. *Barrett*, 205 Conn. 437, 455, 534 A.2d 219 (1987)." *Pasiakos* v. *BJ's Wholesale Club, Inc.*, 93 Conn. App. 641, 645, 889 A.2d 916, cert. denied, 277 Conn. 929, 896 A.2d 101 (2006). Accordingly, the court did not abuse its discretion in failing to sua sponte order a continuance.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICHARD BRUNDAGE (AC 32041)

Lavine, Robinson and Flynn, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his alleged conduct in sexually abusing the daughter of his girlfriend from 1995 to March, 2003. On July 31, 2007, the victim reported the sexual abuse to the Waterbury police, and on October 20, 2007, she reported the sexual abuse to the Wolcott police. In November, 2007, the defendant was arrested and, subsequently, charged with one count of sexual assault in the first degree and one count of risk of injury to a child in two separate informations. The defendant alleged that the charges were time barred pursuant to the statutory ([Rev. to 1993] § 54-193a) two year limitation period then applicable to the prosecution of offenses involving the sexual abuse of children. On May 23, 2002, the legislature enacted Public Acts 2002, No. 02-138, § 1, which amended § 54-193a by extending the limitation period to thirty years. The trial court denied the defendant's motions to dismiss, concluding that the amendment applied retroactively to the charges against the defendant. *Held*:

1. The trial court abused its discretion in denying the defendant's motions to dismiss as untimely the sexual assault charges against him, that court having misconstrued the current version of § 54-193a and having improperly concluded that it applied retroactively, which foreclosed the defendant from offering proof regarding the dates of the offenses in support of an affirmative statute of limitations defense; accordingly, with respect to the incidents that occurred prior to May 23, 2002, those alleged offenses were time barred by the prior limitation period of the earlier statute, but, with respect to the incidents that occurred after May 22, 2002, those alleged offenses were not time barred, as the extended limitation period in the current version of the statute was applicable to those offenses; moreover, because a retrial was not been barred by the double jeopardy clause, the cases were remanded for a new trial as to the charges that were not time barred.
2. The trial court did not abuse its discretion in permitting the state's expert witness to give an opinion in response to a hypothetical question regarding the behavior of a child who has been sexually abused, the hypothetical not having elicited improper testimony as to the victim's credibility.

Argued April 12—officially released September 11, 2012

Procedural History

Substitute informations, in two cases, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury, where the court, *Crawford*, *J.*, denied the defendant's motions to dismiss; thereafter, the matters were tried to the jury; verdicts of guilty; subsequently, the court denied the defendant's motions in arrest of judgment, for judgments of acquittal, to set aside the verdicts and for a new trial, and rendered judgments in accordance with the verdicts, from which the defendant appealed to this court. *Reversed; judgment directed in part; new trial.*

Raymond L. Durelli, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Leonard C. Boyle*, deputy chief state's attorney, *Maureen Platt*, state's attorney, and *Cynthia S. Serafini*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Richard Brundage, appeals from the judgments of conviction, rendered following a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and (2) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] On appeal, the defendant claims that the trial court improperly (1) denied his motions to dismiss the sexual assault charges against him that were time barred by General Statutes (Rev. to 1993) § 54-193a and (2) permitted the state's expert witness to give an opinion in

[1] The defendant was charged in two separate informations, which were consolidated for trial, with one count each of sexual assault in the first degree and risk of injury to a child.

response to a hypothetical question. We agree that the court improperly concluded that General Statutes § 54-193a, as amended by Public Acts 2002, No. 02-138, § 1, effective May 23, 2002, applied to offenses that occurred prior to May 23, 2002, and, therefore, reverse the judgments of conviction.

The jury reasonably could have found the following facts. In January, 1995, the defendant, the boyfriend of the victim's[2] mother, moved into the family home with the victim and her mother in Wolcott. At that time, the victim was eight years old and in third grade.[3] Around this time, the defendant began sexually abusing the victim in the family home when the victim's mother was at work or had gone to bed.

The abuse began with the defendant fondling the victim's breasts and vagina and digitally penetrating the victim's vagina. When the victim was ten years old and in sixth grade, the defendant began having forced penile-vaginal intercourse with her. Initially, the defendant abused the victim approximately twice each month, but as she became older, the abuse increased to approximately once each week.[4] The victim did not report the abuse because she was afraid of the defendant and he threatened to leave her mother if she told her about the abuse.[5] The abuse continued until approximately March, 2003, when the victim's mother discovered that the defendant was having an affair with another woman and the defendant moved out.

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[3] The victim was born on October 19, 1986.

[4] In addition to the abuse at the family home in Wolcott, the defendant abused the victim at a parking lot in Waterbury, the family home in Terryville, the family home in Prospect, the home of the defendant's parents in Vermont, a campground in Rhode Island and a hotel in New York.

[5] The victim testified that she did not want to hurt her mother because her mother had "just finished with her cancer treatment."

On July 31, 2007, after reading a newspaper article discussing the deportation of the defendant's wife,[6] the victim reported the sexual abuse to the Waterbury police. On October 20, 2007, the victim reported the sexual abuse to the Wolcott police. On November 13, 2007, the Waterbury police obtained a warrant for the defendant's arrest. On November 26, 2007, the Wolcott police obtained a warrant for the defendant's arrest. The defendant was charged with one count of sexual assault in the first degree and one count of risk of injury to a child in two separate informations. The victim testified about the abuse at trial, explaining that the defendant fondled and digitally penetrated her on more than 100 occasions and that the defendant had penile-vaginal intercourse with her on more than 100 occasions. The victim also testified as to five specific incidents of sexual abuse that occurred between 1995 and 2003. On November 10, 2009, the jury found the defendant guilty on all counts in both informations. On January 29, 2010, the court sentenced the defendant to a total effective term of thirty years imprisonment, execution suspended after twenty years, and twenty years probation. Additional facts will be set forth as necessary.

I

The defendant claims that the court abused its discretion in denying his motions to dismiss the charges as untimely. The state agrees, and so do we.

Prior to May 23, 2002, the statute of limitations for child sexual abuse cases, General Statutes (Rev. to

[6] The victim testified that the article indicated that the defendant's wife was approximately the same age as she was and that the defendant was distraught after his wife was deported. The victim reported the abuse after reading the article because she wondered whether the defendant's wife also had been abused by the defendant when she was younger, and the victim did not "want anyone to feel sorry for [the defendant] because of what he had done to [the victim]."

1993) § 54-193a, provided: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense involving sexual abuse, sexual exploitation or sexual assault of a minor except within two years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in his official capacity of the commission of the offense, whichever is earlier, provided in no event shall such period of time be less than five years after the commission of the offense."

On May 23, 2002, the legislature passed Public Acts 2002, No. 02-138, § 1, which amended § 54-193a by extending the limitation period. The current version of § 54-193a provides: "Notwithstanding the provisions of section 54-193, no person may be prosecuted for any offense, except a class A felony, involving sexual abuse, sexual exploitation or sexual assault of a minor except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense, whichever is earlier, provided if the prosecution is for a violation of subdivision (1) of subsection (a) of section 53a-71, the victim notified such police officer or state's attorney not later than five years after the commission of the offense."

On appeal, both the defendant and the state agree that the court misconstrued the current version of § 54-193a and improperly concluded that it applied retroactively. The parties agree that General Statutes (Rev. to 1993) § 54-193a applied to alleged incidents that occurred prior to May 23, 2002, and, accordingly, that those alleged offenses are time barred. Thus, the only alleged offenses that are not time barred are those that

occurred after May 22, 2002, because the current version of § 54-193a, which provides an extended limitation period, applies to those offenses. The defendant and the state disagree, however, as to the appropriate remand in these cases. The defendant urges us to set aside the judgments of conviction and direct the trial court to dismiss the charges. The state argues that we should remand the cases for a new trial, providing the state with the opportunity to amend the informations to allege only offenses that occurred after May 22, 2002. We conclude that the cases should be remanded for a new trial.

The following additional facts and procedural history are relevant to this claim. On September 22, 2009, the state filed two substitute long form informations charging the defendant in connection with incidents that occurred in Wolcott and Waterbury, respectively. In the Wolcott information, count one alleged sexual assault in the first degree that occurred between October 19, 1994, and October 19, 1999; count two alleged sexual assault in the second degree that occurred between October 19, 1999, and October 19, 2002; count three alleged risk of injury to a child that occurred between October 19, 1994, and October 19, 2002; and count four also alleged risk of injury to a child that occurred between October 19, 1994, and October 19, 2002. In the Waterbury information, count one alleged sexual assault in the first degree that occurred between September 1, 2000, and October 19, 2002; count two alleged sexual assault in the second degree that occurred between September 1, 2000, and October 19, 2002; count three alleged risk of injury to a child that occurred between September 1, 2000, and October 19, 2002; and count four also alleged risk of injury to a child that occurred between September 1, 2000, and October 19, 2002.

On October 26, 2009, the defendant filed motions to dismiss the charges in each of the informations, asserting that prosecution of the offenses was time barred under General Statutes (Rev. to 1993) § 54-193a. On October 29, 2009, the state objected to each of the motions to dismiss, arguing that the current version of § 54a-193a applies retroactively, and filed substitute informations that realleged the first three counts in each of the informations but not count four.

On November 2, 2009, the court held a hearing on the defendant's motions to dismiss. At the hearing, the state argued that, pursuant to *State* v. *Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006), the current version of § 54a-193a applied to conduct that occurred prior to its amendment because criminal statutes of limitations are presumptively retroactive and the limitation period set forth under General Statutes (Rev. to 1993) § 54-193a had not yet expired at the time of the amendment. The defendant countered that our Supreme Court in *Skakel* stated that criminal statutes of limitations are not retroactive when there is a clear indication that the legislature intended the particular statute to apply prospectively only. The defendant maintained that the legislature clearly intended the current version of § 54a-193a to apply prospectively only, as demonstrated by the notes accompanying the statute and the legislative history. The defendant acknowledged, however, that any offenses that occurred after May 22, 2002 were not time barred. The defendant then represented that, if the court accepted his analysis, the state would have the option to file substitute informations reflecting acts that occurred after May 22, 2002. The court denied the defendant's motions to dismiss, concluding that the current version of § 54a-193a applied retroactively.

On November 6, 2009, the state filed two substitute informations that did not include the sexual assault in

the second degree counts and modified the dates of the risk of injury to a child counts by one day. Accordingly, the operative informations alleged the following. In the Wolcott information, count one alleged sexual assault in the first degree that occurred between October 19, 1994, and October 19, 1999, and count two alleged risk of injury to a child that occurred between October 19, 1994, and October 18, 2002. In the Waterbury information, count one alleged sexual assault in the first degree that occurred between September 1, 2000, and October 18, 2002, and count two alleged risk of injury to a child that occurred between September 1, 2000, and October 18, 2002.

Preliminarily, we set forth the standard of review. "Our standard of review of a trial court's . . . conclusions of law in connection with a motion to dismiss is well settled. . . . [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 . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *State* v. *Woodtke*, 130 Conn. App. 734, 738, 25 A.3d 699 (2011); see also *State* v. *Parra*, 251 Conn. 617, 622, 741 A.2d 902 (1999) (whether statute of limitations applies retroactively is question of law subject to plenary review).

We agree with the parties that, contrary to the trial court's conclusion, § 54-193a, as amended on May 23, 2002, does not apply retroactively and that any offenses that occurred prior to May 23, 2002, are time barred pursuant to General Statutes (Rev. to 1993) § 54-193a. In *State* v. *Skakel*, supra, 276 Conn. 693, our Supreme Court overruled *State* v. *Paradise*, 189 Conn. 346, 456 A.2d 305 (1983), and held that amendments to criminal statutes of limitations are presumptively retroactive,

subject to ex post facto limitations.[7] The court specifically stated, however, that criminal statutes of limitations do not apply retroactively when the legislature has clearly expressed its intent that the statute apply prospectively only. *State* v. *Skakel*, supra, 679–80, 686–87.

When the legislature amended § 54-193a on May 23, 2002, and extended the limitation period, it clearly intended the amendment to apply prospectively only, that is, to offenses that occurred after the date of the amendment. Public Acts 2002, No. 02-138, § 1, which amended § 54-193a, states that the amendment was "[e]ffective from passage, *and applicable to any offense committed on or after said date*." (Emphasis added.) That act was passed on May 23, 2002. Therefore, the current version of § 54-193a applies only to offenses committed on or after May 23, 2002. See *State* v. *George J.*, 280 Conn. 551, 561 n.6, 910 A.2d 931, (2006) ("the 2002 amendment would not be applied retroactively under the rule . . . set forth in . . . *Skakel* . . . given that the 2002 Public Act prescribed that the amendment was 'applicable to any offense committed on or after said date' "), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).[8] Offenses that occurred prior to the 2002 amendment, thus, are governed by the previous version of the statute.

Accordingly, prosecution of offenses that occurred prior to May 23, 2002, is barred by the statute of limitations. Under General Statutes (Rev. to 1993) § 54-193a,

[7] The court explained that the ex post facto clause of the United States constitution only bars retroactive application of a criminal statute of limitations if the limitation period that was in effect prior to the amendment already had expired, and, thus, the prosecution was time barred as of the date of the amendment. *State* v. *Skakel*, supra, 276 Conn. 681.

[8] As the parties point out, the legislative history of Public Acts 2002, No. 02-138, § 1, also demonstrates that the legislature intended § 54-193a to apply prospectively only. See e.g., 45 H.R. Proc., Pt. 13, 2002 Sess., p. 3950.

the defendant may not be prosecuted "except within two years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in his official capacity of the commission of the offense, whichever is earlier, provided in no event shall such period of time be less than five years after the commission of the offense." Two years from the date the victim attained the age of majority is October 19, 2006. See footnote 3 of this opinion. The victim first notified the police on July 31, 2007, and five years from that date is July 31, 2012. October 19, 2006 is the earlier of the two dates and, thus, normally would be the operative date. Under the proviso, however, the defendant may be prosecuted within five years from the commission of the offense. The latest date alleged in the informations is October 18, 2002, and five years from that date is October 18, 2007. The prosecutions began when the warrants were issued[9] on November 13, 2007, and November 26, 2007, after the limitation period under General Statutes (Rev. to 1993) § 54-193a had expired.

Prosecution of offenses that occurred on May 23, 2002 or thereafter, however, is not barred by the statute of limitations. Under the current version of § 54-193a, the defendant may not be prosecuted "except within thirty years from the date the victim attains the age of majority or within five years from the date the victim notifies any police officer or state's attorney acting in such police officer's or state's attorney's official capacity of the commission of the offense, whichever is earlier . . . ." The earlier of the two dates under this scenario is July 31, 2012, five years from the date the victim first notified the police. Accordingly, under the current version of § 54-193a, prosecution is not time barred for alleged offenses that occurred on or after May 23, 2002.

[9] See *State* v. *Kruelski*, 41 Conn. App. 476, 487, 677 A.2d 951, cert. denied, 238 Conn. 903, 677 A.2d 1376 (1996).

Of the four counts in the operative informations, only count one of the Wolcott information alleged a time period that is completely time barred.[10] By alleging time periods up to October 18, 2002, the other three counts are partially untimely and partially timely. Because the trial court erroneously concluded that the current version of § 54-193a applied retroactively, it foreclosed the defendant from offering proof regarding the dates of the offenses in support of an affirmative statute of limitations defense. Such a defense simply no longer was viable in light of the court's ruling.[11] Therefore, the court erred in denying the motions to dismiss.

Although the defendant acknowledges on appeal that prosecution of offenses that occurred after May 22, 2002, is not time barred, he argues that we should set aside the judgments of conviction and direct the trial court to dismiss the partially untimely charges, rather than remand the cases for a new trial.[12] He fails, however, to provide any legal support for this request. Retrial here is not barred by the double jeopardy clause of the fifth amendment. See *State* v. *Boyd*, 221 Conn. 685, 691, 607 A.2d 376, cert. denied, 506 U.S. 923, 113 S. Ct. 344, 121 L. Ed. 2d 959 (1992). In the absence of any persuasive reason to do otherwise, we conclude that the cases should be remanded for a new trial as to the charges that are not time barred.[13]

[10] We therefore conclude that count one of the Wolcott information should be dismissed.

[11] The present cases are therefore distinguishable from *State* v. *Parsons*, 28 Conn. App. 91, 95–97, 612 A.2d 73, cert. denied, 223 Conn. 920, 614 A.2d 829 (1992), where this court held that the trial court did not improperly deny the motion to dismiss because the defendant had the burden to prove at trial that the offense was untimely. Unlike in these cases, the trial court in *Parsons* did not reach an erroneous legal conclusion by applying the wrong statute of limitations. Rather, the motion to dismiss raised a question of fact that had to be proved at trial.

[12] At oral argument before this court, the defendant conceded that the state would not be barred on double jeopardy grounds from retrying the defendant after dismissal.

[13] The defendant also conceded at trial that the state would have the opportunity to amend the informations if the court accepted his argument

II

The defendant next claims that the court improperly permitted the state's expert witness to give an opinion in response to a hypothetical question regarding the behavior of a child who has been sexually abused.[14] We conclude that the court did not abuse its discretion in permitting the expert to respond to the hypothetical question.

The following additional facts and procedural history are relevant to this claim. At trial, the state called Diane Edell to testify as an expert on child sexual abuse.[15] Edell testified that she is a licensed social worker who conducts forensic interviews of children who allegedly have been sexually abused for the Center for Youth and Families at Charlotte Hungerford Hospital. Edell testified that she had not interviewed the victim or reviewed any materials pertaining to the cases. Edell then explained some of the general behavioral patterns of children who have been sexually abused, including delayed disclosure and difficulty distinguishing between individual episodes of abuse.

The state indicated that it was going to provide a set of hypothetical facts to Edell, at which point defense counsel requested an offer of proof outside the presence of the jury. After the jury was excused, the state explained that it intended to provide Edell with a series of facts based on the evidence and ask which facts are

that the current version of § 54-193a is not retroactive. Because the trial court applied the current version of § 54-193a retroactively, there was no need for the state to amend the informations to allege only acts that occurred after May 22, 2002.

[14] We address this claim, even though we have concluded that the cases must be remanded for a new trial, because the issue is likely to recur on retrial. See *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 259–60, 9 A.3d 364 (2010).

[15] The defendant did not object to Edell's testifying as an expert on child sexual abuse.

important to her as an expert and whether the facts are consistent with a child who has been sexually abused. The state proffered the specific hypothetical and follow-up questions it intended to ask. The defendant objected on the ground that the facts of the hypothetical were too close to the facts of the cases and that the state intended to elicit improper testimony as to an ultimate issue, the victim's credibility. After extensive argument, the court ruled that the state could not ask Edell whether the behavior of the child in the hypothetical was consistent with someone who has been sexually abused, but the court permitted the state to ask about delayed disclosure. The court also stated that it would provide a limiting instruction after the response to the hypothetical.

When the jury returned, the state asked Edell to assume the following facts: "You have a twenty year old female whose parents divorced when she was four years old. At age eight, her mother's boyfriend moved into the home. That the mother is a single parent. At age nine, the mom is diagnosed with cancer, underwent intensive chemo and radiation therapy. During that time period, the mother's boyfriend became very attentive to the girl during the illness and assumed the role of the father figure with the girl. That at age eight, the boyfriend had begun fondling the child by putting his fingers in her vagina. That that occurred on more than 100 occasions from the time the child was eight to eleven. That the mother's boyfriend told the child not to tell the mother or he would break up with the mother, so the child did not tell because she was afraid that the mother would be upset or that she would be hurt while she was sick. That at age eleven, the intercourse became penile-vaginal intercourse and that the child was forced to participate in that, that she would struggle and then give up during the intercourse. That the sexual intercourse occurred almost weekly from age eleven to sixteen. That it continued, that type of penile-vaginal

intercourse, until age sixteen when the mother ended the relationship with the boyfriend. That the relationship that the child had with the boyfriend during that eight year period was an up and down relationship, at one point a father-daughter type of relationship, and at other points more of a boyfriend-girlfriend relationship, and that the girl disclosed the sexual abuse at age twenty after she saw an article about the boyfriend in a paper."

The assistant state's attorney examined Edell as follows:

"Q. Do you have an opinion as to whether the child's behavior in the hypothetical is consistent with that of other sexual assault victims that you have interviewed with respect to the timing of a disclosure?

"A. It is consistent, yes.

* * *

"Q. What other facts in the hypothetical are important to you with respect to the timing of when that child disclosed, that the child waited four years after the boyfriend was out of the house to disclose?

"A. Well, starting, I think, probably most of the factors I've already touched on. One is that it was somebody who had a lot of access, and assuming that to be true, that it was chronic. That it—starting at age eight, what we see at that age is kids, you know, they maybe think something is going on that shouldn't be going on, but they're not really clear what that is, what to do about it. It takes a while until they come into full realization that something just needs to stop or that this is really something that's not good. By that time often it's escalated into something else.

"One of the other elements is the mother getting ill means—it just means that the child is more dependent

on this other person not knowing what's going to happen with the mother. I would, you know, again, in terms of my experience with kids, some of the examples, not wanting to tell the mom because mom is sick and how could she possibly, you know, lay that further onto the mom. . . .

"Q. And is there anything—with respect to the facts that I gave you in the hypothetical, is there any significance to the delayed disclosure while the child was still living with the abuser?

"A. Yes. It's not unusual for the disclosure when it's purposeful to come at a point when the person, the child, is feeling safe, or, you know, something like the child kind of—when the abuse stops the child kind of puts it out of their mind, and then they might see somebody passing in the street or something like that and remind them. There might be a lot of different factors that play into the decision to tell, but it's not unusual to wait until the abuse is over and there's some separation from the abuser."

The court then provided the following limiting instruction to the jury: "Just now the state elicited an opinion concerning delayed reporting. In doing so there were certain facts that were assumed. However, for purposes of the opinion the witness was asked to assume certain things were fact. However, it is always the jury's duty to determine what the facts are. And so that was for purposes of the hypothetical, but you determine what facts you find, and you determine whether the state proved those facts beyond a reasonable doubt."

On appeal, the defendant's principal argument is that the hypothetical question elicited expert testimony that "inappropriately served to validate the truthfulness of [the victim's] testimony because the hypothetical was

nothing more than a synopsis of the [the victim's] testimony."[16] The state argues that the hypothetical conformed to the rules of evidence, that "Edell's testimony was proper expert witness testimony on the reactions and behaviors of victims of sexual abuse," and that Edell did not offer an opinion as to the credibility of the victim. We agree with the state.

Our review of the admissibility of a hypothetical question is governed by the abuse of discretion standard. *Smith* v. *Andrews*, 289 Conn. 61, 74–75, 959 A.2d 597 (2008). Section 7-4 (c) of the Connecticut Code of Evidence provides: "An expert may give an opinion in response to a hypothetical question provided that the hypothetical question (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case, (2) is not worded so as to mislead or confuse the jury, and (3) is not so lacking in essential facts as to be without value in the decision of the case. A hypothetical need not contain all of the facts in evidence."

"[E]xpert testimony of reactions and behaviors common to victims of sexual abuse is admissible. . . . Such

[16] The defendant also argues that the hypothetical contained insufficient facts relating to the behavior of children who have been sexually abused. Because the defendant did not raise this evidentiary objection at trial, however, we do not address it. "Our review of evidentiary rulings made by the trial court is limited to the specific legal ground raised in the objection [to the trial court]. . . . [T]o afford petitioners on appeal an opportunity to raise different theories of objection would amount to ambush of the trial court because, [h]ad specific objections been made a trial, the court would have had the opportunity to alter [the charge] or otherwise respond." (Citation omitted; internal quotation marks omitted.) *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 133–34, 998 A.2d 730 (2010).

Additionally, the defendant argues that the hypothetical improperly contained extraneous facts not related to the expert's opinion and failed to specify which facts were important to what behavior. We find no merit in this argument. There is no requirement that the hypothetical contain only those facts directly related to the expert's opinion or that the expert identify each fact set forth in the hypothetical in responding to the state's questions. Moreover, we conclude that the hypothetical was "not worded so as to mislead or confuse the jury." See Connecticut Code of Evidence § 7-4 (c) (2).

evidence assists a jury in its determination of the victim's credibility by explaining the typical consequences of the trauma of sexual abuse on a child. . . . It is not permissible, however, for an expert to testify as to his opinion of whether a victim in a particular case is credible or whether a particular victim's claims are truthful. . . . In this regard, [our Supreme Court has] found expert testimony stating that a victim's behavior was generally *consistent with* that of a victim of sexual or physical abuse to be admissible, and [has] distinguished such statements from expert testimony providing an opinion as to whether a particular victim had *in fact* suffered sexual abuse." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 635, 881 A.2d 1005 (2005). "Moreover, [our Supreme Court has] noted that even indirect assertions by an expert witness regarding the ultimate issue in a case can serve inappropriately to validate the truthfulness of a victim's testimony." Id.

In this case, the defendant stands on its head the more usual claim that the hypothetical failed to set out adequately the necessary facts and, instead, argues that the hypothetical contained facts that were too similar to the facts of the case. In *State* v. *Crespo*, 114 Conn. App. 346, 368–75, 969 A.2d 231 (2009), aff'd on other grounds, 303 Conn. 589, 35 A.3d 243 (2012), this court rejected a similar claim. On appeal, Crespo, the defendant, argued "that the state's hypothetical questions so closely tracked the facts of [the] case that [the expert's] testimony unfairly bolstered the victim's credibility." Id., 374. This court first explained that "[t]here is a critical distinction between admissible expert testimony on general or typical behavior patterns of . . . victims and inadmissible testimony directly concerning the particular victim's credibility." (Internal quotation marks omitted.) Id. This court concluded that "[t]he fact that the prosecutor asked a number of hypothetical

questions that tracked the facts of this case does not lead us to conclude that [the expert] opined that the victim was credible. That the questions tracked the facts of this case bolstered their relevance, and in each hypothetical question [the expert] was asked merely to compare the hypothetical victim's conduct to that of a typical sexual assault victim. The questions did not call on [the expert] to opine that the victim either was credible or was a victim of any crime. The questions called on [the expert] to evaluate whether the victim's conduct was uncommon or unusual as compared to that of other victims of sexual abuse. [The expert] did not testify that he had treated the victim or had even met the victim. Rather, he testified that his knowledge of the case was limited to the facts contained in the state's hypothetical questions. . . . Additionally, the court instructed the jury that the expert testimony was not binding on the jury but subject to its scrutiny. Accordingly, we are not persuaded that the testimony unfairly bolstered the victim's credibility." Id., 375.

Similarly, we conclude that the hypothetical in this case did not elicit improper testimony as to the victim's credibility. It is true that, in this case, the form of the question posed by the assistant state's attorney—a detailed recitation of facts, followed by questions asking the expert to identify the facts important to the expert's opinion—differs somewhat from *Crespo*, in which the prosecutor asked the expert more specific questions following each hypothetical. See id., 371 n.13. We do not conclude, however, that this modest difference in the form of the questions sufficiently distinguishes this case from *Crespo* to render *Crespo* inapplicable. Accordingly, we conclude that the trial court did not abuse its discretion.

The judgments are reversed and the cases are remanded with direction to dismiss count one of the

Wolcott information and for a new trial as to the remaining charges.

In this opinion the other judges concurred.

MARIA E. MILLS, EXECUTRIX (ESTATE OF CLARENCE ISRAEL MILLS) *v.* THE SOLUTION, LLC, ET AL.
(AC 32792)

Gruendel, Lavine and Alvord, Js.

Syllabus

The plaintiff executrix of the estate of C sought to recover damages for, inter alia, the wrongful death of C, who was fatally shot at a carnival held in Bridgeport. The plaintiff brought an action against the defendant A Co., which was the vendor that provided the rides, food and amusement activities for the carnival, as well as various municipal defendants, including the city of Bridgeport, the director of the city's department of parks and recreation, and the city's acting chief of police at the time of the incident. The plaintiff alleged that A Co. and the municipal defendants negligently allowed the carnival to be held without adequate security or police coverage, and sought indemnification from the city for the negligence or carelessness of its employees. The municipal defendants filed a motion for summary judgment, claiming that the allegations of negligence related to discretionary acts for which they were immune from liability pursuant to statute (§ 52-557n). In her opposition to the motion for summary judgment, the plaintiff claimed that the municipal defendants were obligated, pursuant to statute (§ 7-284), to provide police protection and, thus, that a ministerial duty was involved. The trial court granted the motion for summary judgment filed by the municipal defendants and rendered judgment thereon, from which the plaintiff appealed to this court. Thereafter, the trial court granted the motion for summary judgment filed by A Co. and rendered judgment thereon, from which the plaintiff filed an amended appeal with this court. *Held*:

1. The trial court properly rendered summary judgment in favor of the municipal defendants pursuant to the immunity provision of § 52-557n (a) (2) (B) because there was no genuine issue as to any material fact that their allegedly negligent acts were discretionary in nature, that § 7-284 did not create a ministerial duty to furnish police protection, and that they were not engaged in a proprietary activity so as to be exempt from immunity under § 52-577n (a) (1) (B).
2. The trial court properly rendered summary judgment in favor of A Co. because there was no genuine issue as to any material fact that A Co.

lacked possession or control of the carnival premises such that it did not owe a duty to C as a business invitee; the plaintiff's complaint did not allege that A Co. possessed or controlled the premises on which the carnival was held, the plaintiff did not adduce any evidence to show that A Co. was the permittee, owned, rented, possessed or controlled the premises, and there was testimony from the person who received the city permits that he had no authority to represent A Co. or act on its behalf in obtaining the permits.

Argued June 1—officially released September 11, 2012

Procedural History

Action to recover damages for, inter alia, the wrongful death of the plaintiff's decedent allegedly caused by the negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold, J.*, granted the motion for summary judgment filed by the defendant city of Bridgeport et al., and rendered judgment thereon, from which the plaintiff appealed to this court; thereafter, the court, granted the motion for summary judgment filed by the defendant 5 Star Amusement Company, Inc., et al., and rendered judgment thereon; subsequently, the court, denied the plaintiff's motion to reargue and reconsider, and the plaintiff filed an amended appeal with this court. *Affirmed.*

Marie A. Casper, with whom were *Jeremy C. Virgil* and, on the brief, *Jeffrey M. Cooper*, for the appellant (plaintiff).

Karen L. Dowd, with whom were *Kenneth J. Bartschi* and, on the brief, *Christopher M. Vossler*, for the appellees (defendant 5 Star Amusement Company, Inc., et al.).

Betsy A. Edwards, associate city attorney, for the appellees (defendant city of Bridgeport et al.).

Opinion

GRUENDEL, J. The plaintiff, Maria E. Mills, executrix of the estate of Clarence Israel Mills (decedent), appeals

from the summary judgments rendered by the trial court in favor of the defendants the city of Bridgeport (city); Philip C. Handy, the director of the city's department of parks and recreation; Anthony Armeno, the city's acting chief of police at the time of the subject incident; 5 Star Amusement Company, Inc.; Robert E. Coleman, Jr.; and Linda M. Coleman.[1] She claims that the court improperly concluded that no genuine issues of material fact existed as to (1) whether the city, Handy and Armeno (municipal defendants)[2] had qualified immunity because (a) General Statutes § 7-284 imposes a ministerial duty to provide police protection and (b) the city was engaged in a proprietary activity, and (2) whether 5 Star lacked control of the premises such that it did not owe her decedent a duty. We affirm the judgments of the trial court.

We set forth the following facts as gleaned from the pleadings, affidavits and other proof submitted, viewed in a light most favorable to the plaintiff. See *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009). The Solution, LLC, (Solution)[3] was the general organizer and operator of the Midway carnival held annually at Seaside Park in Bridgeport (carnival). 5 Star was the vendor that provided the rides, food and amusement activities for the carnival.

Thomas Kelly received a permit from the city's police department to hold the carnival from June 20, 2005 through July 5, 2005. The organization named on the

[1] Robert E. Coleman, Jr., and Linda M. Coleman are members of 5 Star Amusement Company, Inc. 5 Star Amusement Company, Inc., Robert E. Coleman, Jr., and Linda M. Coleman will be referred to collectively as 5 Star and individually by name when appropriate.

[2] The plaintiff named additional municipal defendants, but they are not parties to this appeal.

[3] Solution and two of its members, Thomas Kelly and Marilyn Goldstone, are defendants in this matter but not parties to this appeal. On March 10, 2010, they filed a motion for summary judgment, which was denied by the court.

permit was 5 Star. The permit required that security be provided and coordinated with the police department's outside overtime office. Those police officers were in addition to the officers already scheduled to work their regular duty shifts. The city's parks and recreation department also issued a permit for the carnival. The identity of the applicant was listed on the permit as "Five Star Amusement Inc. c/o The Solution LLC." The permit identified Kelly as the representative making the application and required that the permittee be responsible for required police coverage for the use and activities conducted under the permit as may be deemed appropriate by the city's police department.

On June 24, 2005, the decedent was fatally shot at the carnival by Lucilo Cifuentes.[4] The plaintiff's third amended complaint alleged thirteen counts against various defendants. The second count of the plaintiff's third amended complaint alleged that the injuries and damages suffered by the decedent were caused as a result of the negligence and carelessness of 5 Star. The third count alleged that the injuries and damages suffered by the decedent were caused as a result of the negligence and carelessness of Handy. The count alleged, inter alia, that Handy negligently allowed the carnival to be held without adequate security or police coverage. In count four, the plaintiff sought indemnity from the city for the negligence and carelessness of Handy. In count seven, the plaintiff alleged that the injuries and damages suffered by the decedent were caused as a result of the negligence and carelessness of Armeno. The count alleged, inter alia, that Armeno negligently failed to provide sufficient police coverage for the carnival and failed to cancel or to postpone the carnival when he knew or should have known that there would

[4] Cifuentes, the shooter, and other individuals alleged to have been involved in the shooting are also defendants in this matter but not parties to this appeal.

be inadequate police coverage. In count eight, the plaintiff sought indemnity from the city for the carelessness and negligence of Armeno.

On March 11, 2010, the municipal defendants filed a motion for summary judgment on counts three, four, seven and eight of the plaintiff's third amended complaint. They asserted that the plaintiff's complaint was legally insufficient because the allegations of negligence in the complaint related to discretionary acts, and the municipal defendants are therefore immune from liability pursuant to General Statutes § 52-557n. They claimed that there was no genuine issue of material fact as to whether their acts were discretionary in nature. Attached to the motion were affidavits from Armeno, Handy and James Honis, who was the deputy chief of police at the time of the incident. In her opposition to the municipal defendants' motion for summary judgment, the plaintiff asserted that § 7-284 obligated the municipal defendants to provide police protection and thus was the source of a ministerial duty.

On October 13, 2010, the court rendered summary judgment in favor of the municipal defendants. In its memorandum of decision, the court found that the plaintiff's complaint was facially insufficient, as it failed to allege that there was a policy, directive, guideline or procedure in place regarding the alleged failures of the municipal defendants. The court found that the actions of the municipal defendants on June 24, 2005, in determining how and when to deploy police officers, were discretionary in nature and not ministerial. The court also held that § 7-284 did not create a ministerial duty, as the implementation of § 7-284 requires the exercise of discretion and judgment by police officials. It further found that the plaintiff could not recover under an exception to a municipal employee's qualified immunity for discretionary acts because the decedent was not an identifiable victim subject to imminent harm and

because there was no evidence that the city derived a pecuniary benefit from providing police protection to the carnival.

5 Star likewise filed a motion for summary judgment on all claims asserted against it on March 16, 2010. It claimed that (1) it was not charged with the duty to provide police protection at the carnival, (2) it had no notice that there was likelihood that homicides would be committed, (3) the homicide in question was unforeseeable and (4) the plaintiff's claims against 5 Star are barred by the intervening intentional and criminal act of another.

On November 1, 2010, the court rendered summary judgment in favor of 5 Star. The court found that there was no evidence presented that 5 Star was the permitee, or that it owned, rented, possessed or otherwise controlled the premises where the carnival took place. Absent evidence of possession or control of the premises, the court determined that 5 Star owed no duty to the decedent as a business invitee, and the plaintiff therefore could not prevail in a negligence claim against it. This appeal followed.

Before considering the precise claims presented on appeal, we note the well established standard of review. "Practice Book § [17-49] requires that 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. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . The party opposing

such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See Practice Book §§ [17-44 and 17-45]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . A motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Weiner* v. *Clinton*, 106 Conn. App. 379, 382–83, 942 A.2d 469 (2008).

I

The plaintiff claims first that the court improperly held that there was no genuine issue of material fact as to whether the municipal defendants had qualified immunity for the negligence claims asserted against them by the plaintiff. Specifically, the plaintiff argues that the court improperly held that the municipal defendants were entitled to qualified governmental immunity because (1) § 7-284[5] imposes a ministerial duty to provide police protection and (2) the municipal defendants were engaged in proprietary activities. We agree with the municipal defendants that the court properly rendered summary judgment in their favor pursuant to § 52-557n because their allegedly negligent acts were

[5] General Statutes § 7-284 provides: "When police protection is necessary or required at any boxing bout or wrestling match, place of public amusement, sport contest or hockey, baseball or basketball game, or any other exhibition or contest, which is being held or is to be held in any municipality, the amount of such protection necessary shall be determined and shall be furnished by (1) the chief or superintendent of the police department in any municipality having an organized or paid police department or (2) the commanding officer of the state police troop having jurisdiction over the municipality in any municipality having a resident state trooper. Any such protection shall be paid for by the person or persons operating, conducting or promoting such game, exhibition or contest."

discretionary in nature and were not performed for a pecuniary benefit.

We begin with the general principles of municipal liability. Under § 52-557n (a) (1) (A),[6] a municipality generally is liable for the ministerial acts of its agents. Section 52-557n (a) (2) (B),[7] however, "explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Coe* v. *Board of Education*, 301 Conn. 112, 117, 19 A.3d 640 (2011).

As our Supreme Court has explained, "[m]unicipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune from liability for

[6] General Statutes § 52-557n (a) (1) (A) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . [t]he 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 . . . ."

[7] General Statutes § 52-557n (a) (2) (B) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

negligence arising out of their ministerial acts . . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Internal quotation marks omitted.) *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 270–71, 41 A.3d 1147 (2012).

"The hallmark of a discretionary act is that it requires the exercise of judgment. . . . If by statute or other rule of law the official's duty is clearly ministerial rather than discretionary, a cause of action lies for an individual injured from allegedly negligent performance. . . . [M]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." (Citations omitted; internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 654, 943 A.2d 507 (2008).

"There are three exceptions to discretionary act immunity. Each of these exceptions represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force. . . . First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, 280 Conn. 310, 319–20, 907 A.2d 1188 (2006).

"Although the determination of whether official acts or omissions are ministerial or discretionary is normally

a question of fact for the fact finder . . . there are cases where it is apparent from the complaint. . . . [T]he determination of whether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52-557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions *necessarily* involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Grignano* v. *Milford*, supra, 106 Conn. App. 654–55.

A

The plaintiff claims first that the court erred in finding that § 7-284 does not create a ministerial duty.[8] We disagree.

We must determine whether the court properly concluded that § 7-284 does not create a ministerial duty to furnish police protection, a question of statutory interpretation over which our review is plenary.[9] See

[8] The municipal defendants argue that any claim relating to § 7-284 is not properly before this court because it was not alleged in the plaintiff's complaint. In her opposition to the municipal defendants' motion for summary judgment, the plaintiff asserted for the first time that § 7-284 obligated the municipal defendants to provide police protection and thus was the source of a ministerial duty. It is sufficient that the plaintiff raised the source of the alleged ministerial duty in her opposition to the motion for summary judgment, and, accordingly, we review the merits of the plaintiff's claim. See *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 50–51, 881 A.2d 194 (2005) (noting that plaintiff failed to present any evidence of policy or directive in his opposition to defendants' motion for summary judgment, and, absent such evidence, holding that defendants were engaged in discretionary acts).

[9] The court considered § 7-284 as potentially falling under the second exception to discretionary act immunity, under which "liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws." (Internal quotation marks omitted.) *Violano* v. *Fernandez*, supra, 280

Santiago v. *Commissioner of Motor Vehicles*, 134 Conn. App. 668, 678, 39 A.3d 1224 (2012). "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.) Id., 678–79.

Section 7-284 provides in relevant part that "[w]hen police protection is necessary or required at any . . . place of public amusement . . . the amount of such protection necessary shall be determined and shall be furnished by . . . the chief of . . . the police department . . . ." The parties do not dispute that § 7-284 vests the chief of police with the discretion to determine whether police protection is necessary at private events and, if so, the amount of such protection. It is the plaintiff's contention, however, that once the chief of police,

Conn. 319–20. The plaintiff claims only that the court erred in concluding that § 7-284 does not impose a ministerial duty and makes no claim that the court erred in concluding that §7-284 does not provide a cause of action against the municipality for failing to enforce certain laws. We therefore only consider whether § 7-284 creates a ministerial duty.

in his or her discretion, determines that police protection is necessary, the chief of police then has a ministerial duty to furnish such police protection. The plaintiff's claim centers on the mandatory nature of the word "shall" in the phrase "the amount of such protection necessary shall be determined and *shall be furnished* by . . . the chief of . . . the police department." (Emphasis added.) General Statutes § 7-284. The plaintiff claims that, because the police department determined that police protection was necessary, it violated its ministerial duty to furnish such protection by failing to provide any police protection whatsoever to the carnival.[10] We disagree with the plaintiff that the word "shall" is sufficient to convert what is otherwise a discretionary act into a ministerial duty where the text of the statute leaves to the discretion of the police official how to perform the function and whether to perform the function at all.

Although the word "shall" can connote a mandatory command, the language of the statute, read as a whole, involves discretionary acts. See *Wiseman* v. *Armstrong*, 269 Conn. 802, 810, 850 A.2d 114 (2004) ("[a] statute is enacted as a whole and must be read as a whole rather than as separate parts or sections"). "The mere fact that a statute uses the word 'shall' in prescribing the function of a government entity or officer should not be assumed to render the function necessarily obligatory in the sense of removing the discretionary nature of the function, and it is therefore not sufficient that some statute contains mandatory language nor that the public entity or officer was under an obligation to perform a function that itself involves the exercise of discretion." 57 Am. Jur. 2d 91, Municipal, County, School, and State Tort Liability § 75 (2012).

[10] The plaintiff contends that whether there were police officers present at the carnival at all is a disputed issue of fact, and summary judgment was therefore inappropriate. This factual issue is not relevant to our inquiry, as we conclude that the act in question was discretionary.

Performance of the allegedly ministerial duty, furnishing police protection, necessarily involves the exercise of discretion because the statute, as well as our common law, vests police officials with the authority to determine the amount of protection necessary. See *Gordon* v. *Bridgeport Housing Authority*, 208 Conn. 161, 179, 544 A.2d 1185 (1988).[11] Our Supreme Court recently held that "for the purposes of § 52-557n, municipal acts that would otherwise be considered discretionary will only be deemed ministerial if a policy or rule limiting discretion in the completion of such acts exists." *Benedict* v. *Norfolk*, 296 Conn. 518, 520 n.4, 997 A.2d 449 (2010); see also *Violano* v. *Fernandez*, supra, 280 Conn. 323–24. Here, there was no policy or rule limiting discretion in the completion of the act, and, instead, the text of the statute reserves to the chief of police discretion in completion of the act. Where the text of the statute explicitly vests the chief of police with the discretion to determine when and how to furnish police protection, we decline to hold that the same statute imposes a ministerial duty on the chief of police to furnish the protection he deems, in his discretion, to be necessary.

The plaintiff argues that the inclusion of certain discretionary matters within § 7-284 does not render the

[11] We note that "[i]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality. . . . [T]he failure to provide, or the inadequacy of, police protection usually does not give rise to a cause of action in tort against a city. . . . The deployment of officers is particularly a governmental function. Considerable latitude must be allowed to [a police chief] in the deployment of his officers, or in enforcing discipline. Indeed, because a police chief's authority to assign his officers to particular duties is deemed a matter that concerns the public safety, he may not be deprived of his power to exercise his own discretion and judgment as to the number, qualifications and identity of officers needed for particular situations at any given time . . . ." (Citation omitted; internal quotation marks omitted.) *Gordon* v. *Bridgeport Housing Authority*, supra, 208 Conn. 180.

mandatory directive any less mandatory. We do not disagree that in some circumstances, a ministerial duty may follow a discretionary determination. See *Pluhowsky* v. *New Haven*, 151 Conn. 337, 347–48, 197 A.2d 645 (1964) ("A ministerial duty on the part of an official often follows a quasi-judicial determination by that official as to the existence of a state of facts. Although the determination itself involves the exercise of judgment, and therefore is not a ministerial act, the duty of giving effect, by taking appropriate action, to the determination is often ministerial."). The plaintiff relies principally on *Wright* v. *Brown*, 167 Conn. 464, 356 A.2d 176 (1975).[12] In that case, the statute in question, General Statutes (Rev. to 1975) § 22-358, required the canine official to make a discretionary determination as to whether there had been a dog bite or dog attack, and, upon making that determination, required that the dog be quarantined, and gave explicit direction on the nature and duration of the quarantine. Id., 466 and n.1. The language of the statute removed the canine official's discretion to determine how and for how long a dog should be quarantined. The statute in question in *Wright* clearly created a ministerial duty, as it created a "duty which is to be performed in a prescribed manner without the exercise of judgment or discretion." Id., 471. For that reason, it is readily distinguishable from the

[12] The plaintiff also argues that *Soderlund* v. *Merrigan*, 110 Conn. App. 389, 397, 955 A.2d 107 (2008) stands for the proposition that the method of performing an act can be discretionary even though the duty to perform it is mandatory. In *Soderlund*, the plaintiff brought a negligence action against a police officer and the city of Meriden for failing to remove from the statewide computer system an arrest warrant that had been vacated by a court. Id., 392. This court concluded that "[o]n the basis of the narrow facts of the present case, a judge's order to vacate an arrest warrant is mandatory even upon a police officer." Id., 399. The court noted that although the order did not specify how the arrest warrant was vacated, it was clearly mandatory as it involved no exercise of judgment or discretion. Id., 397. *Soderlund* is not instructive in determining whether an act is ministerial where the source of the alleged duty vests discretion with the official.

matter at hand and does not persuade us that a ministerial duty to furnish police protection flowed from the discretionary act of determining whether police protection was necessary.

B

The plaintiff next claims that the court erred by holding that there was no genuine issue of material fact as to whether the municipal defendants were engaged in governmental, not proprietary, conduct by requiring the carnival promoters to use and to pay for extra duty police officers as security for the carnival.[13] We disagree.

The permit issued to Kelly by the police department required that the permitee provide security for the event, which security was to be coordinated with the

[13] The municipal defendants, relying on *Haynes v. Middletown*, 122 Conn. App. 72, 80, 997 A.2d 636, cert. granted, 298 Conn. 907, 3 A.3d 70 (2010), assert that the plaintiff may not invoke the pecuniary interest exception because it was not specially pleaded in reply to the city's immunity defense. In their answer, the municipal defendants specially pleaded municipal and governmental immunity. The plaintiff replied to the municipal defendants' special defenses with a general denial, and first raised the pecuniary benefit exception in her opposition to the municipal defendants' motion for summary judgment. Although counsel for the municipal defendants noted during oral argument on the motion for summary judgment that she did not know the pecuniary benefit exception was at issue until the plaintiff's opposition, she did not argue that this exception was foreclosed to the plaintiff as a result of her failure to plead it pursuant to Practice Book § 10-57, which requires that a "[m]atter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply." The court, therefore, never concluded that the pecuniary exception was inapplicable because the plaintiff failed to plead it. Our Supreme Court previously has "afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency." *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 273, 819 A.2d 773 (2003). In the absence of a timely objection to the failure to plead the pecuniary exception to governmental immunity, we will review the merits of the plaintiff's claim. See *Mollica* v. *Toohey*, 134 Conn. App. 607, 611 n.3, 39 A.3d 1202 (2012).

police department's outside overtime office. The plaintiff argued in her opposition to the municipal defendants' motion for summary judgment that, even assuming that the municipal defendants' acts were discretionary, immunity still did not apply because the city received a corporate profit or pecuniary benefit. She claimed that any time police officers are required pursuant to § 7-284,[14] the police officers are acting in the pecuniary interest of the city. The court determined first that the plaintiff adduced no evidence demonstrating that the city received any payment at all. The court also concluded that, even if the city had been paid for overtime charges for police officers assigned to the carnival, the plaintiff produced no evidence to prove that the city made a profit from providing police protection to the carnival, and, accordingly, the requirement of § 52-557n (a) (1) (B) was not met.

Section 52-557n (a) (1) (B) holds municipalities liable for damages to person or property caused by "negligence in the performance of functions from which the political subdivision derives a special corporate or pecuniary benefit . . . ." This section codifies the common-law rule that municipalities are liable for their negligent acts committed in their proprietary capacity. *Considine* v. *Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006). "If a municipality is acting only as the agent or representative of the state in carrying out its public purposes . . . then it clearly is not deriving a special corporate benefit or pecuniary profit. Two classes of activities fall within the broader category of acting as the agent of the state: [1] those imposed by the [s]tate for the benefit of the general public, and [2] those which arise out of legislation imposed in pursuance of a general policy, manifested by legislation affecting similar

[14] General Statutes § 7-284 provides in relevant part that any protection provided pursuant to that statute "shall be paid for by the person or persons operating, conducting or promoting such game, exhibition or contest."

corporations, for the particular advantage of the inhabitants of the municipality, and only through this, and indirectly, for the benefit of the people at large. . . . For example, the maintenance of the public peace or prevention of disease would fall within the first class . . . while the maintenance of a park system would fall within the second class." (Citations omitted; internal quotation marks omitted.) Id., 845–46. "On the other side of the distinction, a municipality generally has been determined to be acting for its own special corporate benefit or pecuniary profit where it engages in an activity for the particular benefit of its inhabitants . . . or if it derives revenue in excess of its costs from the activity." (Citation omitted; internal quotation marks omitted.) Id., 847.

Section 7-284 specifically directs that necessary police protection provided to a place of public amusement "shall be paid for by the person or persons operating, conducting or promoting such game, exhibition or contest." There is no evidence that the city billed for police protection under § 7-284 for the particular benefit of its inhabitants, nor is there evidence that it derived revenue in excess of its costs.[15] Our Supreme Court, in the context of a first amendment challenge to § 7-284, determined that the statute serves the government's interest in both public safety and financial responsibility. *Morascini* v. *Commissioner of Public Safety*, 236 Conn. 781, 801–802, 675 A.2d 1340 (1996). "Absent § 7-284, state and local governments would be without authority to seek compensation for police services furnished to private entrepreneurs. The governmental interest in maintaining public order

[15] We agree with the court's conclusion that there was no evidence that the city received any payment for providing police protection, let alone a profit. Although the existence of an actual pecuniary profit is a factor in deciding whether the function is proprietary, our Supreme Court has noted that "reliance on it alone would create problematic incentives and arbitrary results." *Considine* v. *Waterbury*, supra, 279 Conn. 847 n.11.

consequently would be achieved less effectively in the absence of § 7-284 because its absence would place financial strain on various state and local police departments. . . . [I]t is likely that without § 7-284, public safety would suffer because many cities and towns would be forced by financial circumstances to curtail the number of police officers that presently are covered adequately because of § 7-284." Id., 802.

The purpose of § 7-284 is to maintain the public peace while also transferring the financial burden to private event sponsors. Id. Billing private event promoters for necessary police protection pursuant to § 7-284 is not done for the purpose of deriving a corporate profit, but for public safety and financial responsibility. See id., 801–802. The city, in complying with § 7-284, acts as the agent of the state in carrying out its public purposes. See *Considine* v. *Waterbury*, supra, 279 Conn. 845–46. Accordingly, we conclude that the city was acting in a governmental, not proprietary, function by requiring the carnival promoters to use and to pay for extra duty police officers as security for the carnival.[16] The court therefore properly rendered summary judgment in favor of the municipal defendants.

[16] The plaintiff argues that *Plainfield* v. *Commissioner of Revenue Services*, 213 Conn. 269, 567 A.2d 379 (1989), establishes that police protection provided pursuant to § 7-284 is not governmental in nature. We are not persuaded. In *Plainfield*, the court addressed the question of whether the rendering of services under §7-284 was a taxable sale under General Statutes (Rev. to 1985) § 12-407 (2) (i) (E), which defined as taxable sale "the rendering of certain services for a consideration . . . [including] private investigation, protection, patrol work, watchman and armored car services." Id., 272. The plaintiff town claimed that only services performed on a private basis, rather than a public basis, were taxable, and that there can be no sales tax due for services rendered by its police officers in protecting the public. Id. The court held that the services rendered were private in nature, and bolstered its conclusion by the specific mandate in § 7-284 that the services rendered be paid for by the promoter. Id., 274. A determination that a payment pursuant to § 7-284 is private as opposed to public for the purposes of taxation is not instructive in determining whether the city received a pecuniary benefit.

II

The plaintiff also claims that the court erred by holding that there was no genuine issue of material fact as to whether 5 Star had the right to use and to occupy the carnival premises. The plaintiff claims that there is a genuine issue of material fact as to (1) whether Kelly expressly was authorized by 5 Star to obtain permits on its behalf and (2) whether, in the absence of express authority, Solution impliedly was authorized by 5 Star to obtain permits on its behalf. 5 Star claims that it was not the owner nor was it the possessor of the land where the incident occurred, and therefore it owed no duty to the decedent. We agree with 5 Star that the court properly held that there was no genuine issue of material fact as to whether it was in possession or control of the premises.

The second count of the plaintiff's third amended complaint alleged negligence against 5 Star. Specifically, the plaintiff claimed that 5 Star was negligent in that it, inter alia, failed to provide adequate security or to supervise the carnival properly. The complaint alleged that, at all relevant times, 5 Star "owned, maintained, controlled, possessed, provided and operated amusement rides and other fun booths for use at carnivals including 'Midway 2005,' " but alleged no facts relating to 5 Star's possession or control of the premises. The complaint alleged that 5 Star and Solution jointly applied for and were issued permits. In its memorandum of law in support of its motion for summary judgment, 5 Star argued that it was not involved in the permit application process and that neither Kelly nor Solution were agents of 5 Star or otherwise authorized to act on its behalf. Accompanying the motion were the affidavit of Linda Coleman and Kelly's deposition testimony.

The court found that the plaintiff, in opposing 5 Star's motion for summary judgment, did not adduce any evidence to show that 5 Star was the permitee, owned, rented, possessed or controlled the premises where the carnival took place other than adducing the permits. The court noted that, although 5 Star was listed on both the permit from the police department and from the department of parks and recreation, Kelly's testimony established that he had no authority to represent 5 Star or act on its behalf while obtaining permits from either department. The court held that 5 Star therefore did not owe a duty to the decedent as a business invitee and, accordingly, rendered summary judgment in favor of 5 Star as to the second count of the plaintiff's third amended complaint.

The plaintiff filed a motion to reargue and reconsider 5 Star's motion for summary judgment and her objection thereto, arguing that the issue of control was not raised by 5 Star in its motion for summary judgment, was not addressed in her objection and was not orally argued by either party. The plaintif also argued that 5 Star had control of the premises. On March 7, 2011, the court heard argument on the plaintiff's motion. The court affirmed its original decision granting 5 Star's motion for summary judgment. The plaintiff did not seek an articulation.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . The law is clear that [a] possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe. . . . In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Citation omitted; internal quotation marks omitted.) *Gargano* v. *Azpiri*, 110 Conn. App. 502, 508, 955 A.2d 593 (2008). "[L]iability can be predicated upon

negligence in the control and possession of premises, as opposed to mere ownership thereof." *Mack* v. *Clinch*, 166 Conn. 295, 296, 348 A.2d 669 (1974). "Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." *LaFlamme* v. *Dallessio*, 261 Conn. 247, 252, 802 A.2d 63 (2002). "Retention of control is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . The word control has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or oversee." (Internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, 120 Conn. App. 298, 308, 991 A.2d 1105, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010).

The pleadings, affidavits and other proof submitted support the court's conclusion that there was no genuine issue of material fact as to whether 5 Star possessed or controlled the premises. The plaintiff's third amended complaint did not allege that 5 Star possessed or controlled the premises on which the carnival was held; it merely alleged possession and control of the booths and rides in use at the carnival. Moreover, the plaintiff did not introduce any evidence that raised a genuine issue of material fact that 5 Star was in possession or control of the premises.

The deposition testimony of Kelly was that he was not authorized by 5 Star in writing to act on its behalf, that a representative of 5 Star did not sign any of the documents submitted in the permitting process and that he never asked 5 Star if Solution could submit documents to the city under 5 Star's name, with the exception of requests for the certificate of insurance. He acknowledged writing "5 Star Amusement, Inc. c/o the Solution, LLC" on the permit from the parks and recreation department, and testified "that could have

just been how I filled it out that year, with no malice." He then stated that "[u]pon further reflection of this document, I did not have the authority to do that." Moreover, Linda Coleman attested in her affidavit that neither she nor her husband, Robert E. Coleman, Jr., submitted applications to hold the carnival, that neither were involved in the permitting process, and that neither Kelly nor Solution were agents of 5 Star and neither were authorized to enter into contracts on 5 Star's behalf. She also attested that although she knew that Kelly had applied for permits, she did not know that he did so in 5 Star's name. In light of the uncontroverted testimony of Kelly and Linda Coleman, there is no genuine issue of material fact as to whether Kelly had the authority to seek permits on behalf of 5 Star.[17]

In her motion to reargue and reconsider, the plaintiff argued that Kelly's testimony offers evidence indicating that 5 Star had possession or control of the carnival premises. Kelly testified that, to the best of his knowledge, 5 Star took precautions to protect its rides and equipment during hours of nonoperation. He also testified that 5 Star provided a ticket booth where tickets for the carnival were sold. Kelly testified that patrons, after purchasing their tickets, would then come through a second gate with their tickets, where the tickets would be collected and torn in half. On the night of the incident in question, Kelly was at the second gate taking tickets. Kelly's testimony does not create a genuine issue of

[17] We do not address the plaintiff's argument that Kelly had implied authority from 5 Star because Solution and 5 Star operated a joint venture. The plaintiff did not plead a joint venture between the two entities, and she did not present the issue to the court until the penultimate sentence of her motion to reargue and reconsider in which she baldly asserts that "[t]his was a joint venture for both entities' benefit." In oral argument before the court on the motion to reargue and reconsider, the court questioned counsel for the plaintiff as to whether the joint venture claim would be a permissible amendment to the complaint, but at no time did the plaintiff amend the complaint to include an allegation of joint venture.

material fact as to whether 5 Star had the "power or authority to manage, superintend, direct or oversee" the premises. (Internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, supra, 120 Conn. App. 308. The evidence presented demonstrates that 5 Star was not involved in any regard in the procuring of security or police coverage for the event. The fact that 5 Star protected its rides and equipment does not establish whether it had possession or control over the carnival premises. Likewise, the fact that 5 Star provided a ticket booth does not, without more, establish that it was in control of the premises.

The plaintiff failed to present evidence to show that there was a genuine issue of material fact as to whether 5 Star had possession or control over the premises. "[T]he burden of showing the nonexistence of any material fact is on the party seeking summary judgment . . . . It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute. . . . The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact." (Citation omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 803, 842 A.2d 1134 (2004). Here, 5 Star successfully demonstrated the absence of a material dispute as to its possession and control of the premises, and the plaintiff failed to present any factual predicate to raise an issue of material fact. The court therefore properly rendered summary judgment in favor of 5 Star.

The judgments are affirmed.

In this opinion the other judges concurred.

RICHARD BUEHLER *v.* LILACH BUEHLER
(AC 33356)

Beach, Alvord and Espinosa, Js.

Syllabus

The plaintiff, whose marriage to the defendant had been dissolved, appealed to this court from certain postjudgment orders of the trial court rendered in favor of the defendant. Pursuant to the dissolution judgment, the defendant was to have sole possession of and exclusive use of the marital residence until it was sold, and each party was responsible for one half of the mortgage payment until the sale of the property. The trial court granted the defendant's motion for modification to allow her to place the former marital residence on the market for rent and granted the defendant's motion for contempt and awarded the defendant the rental income generated by the former marital residence. *Held*:

1. The trial court acted without subject matter jurisdiction by entering the postjudgment order awarding the defendant the rental income generated by the former marital residence: at the time of the judgment of dissolution, the trial court ordered that the marital residence be sold and the court, by awarding the defendant all of the rental income from the marital residence, made an improper postjudgment property assignment in violation of statute (§ 46b-86 [a]); furthermore, the defendant's claim that the trial court previously had ruled that she should receive the rental income and, thus, that the plaintiff did not timely appeal from the court's determination regarding allocation of the rental income was unavailing, as there was no transcript or memorandum presented that supported her contention that the trial court had made any such ruling.
2. The trial court improperly found the plaintiff in contempt for his failure to pay one half of the mortgage as required under the dissolution judgment, which payments the plaintiff ceased making after the court allowed the defendant to rent the marital property, the purpose of which was to generate rental income to pay the mortgage; the defendant specifically represented to the court that she would use the rental moneys to pay the mortgage on the marital residence in her motion to modify and it was on that basis that the plaintiff consented to the defendant's placing of the marital residence on the rental market, and because the trial court, in granting the motion for modification, never stated that it still required the plaintiff to pay his one half of the monthly mortgage despite the expectation that the entirety of the parties' mortgage obligation would be satisfied by rental income, its order permitting rental of the marital residence was ambiguous.
3. The trial court did not abuse its discretion in denying the plaintiff's motion to modify, in which he requested that the marital residence immediately be placed for sale at that time; the court determined that the only reason

the mortgage was being paid was because the house was being rented, and the plaintiff presented no evidence to the court that the parties would be able to pay the mortgage without the rental income generated by the marital residence at the time he made his motion to modify, he failed to present evidence that the house simultaneously could be rented and relisted for sale, and he provided the court with no information regarding any improvement in the applicable residential sales market.

Argued May 31—officially released September 11, 2012

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, where the matter was transferred to the Regional Family Trial Docket at Middletown, and tried to the court, *Gordon, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court granted the defendant's motion for contempt and entered certain postjudgment orders, and the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Campbell D. Barrett, with whom were *Jon T. Kukucka*, and, on the brief, *C. Michael Budlong*, for the appellant (plaintiff).

Charles W. Fleischmann, for the appellee (defendant).

Opinion

ALVORD, J. In this domestic relations matter transferred to the Regional Family Trial Docket at Middletown from the Stamford-Norwalk judicial district, the plaintiff, Richard Buehler, appeals from several postjudgment orders of the trial court rendered in favor of the defendant, Lilach Buehler. Specifically, he claims that the trial court improperly (1) acted without subject matter jurisdiction by entering a postjudgment order awarding the defendant the rental income generated by the former marital residence, (2) found him in contempt of court after he ceased making mortgage payments

following the court's decision to allow the parties to place the marital residence on the rental market, and (3) denied his motion to modify and to order that the former marital residence immediately be placed back on the market.[1] We affirm the decision of the trial court denying the plaintiff's motion to modify, however, we agree with the plaintiff that the trial court acted without subject matter jurisdiction by improperly assigning property postjudgment when it awarded the defendant all of the rental income generated by the marital residence. Therefore, we determine that the court improperly found the plaintiff in contempt with respect to his failure to make monthly mortgage payments because the mortgage was being paid out of the rental income generated by the marital residence.[2] Accordingly, we reverse in part the judgment of the trial court, vacate the arrearage finding of April 7, 2011, and remand the case for a new determination of the arrearage consistent with this opinion.

The following facts, as stated in this court's decision affirming the judgment of dissolution rendered by the trial court; *Buehler* v. *Buehler*, 117 Conn. App. 304, 306–308, 978 A.2d 1141 (2009); are relevant to our disposition of the plaintiff's current, postjudgment appeal. "The parties were married on September 7, 1997, and have three minor children. . . . On November 14, 2006, the plaintiff initiated dissolution of marriage proceedings by service of summons and complaint on the defendant. On June 4, 2008, the court, *Gordon*, *J.*, rendered judgment dissolving the parties' marriage on the ground

[1] The plaintiff also argues that the court abused its discretion by entering remedial orders that consume approximately 95 percent of his gross income. In light of our decision to vacate the arrearage award and remand for recalculation, we need not address this claim.

[2] There is a mortgage and an equity line of credit on the marital residence. For clarity and convenience, we refer to the mortgage and equity line of credit as the mortgage throughout this opinion.

that it had broken down irretrievably and that reconciliation was not a possibility. After a lengthy discussion of its factual findings, the court issued the following orders: '[T]he defendant wife . . . shall have sole legal and physical custody of the minor children. She shall have sole decision-making power regarding all matters affecting the health, education and welfare of the children, which is to be read broadly . . . . All parenting time between [the plaintiff] and the children shall be supervised. . . .

" '[The defendant] is awarded $400 per week as child support. . . . [The defendant] is awarded alimony in the amount of $25,000 per year . . . . [The plaintiff] shall pay approximately $196, or one half, of the COBRA[3] cost for [the defendant's] health insurance. . . . Until the [marital home] is sold, each of the parties shall be responsible for one half of the mortgage payment, which is to be paid promptly on the first of each month. . . . *The court retains jurisdiction regarding the sale of the house.* . . .

" 'The marital home . . . currently on the market, shall continue on the market. The coordination of the sale, the broker, etc., shall be [the defendant's] responsibility. Each of the parties is ordered to cooperate regarding the sale of the property and the asking price for the property and to cooperate with the broker. If there is any dispute, [the defendant] can select the broker and set the price after consultation with [the plaintiff]. Until the property is sold, [the defendant] shall have sole possession and exclusive use of the property. Upon the closing, there will be deductions for all of the normal and customary closing costs . . . . Then, it shall be divided as follows from the joint proceeds: to [the defendant], the first $95,000 to repay the loan which

[3] See the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §§ 1161 through 1168.

saved the house. Then, to [the defendant], $12,000 to pay off the balance on her car. Then, to [the defendant] an amount equal to the credit card debt which she incurred from the time of the separation to February 27, 2007. Then, the fees for the guardian ad litem and the attorney for the guardian ad litem. These amounts are to be paid off of the top of the proceeds. Then the balance is to be divided between the parties equally. But from [the plaintiff's] side, shall first be subtracted $65,000 to be paid to [the defendant], which represents her share in the funds which he appropriated out of their accounts before filing this action.' " (Emphasis in original.) Id.

On June 13, 2008, the defendant filed a motion for contempt arguing that the plaintiff failed to make timely mortgage, alimony and support payments in accordance with the June 4, 2008 order of the court. The court held a hearing on June 24, 2008, and found the plaintiff in wilful contempt of court. The court also passed title in the marital home to the defendant to preserve the asset and to effectuate its sale. Id., 309–10. The plaintiff appealed the court's orders to this court, however, this court determined that the plaintiff did not appeal timely the issues relating to the sale of the home and dismissed the appeal with regard to those issues. Id., 310–11.

On August 27, 2008, the defendant filed a postjudgment motion for modification with respect to renting the marital residence. In her motion for modification, the defendant alleged the following: "The defendant represents that there has been a significant change in circumstances in that there have been no offers made on the home, the plaintiff has failed and refused to pay his share of the monthly mortgage payments for the months of July and August, 2008, and the September mortgage payment is soon approaching, and that the defendant's financial situation is deteriorating in that she can no longer afford to pay all of the aforementioned

mortgage payments, and will face a foreclosure action once again.

"Wherefore, the defendant moves that the aforementioned order be modified so that the former marital residence may be placed on the market for rent, so that the anticipated monthly rent will be sufficient to pay the monthly mortgage payments, which will alleviate the financial stress and prevent the marital residence from being placed once again into foreclosure, dissipating all of the assets of the defendant." The court heard the parties on the motion for modification on September 23, 2008, and, at the hearing's conclusion, the court stated: "The motion for modification regarding the sale is granted."

On May 3, 2010, the plaintiff filed a motion for modification requesting "[t]hat the court order [the] defendant to pay [the] plaintiff his equitable one half share of the rental income, retroactive to May 25, 2009, and any deposits or other payments received related to the rental of the marital residence less [the] plaintiff's one half portion of mortgage payments . . . [and] [t]hat the defendant be ordered to place the marital residence back on the market immediately."

On June 11, 2010, the defendant filed a motion for contempt alleging, inter alia, that the plaintiff failed to: pay one half of the defendant's expense for COBRA, set up a direct deposit so that payments for the benefit of the children could be made electronically, pay one half of the children's unreimbursed medical expenses, pay one half of the expenses of the children's extracurricular activities, provide a copy of his 2006 tax return to the defendant and to pay to the defendant one half of the 2006 tax refund, maintain life insurance with the defendant as the trustee beneficiary and pay in full his one half of the outstanding mortgage payments and taxes.

A hearing on these motions was held ten months later on April 6 and 7, 2011.[4] In a ruling from the bench, the court granted the defendant's motion for contempt with regard to the COBRA expenses, the children's extracurricular activities, the direct deposit account and the mortgage payments, finding an arrearage in the amount of $69,172 plus judgment interest. The court ordered that the plaintiff pay an additional $1660 per month on the arrearage subject to wage withholding. Additionally, the court awarded the defendant $1000 in sanctions due to the plaintiff's failure to appear at a deposition. The court also awarded the defendant $32,197 in attorney's fees, which would "come off [the plaintiff's] share that is due and payable at the time of the closing [after the sale of the marital residence]." The court denied the plaintiff's May 3, 2010 motion for modification, stating: "When you come into this court and tell me that you are paying one half of the mortgages on the property that's rented [and] stand ready to contribute, then and only then should you be entitled to share in anything. But certainly, given the fact that you have wilfully not paid it, without any permission from the court, you don't stand here with (a) clean hands or (b) on equitable grounds, because as I said before, the only reason anybody's in this pickle is because of your wilful contempt, and I'm not going to allow you to profit by it." This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first contends that the court improperly acted without subject matter jurisdiction by entering a postjudgment order on April 7, 2011, awarding the defendant the rental income generated by the former marital residence. We agree.

[4] The court also heard argument from the parties on two motions for contempt filed by the plaintiff.

Our Supreme Court recently has restated the well settled rule that "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 531–32, 46 A.3d 102 (2012). "[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.) *Lynch* v. *Lynch*, 135 Conn. App. 40, 55, 43 A.3d 667 (2012).

"The court's judgment in an action for dissolution of a marriage is final and binding upon the parties, where no appeal is taken therefrom, unless and to the extent that statutes, the common law or rules of court permit the setting aside or modification of that judgment. . . . General Statutes § 46b-86 (a) provides in relevant part: Unless and to the extent that the decree precludes modification, 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 . . . . This section shall not apply to [property] assignments under section 46b-81 . . . . *The statute, therefore, deprives the Superior Court of continuing jurisdiction over that portion of a dissolution judgment providing for the assignment of property of one party to the other party under General Statutes § 46b-81.* . . . Although the court has jurisdiction to assign property in connection with § 46b-81, that assignment is not modifiable." (Citations omitted; emphasis added; internal quotation marks omitted.) *Santoro* v. *Santoro*, 70 Conn. App. 212, 216–17, 797 A.2d 592 (2002).

At the time of the judgment of dissolution, the court ordered that the marital residence be sold. By awarding the defendant all of the rental income from the marital

residence, on April 7, 2011, the court made an improper postjudgment property assignment in violation of § 46b-86 (a). The defendant argues that, even if there was an improper postjudgment property assignment, the plaintiff did not timely appeal the court's determination regarding allocation of the rental income. She contends that the court "intended all along that the defendant receive the income" and, therefore, we should consider the date of the court's ruling allowing the defendant to keep all of the rental income to be September 23, 2008. The defendant draws our attention to the court's statement at the April 7, 2011 hearing that it had made such a ruling on September 23, 2008.[5]

After careful review of the record, we can find no transcript or memorandum supporting the contention that the court made any such ruling on September 23, 2008. On September 23, 2008, the court simply stated: "The motion for modification regarding the sale is granted." We therefore consider April 7, 2011, to be the date of the court's ruling on allocation of the rental income, making the plaintiff's appeal of this issue timely. Accordingly, we reach the merits of this claim and determine that the court acted without authority in assigning the rental income wholly to the defendant and vacate that order. We remand for a hearing regarding the amount of net rental income owed to the plaintiff, taking into account the agreed upon payment of the mortgage, costs, taxes and maintenance of the marital residence, in light of the dissolution orders regarding this property.

[5] The following colloquy took place on April 7, 2011:

"[The Plaintiff]: [W]ith all due respect, Your Honor, nobody gave the defendant permission to . . . collect all the rent.

"The Court: I did. You asked, I did. At the time of the hearing, Mr. Buehler, you made the same request, shouldn't we split it, and I said no.

"[The Plaintiff]: I don't recall that."

II

The plaintiff next argues that the court improperly found him in contempt of court after he ceased making mortgage payments to the defendant. Specifically, he argues that the court's decision allowing the defendant to rent the marital property was predicated on the use of the rental income to pay the mortgage. Thus, he argues that the court's decision, to allow the rental of the marital residence, negated the order that he pay one half of the mortgage. To the extent that the court still required him to pay one half of the monthly mortgage, the plaintiff argues that the court's order permitting rental of the marital residence was ambiguous and that, therefore, the court improperly held him in contempt for failing to make those payments. We agree with the plaintiff that the court's order was ambiguous.

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . .

"Civil contempt is committed when a person violates an order of court which requires that person in *specific and definite language* to do or refrain from doing an act or series of acts. . . . Whether an order is sufficiently clear and unambiguous is a necessary prerequisite for a finding of contempt because [t]he contempt

remedy is particularly harsh . . . and may be founded *solely* upon some clear and express direction of the court. . . . One cannot be placed in contempt for failure to read the court's mind. . . . This is a long-standing tenet of the law of contempt. . . . It is also logically sound that a person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Leah S.*, 284 Conn. 685, 693–95, 935 A.2d 1021 (2007).

We first must examine the court's decision on the modification motion. "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Citation omitted; internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 217–18, 14 A.3d 307 (2011).

The defendant specifically represented to the court that she would use the rental moneys to pay the mortgage on the marital residence in her motion to modify. Further, she testified: "I've been looking to possibly try and rent the house out in order *to be able to cover the mortgage payments* and I've spoken with several brokers who believe that this is a very good idea because the rental market is actually a whole lot better

than the sale market right now." It was on this basis that the plaintiff consented to the defendant's placing of the marital residence on the rental market at the September 23, 2008 hearing. He further testified that it was his understanding that the net rental income that he collected could be credited against his then owing arrearage.[6]

In granting the motion, the court said: "The motion for modification regarding the sale is granted." The court never stated that it still required the plaintiff to pay his one half of the monthly mortgage despite the expectation that the entirety of the parties' mortgage obligation would be satisfied by rental income. Accordingly, the court improperly held the plaintiff in contempt on the grounds that he failed to pay his portion of the mortgage. We therefore vacate the current arrearage order and remand the case to the trial court for a hearing to determine the appropriate arrearage amount and the appropriate amount of attorney's fees owed by the plaintiff to the defendant with respect to the remaining contempt findings.[7]

[6] The following colloquy took place between the plaintiff and his appointed counsel at the September 23, 2008 hearing:

"[The Plaintiff's Counsel]: Is there a manner in which you could pay this amount to your ex-wife?

"[The Plaintiff]: Yes.

"[The Plaintiff's Counsel]: And how would you suggest to pay that?

"[The Plaintiff]: I would suggest, if need be, it's my understanding that there is a renter who is available to rent the marital residence and from what I understand, through the testimony of Mrs. Buehler, that the rent received would be somewhere in the neighborhood of $6800. That is significantly more than what's owed each month on the mortgage payment, therefore leaving a surplus somewhere in the neighborhood of $3000 and I would, I had suggested applying my portion of that surplus towards the arrearage."

The plaintiff's counsel also argued later to the court: "I think the rental could be a bonanza for both parties . . . ."

[7] We note that our determination, that the court improperly found the plaintiff in contempt regarding his nonpayment of the mortgage, has no bearing on the court's findings of contempt regarding any other matters.

III

Finally, the plaintiff claims that the trial court improperly failed to effectuate its original dissolution judgment by denying the plaintiff's motion to modify with respect to his prayer for relief that the court order the marital residence to be sold immediately. We disagree.

We first note that the propriety of the court's original decision to place the marital residence on the rental market is not before us because the plaintiff did not timely appeal the September 23, 2008 granting of the defendant's motion to modify. We therefore review the court's decision denying the plaintiff's motion to modify under the abuse of discretion standard. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. 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. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Stancuna* v. *Stancuna*, 135 Conn. App. 349, 353, 41 A.3d 1156 (2012).

While this court appreciates that three years is a lengthy period of time for the home to be rented under these postjudgment circumstances, "[w]e have recognized that it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Roberts* v. *Roberts*, 32 Conn. App. 465, 471, 629 A.2d 1160 (1993). Prior to the court's granting of the defendant's August 27, 2008 motion to modify, which allowed the placement of the marital residence on the rental market, the house was at risk of foreclosure due to the fact that the plaintiff failed to pay his portion of the mortgage for the two months prior. In order to preserve the equity in the house, the court allowed the marital residence to be rented so that the mortgage would be paid each month.

We cannot say that the court abused its discretion by denying the plaintiff's May 3, 2010 motion to modify, which requested that the marital residence immediately be placed for sale at that time. The court determined that the only reason the mortgage was being paid was because the house was being rented. The plaintiff presented no evidence to the court that the parties would be able to pay the mortgage without the rental income generated by the marital residence at the time he made his motion to modify. The plaintiff also failed to present evidence that the house simultaneously could be rented and relisted for sale. Finally, the plaintiff provided the court with no information regarding any improvement, since 2008, in the applicable residential sales market. Accordingly, we cannot conclude that the court improperly denied the plaintiff's motion to modify.

The judgment is reversed as to the award of rental income to the defendant from the marital residence; the judgment of contempt is reversed in part as to the plaintiff's failure to pay one half of the mortgage, the current arrearage is vacated, and the case is remanded

with direction to determine the proper amount of arrearage and attorney's fees consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LOCAL 84, THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, ET AL. *v.* ROBERT FRANCIS ET AL.

(AC 33291)

Robinson, Alvord and Mihalakos, Js.

Syllabus

The plaintiff union, L Co., and its officers sought to recover damages from the defendants, F, S and H, the former officers of another union, E Co., that merged into L Co., for, inter alia, conversion, statutory theft and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the merger of the two unions. The trial court dismissed the statutory theft and CUTPA counts of the complaint and, following a trial, rendered judgment for the defendants on the remaining counts, from which the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court improperly determined that E Co. did not owe or breach a common-law fiduciary duty to L Co. during the effectuation of the merger between the two unions: that court found that F, S and H did not owe a fiduciary duty to L Co. and its members until the date of the merger, there was ample evidence in the record to support its finding that the merger took place on August 30, 2006, and, on the basis of that finding, the court properly found that E Co. was an autonomous, independent union at the time that certain disbursements were made from its treasury prior to the date of the merger and, thus, that the plaintiffs had no standing to bring the claim of breach of fiduciary duty based on those payments as a matter of common law, as they had no real interest in the cause of action, or a legal or equitable right, title or interest in the assets of E Co.; moreover, the plaintiffs' claim that F, S and H entered into a fiduciary relationship with L Co. and its members as soon as an order for the merger was issued and that they had a duty to preserve E Co.'s assets

for L Co.'s benefit once they were aware of the impending merger was unavailing, as the trial court unequivocally stated that F, S an H owed no fiduciary duty to L Co. or its members prior to the date of the merger and, thus, rejected the claim that a duty was owed to the plaintiffs prior to the merger date, and the plaintiffs failed to establish that a fiduciary relationship existed between the two unions prior to the effectuation of the merger.

2. The trial court's finding that F and H were not unjustly enriched when they transferred certain assets from their limited liability company, S Co., to a new limited liability company, C Co., was not clearly erroneous; the plaintiffs failed to show that E Co. had any claim to the assets of S Co., which was an independent limited liability company, and, thus, they could not establish that L Co. had any resulting claim to those assets.

3. This court declined to review the plaintiffs' claim that the trial court improperly allowed and relied on certain expert testimony, which was based on their claim that the defendants never disclosed the witness as an expert according to the rules of practice and that the witness was not qualified as an expert; the plaintiffs failed to provide citations to the specific portions of the witness' testimony that they claimed were improperly admitted and failed to provide this court with any specific objections made to the trial court, which was not sufficient to meet the requirements of the rules of practice.

4. This court declined to review the plaintiffs' claim that the trial court improperly granted the defendants' motion to dismiss the CUTPA count of the complaint, the plaintiffs having failed to brief the claim adequately.

Argued May 30—officially released September 11, 2012

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. Robert Satter*, judge trial referee, granted the defendants' motion for summary judgment only as to the defendant Crew 538, LLC; thereafter, the court granted in part the defendants' motion for reconsideration and granted the defendants' motion for summary judgment in favor of the defendants Stage Production Services, LLC, and Production Services 538, LLC; subsequently, the matter was tried to the court; thereafter, the court, on reconsideration of the defendants' motion for summary judgment, denied the motion for summary judgment as to the defendant Stage Production Services,

LLC; subsequently, the court denied the plaintiffs' motion in limine; thereafter, the court dismissed certain counts of the plaintiffs' complaint; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Richard J. Padykula, with whom was *Leon M. Rosenblatt*, for the appellants (plaintiffs).

Michael J. Walsh, for the appellees (defendants).

Opinion

ALVORD, J. This action concerns the merger of two union locals within the International Alliance of Theatrical Stage Employees (International). The plaintiff union, Local 84, Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC (Local 84), and the plaintiffs Stage Hands Referral Service, LLC, and Charles Buckland and Stella Cerullo, officers of Local 84, appeal from the judgment of the trial court in favor of the defendants Robert Francis, Sheila Harrington-Hughes and Michael Hughes, former officers of Local 538.[1] On appeal, the plaintiffs claim that the trial court improperly (1) determined that they did not have standing to bring a claim for breach of fiduciary duty against Francis, Harrington-Hughes and Hughes for certain actions taken by them during the effectuation of the merger between Locals 84 and 538, (2) determined that Francis and Hughes were not unjustly enriched (3) allowed expert testimony by the vice president of the International, Anthony DePaulo, and (4) determined that Hughes and Francis did not violate the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. We affirm the judgment of the trial court.

[1] The plaintiffs do not appeal from the summary judgment rendered in favor of the defendants Production Services 538, LLC, and Crew 538, LLC, and the judgment rendered in favor of Stage Production Services, LLC.

The following facts, as found by the court, are relevant to our disposition of this appeal. Both Local 84 and Local 538 represented stage hands who sought employment at various performing arts venues throughout the state. A dispute arose in 2005 regarding each local's jurisdiction at the Mohegan Sun Casino. Subsequent to that dispute, the International decided to merge Local 538 into Local 84, with Local 84 as the surviving local. Although Local 538 objected to the merger in writing on June 19, 2006, DePaulo informed the board members of Local 538 that the merger already had been approved and that he had been assigned to effectuate it. In a letter dated August 8, 2006, DePaulo stated that certain measures had to be taken in order to finalize the merger, including forwarding all of Local 538's books and records to the International, transferring Local 538's assets to Local 84, and transferring members of Local 538 into Local 84.

During the summer of 2006, and prior to the merger, Francis, Hughes and Harrington-Hughes continued to preside over meetings of Local 538 and to act on behalf of the local and its members. In August, 2006, Francis, Hughes and Harrington-Hughes, as officers of Local 538, voted to make four disbursements from the treasury of Local 538 (four payments). The first payment was a donation of $2000 to the Veterans of Foreign Wars post to thank the post for allowing Local 538 to use its facilities for meetings without cost for the previous ten years. The second payment was a donation of $750 to a sister local in Dallas for its 100th anniversary commemorative booklet. The third payment was a donation of $1000 to a sister local's memorial fund. Finally, Local 538 disbursed $200 to each of its members as vacation pay in lieu of the annual summer picnic.

On August 30, 2006, Francis, Hughes and Harrington-Hughes met with DePaulo to provide him with all of the materials required to finalize the merger, including

a check in the amount of $8667.04, representing the remaining funds in the treasury of Local 538. At the time of the merger, Francis and Hughes dissolved a limited liability company, of which they were members, called Stage Production Services, LLC (Stage Production). Stage Production's assets, consisting of $15,000, were transferred to a new limited liability company called Crew 538, LLC (Crew 538), of which Francis and Hughes were the only members.

On July 16, 2008, the plaintiffs filed a summons and complaint alleging, inter alia, conversion, unjust enrichment, statutory theft, breach of fiduciary duty and violation of CUTPA. On November 4, 2009, the defendants filed a motion for summary judgment. The court, *Hon. Robert Satter*, judge trial referee, concluded: "The central issue in the case is when the merger of Local 538 and Local 84 occurred. If the merger occurred after the defendant officers of Local 538 distributed monies to the members of the local and to other entities, then their motion for summary judgment should be granted. . . . [The court] is forced to conclude that a factual issue exists as to when the merger occurred." The court thus denied the motion for summary judgment with regard to Francis, Hughes, Harrington-Hughes and Stage Production.[2]

During the trial, which took place on October 20 and 21, 2010, the plaintiffs presented the testimony of Francis, Hughes, Harrington-Hughes, Charles Buckland, the president of Local 84, and William Philbin, the business representative of Local 84. The defendants offered the videotaped deposition of DePaulo.[3] The

[2] The court granted the defendants' motion for summary judgment as to Stage Production, and Production Services 538, LLC, on October 13, 2010, but during trial on October 20, 2010, reconsidered its decision and denied the summary judgment as to Stage Production.

[3] DePaulo was not available to testify and was beyond the court's subpoena power.

plaintiffs filed a motion in limine to preclude the deposition testimony. They argued that DePaulo was not qualified as an expert witness because he lacked the appropriate experience in effectuating mergers and that the defendants had not disclosed DePaulo as an expert pursuant to the rules of practice. The court denied the motion in limine.

At trial, the plaintiffs renewed their objection to the showing of the entire deposition. The court overruled the objection, stating: "I've noted your objection and I overrule it, I will see the video but I will give you the right to take the transcript and make your objections to any material that you feel is not proper . . . either as irrelevant or as opinion evidence or whatever grounds you feel [are] appropriate." The defendants' counsel then noted: "I thought I'd mark the original [deposition] transcript as a full exhibit . . . and then I would mark the DVD as a court exhibit if that's acceptable to you? . . . [S]ubject to whatever motion [is] made later." The court responded in the affirmative, and the plaintiffs did not object at that time.

At the close of evidence, the defendants made an oral motion to dismiss all counts of the complaint pursuant to Practice Book § 15-8[4] on the basis of the plaintiffs' inability to make out a prima facie case. The plaintiffs argued that to the extent the defendants relied on DePaulo's testimony in arguing the motion to dismiss, the court should deny the defendants' motion because DePaulo was not an expert and the defendants improperly offered his deposition as opinion testimony. The

[4] Practice Book § 15-8 provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made."

plaintiffs, however, offered no specific objections to material in the transcript of the deposition. In an oral ruling, the court granted the defendants' motion to dismiss the statutory theft and CUTPA counts of the plaintiffs' complaint. The plaintiffs did not file a motion for articulation regarding the court's oral ruling. The court allowed the plaintiffs and the defendants to file posttrial briefs on the remaining counts of the complaint. In a memorandum of decision dated March 8, 2011, the court rendered judgment for the defendants on all remaining counts. This appeal followed. Additional facts will be set forth as necessary to our disposition of this appeal.

I

The plaintiffs first claim that the trial court improperly determined that Local 538 did not owe or breach a common-law fiduciary duty to Local 84 during the effectuation of the merger between the two locals.[5] The court determined that the plaintiffs did not have standing to bring a claim for breach of fiduciary duty against Francis, Harrington-Hughes and Hughes. We agree with the court that the plaintiffs lacked standing.

"[A] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real

[5] In their posttrial briefs, the plaintiffs also claimed a breach of fiduciary duty pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 501. They also raise that issue in their appellate brief. We conclude that the court properly determined that the plaintiffs were barred from bringing this claim because they neglected to raise the claim as an allegation in their complaint. "The allegations of a complaint limit the issues to be decided on the trial of a case and are calculated to prevent surprise to opposing parties. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." *Stamford Landing Condominium Assn., Inc.* v. *Lerman*, 109 Conn. App. 261, 271, 951 A.2d 642, cert. denied, 289 Conn. 938, 958 A.2d 1246 (2008).

interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *American States Ins. Co.* v. *Allstate Ins. Co.*, 94 Conn. App. 79, 83, 891 A.2d 75 (2006), aff'd, 282 Conn. 454, 922 A.2d 1043 (2007).

The trial court's determination that a plaintiff lacks standing is a conclusion of law over which we exercise plenary review. *Seymour* v. *Region One Board of Education*, 274 Conn. 92, 104, 874 A.2d 742, cert. denied, 546 U.S. 1016, 126 S. Ct. 659, 163 L. Ed. 2d 526 (2005). "We conduct that plenary review, however, in light of the trial court's findings of fact, which we will not overturn unless they are 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." (Citation omitted; internal quotation marks omitted.) Id.

The court determined that the plaintiffs did not have standing to bring a claim for breach of common-law fiduciary duty because it concluded that, while Local 538 and its officers owed a fiduciary duty to the members of Local 538, they did not owe a fiduciary duty to Local 84 or its members. The plaintiffs argued that Francis, Harrington-Hughes and Hughes owed a fiduciary duty to Local 84 because they claimed that the merger between Local 538 and Local 84 occurred on June 9, 2006. They argued that, if the merger took place on June 9, then Local 538's funds belonged to Local 84 as of that date because Local 538 would no longer have existed independently. Thus, the plaintiffs argued that they had standing to raise a claim of breach of fiduciary duty based on the four payments.

In rejecting the plaintiffs' claim, the court made a factual finding that the merger between the two locals

occurred on August 30, 2006. The following additional facts were found by the court. "Although the International announced the merger on June 9, 2006, it assigned Mr. DePaulo to 'effectuate' the merger. In his letter to Local 538 of August, 2006, Mr. DePaulo specifically stated that 'to finalize the merger of Locals 538 and 84,' books and records of Local 538 had to be forwarded to the International and all assets were to be transferred to Local 84. Those events occurred on August 30, 2006, when the officers of Local 538 met with Mr. DePaulo, gave him the books and records of the Local and a check for the balance of the Local's account. As a consequence, this court concludes that the merger actually took place on August 30, 2006."

There is ample evidence to support the court's finding that the merger took place on August 30, 2006, and we are not left with the firm and definite conviction that a mistake has been committed. The plaintiffs have not demonstrated that the court's finding is clearly erroneous. On the basis of its finding that the merger did not take place until August 30, 2006, the court found that Local 538 was an autonomous, independent local at the time that each of the four payments were made. Therefore, the plaintiffs had no standing to bring the claim of breach of fiduciary duty as a matter of common law because the plaintiffs had no real interest in the cause of action, or a legal or equitable right, title or interest in the assets of Local 538.

On the basis of its findings, the court determined that the officers of Local 538 owed no fiduciary duty to Local 84 and its members until the date of the merger. The plaintiffs maintain, however, that even if the merger did not occur on June 9, 2006, Francis, Harrington-Hughes, and Hughes entered into a fiduciary relationship with Local 84 and its members as soon as the order for the merger was issued. They claim that once the officers of Local 538 were aware of the impending

merger, they had a duty to preserve Local 538's assets for Local 84's benefit.

The court did not address this argument directly in its memorandum of decision; however, it unequivocally stated that Francis, Harrington-Hughes, and Hughes owed no fiduciary duty to Local 84 or its members prior to the date of the merger: "[T]he court has determined that the merger occurred on August 30, 2006, [and] the individual defendants owed no fiduciary duty to [Local 84] or its members prior to that date." The court therefore rejected the plaintiffs' alternative argument that a duty was owed to the plaintiffs prior to the merger date.

It was the plaintiffs' burden to establish the existence of a fiduciary duty. See *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 41, 761 A.2d 1268 (2000); see also *Dunham* v. *Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987) ("[o]nce a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary" [internal quotation marks omitted]), overruled on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996). "It is well settled that 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. . . . Although [our Supreme Court] has refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations, we have recognized that not all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Citations omitted; internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, supra, 38.

The plaintiffs argue that Local 538 entered a fiduciary relationship with Local 84 at the time the merger decision was made by the International because Local 538 had superior knowledge of its own financial accounts and a duty not to spend money in those accounts during the interim period between the directive to merge and the actual merger date. The plaintiffs did not provide any relevant authority to the trial court establishing that a fiduciary duty attached prior to the merger date, and they have not provided such authority to this court. Therefore, the plaintiffs failed to establish that a fiduciary relationship existed between the two locals prior to the effectuation of the merger.[6] Accordingly, the court did not improperly determine that the plaintiffs lacked standing to bring a claim for breach of fiduciary duty against Francis, Harrington-Hughes and Hughes.

II

The plaintiffs next claim that the court improperly determined that Francis and Hughes were not unjustly enriched when they transferred assets from Stage Production to Crew 538. We disagree.

We first set forth the applicable legal principles. "[W]herever 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, restitution of the value of what has been given must be allowed. . . . Under such circumstances, the basis of the plaintiff's recovery is the unjust enrichment of the defendant. . . . 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

[6] Even if we assume, arguendo, a fiduciary duty attached once Local 538 had knowledge that a merger was to take place, the plaintiffs have failed to show how any of the four payments could be said to be in breach of that duty. The court analyzed each payment and explicitly found that the plaintiffs failed to prove that any of the four payments were improper, and we agree with the court's analysis.

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. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Citations omitted; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 451–52, 970 A.2d 592 (2009).

The plaintiffs claim that the assets of Stage Production were actually assets of Local 538 and that, therefore, the assets of Stage Production should have been preserved and provided to Local 84 as a result of the merger. The following additional facts, as found by the court, are relevant to our resolution of this claim. "[Stage Production] was formed by officers of Local 538. As of 2002, the members and owners of [Stage Production] were Hughes and Francis. Neither obtained their positions as members and owners as a result of a vote of the members of the Local, and neither invested any of his own money in [Stage Production]. [Stage Production] operated as follows: Much of the work of the Local was at the University of Rhode Island under a subcontract with a private company called Global Spectrum. Local 538 sent its members to work at Global Spectrum. Global Spectrum paid [Stage Production], which, in turn, paid Local 538 members the union wages and paid an assessment to the Local. The other use of

[Stage Production] was as a facade to supply union employees to the Native American casinos. Since those casinos did not recognize labor unions, [Stage Production] provided Local 538 members to work at the casinos, paid the union members their union wages, paid Local 538 the members' assessments and retained the difference, if any.

"Hughes and Francis dissolved [Stage Production] at the end of 2006 or possibly early 2007 because they had disassociated from [the International]. When they were wrapping up [Stage Production], they found there was money in its account in the amount of $15,000. Hughes and Francis rolled over this money into a new LLC known as [Crew 538].

"All of the time they provided services for [Stage Production], Francis and Hughes were never paid and never received any compensation whatsoever. At the time of the dissolution of [Stage Production], Hughes and Francis were owners of [Stage Production] and considered the net profits realized over the years as their own. No member of Local 538 claimed any right to the $15,000. The union members were paid for their services at the union rate. Local 538 was paid its assessments from those services of the union members. [Stage Production] was a separate entity and the owners . . . were entitled to the monies in its account.

"[The] [p]laintiffs have failed to show why they have any legal right or entitlement to the profits of [Stage Production] at the time [Stage Production] was dissolved."

We note at the outset that the court did not determine that there was a contractual relationship between the parties. Assuming, arguendo, that such a relationship existed, the plaintiffs cannot prevail on their claim that Francis and Hughes were unjustly enriched as a result of transferring the $15,000 from Stage Production to

Crew 538. The court's determination that Hughes and Francis were not unjustly enriched is based on its factual findings. "The court's determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings . . . 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." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, supra, 291 Conn. 452.

After thoroughly reviewing the record, we conclude that the plaintiffs have not demonstrated that the court's factual findings with regard to Stage Production are clearly erroneous. The plaintiffs cannot show that Local 538 had any claim to the assets of Stage Production, an independent limited liability company, and, thus, they cannot establish that Local 84 had any resulting claim to those assets. The court properly determined that the forced merger of the two locals did not reach the assets of Stage Production. Accordingly, the court properly rejected the plaintiffs' claim that Francis and Hughes were unjustly enriched.

III

The plaintiffs next claim that the court improperly allowed and relied on expert testimony by the International's vice president DePaulo. Specifically, the plaintiffs claim that the defendants never disclosed DePaulo as an expert according to the rules of practice and that he had never effectuated a merger before and, thus, was not qualified to testify as an expert. We decline to review this claim because it was not adequately briefed.

The plaintiffs have failed to comply with Practice Book § 67-4 (d) (3).[7] "When raising evidentiary issues on appeal, all briefs should identify clearly what evidence was excluded or admitted, where the trial counsel objected and preserved his rights and why there was error. . . . The mere assertion in a brief that evidence was improperly excluded, coupled with transcript page references, will not be sufficient. For 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." (Citations omitted; internal quotation marks omitted.) *Roberto* v. *Honeywell, Inc.*, 43 Conn. App. 161, 163, 681 A.2d 1011, cert. denied, 239 Conn. 941, 684 A.2d 712 (1996). "We need not address the defendant's claim of evidentiary error as this claim has not been presented in accordance with the requirements of our rules of practice." *Mattie & O'Brien Contracting Co.* v. *Rizzo Construction Pool Co.*, 128 Conn. App. 537, 545, 17 A.3d 1083, cert. denied, 302 Conn. 906, 23 A.3d 1247 (2011).

The plaintiffs claim broadly that the court admitted improper opinion and expert testimony by DePaulo, yet they have failed to provide any citations to the specific portions of DePaulo's testimony that they claim were improperly admitted by the court. They have also failed to provide this court with any specific objections made to the trial court, as invited by that court, regarding those specific portions of testimony. General citations to the transcript are insufficient to meet the requirements of the rules of practice. Accordingly, we do not address this evidentiary claim.

IV

The plaintiffs' final claim is that the court improperly granted the defendants' motion to dismiss the count of their complaint alleging that Hughes and Francis

[7] Practice Book § 67-4 (d) (3) provides: "When error is claimed in any evidentiary ruling in a court or jury case, the brief or appendix shall include a verbatim statement of the following: the question or offer of exhibit; the

violated CUTPA by authorizing the four payments prior to the merger without following a democratic process and moving $15,000 from Stage Production to Crew 538. The plaintiffs did not adequately brief this issue.

After the plaintiffs put on their case, the defendants moved to dismiss all counts of the complaint for failure to make a prima facie case pursuant to Practice Book § 15-8. In a brief oral ruling, the court granted the defendants' motion with regard to the CUTPA count of the plaintiffs' complaint.[8] In their appellate brief, the plaintiffs do not cite the appropriate standard of our review of a motion to dismiss pursuant to Practice Book § 15-8. They also fail to set forth, for our consideration, any trial evidence supportive of the elements of their CUTPA claim, and, thus, their appellate brief lacks any analysis of the relevant issue on appeal. Therefore, we decline to address the plaintiffs' final claim. See, e.g., *Carabetta* v. *Carabetta*, 133 Conn. App. 732, 737, 38 A.3d 163 (2012) ("[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed" [internal quotation marks omitted]).

The judgment is affirmed.

In this opinion the other judges concurred.

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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."

[8] The court also determined that the plaintiffs had not made out a prima facie case on the statutory theft count of the complaint. The plaintiffs did not appeal the court's dismissal of that count.

SANDHYA DESMOND *v.* YALE-NEW HAVEN HOSPITAL, INC., ET AL.
(AC 33072)

Gruendel, Lavine and Espinosa, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, workers' compensation fraud in violation of the statute (§ 31-290c [a]) pertaining to fraud in an attempt to prevent the receipt of benefits. The plaintiff was an employee of the defendant hospital when she suffered an injury for which she sought workers' compensation benefits. She claimed that the defendants had made various filings with the workers' compensation commission in a bad faith and fraudulent attempt to delay treatment of her injury. The defendants filed a motion to dismiss, alleging that the exclusivity provision of the Workers' Compensation Act (act) (§ 31-275 et seq.) barred the action. The trial court granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendants' motion to dismiss, that court having correctly determined that the exclusivity provision of the act barred the plaintiff from bringing an action in the Superior Court: § 31-290c is a criminal statute that may be prosecuted only by the state's attorney and did not afford the plaintiff a private right of action, the plaintiff's complaint failed to allege a cause of action for statutory (§ 52-564) theft, and our Supreme Court previously has determined that Connecticut does not recognize a cause of action for bad faith processing of a workers' compensation claim and that claims for damages for an injury arising out of the workers' compensation claims process fall within the exclusive jurisdiction of the commission; accordingly, the plaintiff's claimed injuries here, which were allegedly caused by the defendants' bad faith delays in medical treatment, arose out of and in the course of the workers' compensation claims process and, therefore, fell within the jurisdiction of the commission, and the trial court properly determined that this case did not involve egregious conduct that warranted an exception from the general rule of exclusivity.
2. There was no merit to the plaintiff's claim that the trial court improperly determined that its decision dismissing her claims did not violate her right to due process under the Connecticut constitution; the plaintiff did not avail herself of the various remedies available to her within the workers' compensation framework and, thus, she did not demonstrate that the workers' compensation framework was an inadequate alternative to the enforcement of her rights.

Argued January 10—officially released September 11, 2012

Procedural History

Action to recover damages for, inter alia, workers' compensation fraud, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *J. Fischer*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Eric M. Desmond, for the appellant (plaintiff).

Andrew A. Cohen, for the appellees (defendants).

Opinion

ESPINOSA, J. The plaintiff, Sandhya Desmond, appeals from the judgment of the trial court dismissing her complaint against the defendants, Yale-New Haven Hospital, Inc. (hospital), and Yale-New Haven Health Services, Inc., alleging workers' compensation fraud; statutory negligence; breach of contract; violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; and violations of her right to due process under the Connecticut constitution. The plaintiff claims that the court improperly determined that (1) it lacked jurisdiction over her claims because the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., barred her from bringing an action in the Superior Court and (2) its decision dismissing her claims did not violate her right to due process under the state constitution.[1] We affirm the judgment of the trial court.

[1] Additionally, the plaintiff claims that the court improperly determined that the doctrine of exhaustion of administrative remedies precluded her from bringing her action in the Superior Court. We need not reach this argument, however, because we conclude that the court properly dismissed the action upon its determination that the exclusivity provision of the act barred the plaintiff's claims. See part I of this opinion.

The following undisputed facts are relevant to our consideration of this appeal. At all times relevant to this appeal, the plaintiff was an employee of the hospital. On December 30, 2004, she was injured in the course of her employment. According to the plaintiff, she suffered a spill-related fall while at work and subsequently was diagnosed with bilateral, acute posttraumatic carpal tunnel injuries. Her physicians have advised her that, absent medical treatment, she permanently will be unable to use her hands.

Subsequently, she filed a workers' compensation claim with regard to her injury, and the defendants accepted the claim. On March 6, 2008, she filed a federal action in United States District Court for the District of Connecticut, in which she alleged various claims under state law and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. On March 23, 2009, the District Court granted the defendants' motion to dismiss as to the plaintiff's state law claims, allowing the action to proceed only on her claim under the Americans with Disabilities Act.

On May 20, 2010, the plaintiff filed in the Superior Court the operative complaint in the present case. The complaint contained ten counts, alleging against each of the defendants workers' compensation fraud, statutory negligence, breach of contract, unfair and deceptive acts and practices in violation of CUTPA and delay in the delivery of benefits under the act in violation of the plaintiff's state constitutional right to due process. The complaint alleged that the defendants had made various filings with the workers' compensation commission (commission) in a bad faith and fraudulent attempt to delay treatment. The complaint alleged that these bad faith attempts to delay treatment caused the plaintiff's condition to worsen, as she did not receive necessary treatment.

On June 7, 2010, the defendants filed a motion to dismiss, alleging that the exclusivity provision of the act barred the action and that the plaintiff had failed to exhaust her administrative remedies under the act. The court granted the defendants' motion to dismiss on December 16, 2010. Relying on our Supreme Court's decision in *DeOliveira* v. *Liberty Mutual Ins. Co.*, 273 Conn. 487, 870 A.2d 1066 (2005), the court held that the plaintiff's claims did not allege conduct that was sufficiently egregious to remove the claims from the exclusive jurisdiction of the commission. The plaintiff filed the present appeal on January 20, 2011.

"The standard of review for a court's decision on a motion to dismiss is well settled. 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." (Internal quotation marks omitted.) *Mayfield* v. *Goshen Volunteer Fire Co.*, 301 Conn. 739, 744, 22 A.3d 1251 (2011).

I

First, the plaintiff claims that the court improperly held that it lacked jurisdiction over her claims because the exclusivity provision of the act barred her from bringing an action in the Superior Court. The plaintiff argues that the court erroneously determined that its analysis was controlled by *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 487, and, instead, maintains that General Statutes § 31-290c establishes a civil cause of action over which the commission lacks jurisdiction. In the alternative, the plaintiff argues that, if *DeOliveira* does apply and actions under § 31-290c ordinarily must be brought before the commission, the court improperly held that the present case did not

involve egregious conduct that warranted an exception from the general rule of exclusivity. We disagree.

General Statutes § 31-284 (a) lays out the exclusivity provision of the act. It provides in relevant part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . but an employer shall secure compensation for his employees as provided under this chapter . . . . All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees . . . are abolished other than rights and claims given by this chapter . . . ." General Statutes § 31-284 (a).

Section 31-290c (a) provides: "Any person or his representative who makes or attempts to make any claim for benefits, receives or attempts to receive benefits, prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits under this chapter based in whole or in part upon (1) the intentional misrepresentation of any material fact including, but not limited to, the existence, time, date, place, location, circumstances or symptoms of the claimed injury or illness or (2) the intentional nondisclosure of any material fact affecting such claim or the collection of such benefits, shall be guilty of a class C felony if the amount of benefits claimed or received, including but not limited to, the value of medical services, is less than two thousand dollars, or shall be guilty of a class B felony if the amount of such benefits exceeds two thousand dollars. *Such person shall also be liable for treble damages in a civil proceeding under section 52-564.*" (Emphasis added.)

General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives

and conceals stolen property, shall pay the owner treble his damages." "[S]tatutory theft under § 52-564 is synonymous with larceny under General Statutes § 53a-119. . . . A person commits larceny within the meaning of . . . § 53a-119 when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. An owner is defined, for purposes of § 53a-119, as any person who has a right to possession superior to that of a taker, obtainer or withholder. . . . Conversion can be distinguished from statutory theft as established by § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Citations omitted; internal quotation marks omitted.) *Rana* v. *Terdjanian*, 136 Conn. App. 99, 113–14, 46 A.3d 175 (2012).

Violations of § 31-290c, a criminal statute, may be prosecuted by the state's attorney, not by private individuals. See General Statutes § 31-290d (a) ("There shall be a workers' compensation fraud unit within the office of the Chief State's Attorney in the Division of Criminal Justice. The unit, under the supervision of the Chief State's Attorney, may, upon receipt of a complaint, at the request of the chairman of the Workers' Compensation Commission or on its own initiative, investigate cases of alleged fraud involving any claim for benefits, any receipt or payment of benefits, or the insurance or self-insurance of liability under sections 31-275 to 31-355a, inclusive."). Accordingly, § 31-290c does not afford the plaintiff a private right of action. Rather, § 31-290c confers to the plaintiff the right to bring an action

for statutory theft under § 52-564. See *Delpier* v. *Connecticut Interlocal Risk Management Agency*, Superior Court, judicial district of Waterbury, Docket No. CV-01-0164366 (November 28, 2001) (31 Conn. L. Rptr. 97) ("[§ 31-290c], on its face, does not provide for a private right of action but rather enables a victim to bring an action under . . . § 52-564, the civil theft statute").

In *Second Injury Fund* v. *Lupachino*, 45 Conn. App. 324, 346, 695 A.2d 1072 (1997), this court held that "[§] 31-290c is the legislative response to those who have abused or may be abusing the humanitarian purpose of the act by taking advantage of it by fraudulent means. It has ordained accomplishment of this purpose by spelling out the elements of this cause of action and by imposing liability in treble damages in a 'civil proceeding' under § 52-564." Concluding that the plaintiff, the second injury fund of the treasurer of the state of Connecticut, properly had alleged a cause of action under § 52-564, this court explained: "When treble damages are sought pursuant to § 52-564, as here, this court has decided that clear and convincing proof[2] of the actions alleged is required in order to assess treble damages pursuant to § 52-564. . . . In addition, it is required that in actions seeking to recover double or treble damages under statutes that the claim for relief shall be specifically based upon the statutory remedy. . . . That was done in this case; there is no relief sought that the commissioner is authorized to order. Finally, the fund's complaint is clearly based on the statutory cause of action authorizing such extraordinary damages, and not for any other alleged cause of action." (Citations omitted; internal quotation marks omitted.) Id., 347.

[2] Since *Second Injury Fund*, our Supreme Court has held that the appropriate standard of proof in actions for treble damages under § 52-564 is that of a preponderance of the evidence. *Stuart* v. *Stuart*, 297 Conn. 26, 52–53, 996 A.2d 259 (2010).

In the present case, counts one and two of the complaint each allege[3] in relevant part: "[The defendants] sought, in violation of [General Statutes] § 31-290c et seq., to prevent or attempted to prevent the receipt of benefits, or to reduce or attempted to reduce the amount of benefits, provided to or received by [the plaintiff] under the Act. . . .

"[The defendants] sought a reduction in benefits provided to or received by [the plaintiff] by communicating one or more intentional misrepresentations of material fact or, alternatively, [the defendants] sought a reduction in benefits provided to or received by [the plaintiff] by intentionally failing to disclose or misrepresenting one or more material facts, or, alternatively, [the defendants] sought a reduction in benefits provided to or received by [the plaintiff] by casting [the plaintiff] and her workers' compensation claim in a false light by making certain misrepresentations . . . .

"[The defendants] sought to discontinue medical treatment provided to or received by [the plaintiff] by communicating one or more intentional misrepresentations of material fact or, alternatively, [the defendants] sought a reduction in medical treatment provided to or received by [the plaintiff] by intentionally failing to disclose or misrepresenting one or more material facts, or, alternatively, [the defendants] sought a reduction in benefits provided to or received by [the plaintiff] by casting [the plaintiff] and her workers' compensation claim in a false light by making certain misrepresentations . . . ."

We conclude that the plaintiff did not allege a cause of action for statutory theft under § 52-564. Unlike the complaint in *Second Injury Fund*, the complaint in the

[3] Count one is directed against the hospital, and count two is directed against Yale-New Haven Health Services, Inc. The two counts are identical in all other respects.

present case neither alleges nor purports to allege any of the elements of statutory theft. We refuse to construe the complaint, which makes no mention of § 52-564 until its prayer for relief, as making a claim of statutory theft. See *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 573 n.12, 864 A.2d 1 (2005) ("[t]he interpretation of pleadings is always a question of law for the court and . . . our interpretation of the pleadings therefore is plenary" [internal quotation marks omitted]). Rather, we construe counts one and two of the complaint, despite their labels to the contrary; *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 348, 780 A.2d 98 (2001) ("the labels placed on the allegations by the parties [are] not controlling"); to allege only that the defendants delayed in bad faith the workers' compensation claims of the plaintiff.

Our Supreme Court concluded in *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 501, that "Connecticut does not recognize a cause of action for bad faith processing of a workers' compensation claim . . . ." In reaching this conclusion, our Supreme Court reviewed the contours of the exclusivity provision of the act. Id., 495–501. First, the court recognized that the exclusivity provision was jurisdictional in nature: "The legislature . . . expressly has conferred jurisdiction upon the commission to adjudicate claims related to untimely payment of benefits and has developed a scheme under which remedies may be provided. As a general matter, the commissioners have jurisdiction to hear all claims . . . arising under [the act] . . . ." (Internal quotation marks omitted.) Id., 496–97. The court noted that "in determining whether a cause of action is barred by the exclusivity provision, the appropriate question is whether the act is applicable to the injury at issue." Id., 498. Ultimately, the court concluded that "we must construe the exclusionary provision's prohibition on damages actions for injuries 'arising out

of and in the course of . . . employment' to include injuries arising out of and in the course of the *workers' compensation claims process*." (Emphasis in original.) Id., 504.

Pursuant to *DeOliveira*, the plaintiff's claims alleging a bad faith delay in processing her workers' compensation claims fall within the exclusive jurisdiction of the commission. In *DeOliveira*, our Supreme Court clearly stated that the exclusionary provision removed from the jurisdiction of the court any damages action for an injury arising out of the workers' compensation claims process. Id. Applying the rule articulated in *DeOliveira* to the facts of this case, it is clear that the plaintiff's claimed injuries, allegedly caused by the defendants' bad faith delays in medical treatment, arose out of and in the course of the workers' compensation claims process. Therefore, we conclude that the plaintiff's alleged injuries fall within the jurisdiction of the commission and that, accordingly, the court properly granted the defendants' motion to dismiss.

We are not persuaded by the plaintiff's argument that, even if *DeOliveira* applies, the trial court improperly held that the present case did not involve egregious conduct that warranted an exception from the general rule of exclusivity. In *DeOliveira*, the court noted that "there could be an instance in which an insurer's conduct related to the processing of a claim, separate and apart from nonpayment, might be *so egregious* that the insurer no longer could be deemed to be acting as an agent of the employer and, thus, a claim arising from such conduct would not fall within the scope of the act. Some other jurisdictions have recognized such a limitation. See, e.g., *Unruh* v. *Truck Ins. Exchange*, 7 Cal. 3d 616, 620–21, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (insurer's agent misrepresented identity to claimant, caused her to become emotionally involved with him and induced her to engage in unusual activities

beyond her normal physical capabilities while another person filmed her, resulting in aggravation of her physical injury and physical and mental breakdown requiring hospitalization upon claimant discovering deceit); *Young* v. *Hartford Accident & Indemnity Co.*, 303 Md. 182, 193, 492 A.2d 1270 (1985) (plaintiff who suffered emotional trauma after being assaulted at work alleged that carrier, in attempt to reduce its monetary exposure, insisted on psychiatric examination with deliberate intent that plaintiff either commit suicide or drop her claim, and plaintiff thereafter attempted suicide)." (Emphasis in original.) *DeOliveira* v. *Liberty Mutual Ins. Co.*, supra, 273 Conn. 507.

In the present case, even if we afford the plaintiff's allegations their most damaging interpretation, the defendants' conduct was not on the level of egregious behavior that the court in *DeOliveira* recognized could provide an exception to the exclusivity provision. Rather, the plaintiff's allegations of bad faith processing of her claim by the defendants are the kind of assertions that routinely are made in workers' compensation cases, and, in fact, closely resemble the claims made by the plaintiff in *DeOliveira*. The plaintiff in *DeOliveira* claimed that he suffered from depression due in part to the nonpayment of benefits and the way that his employer responded to his workers' compensation claim. Id., 491–92. The plaintiff's physicians determined that, as a result of this depression, he was totally disabled. Id., 491. In the present case, the plaintiff similarly alleges that the defendants' mishandling of her workers' compensation claim has caused her further injury. This is not the kind of egregious conduct present in *Unruh* and *Young*, cited by the court in *DeOliveira* as examples of cases involving conduct that could warrant an exception from the exclusivity provision. Accordingly, we agree with the court that the plaintiff's claim properly is within the jurisdiction of the commission.

II

Next, the plaintiff claims that the court improperly determined that its decision dismissing her claims did not violate her right to due process under the Connecticut constitution.[4] She argues that the act is premised on the belief that compromising plaintiffs' rights to bring actions in tort is justifiable only to the extent that it provides them with an efficient system for compensation. In support of this point, she cites to the decision of this court in *Martinez* v. *Southington Metal Fabricating Co.*, 101 Conn. App. 796, 800, 924 A.2d 150, cert. denied, 284 Conn. 930, 934 A.2d 246 (2007), in which this court stated that "our case law on workers' compensation exclusivity reflects the proposition that these statutes compromise an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation." (Internal quotation marks omitted.) She maintains that, in the present case, the act is unable to provide " 'relatively quick and certain compensation' " and, accordingly, it is not a reasonable alternative to the enforcement of her constitutional rights.[5] This claim is without merit.

In *Mello* v. *Big Y Foods, Inc.*, 265 Conn. 21, 34–35, 826 A.2d 1117 (2003), our Supreme Court held that the exclusivity provision of the act did not violate a

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

[5] Additionally, the plaintiff contends that the act deprives her of her right to a jury trial in violation of article first, § 19, of the constitution of Connecticut. The plaintiff did not raise this claim at trial and has not requested any extraordinary level 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. . . . To allow such a claim to be raised on appeal would be nothing more than a trial by ambuscade of the trial judge." (Citation omitted; internal quotation marks omitted.) *Solano* v. *Calegari*, 108 Conn. App. 731, 742, 949 A.2d 1257, cert. denied, 289 Conn. 943, 959 A.2d 1010 (2008). Accordingly, we decline to review this claim.

plaintiff's right to due process under the Connecticut constitution by preventing a plaintiff from bringing a negligence action against her employer for injuries suffered in the course of her employment. First, the court noted that article first, § 10, of the constitution of Connecticut "restricts the power of the legislature to abolish a legal right existing at common law prior to 1818 without also establishing a reasonable alternative to the enforcement of that right." (Internal quotation marks omitted.) Id., 32. Additionally, the court explained that "in determining whether an alternative is reasonable, a court need only consider the aggregated benefits of the legislative alternative and assess whether those aggregated benefits reasonably approximate the rights formerly available under the common law." Id., 32–33. On the facts of that case, the court concluded that "the act's rights and remedies provide a reasonable alternative to the plaintiff's common-law right to bring a negligence action for damages resulting from her [injury]." Id., 34.

In the present case, the plaintiff has not availed herself of the various remedies available to her within the workers' compensation framework. See General Statutes § 31-297. She admits that she has not requested a hearing before the commission to consider her claim that the defendants unreasonably have delayed providing her certain medical treatment. Therefore, at this stage, it is pure speculation that the commission would not quickly resolve these claims. The plaintiff has not demonstrated that the workers' compensation framework is an inadequate alternative to the enforcement of her rights, and the court properly did not find a violation of her state constitutional right to due process.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY LITTLE (AC 33383)

Gruendel, Beach and Schaller, Js.

Syllabus

Convicted, following a trial to the court, of the crimes of assault in the second degree and interfering with an emergency call, the defendant appealed to this court. The defendant was at the apartment of his daughter, A, when he got into an altercation with his former girlfriend, D, and slashed her cheek with a knife. When A attempted to call the police, the defendant knocked her cell phone from her hands and then forced D to leave with him. Thereafter, A again called 911, and the defendant was subsequently arrested. *Held*:

1. The evidence was sufficient to support the defendant's conviction of assault in the second degree, there having been a reasonable view of the evidence that permitted the court to find that the defendant intended to injure D; although the testimony regarding the defendant's intent was inconsistent, the court was not obligated to accept D's characterization of events, especially given her statement that she was uncomfortable testifying against the defendant and the evidence showing that the defendant had taken steps to discourage D from cooperating with the state, and in light of the testimony from D and A that the defendant was wielding a knife, there was a fight or scuffle involving the defendant and D, and an injury to D resulted, it was not unreasonable or illogical for the court to have inferred that the injury had been intentionally inflicted, which was consistent with the narrative of A's written statement and 911 call.
2. Contrary to the defendant's claim, the state adduced sufficient evidence to demonstrate that he had the specific intent to interfere with an emergency call to support his conviction of that charge; on the basis of the evidence presented, which showed that the defendant was aware that A had become sufficiently concerned after witnessing his assault of D that she decided to call the police, that the defendant had swatted A's cell phone from her hand when she attempted to call the police and then abruptly departed with D, and that A had made a written statement in which she expressly alleged that the defendant interfered with her 911 call, it was not unreasonable or illogical for the trial court to have inferred that the defendant knew that A was making a telephone call to summon police assistance and that his conscious objective was to prevent her from making the call, and it was not necessary for the state to prove that A had expressly announced an intention to call 911.
3. The defendant could not prevail on his claim that the recording of A's 911 call and her written statement to the police constituted cumulative evidence and should not have been admitted: although the recording

was in some ways duplicative of the written statement, the trial court did not abuse its discretion in admitting both A's 911 call and written statement, as the written statement did not contain all of the factual information conveyed in the recording of the 911 call, which included details about the defendant's treatment of D during their departure, and the recording of the 911 call allowed the court to assess A's state of mind immediately after the assault of D and demonstrated that A feared the defendant and was concerned for D's safety; moreover, even if the evidence was cumulative, the defendant did not allege any unfair prejudice that resulted from the admission of the statement and recording of the 911 call, as the evidence was not unfairly prejudicial merely because it was incriminating.

Argued May 17—officially released September 11, 2012

Procedural History

Substitute information charging the defendant with the crimes of assault in the second degree and interfering with an emergency call, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the court, *Carbonneau*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

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

Melissa L. Streeto, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robert F. Mullins*, *Sr.*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Anthony Little, appeals from the judgment of conviction, rendered after a trial to the court, of assault in the second degree in violation of General Statutes § 53a-60 (a) (2) and interfering with an emergency call in violation of General Statutes § 53a-183b (a). The defendant claims that (1) the state adduced insufficient evidence to sustain his conviction of (a) assault in the second degree and (b) interfering with an emergency call, and (2) the trial court abused its

discretion by admitting a recording of the complaining witness' 911 call, in addition to her written statement to the police, that together constituted cumulative evidence.[1] We affirm the judgment of the trial court.

The following facts, which reasonably could have been found by the court, and procedural history are relevant to the disposition of the defendant's appeal. On the evening of August 30, 2009, the defendant was spending his birthday with his former girlfriend, Carola Demaio. The defendant and Demaio had previously been in a relationship for approximately three years, but they were not dating exclusively at the time. At about 1:30 a.m., after drinking together for some time, the defendant and Demaio proceeded to the Hartford apartment of Channelle Ashley, the defendant's daughter. There were about eight people there, and the atmosphere was noisy and chaotic.

At about 4 a.m., one of the female guests told the defendant that Demaio had slept with the guest's boyfriend, causing the defendant to become "a little irate." The defendant began swinging a pocketknife at Demaio from across a kitchen table, cutting her left cheek. He subsequently pushed her to the floor.

Following this altercation, Ashley became upset and attempted to call the police, but the defendant knocked the cell phone from her hands. The defendant and Demaio abruptly left the party together in his car for Demaio's home in Wethersfield. As they were driving away, Ashley again called 911. She told the dispatcher that her father had cut Demaio's face with a knife and then forced her into his car. Ashley feared for Demaio's

[1] The defendant also claimed that the prosecutor inappropriately characterized the incident at trial. The defendant did not develop this allusion to prosecutorial impropriety in his brief; therefore, we decline to address it. See *New London Federal Savings Bank* v. *Tucciarone*, 48 Conn. App. 89, 100–101, 709 A.2d 14 (1998).

safety and urged the police to respond quickly. She also asked the police not to inform the defendant that she had reported the incident because she did not want him to "come after [her]." Hartford police consequently responded to Ashley's apartment at about 5 a.m.

Among the officers responding to the scene were Corey Somoskey and Robert Hathaway. The defendant called Ashley twice from his car while he and Demaio were en route to Wethersfield. During the first call, which was placed on speakerphone so the officers could hear, Somoskey asked the defendant to return to the apartment with Demaio. The defendant refused, stating that he was almost to Massachusetts. When the defendant called again, Demaio spoke to the officers; she told them that she was already at home, and assured them that she was fine and did not need their assistance.

Somoskey subsequently took a sworn written statement from Ashley, which documented the incident between the defendant and Demaio. The statement was corroborated by a party guest who preferred to remain anonymous. Ashley stated that the defendant had "slashed" Demaio's cheek with a pocketknife following an argument. She further asserted that the defendant had knocked her cell phone from her hand to prevent her from calling 911 before forcing Demaio into his car to leave. She also averred that the defendant had threatened Somoskey and Hathaway over the telephone when they asked him to return to the apartment with Demaio.

Wethersfield police officers, whose assistance had been requested by the Hartford police, were waiting at Demaio's home when she and the defendant arrived at approximately 6 a.m. Somoskey and Hathaway arrived shortly thereafter. The officers noticed a fresh laceration on Demaio's cheek, which she had covered with makeup during the drive from Hartford because she

"didn't want [the defendant] to get in trouble." When questioned about the source of her cut, Demaio alternatively attributed it to a cat scratch and a fight with Ashley.

The defendant was arrested and frisked. No pocketknife was recovered. He was charged with assault in the second degree in violation of § 53a-60 (a) (2) and interfering with an emergency call in violation of § 53a-183b (a). A full protective order in favor of Demaio was issued against the defendant at his arraignment.

After a two day trial to the court on December 2 and 3, 2010, the defendant was convicted of violating §§ 53a-60 (a) (2) and 53a-183b (a). The court imposed a total effective sentence of six years incarceration, execution suspended after two years, with three years of probation. This appeal followed.

I

The defendant's first two claims challenge the sufficiency of the evidence adduced at trial to sustain his conviction of assault in the second degree and interfering with an emergency call. We begin by setting forth the applicable standard of review. "The standard of review employed in a claim of insufficient evidence is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the [finding of guilt]. Second, we determine whether upon the [evidence] so construed . . . the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"[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. . . . As a corollary, [q]uestions 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. . . . Our review of factual determinations is limited to whether those findings are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Altayeb*, 126 Conn. App. 383, 387, 11 A.3d 1122, cert. denied, 300 Conn. 927, 15 A.3d 628 (2011).

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof 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 [finder of fact], would have resulted in an acquittal. . . . 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 finding] of guilty." (Internal quotation marks omitted.) *State* v. *Santos*, 104 Conn. App. 599, 612, 935 A.2d 212 (2007), cert. denied, 286 Conn. 901, 943 A.2d 1103, cert. denied, 555 U.S. 851, 129 S. Ct. 109, 172 L. Ed. 2d 87 (2008).

A

The defendant first claims that there was insufficient evidence to sustain his conviction of assault in the sec-

ond degree.[2] Specifically, the defendant argues that inconsistencies in Demaio's and Ashley's various accounts of what happened at Ashley's apartment created reasonable doubt as to whether he had the requisite intent to cause physical injury to Demaio, or, alternatively, whether he was responsible for her injury at all. This claim can be reduced to a challenge to the trial court's credibility determinations. The defendant essentially contends that the court should have accepted as plausible Demaio's testimony that her injury was inflicted negligently, instead of crediting Ashley's written statement and 911 call, which, together with circumstantial evidence, reasonably could support a finding beyond a reasonable doubt that the act was intentional. This claim is unavailing.

The following additional facts are necessary for the resolution of this claim. Both Demaio and Ashley—respectively, the defendant's former girlfriend and daughter—were subpoenaed by the state to testify at trial. Ashley testified that she would rather go to jail than continue to testify against her father. Demaio candidly asserted that she cared deeply for the defendant and was conscious of the fact that he had small children and a family; thus, she admitted taking steps to mitigate any consequences that might result from her injury. The state also adduced evidence that, despite the issuance of the protective order, approximately one month after the defendant's arrest, he arranged to have dinner with Demaio at a Hartford restaurant. The two discussed "the whole situation," and the defendant apologized for cutting Demaio's face. During this meeting, the defendant pressured Demaio into authoring a letter asking the state's attorney to drop the charges against

[2] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, he causes such injury . . . by means of a deadly weapon or a dangerous instrument . . . ."

the defendant because the incident had been "a huge misunderstanding" and she had not in fact been assaulted with a weapon.

At trial, Ashley claimed that her ability to recall the altercation was compromised by alcohol and the passage of time. Even after reviewing her written statement and listening to a recording of her 911 call, Ashley declined to testify in complete conformity with her prior assertions. Specifically, she would not state that she had actually seen the defendant slash Demaio, or that he had interfered with her first attempt to call 911. The most Ashley would concede at trial was that "at the end of the scuffle I saw my dad with a knife and [Demaio] was cut."

Demaio, for her part, repeatedly sought to minimize the degree of her injury, preferring to characterize it as a "scrape," a "little scratch," or a "nick" that might have been caused unintentionally. Instead of testifying that the defendant had deliberately cut her, Demaio described the defendant as carelessly swinging his pocketknife in her direction.

Focusing on these inconsistent narratives, at the close of the state's case, the defendant moved for a judgment of acquittal on the assault charge. The defendant argued that, although the evidence may have supported a conclusion of recklessness, there was insufficient evidence to establish that he intended to cause physical injury to Demaio. From the defendant's perspective, the evidence merely demonstrated that he was "flailing a knife around" and that he may have "reached over" toward Demaio and accidentally injured her. The court denied the motion.

Construing the evidence in the light most favorable to sustaining the court's finding of guilt, there was clearly a reasonable view of the evidence that permitted the court to hold that the defendant intended to injure

Demaio.[3] As the defendant acknowledges, the intent of the accused is a question for the fact finder, and the fact finder's conclusions in this regard cannot be disturbed unless they are unreasonable. See *State* v. *Turner*, 24 Conn. App. 264, 268, 587 A.2d 1050 ("when the conclusion [regarding intent] is one that is dependent on the resolution of conflicting testimony, it should ordinarily be left to the [fact finder] for its judgment"), cert. denied, 218 Conn. 910, 591 A.2d 812 (1991). Although the testimony regarding the defendant's intent was inconsistent, the court was not obligated to accept Demaio's characterization of events. Demaio explicitly stated that, given her relationship with the defendant, she was uncomfortable testifying against him. The state also adduced evidence that the defendant had taken steps to discourage Demaio from cooperating with the state. The court therefore had good reason to view aspects of her testimony with skepticism.

Moreover, the salient facts concerning Demaio's assault were undisputed in the trial testimony. Both Ashley and Demaio testified that the defendant was wielding a knife; there was a fight or "scuffle" involving the defendant and Demaio; and an injury to Demaio resulted. Thus, it was not unreasonable or illogical for the court to infer that the injury had been intentionally inflicted, consistent with the narrative in Ashley's written statement and 911 call. See *State* v. *Virgo*, 115 Conn.

[3] The state contends, as a threshold matter, that the defendant's first claim was inadequately briefed and consequently forfeited. As the state correctly points out, the defendant erroneously stated in his opening brief that there was insufficient evidence adduced at trial to establish that he had intended to cause *serious* physical injury to Demaio, a requirement of § 53a-60 (a) (1) but not § 53a-60 (a) (2). The state argues that this error should result in the abandonment of the defendant's first claim. Despite the defendant's misstatements regarding the degree of injury required under § 53a-60 (a) (2), the crux of his claim is that he did not intend to cut the victim at all. Therefore, notwithstanding this semantic error, this issue has been sufficiently briefed and is not abandoned.

App. 786, 805, 974 A.2d 752 (intent to cause physical injury can be inferred from "the events leading up to and immediately following the incident" [internal quotation marks omitted]), cert. denied, 293 Conn. 923, 980 A.2d 914 (2009). For these same reasons, the theory that Demaio's injuries were the result of a fight with Ashley was reasonably rejected.[4]

B

The defendant next claims that the state adduced insufficient evidence to demonstrate that he had the specific intent to interfere with an emergency call. The defendant specifically argues that the state failed to prove beyond a reasonable doubt that he knew that Ashley was calling 911, thereby negating a finding of intent to interfere with such a call.[5] This claim also lacks merit.

The following additional facts are relevant to the disposition of this claim. Like the defendant's challenge of the evidence supporting his assault conviction, his argument here is largely based on the divergence of the various accounts of what occurred at Ashley's apartment. At trial, Demaio testified that she did not see Ashley call 911. Ashley, despite the assertions in her written statement, testified that she could not remember whether the defendant had obstructed her first 911 call; in fact, she stated that she recalled making only

[4] Although the defendant adduced testimony at trial that Demaio told Somoskey that her injuries were the result of a fight with Ashley, Demaio disclaimed this explanation at trial, and the defendant did not ask Ashley on cross-examination if such a fight occurred. Demaio testified that she was like an aunt or mother to Ashley.

[5] General Statutes § 53a-183b (a) provides in relevant part: "A person is guilty of interfering with an emergency call when such person, with the intent of preventing another person from making or completing a 9-1-1 telephone call or a telephone call . . . to any law enforcement agency to request police protection or report the commission of a crime, physically or verbally prevents or hinders such other person from making or completing such telephone call . . . ."

one such call, which she placed after the defendant had left her apartment with Demaio. After her memory was refreshed with her inconsistent written statement, Ashley asserted, "I don't want to do this no more. Can I just go to jail?" Even when confronted with the written statement, Ashley would not testify that the defendant had interfered with her first 911 call; she responded, "I [only] remember bits and pieces of that night. I mean, if that's what I said that night at that moment."

At the conclusion of the state's case, the defendant also moved for a judgment of acquittal on the charge of interference with an emergency call. He specifically argued that the state had not established what he termed the "acknowledgment" element of the statute; that is, there was no evidence that Ashley expressly announced her intention to call 911 before the defendant allegedly knocked the cell phone from her hands. Thus, the defendant contended that the state had failed to prove that he had knowledge that Ashley was summoning law enforcement assistance and therefore could not have possessed the intent to interfere with such a call. The court denied the motion. The essence of this argument is reprised on appeal. The defendant additionally asserts that, because Demaio claimed not to know that Ashley had called 911, it was unlikely that the defendant knew, either. We find this theory of imputed ignorance unpersuasive.

Section 53a-183b (a) is a specific intent crime. See General Statutes § 53a-183b (a). Specific intent requires that the "defendant must have the conscious objective to cause the specific result." *State* v. *Chasse*, 51 Conn. App. 345, 369, 721 A.2d 1212 (1998), cert. denied, 247 Conn. 960, 723 A.2d 816 (1999). Therefore, liability can be imposed under § 53a-183b (a) only where the state proves that the defendant had the conscious objective to prevent "another person from making or completing a 9-1-1 telephone call or a telephone call . . . to any

law enforcement agency to request police protection or report the commission of a crime . . . .'' General Statutes § 53a-183b (a).

''It is well established that the question of intent is purely a question of fact. . . . The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually proven by circumstantial evidence . . . . Intent may be and usually is inferred from [conduct. . . . Whether] such an inference should be drawn is properly a question for the [fact finder] to decide.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Torwich*, 38 Conn. App. 306, 314, 661 A.2d 113, cert. denied, 235 Conn. 905, 665 A.2d 906 (1995).

In the context of a sufficiency of the evidence challenge, ''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.'' (Internal quotation marks omitted.) *State* v. *Sherman*, 127 Conn. App. 377, 382, 13 A.3d 1138 (2011).

The evidence, taken in the light most favorable to sustaining the court's finding of guilt, indicates conduct by the defendant consistent with his awareness that Ashley had become sufficiently concerned after witnessing his assault of Demaio that she decided to call the police. Indeed, Ashley's anxiety following the assault was apparent to others at the party. For example, Demaio recounted at trial that ''[Ashley] got very upset and thought that something was going to happen.

She became very paranoid." When Ashley attempted to call the police, the defendant swatted her cell phone from her hand and then quickly absconded with Demaio. After the defendant had pushed Demaio onto the floor, Ashley helped Demaio to stand and tried to prevent the defendant from further harming Demaio by telling the defendant "to go." Immediately after the defendant slashed Demaio's cheek with a pocketknife, Ashley "grabbed" her cell phone and "proceeded to call [the] police." The defendant's physical act of preventing Ashley from using her cell phone combined with his abrupt departure permitted the reasonable inference that the defendant was aware of circumstances in which she would likely attempt to contact the police and that he considered it expedient not to linger at the scene of the crime. While driving to Demaio's home in Wethersfield, the defendant contacted Ashley in an apparent attempt to smooth things over.[6] This attempted intervention provides further circumstantial evidence that the defendant knew that Ashley was considering summoning the police. Undergirding this circumstantial evidence was Ashley's written statement, which expressly alleged the defendant's interference with her 911 call.

It was not necessary for the state to prove that Ashley had expressly announced an intention to call 911; "[i]t was within the province of the [trier] to draw reasonable and logical inferences from the facts proven." (Internal quotation marks omitted.) *State* v. *Turner*, supra, 24 Conn. App. 268. Given the facts adduced at trial, it was not unreasonable or illogical for the trial court to infer that the defendant knew that Ashley was making a telephone call to summon police assistance and that

[6] There was some inconsistency as to who initiated the first telephone call between Ashley and the defendant. Somoskey and Ashley testified that the defendant initiated the call, and Somoskey's police report said the same. Demaio, on the other hand, testified that Ashley had called the defendant.

his conscious objective was to prevent her from making the telephone call.[7]

II

The defendant's final claim is that the admission of the recording of Ashley's 911 call, in addition to her written statement to the police, constituted cumulative evidence and thus should not have been admitted.[8] We do not agree.

The following additional facts are relevant to this claim. Andrew Jaffee, civilian director of Hartford's 911 dispatch center, testified at trial that he received a subpoena requesting the preservation of Ashley's 911 call from the morning of August 31, 2009, and that he consequently copied the recording of the call onto a compact disc (CD). The state adduced testimony that all calls received by the state's 911 system are recorded and retained for thirty days, that the CD was made in conformity with the standard procedures observed by the dispatch center and that it was a complete and accurate recording of the call.

At the end of Jaffee's direct examination, the state moved to admit the CD as a full exhibit. Defense counsel responded: "No objection. I've heard it." The prosecutor then asked to publish the recording to the court, and the court granted permission. Defense counsel then objected, stating that he had agreed only to the admission of the CD containing the recording, but not to its contents. The state responded that defense counsel had missed his opportunity to object and, further, that the

[7] On the facts of this case, we need not decide whether, in order to sustain a conviction, there must be evidence that the defendant had reason to infer that an emergency call was being placed at the time of his preventive act.

[8] There were several issues that were raised by the defendant at trial regarding this recording, including the proper basis for its admissibility and whether it was reliable. The sole issue raised on appeal is whether the recording was cumulative of Ashley's written statement.

recording was being offered only to prove that the Hartford police were dispatched to Ashley's apartment. The state additionally argued that, in light of Jaffee's testimony, the substance of the recording should be admissible under the business record exception to the hearsay rule. The court subsequently admitted the recording under this exception, but only for the limited purpose proffered by the state. The court assured defense counsel that he could renew his objections if the recording were later offered for substantive purposes.

During Ashley's subsequent testimony, the state played the recording again to refresh her memory of what she had told the 911 dispatcher. When Ashley did not testify in complete conformity with her prior statements, the state sought to admit Ashley's written statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Defense counsel objected. He argued that if the court were to admit the statement, the recording of the 911 call, if ultimately admitted for substantive purposes, would constitute cumulative evidence because the statement "says everything the tape says plus more." The state contended that both pieces of evidence were necessary for it to prove the two charges against the defendant. Specifically, the state noted that the written statement included Ashley's allegation that the defendant had prevented her from calling the police, information that she did not convey to the 911 dispatcher.

The court admitted both the recording and the written statement under *Whelan*. As to whether the recording was cumulative, the court noted that, although it was in some ways duplicative of the written statement, the recording was uniquely valuable because it allowed the court as the fact finder to assess Ashley's state of mind when she called 911. The court also noted that it was

able to determine "what's cumulative and what's not" after having reviewed the two pieces of evidence.

As a preliminary matter, the state argues that the defendant waived at trial his claim that Ashley's 911 call constituted cumulative evidence. We disagree. At the time of the purported waiver, Ashley's statements could not properly have been admitted under the business record exception. See General Statutes § 52-180; Conn. Code Evid. § 8-4 (a). "Statements and information obtained from . . . persons outside the 'business' are not admissible even though they are included in a business record because it is the duty to report in a business context that provides the reliability [that] justif[ies] this hearsay exception. . . . [I]nformation in a business record if obtained from a person with no duty to report is . . . admissible [only if it falls] within another hearsay exception . . . ." (Citations omitted.) C. Tait, Connecticut Evidence (3d Ed. 2001) § 8.28.7, pp. 673–74; see also *State* v. *Berger*, 249 Conn. 218, 231, 733 A.2d 156 (1999); *State* v. *Torelli*, 103 Conn. App. 646, 660–62, 931 A.2d 337 (2007) (noting that 911 statements from citizens are admissible only where they fall within hearsay exception other than business record exception). Thus, under the foundation laid by the state when it first sought to admit the recording as a full exhibit, Ashley's statements to the dispatcher constituted inadmissible hearsay, and the state had not identified another exception that would render them admissible. The court implicitly recognized this distinction by initially limiting the state's use of the 911 call to prove that the Hartford police had been dispatched to Ashley's apartment—a use of the recording that would not have required consideration of the truth of Ashley's statements. The court assured the defendant that, if the state later sought to admit the recording for substantive purposes, his objections could be renewed.[9] When the

[9] The state contends that when the prosecutor "sought to admit the audio recording . . . under the business record exception to the hearsay rule, it

state later sought admission of the recording under *Whelan*, the defendant timely objected on the additional ground that it was cumulative of the written statement. We therefore turn to the merits of the defendant's claim.

"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. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 670–71, 31 A.3d 1012 (2011).

Relevant evidence may be excluded if it will cause "undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4.3. "In excluding evidence on the ground that it would be only cumulative, care must be taken *not* to exclude merely because of an *overlap* with evidence previously received. To the extent that evidence presents new matter, it is obviously not cumulative with evidence previously received." (Emphasis in original; internal quotation marks omitted.) *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991), quoting 2 D. Louisell &

laid the appropriate foundation for so doing, and the trial court admitted it as such." This characterization suggests a clarity that was absent from the colloquy regarding the admissibility of the recording. When the state initially moved to admit the CD as a full exhibit, it did not articulate a basis for admitting Ashley's hearsay statements. As noted previously, without an additional hearsay exception, Ashley's statements were not admissible under the business record exception. Because the state had not proffered a basis for admitting these statements, it was not unreasonable for the defendant to have consented to the admission of the physical CD, but not to its contents. That the court ultimately admitted the recording under *Whelan* undermines the state's position that the full recording had already been admitted for its truth under the business record exception when the defendant first objected.

C. Mueller, Federal Evidence (1985) § 128. Multiple statements by an individual recounting the same event, made to different people at different times, may be relevant to show that the statements were consistent. See *State* v. *Parris*, supra, 294. "Rather than [being] prejudicially cumulative . . . [such overlapping evidence] demonstrat[es] . . . that the victim previously had reported the incident she described on direct examination in a constant and consistent fashion." Id. Relevant cumulative evidence is properly excluded when, in the court's exercise of discretion, it is unfairly cumulative and, thus, is more prejudicial than probative. Id., 293.

In the present case, the court did not abuse its discretion by admitting both Ashley's 911 call and written statement. Although there was some overlap between the two sources, the written statement did not contain all of the factual information conveyed in the recording of the 911 call. The recording included details about the defendant's treatment of Demaio during their departure that the statement did not and also allowed the court to assess Ashley's state of mind immediately after the assault of Demaio. The recording demonstrated that Ashley feared the defendant, which may have accounted for her reluctance to testify candidly, and her urgent tone demonstrated her genuine concern for Demaio's safety. Moreover, the defendant placed Ashley's veracity squarely in issue. Having done so, the defendant could not also remove from the fact finder the very tools by which to make a credibility determination; the consistency between the 911 call and the written statement was relevant for this purpose. See id. Finally, even if these two pieces of clearly relevant evidence were cumulative, the defendant has not alleged any unfair prejudice that resulted from their admission. He asserts only that the 911 call strengthened the case against him, but it is axiomatic that evidence is not unfairly prejudicial merely because it is

incriminating. See *State* v. *James G.*, 268 Conn. 382, 399, 844 A.2d 810 (2004) ("[a]ll adverse evidence is [by definition] damaging to one's case, but [such evidence] is inadmissible *only if* it creates *undue* prejudice so that it threatens an injustice were it to be admitted" [emphasis in original; internal quotation marks omitted]).[10]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SCOTT A. CRAWLEY (AC 32610)

Gruendel, Bear and Bishop, Js.

Syllabus

Convicted, following a trial to the court, of the infraction of failure to obey traffic signals and, following a jury trial, of the crimes of interfering with an officer, operating a motor vehicle while his license was under suspension, possession of marijuana, possession of drug paraphernalia, possession of narcotics and possession of narcotics with intent to sell by a person who is not drug-dependent, the defendant appealed to

[10] The defendant additionally argues that under *State* v. *Bermudez*, 95 Conn. App. 577, 897 A.2d 661 (2006), it was improper for the court to permit the prosecutor to present extrinsic evidence of Ashley's written statement and the recording of her 911 call. See id., 585 ("the appellate courts in this state have established that when a witness admits to making a prior inconsistent statement, additional evidence of the inconsistency is merely cumulative"). Although § 6-10 of the Connecticut Code of Evidence generally precludes the use of extrinsic evidence of a prior inconsistent statement once the witness admits making such statement, Ashley never adopted material aspects of her prior statements. She testified that she did not witness the defendant cut Demaio and that she had made only one 911 call. In the absence of an admission, evidence of the prior inconsistent statements is not cumulative. See *State* v. *Daskam*, 10 Conn. App. 50, 54, 521 A.2d 587 (where witness refuses to admit to making prior material statements, extrinsic evidence of prior inconsistency not merely cumulative), cert. denied, 203 Conn. 806, 525 A.2d 520 (1987). Moreover, the *Bermudez* court "emphasize[d] that the decision to admit extrinsic evidence for impeachment purposes is vested in the liberal discretion of the trial court." *State* v. *Bermudez*, supra, 586.

this court. The defendant's conviction stemmed from charges brought against him in two informations that were tried together. After the jury was selected and just before the presentation of evidence, the defendant claimed that an attorney, B, had represented him in the first case, rather than the attorney, F, who was present and who had filed an appearance in the case in lieu of his colleague, H. The court, after taking a recess, informed the defendant that F was his attorney and denied the defendant's request for a continuance to hire new counsel, and the defendant left the courtroom during the trial. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court improperly continued the trial in his absence without ascertaining that he had validly waived his sixth amendment right to confrontation; where, as here, the court indicated to the defendant that the trial would continue in his absence and he voluntarily left after he refused to accept F as his attorney, the defendant waived his right to be present during trial and, having done so, he failed to demonstrate that the alleged constitutional violation clearly deprived him of a fair trial.

2. The trial court did not abuse its discretion in refusing to grant the defendant a continuance to allow him to obtain alternate counsel: although F stated that there had been a breakdown in the communication with the defendant, the court reasonably concluded that the defendant was responsible for whatever lack of communication existed at the outset of his trial, and, thus, he could not now rely on a breakdown in communication that he induced to argue that his motion for a continuance to find new counsel should have been granted; furthermore, the defendant's claim that a continuance was warranted because the law firm of B and H appeared as counsel of record on the judicial branch website was unavailing, as F was the only attorney with an appearance filed on the defendant's behalf, neither H nor B represented the defendant in any of the pending matters, both F and the prosecutor confirmed that F was the counsel of record in both cases, and the defendant did not demonstrate that there existed the exceptional circumstances necessary to warrant a delay by a last minute replacement of counsel; moreover, the record supported the court's finding that the defendant's request for a continuance to obtain new counsel was merely an attempt to delay the proceedings.

3. The defendant could not prevail on his claim that the trial court abused its discretion and denied him due process of law by proceeding with the trial without further determining whether he was competent to stand trial; although, after the defendant left the courtroom, F made an oral motion for a competency evaluation, claiming that the defendant's behavior suggested that he was not in touch with reality, the court was not required to accept F's opinion and did not abuse its discretion in denying the motion after it found, on the basis of its own observations, that the defendant merely was attempting to disrupt the orderly presentation of evidence, which was not sufficient to establish incompetence.

Argued May 14—officially released September 11, 2012

Procedural History

Information, in the first case, charging the defendant with two counts each of the crimes of interfering with an officer and assault of public safety personnel, and with the crimes of possession of a controlled substance, possession of drug paraphernalia and operating a motor vehicle while his license was under suspension, and substitute two part information, in the second case, charging the defendant, in the first part, with the crimes of possession of narcotics, possession of narcotics with intent to sell by a person who is not drug-dependent and operating a motor vehicle while his license was under suspension, and with the infraction of failure to obey traffic control signals, and, in the second part, with having committed crimes while released on bond, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the cases were consolidated; thereafter, the defendant was tried to the court, *Swords*, *J.*, on the charge of failure to obey traffic control signals in the second case; judgment of guilty; subsequently, the cases were tried to the jury; verdicts of guilty of two counts each of interfering with an officer and operating a motor vehicle while his license was under suspension, and of possession of marijuana, possession of drug paraphernalia, possession of narcotics and possession of narcotics with intent to sell by a person who is not drug-dependent; thereafter, the defendant was tried to the court on the second part of the information in the second case; judgments of guilty and sentence enhanced for having committed crimes while released on bond, from which the defendant appealed to this court; subsequently, the court, *Swords*, *J.*, issued a rectification of its decision. *Affirmed.*

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

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Kathleen A. Dwyer*, senior assistant state's attorney, for the appellee (state).

Opinion

GRUENDEL, J. The defendant, Scott A. Crawley, appeals from the judgments of conviction, rendered following a jury trial, of various offenses related to two separate incidents. On appeal, the defendant claims that the trial court (1) improperly proceeded with the trial in his absence without ascertaining that he validly waived his right to confrontation, (2) failed to grant a continuance to allow him to obtain alternative counsel and (3) failed to hold a second competency hearing.[1] We affirm the judgments of the trial court.

The defendant's appeal involves two files for offenses committed during two separate incidents. The first file pertained to charges against the defendant arising from a May 23, 2002 incident (first case), with docket numbers CR-02-0183551-S and MV-02-0346006-S, and the second file pertained to those charges against the defendant arising from a September 5, 2002 incident (second case), with docket numbers CR-02-0185248-S and MV-02-0383935-S. The two files were consolidated and were to be tried jointly before a jury. On March 9, 2004, after the jury had been selected and just before the presentation of evidence was to begin, the defendant appeared before the court outside of the presence of

[1] The defendant also claims that the court deprived him of his right to a jury trial by enhancing his sentence pursuant to General Statutes § 53a-40b based on its finding that he committed the offenses while out on bond. The defendant concedes that this claim is bound by *State* v. *Fagan*, 280 Conn. 69, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). In *Fagan*, our Supreme Court rejected the claim that a trial court deprives a defendant of his constitutional right to a jury trial when it enhances its sentence pursuant to § 53a-40b. Id., 89–102. Accordingly, we do not address this claim.

the jury. He informed the court that attorney Terri Bayer represented him in the first case, and not attorney Donald Freeman, who was present. The courtroom clerk noted that there was an undated appearance from Bayer and that Freeman had filed an appearance on October 24, 2002, in lieu of attorney John Hyde, a colleague of Bayer's. The defendant reiterated that Bayer was his lawyer, that he had written her a letter and that Freeman was not his lawyer. Freeman stated that in October, he had conversations with the defendant and Hyde and agreed to file an appearance in lieu of Hyde in the first case. The state agreed that the only appearance in its file was for Freeman and that it was for both cases.

The court took a ten minute recess and requested that the court clerk's office contact Bayer's office to determine whether either Bayer or Hyde represented the defendant. The defendant began "acting up" with the courtroom marshal, and the court instructed the marshal to remove the defendant from the courtroom. Following the recess, the court warned the defendant that his behavior earlier interrupted the proceedings and that continued disturbances would not be tolerated. The court told the defendant that if he continued to conduct himself in such a manner, he would be removed from the courtroom and would not be able to participate in the trial. The court also asked the defendant if he understood. The defendant replied that he did.

The court then informed the defendant that the clerk's office had reached Hyde and that it was his position that neither he nor Bayer represented the defendant in the matter. The defendant stated that Freeman did not represent him, either, and that he needed to obtain new counsel. The court informed the defendant that Freeman did represent him, as he had filed an appearance. The defendant disputed that, stating that he had a say in who would be his attorney. The court informed the defendant that he indeed did have

a say in who would be his attorney, but only up until the time of trial, after which he needed a continuance from the court to hire new counsel. The defendant stated that he wanted to hire different counsel. The court denied the request because (1) the case had been pending since May, 2002, (2) Freeman's appearance had been in the file since October 24, 2002, (3) the case already had been continued thirteen or fourteen times and (4) Hyde did not appear for the defendant on any of those continuances, nor did anyone else from his firm. The court concluded that because the jury had been selected and the presentation of evidence was to commence that morning, Freeman would continue to represent the defendant.

Thereafter, a discussion ensued about whether the defendant wanted to accept the state's plea offer rather than proceed to trial. The defendant did not accept the offer. The court then asked the parties whether there was anything further before it brought in the jury. The court and the defendant had another exchange about Freeman that culminated in the defendant's leaving the courtroom.[2] Freeman subsequently made an oral

[2] The following colloquy transpired between the court and the defendant:

"The Defendant: He's not my lawyer, so I'm leaving the courtroom. You all can do whatever you want to do, I'm leaving. You're not my lawyer. You're not representing me. So, I'll leave the courtroom.

"The Court: Mr. Crawley, if you want to voluntarily absent yourself from the proceedings, that's your choice.

"The Defendant: I want to leave the courtroom. He's not my lawyer. You can't force him to represent me on this case. You can't force him. So, I'm leaving the courtroom.

"The Court: Okay.

"The Defendant: You can't force him to represent me on this case.

"The Court: Okay.

"The Defendant: He's not my lawyer. I paid Terri Bayer for this case, so she's supposed to be here.

"The Court: All right, you can remove the defendant since he does not want to be present during the proceedings.

"The Marshal: Yes, Your Honor.

"(WHEREUPON, THE DEFENDANT VOLUNTARILY ASKED TO BE REMOVED FROM THE COURTROOM.)

motion for a competency examination pursuant to General Statutes § 54-56d (c), which the court denied.

The defendant was not present during the direct or cross-examination of any of the witnesses. As to the first case, the jury found the defendant guilty of possession of marijuana in violation of General Statutes § 21a-279 (c), possession of drug paraphernalia in violation of General Statutes § 21a-267, operation of a motor vehicle while his license was under suspension in violation of General Statutes § 14-215 (a) and two counts of interfering with a police officer in violation of General Statutes § 53a-167 (a). The jury also found the defendant guilty of possession of narcotics in violation of § 21a-279 (a), possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b) and operation of a motor vehicle while his license was under suspension in violation of § 14-215 (a) related to the second case.

Pursuant to a part B information, the court found that the defendant committed the offenses related to the second case while on release, thereby subjecting him to a sentence enhancement pursuant to General Statutes § 53a-40b. On June 3, 2004, the court imposed a total effective sentence of twenty-seven years incarceration. Following a trial on the merits, a habeas court restored the defendant's appellate rights on May 17, 2010. This appeal followed. Additional factual and procedural history will be set forth as necessary.

I

The defendant claims first that the court improperly continued the trial in his absence without ascertaining

"The Court: If you change your mind, Mr. Crawley, and you want to come back—

"The Defendant: As long as Terri Bayer is here, I'll change my mind. I'll come back.

"The Court:—please let the marshal know.

"(WHEREUPON, THE DEFENDANT WAS TAKEN BACK TO LOCKUP)."

that he validly waived his sixth amendment right to confrontation. We disagree.

The defendant affirmatively requests review of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[3] We review the defendant's claim because the record is adequate for review and the claim is of constitutional magnitude. See *State* v. *Peeler*, 271 Conn. 338, 369 n.29, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). We determine, however, that the defendant waived his right to be present during the trial and conclude that the alleged constitutional violation therefore fails to satisfy the third prong of *Golding*.

"It has long been settled that an accused enjoys a right both at common law and pursuant to the sixth amendment's confrontation clause to be present at all stages of trial. . . . It is also well settled that under the due process clauses of the fifth and fourteenth amendments a defendant must be allowed to be present at his trial to the extent that a fair and just hearing would be thwarted by his absence. . . . Nevertheless, the defendant's presence is not required when the right is waived. Waiver in this context is addressed both in our rules of practice and in our case law.

"Under our rules of practice, the trial court in its discretion may exclude the defendant if it determines that the defendant waived his right to be present or if the defendant's absence is justified due to his or her

[3] 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." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

conduct. Practice Book § 44-8 provides in relevant part: The defendant must be present at the trial and at the sentencing hearing, but, if the defendant will be represented by counsel at the trial or sentencing hearing, the judicial authority may: (1) Excuse the defendant from being present at the trial or a part thereof or the sentencing hearing if the defendant waives the right to be present; (2) Direct that the trial or a part thereof or the sentencing hearing be conducted in the defendant's absence if the judicial authority determines that the defendant waived the right to be present . . . .

"Relevant cases instruct that [a] defendant in a criminal prosecution may waive one or more of his or her fundamental rights. . . . In [*State* v.] *Patterson*, [230 Conn. 385, 396, 645 A.2d 535 (1994)], our Supreme Court stated that [i]n some circumstances, a waiver of rights must be knowing, voluntary and intelligent, and it must be expressly made. . . . In other circumstances, waiver can be implied. . . . Our Supreme Court has . . . held that a defendant may waive his constitutional right to be present during trial merely by an unexplained absence. . . .

"In discussing the circumstances in which a valid waiver might be present, our Supreme Court noted that [w]hether there has been an intelligent and competent waiver of the right to presence must depend, in each case, upon the particular facts and circumstances surrounding that case. . . . [A] waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced." (Citations omitted; internal quotation marks omitted.) *State* v. *Vines*, 71 Conn. App. 751, 767–68, 804 A.2d 877 (2002), aff'd, 268 Conn. 239, 842 A.2d 1086 (2004). "[A] trial court need not engage in a colloquy with a defendant expressly focused on the defendant's understanding of his right to be present to determine that a waiver of the right of presence was

valid. Rather, the court may infer the defendant's waiver from the totality of his acts and conduct, so long as the defendant has been adequately informed that the trial would continue in his absence." *State* v. *Gonzalez*, 205 Conn. 673, 689, 535 A.2d 345 (1987).

The record in this case is sufficient to support the conclusion that the defendant waived his right to be present during the trial. When the defendant's behavior initially interrupted the proceedings, the court warned the defendant that further interruptions would not be tolerated, and that if he continued to behave in such a manner, he would be removed from the courtroom during the trial and would not be able to participate in the trial. The court asked the defendant if he understood, and he said yes. Although the defendant was not removed because of his disruptive conduct, that statement informed him that the trial could continue in his absence. When the defendant later refused to accept Freeman as his attorney, he told the court that he was leaving the courtroom and that "[y]ou all can do whatever you all want to do, I'm leaving." The defendant's statement indicates that he understood the proceedings would continue in his absence. The court informed the defendant that it was his choice to leave, and the defendant then voluntarily asked to be removed from the courtroom. The court instructed the marshal that the defendant could be removed "since [the defendant] does not want to be present during the proceedings." This statement again indicated to the defendant that the proceedings would continue in his absence. The court also informed the defendant that if he changed his mind and wanted to come back, he should let the marshal know. The defendant did choose to return to the proceedings and was present when the court delivered its charge to the jury.

We appreciate that the defendant's right to be present at all stages of his trial is "scarcely less important to

the accused than the right of trial itself."[4] *Diaz* v. *United States*, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). However, "[w]e cannot permit an accused to elect one course at the trial and then . . . to insist on appeal that the course which he rejected at the trial be reopened to him . . . ." (Internal quotation marks omitted.) *State* v. *Drakeford*, 202 Conn. 75, 81, 519 A.2d 1194 (1987). "If a defendant deliberately leaves the courtroom after his trial has begun, he forfeits his right to be present at trial. . . . Having forfeited that right, he cannot be allowed to claim any advantage because of his absence." (Citation omitted.) Id.

Where, as here, the court indicated to the defendant that the trial would continue in his absence and he voluntarily left, the defendant's waiver may be inferred from his conduct. See *State* v. *Gonzalez*, supra, 205 Conn. 689. Because the defendant waived his right to be present for the trial, we conclude that he has failed to demonstrate that the alleged constitutional violation clearly deprived him of a fair trial. The defendant, therefore, has failed to satisfy his burden pursuant to the third prong of *Golding*.

II

The defendant claims next that the court abused its discretion in refusing to grant a continuance to allow him to obtain alternative counsel. We disagree.

Although the original appearance forms are not in the record before us, the transcripts of various proceedings

[4] Recognizing that importance, we agree with our Supreme Court's statement in *State* v. *Drakeford*, 202 Conn. 75, 81, 519 A.2d 1194 (1987), that "[w]hile we have not required the procedure of bringing the defendant personally before the court, advising him of his right to be present, and then permitting a knowing and intelligent waiver . . . we do believe that a defendant should be warned of the consequences of his failure to attend trial." (Citation omitted.) The court concluded, however, that "it is sufficient if the trial court indicates to the defendant that the trial will continue in his absence"; id.; and it is therefore that standard that we apply in the present case.

offer some indication of the appearances that were made on behalf of the defendant. On September 19, 2002, Freeman and Hyde appeared before the court. The defendant also was present. Freeman told the court that he represented the defendant in docket number CR-02-0185248-S, the second case, and Hyde told the court that he represented the defendant in the first case, docket number CR-02-0183551-S. Freeman explained at the start of the trial that in October, he had conversations with the defendant and Hyde and, on the basis of those conversations, he agreed to file his appearance in lieu of Hyde in the first case. On October 24, 2002, both attorneys again appeared before the court, and Hyde told the court that Freeman was going to file an appearance in lieu of his appearance in the first case.[5] From that point on, neither Hyde nor Bayer appeared in court on the defendant's behalf.

"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.* . . . After the commencement of trial, neither a right to be represented by counsel of choice nor a right to due process entitle a defendant to a continuance on demand. . . .

[5] The record before us does not reflect whether the defendant was present for this proceeding, as he was for the September 19, 2002 proceeding.

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay . . . 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 . . . the timing of the request; the likelihood that the denial would substantially impair the defendant's ability to defend himself; [and] the availability of other, adequately equipped and prepared counsel to try the case. . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial. . . . In order to work a delay by a last minute [replacement] of counsel there must exist exceptional circumstances." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ross V.*, 110 Conn. App. 1, 7–8, 953 A.2d 945, cert. denied, 289 Conn. 939, 958 A.2d 1247 (2008).

The defendant argues that, because Freeman stated that there had been a breakdown in communication, the court improperly denied his request for a continuance to find new counsel. Our Supreme Court has observed that "[a]lthough under some circumstances a complete breakdown in communication between a defendant and his counsel may warrant appointment of new counsel . . . a defendant is not entitled to demand a reassignment of counsel simply on the basis of a breakdown in communication which he himself induced." (Citation omitted; internal quotation marks omitted.) *Sekou* v. *Warden*, 216 Conn. 678, 688, 583 A.2d 1277 (1990). In moving for a competency evaluation, Freeman stated that there had been a breakdown in communication because the defendant "listens to nothing. And not only does he not listen, he doesn't allow me to speak." The court reasonably concluded that the defendant was responsible for whatever lack of communication

existed at the outset of his trial.[6] Accordingly, the defendant cannot now rely on a breakdown in communication that he induced to argue that his motion for a continuance to find new counsel should have been granted.

The defendant additionally argues that, because Bayer's and Hyde's firm still appears as counsel of record on the Judicial Branch's website in MV-02-0383935-S, the motor vehicle docket associated with the second case, there was sufficient cause to grant a continuance. We cannot discern whether Freeman had an appearance in the motor vehicle file associated with the second case from the record before us. We reiterate that both attorneys represented to the court that although Hyde initially represented the defendant in the first case and Freeman in the second, Freeman filed an appearance in lieu of Hyde in the first matter. There is no indication in the transcripts or the record before us that Hyde, nor his colleague Bayer, ever filed an appearance in the second case. At no time was it brought to the court's attention that Freeman did not have an appearance filed for docket number MV-02-0383935-S. The court ascertained that Freeman was the only attorney with an appearance filed on the defendant's behalf and confirmed that neither Hyde nor Bayer represented the defendant in any of the pending matters. Both Freeman and the prosecutor confirmed that Freeman was the counsel of record in both cases. On the basis of our review of the record, we cannot conclude that the court abused its discretion by denying the request for a continuance because of the confusion caused by the various appearances. The defendant has not demonstrated that there existed the exceptional circumstances necessary

[6] In ruling on Freeman's motion for a competency evaluation, the court stated: "I don't find that he's unable to understand the proceedings, or unable to assist counsel. I just find that he's a management problem in that he doesn't like what he's hearing and so he's acting out accordingly."

to warrant a delay by a last minute replacement of counsel. See *State* v. *Ross V.*, supra, 110 Conn. App. 8.

We also note the court's finding that the defendant's request was an attempt to delay the proceedings. In ruling on Freeman's motion for a competency evaluation, the court noted that "the whole issue with attorney Bayer representing him, he decided to bring this morning just as we're about to start the evidence in this case, even though neither Ms. Bayer, nor Mr. Hyde nor anyone from their office had been in court with him for the last thirteen or fourteen court appearances. If [the defendant] truly believed that . . . Ms. Bayer represented him or Mr. Hyde, then that's something that he would have made known to the court sometime in advance. So, what I discern from that is that the defendant [is] not liking where we are at in terms of this trial, in other words . . . [he] is now doing everything he can to disrupt the orderly presentation of evidence in this case." "A court need not permit the replacement of counsel upon a defendant's mere whimsical demand and certainly not where it is evident that a professed disenchantment with his lawyer is a subterfuge to secure an unwarranted delay in the trial." (Internal quotation marks omitted.) *Sekou* v. *Warden*, supra, 216 Conn. 686–87. The record supports the court's finding that the defendant had other opportunities to make known to the court that Freeman was not his counsel of choice in the first case. For example, the defendant was present in court with Freeman on March 2, 2004, for jury selection, at the outset of which the court informed the jury panel that the case involved charges related to two files from two incidents. In light of the court's finding that the defendant's request for a continuance to find new counsel was merely a delay tactic, we cannot conclude that the court abused its discretion in denying such a request.

III

The defendant also claims that the court abused its discretion and denied him due process of law by proceeding with the trial without further determining whether he was competent to stand trial. We disagree.

After the defendant left the courtroom, Freeman made an oral motion for a competency evaluation pursuant to § 54-56d. Freeman argued that the defendant's behavior suggested that he was "not in touch with reality." He argued that there had been a breakdown in communication and that there is "a mental process that prevents [the defendant] from cooperating with counsel." The court denied the motion and concluded, based on its observations of the defendant, that he merely was attempting to disrupt the orderly presentation of evidence in this case. It did not find that he was unable to understand the proceedings or unable to assist counsel, and determined that there was no psychiatric component to the defendant's behavior.

"As a matter of constitutional law, it is undisputed that the guilty plea and subsequent conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . This constitutional mandate is codified in our state law by . . . § 54-56d (a), which provides that [a] defendant shall not be tried, convicted or sentenced while he is not competent. For the purposes of this section, a defendant is not competent if he is unable to understand the proceedings against him or to assist in his own defense. . . . [Section] 54-56d (b), however, posits a presumption in favor of a defendant's competence. . . . Every criminal defendant is presumed to be competent. General Statutes § 54-56d (b). During the course of the criminal proceedings, however, if it appears that the defendant is not competent, either party or the court may request

an examination to determine the defendant's competency. General Statutes § 54-56d (c).

"The provisions of § 54-56d state that if it appears that the defendant is not competent, and if the trial court finds that a request for a competency evaluation is justified, the court must order a competency examination. We have interpreted this standard as requiring a competency evaluation any time a reasonable doubt is raised regarding the defendant's competency. . . . To establish such reasonable doubt, the defendant must present substantial evidence, not merely allegations, that he is incompetent. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . .

"We review the court's ruling on a motion for a competency evaluation under the abuse of discretion standard. . . . 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. . . . Our review of a trial court's exercise of the legal 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." (Citations omitted; internal quotation marks omitted.) *State* v. *Kendall*, 123 Conn. App. 625, 650–51, 2 A.3d 990, cert. denied, 299 Conn. 902, 10 A.3d 521 (2010).

The defendant argues that the court improperly rejected his counsel's representations that his "behavior suggests . . . that he is not in touch with reality" and that "there's something not quite right in his head." We disagree. "Although the opinion of defense counsel is a factor to be considered when considering a § 54-56d

motion, the court need not accept counsel's opinion without question." *State* v. *Collazo*, 113 Conn. App. 651, 663, 967 A.2d 597, cert. denied, 293 Conn. 904, 976 A.2d 705 (2009). The court denied the motion on the basis of its own observations of the defendant. See *State* v. *DesLaurier*, 230 Conn. 572, 590, 646 A.2d 108 (1994) (trial court may rely on its own observations of defendant, including demeanor, tone and attitude). The court's observation of the defendant in this case was that his lack of cooperation with counsel was an attempt to delay or disrupt the proceedings. Such behavior is insufficient to establish incompetence. See *State* v. *Johnson*, 22 Conn. App. 477, 489, 578 A.2d 1085 (defendant's "obstreperous, uncooperative or belligerent behavior" including refusal to return to court and hostility toward attorney did not require competency evaluation), cert. denied, 216 Conn. 817, 580 A.2d 63 (1990). The court did not abuse its discretion in denying the motion for a competency evaluation.

The judgments are affirmed.

In this opinion the other judges concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* CITY OF HARTFORD ET AL.
(AC 32894)

DiPentima, C. J., and Beach and Sheldon, Js.

Syllabus

The plaintiff commission on human rights and opportunities appealed to the trial court from the decision of the commission's human rights referee dismissing the claims of discrimination and retaliation made by the complainant, P, a Hartford police officer. P had filed a complaint with the commission alleging that the police department had discriminated against her on the basis of her gender and disability during the process of selecting trainees for the position of canine handler in January-February, 2003, and in September, 2003. Specifically, P had filed a complaint

with the commission in August, 2003, alleging that she was denied the opportunity to be trained as a canine handler during the selection process in January-February, 2003, because of her gender and physical disability. In October, 2003, she amended her complaint to add a claim of retaliation, claiming that she was denied the position because she had opposed discriminatory employment practices and because of the initial complaint she had filed with the commission. The trial court rendered judgment sustaining the appeal and remanded the matter to the referee on the issues of pretext, physical disability, gender stereotyping and retaliation. On the appeal to this court by the defendant city of Hartford, *held*:

1. The city could not prevail on its claim that the trial court improperly denied its motion to dismiss, in which the city claimed that a May, 2010 order of the trial court remanding the matter to the referee to issue a clarification was a final judgment pursuant to statute (§ 4-183 [j]), that the court's jurisdiction over the matter had terminated, and that the court had no jurisdiction to hear the matter subsequently and to render its judgment; although a remand issued pursuant to § 4-183 (j) constitutes a final judgment for the purposes of appeal irrespective of the nature of the remand and administrative proceedings that are expected to follow it, the court's remand order here directing the referee to clarify three points was not made pursuant to § 4-183 (j) and properly could be characterized as a request for an articulation and, therefore, was not a final judgment.

2. The trial court improperly reversed the decision of the referee and remanded the discrimination claim to him on the issue of pretext, that court having improperly concluded that he failed to consider all the evidence of a discriminatory environment when making a determination on the issue of pretext; the referee's findings indicated that he considered the work environment and his conclusions were supported by substantial evidence showing that P did not set forth a prima facie case of discrimination as to a January, 2003 physical agility test that she failed, that the standard scoring method used for a fitness run was not a pretext for discrimination, that P did not prove that the reasons provided for her not having been selected in September, 2003, for the position of canine handler were pretextual, and that the ranking of candidates for a canine training academy was objective and not a pretext for discrimination.

3. The trial court improperly reversed the decision of the referee that P did not provide sufficient evidence of a physical disability and remanded the case to the referee for the purpose of reconsidering the issue of physical disability; the referee having found that P belonged to a protected class by virtue of a mental disability, a finding regarding physical disability would have added nothing to the legal analysis and could not, itself, have changed the result and, thus, such a finding was not necessary in the context of this case and would have provided no greater benefit to P.

4. The trial court improperly remanded the gender stereotyping claim to the referee and stated that P and the commission could seek clarification on that issue on remand if they wanted to do so; the referee did not find credible the evidence submitted by P in support of her gender stereotyping claim, the court's statement regarding clarification of the gender stereotyping claim merely highlighted one aspect of the court's remand order for further analysis concerning the discrimination claim, and this court had determined that a remand on the discrimination claim was improper.

5. The trial court improperly reversed the decision of the referee and remanded the retaliation claim to the referee, the referee having properly declined to address the issue of retaliation in relation to the January-February, 2003 selection process because P's initial complaint did not raise it, and her amended complaint was filed too late to raise it in a timely manner.

Argued November 29, 2011—officially released September 18, 2012

Procedural History

Appeal from the decision by the plaintiff's human rights referee dismissing a complaint of, inter alia, gender discrimination, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn*, *J.*, granted the motion to be added as a party plaintiff filed by Dana Peterson; thereafter, the court remanded the matter to the plaintiff's human rights referee for clarification of his decision and the plaintiff's human rights referee issued a clarification; subsequently, the court denied the named defendant's motion to dismiss; thereafter, the matter was tried to the court; judgment sustaining the appeal and remanding the matter to the plaintiff's human rights referee for further proceedings, from which the named defendant appealed to this court. *Reversed*; *judgment directed.*

Helen Apostolidis, for the appellant (named defendant).

David L. Kent, human rights attorney, for the appellee (plaintiff).

Jamie L. Mills, for the appellee (plaintiff Dana Peterson).

Charles Krich, principal attorney, filed a brief for the appellee (defendant commission on human rights and opportunities).

Jennifer L. Levi filed a brief for the Transgender Rights Project of Gay & Lesbian Advocates & Defenders as amicus curiae.

Opinion

BEACH, J. The defendant city of Hartford[1] appeals from the judgment of the trial court rendered in favor of the plaintiffs, Dana Peterson and the commission on human rights and opportunities (commission),[2] reversing the decision of the commission's human rights referee (referee) and remanding the case on various grounds to the referee for further proceedings. The defendant claims that the court erred in denying its motion to dismiss and in subsequently reversing the decision and remanding the case to the referee on the issues of pretext, physical disability, gender stereotyping and retaliation. We reverse the judgment of the trial court.

On August 6, 2003, Peterson filed a complaint with the commission alleging that the Hartford police department (department) discriminated against her on the

[1] The commission on human rights and opportunities (commission), in its decision-making capacity, was also named as a defendant. The commission's decision-making division declined to defend the appeal in the trial court and joined the plaintiffs. See General Statutes § 46a-94. We therefore refer in this opinion to the city of Hartford as the defendant.

The commission appealed the referee's decision on behalf of Peterson, and she later moved to be made a party plaintiff.

[2] The commission acts in a dual role of protecting the public interest and the private complainant. *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 683, 855 A.2d 212 (2004). Although the primary role of the commission is to enforce statutes barring discrimination and it has an institutional interest in its decision-making process, the commission also is empowered by statute to prosecute complaints on issues of public concern. Id., 682–83; see also General Statutes § 46a-94a (a) (empowering commission to appeal from decisions of administrative referees within agency in accordance with General Statutes § 4-183 [a]).

basis of her sex (female) and disability (transsexual and gender dysphoria) during the process of selecting trainees for the position of patrol canine handler, in violation of the Connecticut Fair Employment Practices Act, General Statutes §§ 46a-60 (a) (1) and 46a-58 (a). On October 15, 2003, she amended her complaint to allege retaliation in violation of § 46a-60 (a) (4).

The commission certified the complaint for a public hearing. Following a public hearing, the referee issued a memorandum of decision on November 14, 2008. The referee set forth the following relevant findings of fact. Peterson was born a biological male in 1967. After years of turmoil regarding her then anatomical sex and after seeking assistance from mental health professionals, Peterson began living as a woman in 1991. In 1993, Peterson underwent sex reassignment surgery in Canada. Also in 1993, Peterson applied for a position as a police officer with the department. After completing the requisite training, Peterson was sworn in as a police officer with the department in 1994 and was promoted to the rank of sergeant on July 31, 2004.

Peterson has had the career goal of becoming a patrol canine handler. The department did not train canine handlers itself; training was provided by a state operated canine training academy (academy). In 2002, Neville Brooks, a sergeant with the department, was appointed to the position of supervisor of the department's patrol canine unit. In that position, Brooks was responsible for the selection of officers for the canine unit. Brooks created an interdepartmental memorandum, dated May 13, 2002, expressing the department's intention to fill certain canine handler positions. The memorandum stated that the selection process entailed a letter of recommendation from an immediate supervisor, a physical agility test based on the "Cooper Standards," a review of lost time and disciplinary action, an interview with family members, an inspection of

residence and successful completion of a sixteen week training class. The Cooper Standards are physical agility fitness norms.[3] Passing a physical agility test administered by the academy had been a requirement of becoming a member of the department's canine unit since at least August 9, 1999.

Seven officers, including Peterson, responded to the May 13, 2002 announcement. It was the custom of the department to select for academy training one more person than the number of positions available to the department in the academy's training class so that an alternate could be trained if one of the others failed initial testing at the academy. Brooks selected three officers; Peterson was not included. The three officers selected by Brooks were given a physical agility test by the academy on December 30, 2002; all three officers failed. As a result of their failure, Brooks decided to administer his own physical agility test to all officers who applied to become patrol canine handlers in order to avoid the embarrassment of officers' failure to pass the academy's physical agility test and to avoid losing positions allocated to the department in the academy's sixteen week training class for canine handlers.

By interdepartmental memorandum dated January 6, 2003, Brooks again announced that the department was seeking to send candidates for the position of patrol canine handler to the academy. The memorandum indicated that the selection process would include two

[3] The referee noted that the Cooper Standards/physical agility fitness norms have been defined as standards "based on a representative sample of approximately 4000 officers that were stratified (by age and gender) and randomly selected from forty municipal, state and federal agencies. 89.7 [percent] of the sample was male and 10.3 [percent] of the sample was female; which reflects the gender characteristics of most agencies. The physical fitness tests were field tests measuring those job related physical fitness areas that have been shown to be the underlying and predictive factors for officer physical abilities to perform essential physical tasks and functions of the job."

physical agility tests: one conducted in advance by the department and the other conducted by the academy. Although Peterson did not respond to the announcement, she nonetheless was invited to participate in the January physical agility test conducted by the department.

On January 26, 2003, Brooks conducted a physical agility test. Brooks tried to duplicate the test used by the academy. He contacted the academy and was provided with the events and scoring standards. The events included a 300 meter run for which the scoring standards did not differentiate by gender or age. Using these standards to score the January, 2003 test, Brooks determined that Peterson had failed the 300 meter run.

After being informed of this result, Peterson contacted the department's police academy and spoke with Dave Dufault, a Cooper Standards certified instructor,[4] who provided her with a different version of the Cooper Standards for the 300 meter run that varied by gender and age. On February 21, 2003, Peterson's union filed a grievance with the department regarding her failing the department's January 26, 2003 physical agility test.

The two candidates who passed the department's physical agility test were sent to the academy for physical agility testing. One candidate, Robert Lawlor, withdrew from the academy's canine training class because his dog had been found to be unsuitable. As a result of Lawlor's withdrawal, Brooks requested, and the department was allotted, a slot in the September, 2003 session of the academy.

By interdepartmental memorandum dated August 28, 2003, Brooks again announced that the department was seeking candidates for the position of patrol canine

[4] To become a certified instructor, Dufault was required to attend a sixty hour course conducted by the Cooper Institute.

handler. Peterson responded to this announcement. On September 7, 2003, the department conducted a physical agility test to screen the applicants. Brooks requested that Dufault administer the physical agility test. Dufault was not assigned the additional task of determining whether a candidate passed or failed the test. Peterson, along with four other candidates, passed the physical agility test. The department had been allotted one slot in the academy class, and Brooks again decided to send one more candidate for preliminary testing at the academy than the number of slots available to the department in the training class. Brooks ranked the candidates according to performance on the physical agility test, and Peterson, who ranked last, was not selected.

The referee rejected Peterson's claims of discrimination and retaliation and dismissed the complaint. The commission appealed from the referee's decision to the Superior Court pursuant to General Statutes §§ 46a-94a[5] and 4-183.[6] Thereafter, Peterson filed a motion to be made a party plaintiff, which was granted by the trial court. On May 4, 2010, the court remanded the matter to the commission for clarification of three points. After the referee filed his response to the remand order, the defendant filed a motion to dismiss the action for lack of subject matter jurisdiction. The defendant claimed that the remand order of May 4, 2010, was a final judgment and further action in the same appeal was thus impossible. The court denied the motion to dismiss.

[5] General Statutes § 46a-94a (a) provides in relevant part: "The Commission on Human Rights and Opportunities, any respondent or any complainant aggrieved by a final order of a presiding officer . . . may appeal therefrom in accordance with section 4-183. . . ."

[6] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

In a memorandum of decision issued on October 27, 2010, the court sustained the appeal. The court found that the referee erred by inadequately discussing the issue of pretext and improperly concluding that Peterson could not bring a complaint for physical disability discrimination and that the protected activity relevant to her retaliation claim was limited to the filing of the August, 2003 commission complaint. The court remanded the matter to the referee for further proceedings based on the existing record. This appeal followed.[7]

We first set forth our standard of review. "Our review of an agency's factual determination is constrained by . . . § 4-183 (j), which mandates that a court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . . This limited standard of review dictates that, [w]ith regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The burden is on the [party challenging the agency's decision] to demonstrate that the

[7] This court granted the application of the Transgender Rights Project of Gay & Lesbian Advocates & Defenders to file an amicus curiae brief.

[agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record. . . . With respect to questions of law, [w]e have said that [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 503–504, 832 A.2d 660 (2003).

I

The defendant first claims that the court erred in denying its motion to dismiss. The defendant argued in the motion that the court's first remand effectively was a final judgment and that the court had no jurisdiction to hear the matter subsequently. We disagree.

We first set forth our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court . . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to deny] . . . the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346–47, 977 A.2d 636 (2009).

At oral argument on March 25, 2010, the trial court sua sponte raised issues regarding the clarity of the referee's decision. On April 1, 2010, the court issued an order permitting the parties to file briefs before it considered a remand for clarification. On May 4, 2010, the court issued an order remanding the matter to the referee "to issue a clarification" in accordance with the March 25, 2010 transcript of the trial court's proceedings. On May 14, 2010, the defendant filed a motion requesting that the court issue a clarification of its May 4, 2010 remand order. On May 17, 2010, the court issued

a clarification that specified three points for the referee to clarify. On June 23, 2010, the referee filed a response to the court's remand order in which it addressed the three points. The defendant filed a motion to dismiss the action for lack of subject matter jurisdiction. In its memorandum in support of its motion to dismiss, the defendant argued that the court's May 4, 2010 remand order was a final judgment pursuant to § 4-183 (j), and, thus that the court's jurisdiction over the matter had terminated. Following argument on the matter, the court denied the motion on the reasoning that the prior remand was solely for clarification and not a determination of the merits.

If the May 4, 2010 order was a final judgment for the purpose of appeal, then further substantive rulings would generally be inappropriate, but if the remand order was simply requesting clarification, the court later properly considered the merits of the administrative appeal. Section 4-183, which governs appeals under the Uniform Administrative Procedure Act, contains two subsections, (h) and (j), that specifically concern remands. The defendant argues that the court's May 4, 2010 remand order was not issued pursuant to subsection (h). Remand orders issued pursuant to subsection (h) are not final judgments. "Subsection (h) permits the trial court, prior to a hearing on the merits and upon request of a party, to order that the additional evidence be taken before the agency, which in turn allows the agency to modify its findings or decision." (Internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 558, 964 A.2d 1213 (2009). We agree that the remand order was not issued under subsection (h).

The defendant argues that, because the remand order was not one authorized by subsection (h), it must have been authorized by subsection (j). A remand issued by the trial court pursuant to § 4-183 (j) constitutes a final

judgment for the purpose of appeal irrespective of the nature of the remand and administrative proceedings that are expected to follow it. See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 675, 855 A.2d 212 (2004). The defendant argues, accordingly, that, because the remand order was a final judgment, the order terminated the proceedings before the trial court, and thus terminated its jurisdiction over the case. We disagree and conclude that the court's remand order was not issued pursuant to § 4-183 (j).

Section 4-183 (j) provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment."

In its May 17, 2010 clarification of its May 4, 2010 remand order, the court ordered the referee to clarify three points: "1. Was the issue of 'mixed motive' discussed in the referee's opinion as regards [Peterson]? . . . There appears to be a 'not' missing . . . as regards the referee's statement comparing *Conway* [v. *Hartford*, Superior Court, judicial district of Hartford,

Docket No. CV-95-0553003 (February 4, 1997) (19 Conn. L. Rptr. 109)], to the present case. Did the referee conclude that *Conway* was, or was not, controlling? 3. Did the referee discuss the February, 2003 incident, as the October, 2003 affidavit did not supplant, but only supplemented, the August, 2003 affidavit? . . .'' (Citations omitted.) The court also noted in a footnote that there was a typographical error on page thirty-seven of the referee's decision.

The May 4, 2010 remand order was not issued under subsection (j). In the clarification of its remand order, the court did not find that the "substantial rights of the person appealing" had been prejudiced as a result of one or more of the errors enumerated in § 4-183 (j), nor does the remand functionally affect substantial rights. Parenthetically, at the March 25, 2010 hearing, the court indicated its intention to retain jurisdiction: "I'm really thinking that this decision has to be clarified so that we know what we're dealing with. . . . [I]f [the referee] wants to put an amended decision in, then come back here, and we'll take a look at it."

The defendant is incorrect in its position that if a court remands a matter to an agency, that remand must necessarily be governed by either subsection (h) or subsection (j). Although the plain text of § 4-183 expressly refers to remands only in subsection (j) and implicitly refers to remands in subsection (h),[8] it does not state that the types of remands addressed in § 4-183 constitute an exhaustive list despite the legislature's knowledge of how to express such an intent. See *Vincent* v. *New Haven*, 285 Conn. 778, 789, 941 A.2d 932 (2008). Reviewing courts typically have the ability to

[8] Our Supreme Court has stated that orders under subsection (h) of § 4-183 "fairly may be characterized as remands." *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 558.

obtain articulations from the tribunals whose decisions they review.[9]

In *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 558 n.7, our Supreme Court, determining that the remand order at issue in that case properly was rendered under § 4-183 (j), reasoned that "[t]he remand cannot be characterized as ordering an articulation, *which would fall outside the scope of § 4-183 altogether* . . . ." (Emphasis added.) In the present case, the May 4, 2010 remand order is not within the scope of § 4-183, can properly be characterized as a request for an articulation and, therefore, was not a final judgment. Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss. Having determined that the first remand order was not a final judgment, we turn to the defendant's remaining claims, which concern the merits of the second remand order in the court's October 27, 2010 judgment.

II

The defendant claims that the trial court erred in reversing the decision of the referee and remanding the discrimination claim to the referee on the issue of pretext. We agree.

The referee analyzed Peterson's discrimination claim using the pretext model articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[10] In order to set forth a prima facie

[9] For example, Practice Book § 60-5 provides for remands by appellate courts "for a further articulation of the basis of the trial court's factual findings or decision." By analogy, a trial court hearing administrative appeals has the same power, which sometimes is necessary to reach a reasoned and informed decision.

[10] "The United States Supreme Court has set forth three theories of discrimination, each of which requires a different prima facie case and corresponding burden of proof. These theories are: (1) the [pretext] theory. . . (2) the disparate impact theory . . . and (3) the [mixed motives] theory." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 225–26, 939 A.2d 541 (2008).

case of discrimination under the pretext model, a plaintiff must establish that she: "(1) is a member of a protected class; (2) applied for and was qualified for the benefit or position; (3) suffered an adverse action by the defendant; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 227, 939 A.2d 541 (2008), citing *McDonnell Douglas Corp.* v. *Green*, supra, 802.

"Under [the burden shifting] analysis [of *McDonnell Douglas Corp.*], the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 220, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008).

The referee determined that Peterson was "a member of a protected class by virtue of her gender (female); that she suffered an adverse employment action; and that the decision not to pass [Peterson] on the January 2003 . . . physical agility test gives rise to an inference of discrimination." The referee found, however, that Peterson had not established a prima facie case of discrimination because she had not proven that she was qualified for the position as a result of her having not passed the department's physical agility test. The referee also found, in the alternative, that even assuming Peterson had established a prima facie case, she could not prevail because the defendant had produced a legitimate business reason for the adverse employment decision, and Peterson had failed to prove that reason to be a pretext for discrimination.

With respect to the September, 2003 selection process, the referee found that Peterson had established a prima facie case because, having passed the preliminary tests, she was qualified for the position. The referee determined, however, that Peterson had not proven by a preponderance of the evidence that the reason proffered by the defendant for why she was not selected was a pretext for discrimination actually resulting from discriminatory animus on the part of Brooks.

The court determined that the referee's findings regarding the business justification and pretext were unclear and required further elaboration. The court further stated that the referee failed to consider evidence of a discriminatory environment and that such evidence properly should be considered when evaluating the issue of pretext.

The defendant argues on appeal that the court erred in reversing the decision and remanding the case to the referee on the basis that the referee's discussion of pretext was inadequate and that the referee failed to address additional evidence of discrimination. The defendant maintains that, because there was substantial evidence to support the referee's decision on the issue of pretext, it was error for the court not to sustain the decision. In its brief, the commission argues that the court's decision to remand the case on the issue of pretext was proper because the referee committed legal error by failing to consider adequately all probative evidence on the issue of pretext. We agree with the defendant.

"Judicial review of [an administrative agency's] action is governed by the [Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably,

arbitrarily, illegally, or in abuse of its discretion. . . . In order for a reviewing court to reverse or modify an agency's decision . . . § 4-183 (g) (1) [now subsection (j)] requires the court to find that substantial rights of the appellant have been prejudiced." (Citation omitted; internal quotation marks omitted.) *Sgritta* v. *Commissioner of Public Health*, 133 Conn. App. 710, 715, 37 A.3d 774, cert. denied, 305 Conn. 906, 44 A.3d 182 (2012).

The trial court concluded that the referee did not consider all the evidence before him, in particular, evidence of a discriminatory environment, when making his decision. There is, however, nothing in the record to justify this conclusion. We presume that the referee considered all the evidence before him in arriving at his decision. See *Bancroft* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 391, 404, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

In support of its conclusion that the referee failed to consider evidence of a discriminatory environment—more specifically, several instances of uncivil and demeaning behavior—when making his determination on pretext, the court highlighted a footnote in the referee's decision, which stated: "While [Peterson] testified to these unpleasant instances the pending complaint does not include these. It is important to note that [Peterson] has not made a claim of a hostile work environment which could have made these experiences relevant." This footnote, which was made in the context of the referee's statement of the parties' positions, simply states that a hostile work environment claim per se was not before the referee. It does not necessarily mean that the referee considered evidence of her environment to be irrelevant for the purpose of context or background when analyzing Peterson's claim of discrimination. The referee included in his findings of fact

"unpleasant instances" of discriminatory treatment.[11] These facts were found without any indication that the referee deemed them irrelevant.

The referee also made findings regarding Brooks' use of the "single norm" Cooper Standards in evaluating the January test. The referee found that "Brooks had no preference as to what standard was utilized for the 300 meter event other than to use what the [academy] used so that the [department's] physical assessment 'mirrored' exactly what the [academy] did." The fact that the referee included findings regarding the discriminatory environment and also made findings supporting his conclusion that Peterson failed to prove that the legitimate business reason presented by the defendant was a pretext indicates that the referee did consider the work environment.

Applying our highly deferential standard of review, we determine that the referee's conclusions regarding pretext were supported by substantial evidence. With respect to the January-February, 2003 selection process, the referee found that Peterson failed to meet her burden of proving a prima facie case of discrimination under the *McDonnell Douglas Corp.* test because she failed to show that she was qualified for the position of patrol canine handler.[12] The referee also found that even if Peterson had established a prima facie case, the defendant met the burden of producing a legitimate business reason, and Peterson had failed to prove that that reason was a pretext for discrimination.

The referee's factual findings support a conclusion that Peterson did not set forth a prima facie case of

[11] Although the referee found that, over a period of years, several specific insulting and demeaning events had occurred, we see no useful purpose in reciting the details here.

[12] Although not explicitly stated by the referee, this conclusion clearly applies to the January, 2003 test, which Peterson did not pass.

discrimination as to the January, 2003 test, which she failed, and that Brooks' use of the single norm Cooper Standard to score the 300 meter run was not a pretext for discrimination.[13] The referee found that the process of selecting canine handlers included a physical agility test conducted by the department, and that Peterson did not pass the department's physical agility test because she failed the 300 meter run under the single fitness norm. The referee rejected Peterson's argument that Brooks, motivated by discriminatory animus toward Peterson on the basis of her sex, scaled the 300 meter run using a single fitness norm to ensure that she failed. He also rejected Peterson's argument that there was no evidence to suggest that the academy required any particular score on the 300 meter run in order to submit candidates to its canine training program. The referee found that the most crucial qualification for selection to attend the academy was passing the department's physical agility test and that Peterson did not pass. The physical agility test conducted by the academy included a 300 meter run, which was scored using the Cooper Standards. In determining the passing score for each event in the January, 2003 physical agility test, which involved the 300 meter run, Brooks used the Cooper Standards that had been supplied to him by the academy. For the 300 meter run, the Cooper Standard used by Brooks did not differentiate between males and females or for the age of the candidate but, rather, provided a single set of scores. Following the January, 2003 physical agility test, Brooks contacted Sergeant Kevin Rodino, the commanding officer of the academy, and confirmed that a single norm standard was the proper standard utilized for the 300 meter run. Upon receiving confirmation from Rodino, Brooks determined that Peterson had failed the 300 meter run event.

[13] Brooks used this standard in the January, 2003 test, which Peterson did not pass, and the September, 2003 test, which Peterson passed.

Brooks first became aware of a Cooper Standard for the 300 meter run that was scored by age and gender at the hearing on Peterson's grievance, which, of course, occurred after the January-February, 2003 selection process. After having been made aware of this standard, Brooks did not reassess his use of a single norm standard in scoring the January 26, 2003 test. He had no preference as to what standard would be used, but wanted the department's test to employ the same standards as the academy. Because he believed that the academy used a single norm standard in January, 2003, Brooks used the same standard.

The referee's findings also support his conclusion that Peterson did not prove that the reasons provided for her not having been selected in September, 2003, were pretextual. As to Brooks' decision to assign the designated spot in the September, 2003 training class to Lawlor, despite his having ranked fourth, the referee determined that Brooks' decision in this regard was a result of a previous commitment to Lawlor. The referee stated that "[i]n addressing the issues raised by [Peterson] I could neither find justification, nor was any offered and substantiated, for concluding that using the results of the events to rank the candidates was improper." The referee determined that Brooks' ranking of the candidates to determine which candidate would be sent to canine training as Lawlor's alternate to be a "clear, understandable and objective standard." The referee found that the academy used the Cooper Standards scores as a "ranking tool." The referee did not credit Peterson's argument that the ranking system used by Brooks was a pretext for discrimination but found that argument to be "totally unsupported" by the evidence and "mere conjecture."

The referee's findings and conclusions indicate that, after considering Peterson's arguments, he rejected them and found that she had not met her burden of

proof. The referee found the following. In determining which candidates to send to the academy, Brooks ranked the candidates first through fifth place for each of the events and, after eliminating each candidate's lowest score, averaged the event scores. Peterson placed fifth and, accordingly, was not selected. Lawlor, the officer who placed fourth, was selected because he had to withdraw from an earlier canine training class. The officer who placed first was also selected.

The referee determined that the ranking of candidates was objective and not a pretext for discrimination. The referee found that Brooks began using the physical agility test as part of his selection process after he sent three officers to canine training and they failed the physical agility test administered by the academy. He wanted to avoid the embarrassment of officers' inability to pass the academy's physical agility test, and he wanted to avoid losing slots assigned to the department in the academy's sixteen week training class for canine handlers. On the record before us, we conclude that the referee's decision in this regard was based on substantial evidence.

III

The defendant next claims that the court erred in reversing the decision of the referee and remanding the case to the referee for the purpose of reconsidering the issue of physical disability. We agree.

Peterson argued before the referee that she was discriminated against as a result of a physical disability (transsexual) and a mental disability (gender dysphoria).[14] The referee found that Peterson had been diagnosed with gender identity disorder, which is defined

[14] The referee construed Peterson's complaint as claiming both a mental disability and a physical disability.

in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (4th Ed. 1994) (DSM-IV). The referee concluded that Peterson was part of a protected class because of her mental disability.[15] With respect to Peterson's claim of physical disability, the referee found that Peterson had not produced sufficient evidence to satisfy the definition of "physical disability" in General Statutes § 46a-51 (15).[16]

The court determined that *Conway* v. *Hartford*, supra, 19 Conn. L. Rptr. 109, a case on which the referee had relied in the context of his discussion on physical disability, was not applicable and remanded the case for the referee to consider the issue of physical disability without the aid of *Conway*.

Peterson alleged discrimination under § 46a-60 (a) (1), which provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness . . . ."

[15] General Statutes § 46a-51 (20) provides: " 'Mental disability' refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders.' "

[16] General Statues § 46a-51 (15) provides: " 'Physically disabled' refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device . . . ."

The court improperly remanded the case to the referee regarding physical disability because such a finding was not necessary in the context of this case. Even if the referee were to have found that Peterson suffered from a physical disability neither the analysis nor the outcome of the case would change. When analyzing Peterson's claim of discrimination under the *McDonnell Douglas Corp.* test, the referee found that Peterson belonged to a protected class by virtue of a mental disability. A finding regarding physical disability would add nothing to the legal analysis and could not, in itself, change the result. No greater benefit would have arisen from being a member of a protected class for more than one reason. Accordingly, the court erred in reversing the referee's decision and remanding the case on this ground.

IV

The defendant next claims that the court erred in reversing the decision of the referee and remanding the gender stereotyping claim to the referee. We agree.

"[I]n enacting Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII)], Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). . . . As a result, [s]ex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination. . . . That is, individual employees who face adverse employment actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII." (Citation omitted; internal quotation marks omitted.) *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).

The referee determined that the *McDonnell Douglas Corp.* model was appropriate. The referee noted that, although gender stereotyping was a recognized claim, it was not clear exactly what Peterson was alleging with respect to her gender stereotyping claim. The referee did not find credible statements of Officer Darren Besse that, during the January, 2003 physical agility test, he had overheard Brooks refer to Peterson as a "he/she/it," say that he believed that Peterson should be graded as a male for the physical agility test or state that he would never send Peterson to the academy as she would be an embarrassment. The referee determined that once the " 'Besse comments' " were rejected, the record contained no evidence to establish gender stereotyping by Brooks.

The court included a footnote in its discussion of the three issues that it remanded to the referee that "[t]he [commission] and [Peterson] may also seek clarification on remand on their gender stereotyping claim. . . . [T]he referee was unclear as to the nature of this claim. To the court, it appears that the [commission] and [Peterson] contend that [she] as a postoperative transsexual was entitled to be free from discrimination due to her past gender."

The defendant argues that, although the referee was somewhat puzzled as to what specifically Peterson was claiming in her gender stereotyping claim, he nevertheless considered the claim on the merits and found that there were no facts supporting the claim. Because the referee considered the claim and set forth his reasoning, the defendant argues that there was no need for the court to remand the claim of gender stereotyping to the referee.

The court addressed the issue of gender stereotyping in a brief footnote. The court did not explicitly reverse and remand on the issue of gender stereotyping, but

merely stated that the commission and Peterson *may* seek clarification on remand if they wanted to do so. The court's footnote regarding clarification of the gender stereotyping claim merely highlighted one aspect of the court's remand for further analysis regarding the discrimination claim. Because we have determined that the remand on the discrimination claim was improper, we have no further need to discuss the scope of the remand.[17]

V

The defendant last claims that the court erred in reversing the decision of the referee and remanding the retaliation claim to the referee. We agree.

On August 6, 2003, Peterson filed her initial complaint with the commission alleging that on or about February 11, 2003, she was denied the opportunity to be trained as a patrol canine handler because of her sex and physical disability in violation of §§ 46a-58 (a) and 46a-60 (a) (1). On October 15, 2003, Peterson amended her complaint to add a claim of retaliation in violation of § 46a-60 (a) (4). In her affidavit in support of her amended complaint, Peterson stated: "I believe I was denied training opportunities and the position of patrol K-9 handler because I have opposed discriminatory employment practices and because I filed a complaint with the [commission]."

In his November 4, 2008 decision, the referee dismissed Peterson's claim of retaliation. The referee analyzed Peterson's retaliation claim as it pertained to the

[17] The United States Supreme Court embraced a gender stereotyping theory of Title VII liability in *Price Waterhouse* v. *Hopkins*, supra, 490 U.S. 228. In that case, the court determined that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' " Id., 256. Nonetheless, we conclude that the referee's credibility determination is dispositive of this claim. If the referee did not find Besse's statements credible, then there was no viable claim.

selection process including the September, 2003 physical agility test and determined that, assuming arguendo that Peterson had established a prima facie case, Peterson had not sustained her burden to prove that the legitimate business reasons advanced by the defendant were merely a pretext for retaliation.

On May 4, 2010, the court remanded the matter to the referee to clarify, inter alia, whether his decision addressed the retaliation claim as it might relate to the January-February, 2003 selection process. The referee clarified that he did not address the retaliation claim as to the January-February, 2003 selection process because neither the initial complaint nor the amended complaint alleged that Brook's determination that Peterson had failed the January 26, 2003 agility test was motivated by retaliation. The referee further stated that the only protected activity alleged in the amended complaint was Peterson's filing of the initial complaint. Accordingly, the referee's decision addressed only that protected activity. Because the filing of the complaint followed the announcement of the results of the January-February 2003 selection process, the department's failure to select her in February could not logically have been motivated by the filing of that complaint.

In its memorandum of decision, the court concluded that the referee erred in determining that the only protected activity Peterson alleged in the retaliation claim of the amended complaint was the filing of the August, 2003 commission complaint. The court determined that the amended complaint, when read liberally, included claims that a retaliatory motive underlay her failure to be chosen in both the January-February, 2003 and the September, 2003 selection processes.[18] The court concluded that Peterson's claims of retaliation in the January-February, 2003 selection process, which claims

[18] Peterson's posthearing brief reveals the following as a claimed basis for her retaliation claim regarding the February, 2003 selection process, which she alleged she made in her amended complaint. Peterson responded

were raised in October, 2003, relate back to the August, 2003 complaint and, thus, were not time barred by the 180 day limitation period of General Statutes § 46a-82 (f).

The defendant claims that the court erred in reversing the decision of the referee and remanding the retaliation claim because the October 15, 2003 amended complaint did not relate back to the August 6, 2003 complaint. Accordingly, the defendant contends that, under the applicable 180 day statute of limitations, allegations of retaliatory acts that occurred before April 18, 2003, are time barred and, therefore, any act of retaliation occurring during the January-February, 2003 selection process may not provide the basis for a viable cause of action under this analysis.

According to § 46a-82 (f), a complaint to the commission alleging employment discrimination "must be filed within one hundred and eighty days after the alleged act of discrimination . . . ." General Statutes § 46a-82 (f). The 180 day time requirement is not jurisdictional but rather is subject to waiver and equitable tolling. *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 266–70, 777 A.2d 645 (2001).

Section 46a-54-38a (b) of the Regulations of Connecticut State Agencies is similar to our common law and provides: "A complaint may be amended to restate its contents on a commission complaint form, to cure technical defects and omissions or to clarify and amplify

to the May, 2002 announcement for patrol canine handlers but was not among those selected by Brooks to take the December, 2002 academy physical agility test. Peterson complained to her union president that she had been discriminated against in the December, 2002 selection process. Wood spoke with Brooks and the chief of police. During the January, 2003 department physical agility test, Brooks exhibited hostility and anger toward Peterson. Under this reasoning, the decision not to select her in February, 2003, was motivated by Brooks' desire to retaliate for her complaint to the union.

allegations made therein. Such amendments and amendments alleging additional acts that constitute discriminatory practices which are reasonably like or related to or growing out of the allegations of the original complaint, including those facts discovered during the investigation of the original complaint, and including additional protected class status or naming additional respondents who have had notice of the complaint, relate back to the date the complaint was first received."

"In reviewing whether the court properly concluded that the relation back doctrine applied to the amended commission complaint, we look to our well established common-law rules governing that doctrine established by our courts." *Wright* v. *Teamsters Local 559*, 123 Conn. App. 1, 6, 1 A.3d 207 (2010). "[A] party properly may amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same. . . . If a new cause of action is alleged in an amended complaint, however, it will [speak] as of the date when it was filed. . . . A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. . . . A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. The facts which establish the existence of that right and that delict constitute the cause of action. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but whe[n] an entirely new and different factual situation is presented, a new and different cause of action is stated." (Citations omitted; internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 129–30, 788 A.2d 83

(2002). "If the alternate theory of liability may be supported by the original factual allegations, then the mere fact that the amendment adds a new theory of liability is not a bar to the application of the relation back doctrine. . . . If, however, the new theory of liability is not supported by the original factual allegations of the earlier, timely complaint, and would require the presentation of new and different evidence, the amendment does not relate back." (Citation omitted.) *Sherman* v. *Ronco*, 294 Conn. 548, 563, 985 A.2d 1042 (2010).

Our review of the applicability of the relation back doctrine is plenary. See id., 554 n.10. The interpretation of pleadings also presents a question of law over which our review is plenary. *Landry* v. *Spitz*, 102 Conn. App. 34, 41, 925 A.2d 334 (2007).

In determining whether the relation back doctrine applies, we begin with a closer look at Peterson's initial and amended complaints. Peterson's initial complaint, in August, 2003, concerned the January-February, 2003 selection process and included allegations of events occurring prior to that process that show a possibility of discrimination in that process. In her affidavit in support of her initial complaint, Peterson stated that she repeatedly had applied for and repeatedly been denied the position of patrol canine handler, most recently on February 11, 2003.[19] Peterson's amended complaint filed in October, 2003, in contrast, alleged facts occurring after the filing of her initial complaint. In her affidavit in support of her amended complaint, she stated that after she had filed the complaint with the commission in August, 2003, she passed the physical agility test administered by the defendant but was nonetheless denied the opportunity to go to the requisite training to become a patrol canine handler.

[19] The initial complaint included a form, where Peterson checked off the applicable statutes and forms of discrimination, and an affidavit. The amended complaint consisted of an affidavit.

The language in her amended complaint specifically at issue before the referee and the trial court is as follows. "After filing the complaint of discrimination, I applied for a position of patrol K-9 handler. In August, 2003, I passed the physical agility test administered by the [department]. I was denied the opportunity to go to the requisite training to become a patrol K-9 handler. I believe I was denied training opportunities and the position of patrol K-9 handler because I have opposed discriminatory employment practices and because I filed a complaint with the [commission]." She clearly stated two bases for her claim of retaliation: her opposition to discriminatory employment practices *and* the filing of her August, 2003 complaint with the commission. The only act of retaliation alleged was the failure to select her in the September, 2003 selection process.[20] The phrase "because I have opposed discriminatory employment practices" stated another possibly protected activity, in addition to the filing of the August, 2003 complaint, on which she based her claim that her rejection in the September, 2003 selection process was the result of a retaliatory motive.

The alleged act of retaliation in the amended complaint is, however, her failure to be selected in the September, 2003 selection process, and, therefore, the operative facts ought not be deemed to arise from or to amplify the allegations in the initial complaint, which concerned, as an act of retaliation, the January-February, 2003 selection process. Because the allegations in the amended complaint present a different set of operative facts from those presented in the initial complaint, the relation back doctrine is inapplicable.[21] The referee

[20] Her affidavit refers to an "August 2003" physical agility test. Both parties, the referee and the court apparently understood this to refer to the September 7, 2003 physical agility test.

[21] The facts of *Wright* v. *Teamsters Local 559*, supra, 123 Conn. App. 1, provide a useful foil. There, a union member claimed that he lost his position as a union steward because of racial discrimination. Id., 3. He subsequently amended his complaint to include age discrimination as another reason he

properly declined, therefore, to address the issue of retaliation in the January-February, 2003 selection process because the initial complaint did not raise it, and the amended complaint was filed too late to raise it in a timely manner. Accordingly, the court erred in reversing the decision of the referee and remanding the issue of retaliation as to the January-February, 2003 selection process to the referee.[22]

The judgment is reversed and the case is remanded to the trial court with direction to dismiss the plaintiffs' appeal and to render judgment enforcing the decision of the referee.

In this opinion the other judges concurred.

BENNIE GRAY *v.* COMMISSIONER OF CORRECTION (AC 32906)

Bear, Espinosa and West, Js.

Syllabus

The petitioner, who had been convicted on a plea of nolo contendere of the crime of manslaughter in the first degree with a firearm, sought a writ of habeas corpus claiming that his appellate counsel in a prior habeas action had rendered ineffective assistance. Specifically, he claimed that appellate counsel in the prior action failed to challenge directly the habeas court's application of the incorrect standard for ineffective assistance of counsel in guilty plea cases, which failure caused this court to render an erroneous decision on appeal. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly rejected the petitioner's claim that his appellate

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lost his position. Id. Because the same set of facts underlay each complaint in that case, but the second complaint alleged discrimination that arose from an additional alleged animus, the second complaint related back to the first. Id., 6–7. In the present case, an entirely different act of retaliation is alleged in the second complaint, and, therefore, a different set of operative facts exists.

[22] We note that the referee found, in any event, that the results of both selection processes were motivated only by legitimate considerations.

counsel in the prior habeas action had provided ineffective assistance, the petitioner having failed to show that appellate counsel's performance was deficient based on any failure to brief properly and to advocate the appropriate standard for ineffective assistance of trial counsel in guilty plea cases; contrary to the petitioner's claim, his appellate counsel briefly raised the argument advanced by the petitioner that the standard set forth in *Hill* v. *Lockhart* (474 U.S. 52) was applicable and he attempted to distinguish the standard set forth in *Copas* v. *Commissioner of Correction* (234 Conn. 139), which was binding precedent when appellate counsel presented his argument to this court, the petitioner did not offer any Connecticut case supporting his argument that *Copas* was distinguishable because his case did not involve undiscovered evidence or defenses, and, by arguing the *Copas* standard, appellate counsel elected to maneuver within the existing law and, therefore, did not render deficient performance.

Argued May 15—officially released September 18, 2012

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, *Schuman*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Laljeebhai R. Patel, special public defender, for the appellant (petitioner).

Emily Graner Sexton, special deputy assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Marcia Pillsbury*, special deputy assistant state's attorney, for the appellee (respondent).

Opinion

WEST, J. The petitioner, Bennie Gray, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly rejected his claim that his appellate counsel in his first habeas action rendered ineffective assistance by not advocating the

correct standard for ineffective assistance of trial counsel in guilty plea cases. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. On September 10, 1998, the petitioner pleaded nolo contendere to manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and was sentenced to twenty years imprisonment. In the petitioner's first habeas action, he claimed, inter alia, that his trial counsel, attorney Burton Weinstein, rendered ineffective assistance by fraudulently inducing him to enter the nolo contendere plea. On July 23, 2004, the habeas court denied the petition concluding that "[t]he [p]etitioner has persuaded this [c]ourt that [trial counsel] used improper tactics to pressure the [p]etitioner to plead nolo contendere and accept the plea bargain but has not met his burden of proving that [trial counsel's] actions constituted ineffective assistance of counsel in view of the result as opposed to the potential result." On appeal, this court affirmed the judgment of the habeas court. *Gray* v. *Commissioner of Correction*, 99 Conn. App. 444, 449, 914 A.2d 1046, cert. denied, 282 Conn. 925, 926 A.2d 666 (2007). This court determined that "[t]he habeas court recognized and applied the correct standard for adjudicating the petitioner's habeas claim. It asked whether there was a reasonable probability that if it were not for the ineffectiveness of counsel for the [petitioner], there is a reasonable probability that the outcome would have been different?" (Internal quotation marks omitted.) Id., 448.

In the present case, the petitioner filed a second habeas petition claiming that he received ineffective assistance of appellate counsel in his first habeas appeal, where he was represented by attorney Donald

O'Brien.[1] The petitioner alleged that appellate counsel failed to challenge directly the habeas court's application of the incorrect standard for ineffective assistance of trial counsel in guilty plea cases, which failure caused this court to render an erroneous decision. In this regard, the petitioner alleged that the appropriate standard in his case was set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), and that the standard set forth in *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 662 A.2d 718 (1995), is inapplicable.[2] Specifically, the petitioner alleged that,

[1] The petitioner filed a two count amended habeas petition, dated November 24, 2009, in which he alleged that appellate counsel was ineffective because: (1) he failed to challenge directly the merits of the habeas court's legal conclusion and (2) he failed to file a Practice Book § 71-5 motion for reconsideration. The habeas court did not address the second count, and the petitioner has not raised a claim regarding the second count in this appeal.

[2] Fundamental to the petitioner's claim is an understanding of the appropriate standard for ineffective assistance of trial counsel in guilty plea cases. In *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court "adopted a two-part standard for evaluating claims of ineffective assistance of counsel." *Hill* v. *Lockhart*, supra, 474 U.S. 57. First, "the [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." (Internal quotation marks omitted.) Id. Second, "[t]he [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.) Id.

In *Hill*, the United States Supreme Court held "that the two-part *Strickland* . . . test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* . . . test is nothing more than a restatement of the standard of attorney competence . . . . The second, or prejudice, requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the prejudice requirement, the [petitioner] 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." (Internal quotation marks omitted.) Id., 58–59.

Nevertheless, the *Hill* court further stated that "[i]n many guilty plea cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination

because his case does not involve a failure of trial counsel to discover evidence or defenses, under *Hill*, the focus is on the plea proceeding and its outcome, and not the outcome of a possible criminal trial.

In its memorandum of decision denying the petitioner's habeas petition, the habeas court found that appellate counsel did raise the *Hill* standard in his brief and attempted to distinguish *Copas*. The habeas court further noted that this court already has determined that the appropriate standard involves inquiring whether "there is a reasonable probability that the outcome would have been different?" (Internal quotation marks omitted.) *Gray* v. *Commissioner of Correction*, supra, 99 Conn. App. 448. The habeas court stated that even if appellate counsel had developed the argument with more focus and detail, he would not have been successful because, although this court has not always quoted the "different outcome" component of the prejudice test in guilty plea cases, it remains an integral part of *Hill* and not merely a separate prong added by *Copas*. Finally, the habeas court rejected the petitioner's argument that the "different outcome" test does not apply because this case does not involve a failure to discover evidence or defenses. The court stated: "Logically it

whether the error prejudiced the [petitioner] by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the [petitioner] of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." (Internal quotation marks omitted.) Id., 59. Seizing on this language, our Supreme Court has stated that "*Hill* requires the petitioner to demonstrate that he would not have pleaded guilty, that he would have insisted on going to trial, and that the evidence that had been undiscovered or the defenses he claims should have been introduced were likely to have been successful at trial." *Copas* v. *Commissioner of Correction*, supra, 234 Conn. 151.

makes no sense to delete the *Copas* 'different outcome' test merely because the petitioner here claimed in his prior habeas petition that his trial attorney improperly persuaded him to plead guilty, as opposed to the reported cases in which a [petitioner] claims that his trial counsel failed to discover evidence or defenses. The precise reason why counsel was ineffective in inducing the petitioner to plead guilty—whether it is bad advice or failure to investigate—is immaterial if the petitioner is actually guilty. In either scenario, the petitioner is not truly prejudiced unless there is a reasonable probability that he would achieve some measure of success at trial." The habeas court granted the petition for certification to appeal from the judgment. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly denied his claim that his appellate counsel in his first habeas action rendered ineffective assistance. Specifically, the petitioner argues that the *Hill* standard is the correct standard, which requires proof only that the petitioner would have insisted on going to trial. He further argues that, had his appellate counsel properly briefed and advocated this standard, this court would have reversed the habeas court in the first habeas action and restored the petitioner's constitutional right to a jury trial. We disagree.

We begin by setting forth the standard of review applicable to the petitioner's 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. . . . 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." (Internal quotation marks omitted.) *Moore* v. *Commissioner of*

Correction, 119 Conn. App. 530, 535–36, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

"Our Supreme Court has adopted [the] two part analysis [set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] in reviewing claims of ineffective assistance of appellate counsel." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 131 Conn. App. 805, 808, 29 A.3d 166 (2011). "To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . First, deficient performance may be proved by showing that the counsel's representation fell below an objective standard of reasonableness. . . . Second, prejudice to the defense requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 119 Conn. App. 534–35; see also *Strickland* v. *Washington*, supra, 687.[3] "Because the petitioner must satisfy both prongs of the *Strickland* test to prevail on a habeas corpus petition, this court may dispose of the petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 535.

[3] With regard to the prejudice prong, however, "our Supreme Court distinguished the standards of review for claims of ineffective trial counsel and ineffective appellate counsel." *Moore* v. *Commissioner of Correction*, supra, 119 Conn. App. 535; see *Small* v. *Commissioner of Correction*, 286 Conn. 707, 721–24, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "For claims of ineffective appellate counsel, the [prejudice] prong considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 535.

Under the performance prong, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . The right to counsel is not the right to perfect representation. . . . [Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones. . . . [I]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 131 Conn. App. 808–809.

The habeas court concluded that "there was no ineffective assistance in, or any prejudice resulting from, any failure of [appellate counsel] to argue at greater length that the *Copas* 'different outcome' test did not apply in this case."[4] Because we agree that the petitioner has failed to show that appellate counsel's performance was deficient based on any failure to brief properly and to advocate the appropriate standard for ineffective assistance of trial counsel in guilty plea cases, we agree with the judgment of the habeas court.

[4] We interpret the court's denial of the petition to be under both the performance and the prejudice prongs of the *Strickland* test.

At the outset, the petitioner failed to offer any expert testimony that appellate counsel rendered deficient performance. Instead, the petitioner offered his own testimony concerning the appropriate standard that his appellate counsel should have briefed and advocated before this court. Although "[a]n expert witness is not essential to show that an attorney's performance was so deficient that it fell below the standard of reasonably effective assistance . . . in many cases, expert testimony is useful." *Small* v. *Commissioner of Correction*, 98 Conn. App. 389, 394, 909 A.2d 533 (2006), aff'd, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). Furthermore, as noted by the habeas court, appellate counsel did, at least briefly, raise the argument advanced by the petitioner by setting forth the *Hill* standard and attempting to distinguish *Copas*.

Copas was binding precedent when appellate counsel presented his argument to this court. To the extent that the petitioner argues that *Copas* is distinguishable because his case does not involve undiscovered evidence or defenses, the petitioner does not offer any Connecticut case that has accepted this argument or that has addressed the apparent dichotomy between *Hill* and *Copas* that the petitioner offers for our consideration in this appeal. This court has cited the modified *Hill* standard for the proposition that "the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 722, 789 A.2d 1046 (2002). In doing so, however, this court has also noted that "[r]easonable probability does not require the petitioner to show that counsel's deficient conduct more likely than not altered the outcome in the case, *but he must establish a probability sufficient to undermine confi-*

dence in the outcome." (Emphasis added; internal quotation marks omitted.) Id.; see also *Shelton* v. *Commissioner of Correction*, 116 Conn. App. 867, 874–75, 977 A.2d 714, cert. denied, 293 Conn. 936, 981 A.2d 1080 (2009); *Mock* v. *Commissioner of Correction*, 115 Conn. App. 99, 105, 971 A.2d 802, cert. denied, 293 Conn. 918, 979 A.2d 490 (2009).[5]

"Moreover, numerous state and federal courts have concluded that counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance. . . . Nor is counsel required to change then-existing law to provide effective representation. . . . Counsel instead performs effectively when he elects to maneuver within the existing law, declining to present untested . . . legal theories." (Citations omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 461–62, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). By arguing the *Copas* standard, appellate counsel elected to maneuver within the existing law and, therefore, did not render deficient performance.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] The petitioner, however, has set forth a number of cases that have not cited the "different outcome" component of the test. See *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 598, 940 A.2d 789 (2008); *Gudino* v. *Commissioner of Correction*, 123 Conn. App. 719, 723, 3 A.3d 134, cert. denied, 299 Conn. 905, 10 A.3d 522 (2010). In *Crawford*, however, our Supreme Court did not reach the prejudice prong of the test. *Crawford* v. *Commissioner of Correction*, supra, 599–600. In *Gudino*, this court did not address the apparent dichotomy between *Hill* and *Copas* that the petitioner offers for our consideration in this appeal, but, instead, simply concluded that "it is clear from the habeas court's factual findings that the petitioner failed to provide any evidence under the prejudice prong." *Gudino* v. *Commissioner of Correction*, supra, 724. To the extent that these cases support the petitioner's argument, neither of these cases were available for appellate counsel because both were decided after he presented his argument to this court.

STATE OF CONNECTICUT *v.* JAMES R.* (AC 32802)

Lavine, Espinosa and West, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, kidnapping in the second degree, burglary in the second degree and risk of injury to a child, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that numerous instances of prosecutorial impropriety occurred throughout the trial and deprived him of a fair trial:

   a. Contrary to the claims of the defendant, certain statements of the prosecutor did not constitute improper comment on the credibility of the witnesses, the prosecutor did not improperly suggest that the state's witnesses had testified truthfully, it was not improper for the prosecutor to challenge a witness' belief in the defendant's innocence, the prosecutor's questioning of the defendant did not improperly inject a personal opinion that he was guilty, certain rhetorical questions asked by the prosecutor were permissible as they were based on the evidence and the inferences reasonably drawn therefrom, it was not improper for the prosecutor to question the witnesses about the evidence in the state's case consistent with a finding of guilt or to vigorously confront the witnesses in an attempt to discredit their testimony, the prosecutor acted properly in characterizing a 911 recording that was admitted into evidence without objection and by relying on that evidence during his presentation of the evidence and argument to the jury, and the prosecutor was not precluded from asking questions that portrayed the defendant in a negative light and were consistent with the state's theory of the case and the evidence.

   b. Although the prosecutor made an improper derisive comment concerning the testimony of one witness and improperly injected certain comments during cross-examination of the defendant, the defendant failed to demonstrate that the prosecutorial improprieties deprived him of a fair trial, as the instances of impropriety were infrequent, they were neither severe in nature nor central to the critical issues in the case, the trial court's curative measures were sufficiently strong and appropriate, and the state's case against the defendant was strong.

2. The defendant could not prevail on his unpreserved claim that the trial court demonstrated judicial bias in the state's favor and thereby deprived

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

him of a fair trial; there was no merit to the defendant's claim to the extent that it was based on the trial court's actions pertaining to alleged prosecutorial impropriety, this court having concluded that the defendant was not deprived of a fair trial as a result of the few isolated instances of prosecutorial impropriety, and the claim was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233) to the extent that it was based on the trial court's evidentiary rulings and various statements made by the trial court during the course of the trial, as such claims were not constitutional in nature.

Argued March 14—officially released September 18, 2012

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, kidnapping in the second degree, burglary in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Adelman*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the court, *Adelman*, *J.*, issued an articulation of its decision. *Affirmed*.

Brian J. Woolf, with whom were *Kathleen E. Rallo* and, on the brief, *Michael A. Roussos*, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The defendant, James R., appeals from the judgment of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), kidnapping in the second degree in violation of General Statutes § 53a-94 (a), burglary in the second degree in violation of General Statutes § 53a-102 (a) and risk of injury to a child in

violation of General Statutes § 53-21 (a) (1).[1] The defendant claims that (1) prosecutorial impropriety deprived him of a fair trial and (2) the trial court demonstrated judicial bias in the state's favor, thereby depriving him of a fair trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. Prior to the events at issue in this appeal, the female victim had resided with her mother and the defendant, her stepfather, in Waterbury. In 2007, the victim moved out of the residence and began living in another residence in Waterbury. The victim did not speak with her mother after moving out of her mother's residence, but the defendant routinely visited the victim at her new residence. The victim gave birth to a daughter in 2008.

On October 1, 2008, the victim was in her bedroom with a male friend when the defendant entered her apartment and stood in the bedroom doorway. The defendant stated, "I was fit to scare your ass," and, "I would have got you." After the victim walked the defendant to his automobile, the defendant asked the victim questions about people who might be staying at her house and when they would be at her house.

On October 2, 2008, the victim was home, lying on her bed with her seven month old daughter, and watching television. At approximately 9 a.m., the defendant, wearing a black mask, a black shirt, dark pants and gloves, appeared in the victim's bedroom. The defendant was holding a sofa cushion. He lunged on top of the victim and her daughter and held the sofa cushion over the victim's head. When the victim started to scream, the defendant threatened to kill her daughter.

[1] The court imposed a total effective sentence of forty-four years imprisonment, suspended after thirty-four years, followed by fifteen years of probation.

The defendant bound the victim's hands with black electrical tape, put a blanket over her head and undressed her from the waist down. The defendant fondled the victim's breasts and inserted his penis into her vagina for a brief period of time before he was startled by a noise from a neighboring residence. The defendant placed a heavier blanket over the victim's head and carried her to the kitchen, where he restrained her to a chair. The defendant exited the residence, after which time the victim broke free from the chair and obtained assistance from a neighbor. Members of the Waterbury police department arrived on the scene by 9:22 a.m.

By approximately 10:20 a.m., David Sheehan, a police sergeant, was at the defendant's residence after having interviewed the victim. The defendant told Sheehan that he had been home all morning. The defendant voluntarily accompanied a police officer to police headquarters, where he was interviewed by Jorge Tirado, a detective. Initially, the defendant told Tirado that he had been home all morning because his wife asked him to perform work on their house. Later, the defendant's wife told Tirado that she expected that the defendant would be at work that day. When Tirado confronted the defendant with evidence that police officers, upon arriving at the defendant's residence, had observed that the hood of his automobile was very warm to the touch, strongly suggesting that the vehicle had been driven shortly prior to their arrival, the defendant stated that he had moved his automobile from his driveway at approximately 5 a.m., so that his wife could drive her automobile to work. The defendant's wife told Tirado that this was not accurate because her automobile was not parked in the driveway that morning.

Upon further questioning, the defendant told Tirado that he had, in fact, left his residence earlier that morning to purchase cigarettes at a convenience store, a

statement that was not supported by a review of the store's surveillance video. Initially, the defendant stated that he had not had any contact with the victim for months, but he then admitted that he had visited the victim at her residence just days earlier.

After the defendant refused to consent to a search of his automobile, the police obtained and executed a warrant to search the automobile. The search yielded a black ski mask, a pair of gloves and a bag containing a receipt from a hardware store that was located less than one half of a mile from the victim's residence. These items were stashed under the driver's seat of the automobile. The gloves and ski mask bore stains that, within a reasonable degree of scientific certainty, matched the composition of a skin tanning product that the victim had on her body at the time of the sexual assault. DNA testing of one of the gloves seized from the defendant's automobile revealed that the victim was a likely contributor to DNA taken from the glove. The receipt found in the automobile was for a pair of gloves that had been purchased less than one-half hour prior to the invasion of the victim's residence. Police later discovered a roll of black electrical tape in the defendant's residence. Subsequent analysis of the tape revealed that, within a reasonable degree of scientific certainty, the tape used to bind the victim was taken from the roll of tape discovered at the defendant's residence.

Following the search, Tirado asked the defendant if he went to the hardware store that morning. The defendant replied that he had not gone to the store that morning. After Tirado confronted the defendant with the evidence of the store receipt, the defendant stated that he had overlooked the fact that he went to the store that morning to purchase paint. When Tirado specifically asked the defendant if he had purchased gloves at the store, the defendant stated that, earlier, he forgot

to mention the purchase of the gloves because he purchased the gloves after he purchased the paint.

The defendant's conviction followed a trial before a jury. This appeal followed. Additional facts will be set forth as necessary.

I

PROSECUTORIAL IMPROPRIETY

First, the defendant claims that, on more than seventy occasions throughout the trial, prosecutorial impropriety occurred that deprived him of a fair trial. Several portions of the defendant's claim border on being unreviewable, for they consist of little more than references to trial transcripts followed by isolated words and phrases quoted from the trial transcripts. Although the defendant's brief is replete with such transcript citations as well as boilerplate concerning various types of prosecutorial impropriety, in many instances it lacks a thorough analysis. Conclusory labels are not a substitute for sound legal analysis. See *State* v. *T.R.D.*, 286 Conn. 191, 213 n.18, 942 A.2d 1000 (2008) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." [Internal quotation marks omitted.]). Notwithstanding the cursory analysis that accompanies many of the alleged instances of impropriety, we have reviewed the entire claim. We will discuss in detail only those aspects of the claim that, in our assessment, warrant a more thorough discussion.

Before analyzing the alleged impropriety, we observe that the defendant did not object to most of the alleged impropriety at issue in this claim. The claim is reviewable on appeal, however, without resort to an extraordinary level of review. See *State* v. *Fauci*, 282 Conn. 23,

33, 917 A.2d 978 (2007); *State* v. *Warholic*, 278 Conn. 354, 360, 897 A.2d 569 (2006). "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

"[O]ur determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that misconduct was objected to at trial. . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 560–61, 34 A.3d 370 (2012).

A

First, the defendant claims that, at several points during the presentation of evidence, the prosecutor improperly expressed his opinion concerning the credibility of witnesses. "[A]s a general rule, prosecutors should not express their personal opinions about the guilt of the defendant, credibility of witnesses or evidence. . . . Our jurisprudence instructs [however] that

a prosecutor may comment on a witness' motivation to be truthful or to lie." (Citation omitted; internal quotation marks omitted.) *State* v. *Skidd*, 104 Conn. App. 46, 66, 932 A.2d 416 (2007).

The defendant draws our attention to the state's cross-examination of the victim's sister, J, who is the defendant's stepdaughter. During the questioning, the prosecutor questioned the witness about her motivation in testifying for the defendant. After the witness stated that she was testifying truthfully, the prosecutor remarked: "We've seen that, obviously, when I presented the evidence to you," and then followed with a question. The state acknowledges, and we agree, that the prosecutor's comment was improper. Cross-examination did not afford the prosecutor an opportunity to comment on the witness' testimony, and the prosecutor's comment, sarcastic in nature, reasonably could have been interpreted as a derisive comment about the witness' testimony.

Additionally, the defendant refers to the defendant's examination of Kevin McCall, who testified that he believed that he resided with the victim prior to October 2, 2008, and that he resided with the victim for four to six months. During an objection, the prosecutor stated that the witness' memory was not clear. We disagree that the challenged statement constituted an improper comment on the credibility of the witness. The ground of the objection was that an inquiry by the defendant should not be permitted because the witness had not testified clearly with regard to relevant dates. Our review of the testimony that preceded the colloquy reveals that the witness had not testified clearly with respect to when the relevant observations at issue had occurred. Considered in its context, the objection was not an improper comment on the credibility of the witness.

Next, the defendant focuses on the testimony of Christopher Caviness, a boyfriend of one of the victim's sisters, who testified about his observations of the victim being intoxicated and dancing at the defendant's home on Christmas, 2009. During his cross-examination by the state, Caviness testified that he was testifying because of his belief in the defendant's innocence. Thereafter, the prosecutor confronted Caviness with some of the state's tangible physical evidence, specifically, the gloves found under the front seat of the defendant's automobile. When he was asked to comment on this evidence, Caviness shifted blame to the police. The prosecutor responded, "*Oh, it's the police's fault.* . . . Police's fault. What if [the victim's] makeup was on [the gloves], police's fault again?" (Emphasis added.)

We disagree that the challenged portion of the prosecutor's inquiry constituted an improper comment on the witness' credibility. The statement was a means of restating the witness' view of the facts. A prosecutor may not comment on a witness' credibility but may challenge vigorously by means of cross-examination the testimony of any witness. Our case law counsels that not every use of rhetorical devices by the prosecutor is improper. *State* v. *Ancona*, 270 Conn. 568, 594, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005).

The defendant argues that, five times during the state's cross-examination of defense witnesses, the prosecutor definitively asserted that the victim's DNA was identified on the gloves that the police found in the defendant's automobile. The defendant claims that these assertions by the prosecutor were an impermissible means of indirectly bolstering the testimony of state's witnesses who testified about the DNA evidence found on the gloves, a disputed question of fact. Having reviewed these instances, we disagree that they were an impermissible means of suggesting that the state's

witnesses had testified truthfully. Rather, the prosecutor's questions were based on evidence in the state's case. The prosecutor properly questioned defense witnesses about such evidence.

B

Next, the defendant claims that, during the presentation of evidence, the prosecutor expressed an opinion as to his guilt, disparaged his character on multiple occasions and commented negatively on his credibility. It is well established that a prosecutor may not "express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." (Internal quotation marks omitted.) *State* v. *Gibson*, 302 Conn. 653, 660, 31 A.3d 346 (2011). Furthermore, "a prosecutor should avoid arguments which are calculated to influence the passions or prejudices of the jury, or which would have the effect of diverting the jury's attention from their duty to decide the case on the evidence. . . . It is no part of a [prosecutor's] duty, and it is not his right, to stigmatize a defendant." (Internal quotation marks omitted.) *State* v. *Couture*, 194 Conn. 530, 562, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985).

The defendant relies on a question the prosecutor asked of S, who is the victim's sister and the defendant's stepdaughter. S testified that she appeared in court because she believed in the defendant's innocence. The prosecutor responded by asking S about some of the state's evidence, specifically, the gloves found in the defendant's automobile. After S testified that she was not satisfied with the proof presented, the prosecutor asked: "So, once again, we're here today for a man who pays your bills and lets you live [at his residence] free,

and you're just going to sit there with all that . . . I just told you and say that you still think he didn't do it?" (Emphasis added.)

This question was a means of challenging the witness' testimony. This is not a circumstance in which a prosecutor expressed a personal opinion, apart from the evidence, of a defendant's guilt. The prosecutor, referring to specific evidence, merely challenged the witness' belief in the defendant's innocence. The inquiry was not improper.

The defendant also relies on a question that the prosecutor asked of him during cross-examination. The defendant testified that he purchased the gloves found in his automobile from a hardware store. He testified that, after making an initial purchase of paint in the store, he went back inside and bought the gloves. The prosecutor asked: "[*I*]*sn't it true that* [*when*] *you walked out* [*the store*] *after buying paint that day*, *you knew you were going over* [*to the victim's residence*] *to do this* and you went back in and bought the gloves for that reason?" (Emphasis added.)

We are not persuaded that the inquiry was improper. This was not, as is suggested by the defendant, an instance of the prosecutor injecting a personal opinion that the defendant was guilty. The prosecutor merely asked a leading question of the defendant that was consistent with the evidence and the state's theory of the case. Such inquiry was not improper.

The defendant also refers to questions that the prosecutor asked the defendant's wife concerning his relationship with the victim. The defendant's wife testified during her direct examination that she was aware of the fact that occasionally the defendant visited the victim at the victim's residence. The prosecutor asked the defendant's wife what her reaction would be if she learned that the defendant visited the victim more than she

expected. The prosecutor asked the defendant's wife what her reaction would be if she learned that the defendant had "lied" to her about his whereabouts when he was with the victim, or whether it would cause her to ask, "[w]hy would [the defendant] be there or if he was there and not doing anything wrong, why wouldn't he just tell you?"

The inquiry was not a means of disparaging the defendant's character. The inquiry was a means of confronting the witness with circumstances that were not hypothetical, but based on the evidence presented in the state's case. The prosecutor did not argue, apart from the evidence, that the defendant was a liar. Rather, he asked the witness what her reaction would be if she learned that the defendant had lied about his whereabouts on the day prior to the sexual assault of the victim. In light of the fact that the inquiry was supported by the evidence, the inquiry was not improper.

During the defendant's cross-examination, the prosecutor asked the defendant to explain his testimony that, at the time that the police arrived at his house, the automobiles at his house were wet with precipitation, but his house was not wet with precipitation. During the colloquy, the defendant stated that he knew that the house was not wet and that he knew a police officer observed him painting the house. Twice, the prosecutor stated, "Of course you do." Following an objection by defense counsel, the court struck the prosecutor's comments as being "editorial" in nature. We review these comments in their context, a vigorous cross-examination. Nonetheless, as the state acknowledges, it was improper for the prosecutor to inject such commentary during cross-examination of a witness.

The defendant also refers to two other inquiries that, he argues, demonstrate that the prosecutor commented

negatively on his credibility and character. Having carefully reviewed the questions at issue, we are persuaded that they were properly based on the evidence and the state's theory of the case. As stated previously, the state was not precluded from questioning witnesses about the evidence in the state's case or from vigorously confronting witnesses, including the defendant, in an attempt to discredit their testimony.

C

The defendant claims that, twelve times during closing arguments, the prosecutor expressed his personal opinion about the credibility of several witnesses. As stated in part I A of this opinion, such type of commentary is improper.

We carefully have reviewed the words and phrases upon which the defendant has based this aspect of his claim. Given the weakness in the defendant's claim, it would not serve a useful purpose to analyze in detail each aspect of it. Each instance of claimed impropriety did not reflect a personal opinion but was based on the evidence presented and the state's theory of the case. The inquiries were not improper.

D

Next, the defendant claims that, on ten occasions during closing arguments, the prosecutor expressed his personal opinion that the defendant was guilty. As stated in part I B of this opinion, such type of commentary is improper.

We carefully have reviewed the alleged instances of impropriety. The statements made by the prosecutor did not suggest a belief in the defendant's guilt that was personal in nature, meaning *apart from a rational view of the evidence*. Rather, the statements were based on a belief in guilt that was wholly connected to the evidence presented at trial. As this court has observed, "[t]he

prosecutor was not precluded from interpreting the evidence elicited consistent with a finding of guilt." *State* v. *David O.*, 104 Conn. App. 722, 734 n.5, 937 A.2d 56 (2007), cert. denied, 285 Conn. 915, 943 A.2d 473 (2008).

E

The defendant claims that, on three occasions during closing arguments, the prosecutor referred to prejudicial information that was outside of the evidence presented at trial. "Our Supreme Court frequently has stressed the importance of restricting comments made during closing arguments to matters related to the evidence before the jury. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, *it must never be used as a license to state, or to comment upon, or even to suggest an inference from, facts not in evidence, or to present matters which the jury* [*has*] *no right to consider*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Gamble*, 119 Conn. App. 287, 302, 987 A.2d 1049, cert. denied, 295 Conn. 915, 990 A.2d 867 (2010).

The defendant relies on an argument made by the prosecutor in which he referred to the fact that the defendant was at the victim's residence on the day prior to the alleged sexual assault and that he did not reveal this fact to the police when he was questioned. The victim testified that, on October 1, 2008, the day before the alleged assault, the defendant snuck into her apartment and came upon her and a male friend who were playfully "wrestling" on her bed. The victim testified that the defendant entered her residence unannounced and appeared in the doorway of her bedroom, after which time he said, "I was fit to scare your ass." After the victim escorted the defendant out of her residence and to his automobile, the defendant asked the victim several questions about visitors to her residence. During

argument, the prosecutor stated: "Remember the circumstances, they're in [the bedroom], wrestling around, look up, and there he is, standing in the room again, in the doorway. Did he plan on possibly doing something the day before? *Was he doing a little recon mission*, trying to figure out the layout of the land? Was he going in there to see who's hanging around her house? No one knows what's in his mind." (Emphasis added.) Later, the prosecutor reiterated this line of argument, questioning the purpose of the defendant's presence at the victim's residence: "Again, *was that a recon mission*, was that maybe the day he was going to do it?" (Emphasis added.)

We readily conclude that the challenged argument was not improper. There was ample evidence concerning the defendant's unannounced appearance at the victim's residence on the day prior to the alleged assault. It was not unreasonable for the prosecutor to invite the jury to infer that the defendant's conduct in this regard not only was suspicious but that it was evidence of his gathering information to facilitate the assault that occurred the very next day. Accordingly, we conclude that the rhetorical questions at issue were based on the evidence and the inferences reasonably drawn therefrom.

During closing argument, the defendant's attorney argued that it was improbable that the defendant purchased paint and gloves at the hardware store, which was located one-quarter to one-half mile from the victim's residence, and then did not arrive at the victim's residence until nearly one-half hour later. The defendant's attorney opined that it was more reasonable to conclude that the defendant merely went home, as he testified, after he purchased the gloves. The state's theory of the case, supported by the evidence, was that the defendant purchased the gloves at 8:34 a.m. and that the alleged sexual assault did not occur until

approximately 9 a.m. Also, there was evidence that Donald Simpson, a friend of the victim, briefly visited with the victim at her residence sometime between 8:30 and 9 a.m. Simpson testified that he stopped by the residence unexpectedly on his way to work to talk to the victim and that, if he was not at work by 9:15 a.m., he would be considered late for work. He spoke with the victim for less than five minutes while she was on an enclosed porch in front of her residence. He testified that he did not observe an automobile matching the description of the defendant's automobile, let alone any suspicious activity in the area.

Responding to the defense argument, the prosecutor argued: "Mr. Simpson said he was in a rush. He didn't look around to see who was there. [The defendant] could have been sitting there while Simpson's car was in the front of the house, watch him walk up the stairs and walk down the stairs. *He could have been sitting there planning what he was doing. Who knows what goes through someone's head before they commit an act like this.* Improbable, no. My opinion, you can scratch that right off." (Emphasis added.)

The defendant argues on appeal that the argument was improper because "[n]o evidence suggested the defendant's presence at the scene, prior to the commission of the crime, on the date in question." We disagree that the argument was not based on the evidence and the reasonable inferences to be drawn from the evidence. In light of the evidence presented by the state that the defendant was at a hardware store at approximately 8:30 a.m. and at the victim's residence at 9 a.m., it was not unreasonable for the prosecutor to suggest that the defendant could have been parked in the vicinity of the victim's residence at some time prior to 9 a.m., planning his criminal conduct. A careful review of the argument reveals that the prosecutor did not

suggest that there was evidence of the defendant's presence in front of the residence but only that such an occurrence was possible. Nothing about this argument was improper.

F

The defendant argues that, on five separate occasions, the prosecutor improperly questioned defense witnesses about his guilt or innocence and improperly injected his personal opinion by asserting, during questioning of defense witnesses, that the victim's DNA was found on the gloves stashed under the driver's seat of the defendant's automobile. We disagree that the inquiries were improper.

It is well settled that "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." (Internal quotation marks omitted.) *State* v. *Fuller*, 56 Conn. App. 592, 619, 744 A.2d 931, cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000). As stated previously, a prosecutor must refrain from injecting personal opinion into his or her appraisal of the evidence but may, nonetheless, suggest reasonable inferences from the facts in evidence. See *State* v. *Gamble*, supra, 119 Conn. App. 302.

Our review of the record reveals that the inquiries of which the defendant complains were not an attempt to elicit an opinion from the witnesses as to the defendant's guilt or innocence. Rather, they were an attempt to confront defense witnesses with the physical evidence presented by the state. Additionally, although it remained the exclusive province of the jury to determine whether the defendant's DNA was found on the gloves, it did not invade the jury's fact-finding function for the prosecutor to state, in the form of hypothetical questions asked of defense witnesses, that the defendant's DNA was found on the gloves. In so doing, the

prosecutor merely asked questions consistent with the state's theory of the case and a reasonable interpretation of the evidence presented at trial, albeit one consistent with a finding of guilt.

G

Next, the defendant claims that the prosecutor improperly encouraged the members of the jury to identify with the victim. "A prosecutor may not appeal to the emotions, passions and prejudices of the jurors. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal. . . . Similarly, a prosecutor should not inject extraneous issues into the case that divert the jury from its duty to decide the case on the evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Warholic*, supra, 278 Conn. 376. We disagree that the challenged conduct was improper.

Absent objection during the state's case-in-chief, the prosecutor presented the recorded 911 call that a bystander who encountered the victim immediately after the sexual assault made to the police. The prosecutor played the recording for the jury both during the presentation of evidence and during closing arguments. Also, in argument, the prosecutor characterized the victim's emotional state in the recorded conversation as "hysterical" and noted that during the conversation the victim was "screaming."

The defendant claims that the prosecutor engaged in improper conduct by playing the recording before the jury and by so characterizing the victim's emotional state. The defendant asserts that, in light of the fact that he did not contest that a sexual assault of the victim had occurred, the very introduction of this evidence did not serve any proper purpose at trial.

As a preliminary matter, we observe that the defendant has not raised an evidentiary claim in this appeal. The defendant did not object to the admission of the 911 recording, and this prosecutorial impropriety claim does not afford him an opportunity to obtain review of an unpreserved evidentiary claim. Insofar as the claim is rooted in prosecutorial impropriety, it has no merit. As we have stated previously, the prosecutor had a right to comment fairly on the evidence presented at trial. Thus, the prosecutor acted properly in characterizing the 911 recording and by relying on this evidence during his presentation of the evidence and his argument before the jury. Contrary to the defendant's assertions, the defendant has not demonstrated that the prosecutor, in playing the 911 recording or discussing the evidence, appealed to the jury's emotions or invited the jury to identify with the victim.

H

Finally, the defendant claims that, throughout the state's examination of Tirado, the prosecutor improperly encouraged the witness to opine that the defendant was guilty, bolstered the witness' testimony, commented on the defendant's veracity, alluded to the defendant's guilt and elicited testimony that tended to portray the defendant in an incriminating light.

After reviewing the numerous allegations of impropriety, we conclude that no impropriety occurred. The defendant's claim amounts to a careful dissection of words and phrases used by the prosecutor and the witness in an attempt to transmute proper questions of the witness into instances of impropriety. It suffices to observe that the prosecutor was not precluded from asking questions that tended to portray the defendant in a negative light, tended to reveal his implication in the criminal activity with which he was charged and were consistent with the state's theory of the case as

demonstrated by the evidence. The inquiries did not take the form of personal opinion because they were inquiries that were based on the evidence and the rational inferences drawn therefrom, nor did they invite the witness to comment directly on the defendant's guilt.

I

As discussed in parts I A and B of this opinion, the prosecutor engaged in two instances of impropriety during trial: one occurring during the cross-examination of the victim's sister, J, and another occurring during the cross-examination of the defendant. Having identified impropriety, we undertake an analysis under *State* v. *Williams*, supra, 204 Conn. 540, to determine whether it deprived the defendant of a fair trial.

First, the impropriety was not invited by defense conduct or argument; it consisted of the prosecutor's comments during his cross-examination of defense witnesses. Second, although the comments during cross-examination were improper, the instances of impropriety were not severe. Both instances of impropriety were similar in that they consist of editorial comments of a sarcastic nature that reasonably could be viewed as having called into doubt the witness' testimony. The comments did not directly disparage the witnesses or their testimony. Third, the impropriety was infrequent, occurring once during the cross-examination of J and once during the cross-examination of the defendant. Certainly, the impropriety was by no means a pervasive element of the trial. Fourth, the impropriety was not central to the critical issues in the case. Fifth, following a defense objection, the court struck the prosecutor's comments during the cross-examination of the defendant and reminded counsel to "play by the rules." In light of the fact that the impropriety at issue was isolated and not severe in nature, this

curative measure was sufficiently strong and appropriate. Because the defendant did not object to the impropriety that occurred during the cross-examination of J, the court did not take any curative measures with regard to that conduct. Finally, the state presented a very strong case against the defendant, one that included the victim's testimony, physical evidence and strong circumstantial evidence.

Having considered the two instances of impropriety in light of the *Williams* factors, we are not persuaded that the impropriety deprived the defendant of a fair trial. The impropriety was infrequent and was not severe in nature, and the state presented a very strong case against the defendant. The defendant urges us to view cumulatively the claimed instances of impropriety in determining whether he was deprived of a fair trial. Whether viewed individually or cumulatively, the claimed instances of impropriety did not give rise to a constitutional violation.

II

JUDICIAL BIAS

Second, the defendant raises an unpreserved claim of judicial bias. This claim focuses on numerous actions of the trial court throughout the trial. The defendant alleges that the court appeared to collaborate with the state, appeared to adopt a position of advocacy in favor of the state and failed to maintain an impartial atmosphere during the trial. Specifically, the defendant asserts that the court appeared to demonstrate bias in that it, inter alia, (1) used words and phrases in responding to multiple objections raised by the state that "suggest[ed]" its deference to the state's position; (2) "engaged in actions potentially suggesting an adoption of a position of advocacy";[2] (3) showed "seeming

[2] By way of example, the defendant points out that, in response to an objection made by the state on relevancy grounds, the court replied, "I would join in that." After hearing from the defendant's attorney, however,

periodic deference" to the state in ruling on various evidentiary matters; and (4) failed to prevent sua sponte the prosecutor from engaging in the improper conduct addressed in part I of this opinion.

"It is well settled that courts [generally] will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court through a motion for disqualification or a motion for a mistrial. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal. . . . However, because a claim of the appearance of judicial bias strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary . . . we nonetheless have reviewed unpreserved claims of judicial bias under the plain error doctrine." (Citations omitted; internal quotation marks omitted.) *State* v. *Herbert*, 99 Conn. App. 63, 68, 913 A.2d 443, cert. denied, 281 Conn. 917, 917 A.2d 999 (2007).

The defendant does not argue that plain error exists and, thus, we do not engage in plain error review. See *State* v. *McKenzie-Adams*, 281 Conn. 486, 533 n.23, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012). Instead, the defendant seeks review of his unpreserved claim under the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). This request is flawed on several grounds.

the court overruled the state's objection. The defendant also relies on the fact that, on several occasions during the defendant's testimony, the court asked the defendant to respond only to the questions posed to him by counsel.

As a preliminary matter, insofar as the claim is based on "the trial court's actions pertaining to extensive prosecutorial misconduct," the claim is not supported by the record and is, thus, without merit. We already have concluded in part I of this opinion that prosecutorial impropriety sufficient to deprive the defendant of a fair trial did not occur. The impropriety in this case was not extensive, as the defendant argues, but was infrequent and not severe. Furthermore, the record reflects that the court immediately took appropriate corrective measures following the defendant's objection to one of the two improper comments made by the prosecutor. Insofar as the claim is based largely on the propriety of several of the court's evidentiary rulings, the claim is not reviewable under *Golding* because such aspects of the claim are purely evidentiary in nature, brought before this court in the guise of a due process claim. *Golding* review does not afford an opportunity to relitigate each and every adverse ruling that was made at trial; it is an extraordinary remedy reserved for unpreserved constitutional violations. Last, insofar as the claim is based on various statements made by the court during the course of the trial, the claim essentially is that the court *appeared to be partial*. We conclude that these aspects of the claim are not reviewable under *Golding* because they are not constitutional in nature. See *State* v. *D'Antonio*, 274 Conn. 658, 669, 877 A.2d 696 (2005) (claim of judicial bias based on appearance of partiality in plea bargaining negotiations not reviewable under *Golding* because it is not constitutional in nature); *State* v. *Herbert*, supra, 99 Conn. App. 68 n.7 ("[t]he defendant's claim of judicial bias based solely upon the *appearance* of partiality, does not rise to the level of a constitutional violation" [emphasis in original; internal quotation marks omitted]).

The judgment is affirmed.

In this opinion the other judges concurred.

SCHAGHTICOKE INDIAN TRIBE ET AL. *v.* MICHAEL J. ROST
(AC 33374)

Lavine, Robinson and Flynn, Js.

Syllabus

The plaintiffs, the Schaghticoke Indian Tribe and the Schaghticoke Tribal Nation, both of which collectively represent the Schaghticoke Indians, a self-governing tribe recognized by the state that possesses the power to determine tribal membership and residency on reservation land, sought, by way of summary process, to regain possession of certain premises from the defendant, who lived on reservation property with the permission of D, a recognized Schaghticoke Indian, at her personal residence. The trial court rendered judgment for the plaintiffs, from which the defendant appealed to this court. *Held*:

1. The defendant's claim that the trial court lacked personal jurisdiction over him because he is a "sovereign human being" and "common law free man" was unavailing, the defendant having waived his right to challenge personal jurisdiction by filing an appearance and a responsive pleading without timely moving to dismiss the action for lack of personal jurisdiction.
2. The defendant could not prevail on his claim that the trial court's exercise of jurisdiction in this matter constituted an undue infringement of the tribal sovereignty of the Schaghticoke Indians as recognized under state law and, thus, that the trial court lacked subject matter jurisdiction to adjudicate this summary process action; by initiating the summary process action, the plaintiffs effectively consented to the trial court's jurisdiction, there was nothing to indicate that the trial court's adjudication of the summary process matter in any way interfered with the Schaghticoke Indians' right to self-governance or infringed on any existing tribal laws or adjudicative authority of the Schaghticoke Indians, and the defendant lacked authority to assert the Schaghticoke Indians' sovereignty on his own behalf, as tribal sovereignty may be invoked only by a member of the tribe.
3. There was no merit to the defendant's claim that the trial court improperly decided a dispute over tribal leadership; although the court, in its initial decision ruling against the defendant in this summary process matter, made a finding that the tribal nation, through its tribal council, was the governing authority for the Schaghticoke Indians, the trial court subsequently vacated that finding, and the defendant did not amend the appeal to challenge the court's modification of its earlier ruling or file a new appeal.
4. The defendant's claim that the trial court improperly rendered judgment without one of the plaintiffs being represented at the summary process

trial was not reviewable, as he was not the proper party to raise such a claim, and he failed to explain how he was aggrieved personally by the tribe's failure to appear and to present evidence at the summary process trial.

5. The defendant could not prevail on his claim that the trial court ignored prior judicial decisions that impacted the tribal nation's claim of authority to represent the interests of the Schaghticoke Indians; the trial court having vacated its finding that the tribal nation, through its tribal council, represented the proper governing authority of the Schaghticoke Indians, the defendant's claim, which attempted to show error in that finding, was moot and warranted no further review.

Argued April 12—officially released September 18, 2012

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Litchfield, Housing Session, geographical area number eighteen, and tried to the court, *Klatt*, *J.*; thereafter, the court denied the motion to open the evidence filed by the plaintiff Schaghticoke Indian Tribe; judgment for the plaintiffs, from which the defendant appealed to this court; subsequently, the court, *Klatt*, *J.*, denied in part the motion to open the judgment filed by the plaintiff Schaghticoke Indian Tribe, and vacated its finding regarding recognized tribal leadership. *Affirmed.*

Michael J. Rost, pro se, the appellant (defendant).

Hugh J. Lavery, for the appellee (plaintiff Schaghticoke Indian Tribe).

Dennis L. Kern, for the appellee (plaintiff Schaghticoke Tribal Nation).

Opinion

ROBINSON, J. The self-represented defendant in this summary process eviction action, Michael J. Rost, appeals from the trial court's judgment of possession rendered in favor of the plaintiffs, the Schaghticoke Indian Tribe (SIT) and the Schaghticoke Tribal Nation (STN). The defendant claims that the court improperly

(1) exercised jurisdiction by adjudicating a summary process action involving sovereign reservation land, (2) decided a dispute over tribal leadership, (3) rendered judgment without one of the plaintiffs being represented at the summary process trial and (4) ignored prior judicial decisions impacting STN's authority to represent the interests of the Schaghticoke Indians. We affirm the judgment of the trial court.

The following facts, which either are undisputed on the basis of the record or were found by the court, and procedural history are relevant to our review of the claims on appeal. The Schaghticoke tribe is recognized by the state as a self-governing entity that possesses the power to, inter alia, "[d]etermine tribal membership and residency on reservation land . . . ." General Statutes § 47-59a (b) (1).[1] The Schaghticoke Indian reservation (reservation) is comprised of approximately four hundred acres of property located in Kent. For at least two years prior to the commencement of this summary process action, the defendant lived on the reservation with the permission of Gayle Donovan, a recognized Schaghticoke Indian, at her personal residence located at 262 Schaghticoke Road. Donovan had been given

[1] General Statutes § 47-59a, titled "Connecticut Indians; citizenship, civil rights, land rights," provides: "(a) It is hereby declared the policy of the state of Connecticut to recognize that all resident Indians of qualified Connecticut tribes are considered to be full citizens of the state and they are hereby granted all the rights and privileges afforded by law, that all of Connecticut's citizens enjoy. It is further recognized that said Indians have certain special rights to tribal lands as may have been set forth by treaty or other agreements.

"(b) The state of Connecticut further recognizes that the indigenous tribes, the Schaghticoke, the Paucatuck Eastern Pequot, the Mashantucket Pequot, the Mohegan and the Golden Hill Paugussett are self-governing entities possessing powers and duties over tribal members and reservations. Such powers and duties include the power to: (1) Determine tribal membership and residency on reservation land; (2) determine the tribal form of government; (3) regulate trade and commerce on the reservation; (4) make contracts, and (5) determine tribal leadership in accordance with tribal practice and usage."

permission to build her residence on the reservation more than twenty years earlier. Donovan owns and is responsible for the residence, but she does not own the land.

On June 30, 2010, the plaintiffs jointly served the defendant with a notice to quit possession of "the [e]ntire Schaghticoke [r]eservation (including but not limited to) Schaghticoke Road, Kent, CT" by July 27, 2010, on the ground that he had "[n]o right or privilege to occupy same." On August 4, 2010, the plaintiffs commenced this summary process action. Initially, both plaintiffs were represented by Attorney Paul Garlasco. The plaintiffs alleged in their complaint that they "own and possess" the reservation and that the defendant entered the reservation with no right or privilege to occupy or remain on the reservation. The plaintiffs further alleged that the defendant had failed to quit possession, and, therefore, they sought a judgment of "[e]xclusive [p]ossession of the reservation with an order of no re-entry" and "[a]n immediate execution of eviction of the [defendant]." The defendant filed an appearance and an answer to the complaint, in which he challenged the plaintiffs' authority to evict him from the reservation. Specifically, he stated that the plaintiffs do not represent the historic tribe as evidenced by copies of documents that he attached to his answer and which allegedly were on file with the secretary of the state of Connecticut and with the Interior Board of Indian Appeals.

The matter initially was assigned for a pretrial hearing on October 22, 2010. On October 6, 2010, Garlasco filed a motion to withdraw as counsel for the plaintiffs, alleging a breakdown in the attorney-client relationship. Following a hearing, the court granted the motion to withdraw. The court also granted several continuances to allow the plaintiffs an opportunity to obtain new counsel. On January 27, 2011, the court issued notice

to all parties that a summary process trial would be held on March 15, 2011. On March 14, 2011, Attorney Dennis L. Kern filed an appearance on behalf of STN only. The summary process trial went forward as scheduled on March 15, 2011. Kern and the defendant were present and each presented evidence; however, no one representing SIT appeared at the summary process trial. The court indicated at the close of the proceedings that it would continue the matter to April 15, 2011, at which time it would render a final decision.

On April 15, 2011, Attorney Hugh J. Lavery filed an appearance on behalf of SIT and also filed a motion asking the court to open the evidentiary portion of the trial to allow SIT an opportunity to present additional testimony or to declare a mistrial.[2] The court denied the motion to present evidence on the ground that the motion was procedurally irregular and that the proffered evidence concerned only the ongoing dispute between SIT and STN over tribal leadership, which the court found was immaterial to the summary process matter before it. The court next issued a written decision in which it found that the plaintiffs had met their burden as to all elements of the summary process complaint and rendered a judgment of possession in favor of the plaintiffs subject to any statutory stays. In reaching its decision, the court made the following specific finding: "Based on the evidence submitted by both parties, the court finds that [STN], through its [t]ribal

[2] According to the motion, Alan Russell, the tribal chairman of SIT, filed an appearance in November, 2010, purporting to be on behalf of SIT, which appearance allegedly was rejected by the clerk's office because, as a nonattorney, Russell could not appear on behalf of SIT. SIT further alleged in its motion that Russell never received notice that his appearance had been rejected or of the date of the summary process trial. The record does not contain evidence of Russell's rejected appearance, although the court indicated on the record that the appearance was never properly filed. The record indicates that notice of the summary process trial was sent to SIT at the address on file with the court.

[c]ouncil, is the governing authority for the Schaghticoke tribe." The defendant filed the present appeal on April 20, 2011.

After the appeal was filed, SIT filed a motion to open the judgment. SIT argued that it wrongly had been deprived of an opportunity to present evidence that would have shown that SIT, and not STN, is the true governing authority for the Schaghticoke Indians. SIT was concerned about the res judicata effect of the court's finding that STN was the governing authority for the Schaghticoke Indians. SIT, nonetheless, also made clear that, despite the ongoing dispute between SIT and STN over which entity governs the Schaghticoke Indians, the entities continued to be united in their goal to remove the defendant from the reservation and had alleged in their complaint that they collectively own and possess the reservation. According to SIT, under a theory of judicial restraint, the court could reach a decision in which it finds the allegation of the summary process complaint proven without selecting a winner of the governing dispute.

The court heard argument on the motion to open on May 9, 2011, following which it denied the motion. The court reasoned, as it previously had, that the issue of which entity was "in charge" was not properly before it, and, therefore, it did not need to hear additional evidence on that topic from SIT. The court nevertheless opened its decision for the purpose of vacating its earlier finding that STN, through its tribal council, was the recognized tribal leader. It clarified that the plaintiffs collectively represented the individual members of the Schaghticoke Indians, and that it was those "individuals that have brought this summary process action, and have moved to evict [defendant]." The defendant did

not amend his existing appeal to challenge the court's modification of its earlier decision.[3]

I

The defendant first claims that the court improperly exercised jurisdiction in adjudicating the present summary process action. We note at the outset that the defendant's brief contains little in the way of legal analysis and is, at times, disjointed and difficult to comprehend. Nevertheless, given the stated policy of Connecticut's courts to be solicitous of self-represented litigants; see *State* v. *Adams*, 117 Conn. App. 747, 755, 982 A.2d 187 (2009); and because the defendant challenges the court's exercise of both personal and subject matter jurisdiction in this matter, over which our review is plenary; see *Ryan* v. *Cerullo*, 282 Conn. 109, 118, 918 A.2d 867 (2007); *Pritchard* v. *Pritchard*, 281 Conn. 262, 270, 914 A.2d 1025 (2007); we will endeavor to review the defendant's claims despite the state of the briefing provided. We construe the defendant's jurisdictional argument to be twofold. First, he argues that, because the reservation constitutes sovereign land and the Schaghticoke Indians never entered into any agreement or contract with the state, it is not subject to the civil jurisdiction of Connecticut's courts. The defendant also argues that the court lacked personal jurisdiction over him because he is a "sovereign human being" and "common law free man." We conclude that the court properly exercised jurisdiction in this matter.

A

We first dispose of the defendant's claim that the court lacked personal jurisdiction over him as a "sovereign human being" and "common law free man." The defendant fails to explain in his brief the legal import of

[3] SIT filed an appeal from the court's denial of its motion to open, but that appeal was dismissed on a nisi order on July 5, 2011, after SIT failed to comply fully with Practice Book § 64-1.

his numerous assertions that he is a "sovereign human being" and "common law free man." We can discern no legal reason why the mere donning of such a mantle would act to defeat the court's exercise of personal jurisdiction over him in this matter. Nevertheless, it is unnecessary for us to delve further into the defendant's personal jurisdiction claim because we conclude that the defendant has waived his right to challenge personal jurisdiction.

"As a general matter, a party waives the right to dispute personal jurisdiction unless that party files a motion to dismiss within thirty days of the filing of an appearance. . . . Personal jurisdiction is not like subject matter jurisdiction, which can be raised at any time and by the court on its own motion. . . . Unless the issue of personal jurisdiction is raised by a timely motion to dismiss, any challenge to the court's personal jurisdiction over the defendant is lost. . . . As noted by our Supreme Court, under our rules of practice, the filing of a responsive pleading operates as a waiver of a future challenge of the court's personal jurisdiction over a party." (Citation omitted; internal quotation marks omitted.) *Investment Associates* v. *Summit Associates*, 132 Conn. App. 192, 206–207, 31 A.3d 820 (2011), cert. granted on other grounds, 303 Conn. 921, 34 A.3d 396 (2012). Although, under our rules of practice, pleadings in summary process actions advance at a different pace from those in other civil matters; see General Statutes § 47a-26c; the aforementioned principles nevertheless remain applicable. See, e.g., *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 739–40, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011) (holding issue of personal jurisdiction waived in summary process action by defendant's failure to file timely motion to dismiss).

The defendant filed his appearance in this matter as a self-represented party on August 17, 2010, along with

an answer to the complaint. He never filed a motion to dismiss. Accordingly, having filed an appearance and a responsive pleading without timely moving to dismiss the action for lack of personal jurisdiction, the defendant waived his right later to attack the court's judgment on personal jurisdiction grounds.

B

We next turn to the defendant's other jurisdictional argument. According to the defendant, because the reservation is sovereign land and the Schaghticoke Indians never entered into any agreement or contract with the state, the court lacked subject matter jurisdiction to adjudicate the present summary process action. We construe the defendant's claim to be that the court's exercise of jurisdiction in this matter constituted an undue infringement on the tribal sovereignty of the Schaghticoke Indians as recognized under state law. We disagree.

"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.) *Kizis* v. *Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002). "There is no doubt that the Superior Court is authorized to hear summary process cases; the Superior Court is authorized to hear all cases except those over which the probate courts have original jurisdiction." *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d. 590 (1989). The question before us is whether that jurisdiction is somehow lost when the summary process case involves an eviction from state recognized reservation land.

"Like all instrumentalities of the state of Connecticut, our courts are powerless to intervene in the exercise of

tribal self-government. Federal statute, federal common law and state statute all require us to treat bona fide Indian tribes as sovereign nations and to protect tribal rights to self-determination. . . . Because of the continuing inherent sovereignty of Indian tribes, for example, federal common law forbids states from unlawfully infring[ing] on the right of reservation Indians to make their own laws and be ruled by them. . . . Similarly, state statutes explicitly provide that the indigenous tribes . . . are self-governing entities possessing powers and duties over tribal members and reservations. . . . Any action by a state court that infringed on tribal sovereignty or interfered in tribal self-government would therefore be improper." (Citations omitted; internal quotation marks omitted.) *Golden Hill Paugussett Tribe of Indians* v. *Southbury*, 231 Conn. 563, 574–75, 651 A.2d 1246 (1995). Our United States Supreme Court has explained that inherent tribal sovereignty will impede state court jurisdiction only if "the exercise of state-court jurisdiction in [the] case would interfere with the right of tribal Indians to govern themselves under their own laws. . . . If the exercise of state court jurisdiction is compatible with tribal autonomy . . . judicial action not only is permitted, but may be required." (Citations omitted; internal quotation marks omitted) Id., 575–76 citing *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138, 148–49, 151–52, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984) (suggesting state's failure to exercise jurisdiction when present could violate Indians' rights under due process clause, equal protection clause and 42 U.S.C. § 1981).

Pursuant to the court's May 9, 2011 oral postjudgment ruling, the plaintiffs who initiated this action before the Superior Court collectively represent the Schaghticoke Indians. The defendant did not amend his appeal to

challenge that determination, and, thus, the determination is not properly before us for review. See Practice Book § 61-9.[4] Section 47-59a (a) provides in relevant part that members of state recognized tribes, which includes the Schaghticoke Indians, "are considered to be full citizens of the state and they are hereby granted all the rights and privileges afforded by law, that all of Connecticut's citizens enjoy. . . ." Such rights and privileges must include access to our state's courts. By initiating the summary process action in state court, the plaintiffs effectively consented to the court's jurisdiction. Further, there is nothing in the record before us indicating that the court's adjudication of the present summary process matter in any way interfered with the Schaghticoke Indians' right to self-governance or infringed on any existing tribal laws or adjudicative authority of the Schaghticoke Indians.

Additionally, although the defendant seeks to assert tribal sovereignty as a bar to the present action, he has failed to set forth the necessary factual predicate to establish his authority to assert the Schaghticoke Indians' sovereignty on his own behalf or to overcome the Schaghticoke Indians' consent to the jurisdiction of the court. Our Supreme Court has indicated that tribal sovereignty may only be invoked by a member of the tribe. See *State* v. *Velky*, 263 Conn. 602, 605 n.5, 821 A.2d 752 (2003). The defendant never asserted before the trial court or this court that he is a recognized Schaghticoke tribal member. In fact, he appears to have disavowed any such claim before the trial court.[5] The defendant

[4] Practice Book § 61-9 provides in relevant part: "Should the trial court, subsequent to the filing of the appeal, make a decision which the appellant desires to have reviewed, the appellant shall file an amended appeal form in the trial court within twenty days from the issuance of notice of the decision as provided for in Section 63-1. . . ."

[5] At the May 9, 2011 hearing, the following colloquy took place:

"[Attorney] Lavery: When he delineates his lineage, he says he became a specialist in Indian law, took a tribal member as a wife, had two children with tribal member Deborah Buckson, but that still does not make him a—an Indian—

only asserts that he was granted permission by tribal members to live and work on the reservation. Such an assertion alone is insufficient to allow the defendant to invoke tribal sovereignty as a bar to the court's jurisdiction in the present case. In sum, we conclude that the court properly exercised both personal and subject matter jurisdiction in adjudicating this summary process action.

II

The defendant next claims that the trial court improperly decided a dispute over tribal leadership. Given the court's modification of its original rationale for rendering its judgment of possession in favor of the plaintiffs, we disagree.

General Statutes § 47-66i (b) sets forth the procedures for resolution of a dispute over tribal leadership, providing: "A leadership dispute shall be resolved in accordance with tribal usage and practice. Upon request of a party to a dispute, the dispute may be settled by a council. Each party to the dispute shall appoint a member to the council and the parties shall

"[The Defendant]: Nobody can condemn my rights.

"[Attorney] Lavery: —a Schaghticoke Indian.

"The Court: Don't—

"[The Defendant]: No man can be judged on his race, color, and creed.

"The Court: You can't interrupt—

"[The Defendant]: I'm sorry.

The Court: —each other.

"[The Defendant]: I'm sorry.

"The Court: Go ahead.

"[Attorney] Lavery: I just want to point out that he claimed now in court to have his lineary descendants come from the Schaghticoke Tribe.

"[The Defendant]: No, I—

"[Attorney] Lavery: He's never made that claim before. And well, we deny that.

"[The Defendant]: I—

"The Court: Okay. All right. That's not—it's not an issue.

"[The Defendant]: Yeah, it's not a big deal. I know. I just—I didn't—I didn't claim that."

jointly appoint one or two additional members provided the number of members of the council shall be an odd number. If the parties cannot agree on any joint appointment, the Governor shall appoint any such member who shall be a person knowledgeable in Indian affairs. The decision of the council shall be final on substantive issues. An appeal may be taken to the Superior Court to determine if provisions of the written description filed with the Secretary of the State pursuant to this section have been followed. If the court finds that the dispute was not resolved in accordance with the provisions of the written description, it shall remand the matter with instructions to reinstitute proceedings, in accordance with such provisions." Accordingly, as the parties and the court recognized, disputes over tribal leadership are to be resolved by the Schaghticoke Indians in the first instance or, if necessary, by a council appointed in accordance with the statute. There is no provision whereby tribal leadership disputes are to be decided first by the Superior Court. For reasons not reflected in the record, the various factions of the Schaghticoke Indians thus far have failed to avail themselves of the dispute resolution proceedings set forth in § 47-66i.

In its initial April 15, 2011 decision ruling against the defendant in this summary process matter, the trial court correctly set forth that the plaintiffs had the burden of establishing, among other elements, that they were the "owners" of the property from which they sought to evict the defendant.[6] In considering whether the plaintiffs had met that burden, the court made a

[6] Although reservation lands are held in trust by the state, "[a] tribe shall exercise on reservation land all rights incident to ownership except the power of alienation." General Statutes § 47-60. One right incident to property ownership is the right to bring a summary process eviction action against any person who never had a right or privilege to occupy the subject property or who had a right or privilege but such right or privilege has since terminated. General Statutes § 47a-23 (a).

finding, based on the evidence presented, that "the Schaghticoke Tribal Nation, through its [t]ribal [c]ouncil, is the governing authority for the Schaghticoke tribe." That finding arguably could be interpreted as the court deciding the ongoing and hotly contested dispute between SIT and STN over which is the legitimate governing body of the Schaghticoke Indians.

It was that particular finding that prompted SIT, which had not appeared at the summary process trial, to file its postjudgment motion to open the proceedings expressly for the purpose of presenting evidence that it, and not STN, was the legitimate governing body of the Schaghticoke Indians. The court denied the motion to open precisely because it recognized that it lacked the authority to decide the tribal leadership dispute and because it did not consider resolution of that dispute a necessary component of its summary process analysis. The court reasoned, as it had previously, that the issue of which entity was "in charge" was not properly before it, and, therefore, it did not need to hear additional evidence on that topic from SIT.

The court nevertheless agreed to open its earlier decision for the limited purpose of vacating its finding that STN, through its tribal council, was the governing authority for the Schaghticoke Indians. The court clarified as follows: "It's the Schaghticoke Indians that have the right to say who lives on the reservation. And they clearly have spoken here. Because both plaintiffs are in agreement that they do not want [the defendant] on the location." The court later stated: "I am reopening my decision and clarifying my decision, that even if [Richard] Velky,[7] in my analysis of the law, even if Velky is not the accepted and recognized tribal leader, nevertheless the plaintiffs—the plaintiffs being the Schaghticoke Indian—that—Indians, not the Schaghticoke

[7] Velky testified on behalf STN in his position as STN's tribal chairman.

Indian Tribe, not the Schaghticoke Tribal Nation, but the Indians that were originally recognized by this state, are the individuals that have brought this summary process action and have moved to evict [the defendant]. So, that's the clarification of the court's decision." Accordingly, the court modified that portion of its earlier decision finding that STN was the governing authority for the Schaghticoke Indians.

As previously indicated, the defendant did not amend the current appeal to challenge the court's modification of its earlier ruling, nor did he file a new appeal. See footnote 4 of this opinion. Because the court has vacated any finding that could be construed as resolving an internal dispute over tribal leadership, the defendant's claim of improper interference in that area no longer has merit.

III

We next turn to the defendant's claim that it was improper for the court to have rendered judgment without one of the plaintiffs being represented at the summary process trial. The defendant maintains that the fact that SIT was not present for the summary process trial is grounds for a mistrial. We cannot review the defendant's claim because he has failed to establish that he is the proper party to raise it.

"The general rule is that one party has no standing to raise another's rights. . . . 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 is] ordinarily held to have been met when a complainant makes a colorable claim of direct injury he . . . is likely to suffer . . . ." (Citation omitted, internal quotation marks omitted.) *Delio* v. *Earth Garden Florist, Inc.*, 28 Conn. App. 73, 78, 609 A.2d 1057 (1992).

In his brief, the defendant's discussion of his claim that SIT's absence from the summary process trial

required a mistrial is limited to noting that SIT had sought to open the proceedings and that SIT had indicated in its motion to open "many aspects of the trial that had been adversely affected by the [c]ourt's impression that Attorney Kern had appeared as representation for both plaintiffs." The defendant then indicates his wish to "assert the same information as fact to the [c]ourt." SIT's motion to open the summary process judgment, however, focused solely on the issue of the tribal leadership dispute and whether, by proceeding in its absence, the court had deprived SIT of the right to present evidence that it is the true governing authority of the Schaghticoke Indians. Any need for such evidence became moot following the court's clarification that it was not deciding the tribal governance dispute. Because SIT also sought the eviction of the defendant from the reservation, it is unclear how its presence or presentation of the proffered evidence would have benefited the defendant. The defendant has failed to explain how he was aggrieved personally by SIT's failure to appear and to present evidence at the summary process trial. Accordingly, we conclude that the defendant lacks standing to raise the claim, and we will not consider it.

IV

Finally, the defendant claims that the court ignored prior judicial decisions that impacted on STN's claim of authority to represent the interests of the Schaghticoke Indians. Because, as explained previously, the court vacated its finding that STN, through its tribal council, represented the proper governing authority of the Schaghticoke Indians, the defendant's claim, which attempts to show error in that finding, is moot and warrants no further review.

The judgment is affirmed.

In this opinion the other judges concurred.

FIRST MERCHANTS GROUP LIMITED PARTNERSHIP *v.* HARRIET FORDHAM (AC 33096)

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

Syllabus

The plaintiff sought a judgment declaring whether an arbitration award constituted a final decision. The plaintiff and the defendant were the sole members of a limited liability company. Following arbitration of a dispute over issues arising out of the operating agreement, the arbitrator issued a decision on February 23, 2007, disposing of all of the issues submitted. Thereafter, the defendants continued to serve the arbitrator with additional pleadings, seeking relief related to the decision and for issues that arose after the decision was issued. After the arbitrator suggested in a correspondence that her decision was not a final award, the plaintiff brought this action requesting a determination of whether the February 23, 2007 decision was a final award that had resolved fully the rights of the parties. The trial court denied the defendant's motion for summary judgment, concluding that certain issues of material fact remained in dispute, including whether the arbitration was to continue. Despite its denial of summary judgment, the trial court remanded the case to the arbitrator to make any findings she deemed appropriate to conclude the arbitration, and the plaintiff appealed to this court. *Held*:

1. Although the denial of summary judgment generally is not a final judgment for purposes of appeal, because the effect of the remand to the arbitrator was to deny the plaintiff the right it sought to have adjudicated in the declaratory judgment action and its right to an evidentiary hearing, the remand had the same effect as granting summary judgment and, therefore, the trial court's remand to the arbitrator was appealable as a final judgment.
2. The trial court, after denying the motion for summary judgment, lacked authority to remand the case to the arbitrator before holding an evidentiary hearing; the dispute before the trial court was whether the award was final and, therefore, whether the arbitrator still had jurisdiction, and the trial court having determined that disputed issues of material fact remained, it was necessary for the court to hear evidence on that question and to hold a trial-like hearing before deciding whether to remand the case to the arbitrator.

Argued May 21—officially released September 25, 2012

Procedural History

Action for a judgment declaring whether a certain arbitration award constitutes a final decision, brought

to the Superior Court in the judicial district of Hartford, where the defendant filed a counterclaim; thereafter, the court, *Hon. Richard M. Rittenband*, judge trial referee, denied the defendant's motion for summary judgment on the counterclaim, and the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Jenna N. Sternberg, for the appellant (plaintiff).

Laurence S. Fordham, pro hac vice, with whom was *Paul H. D. Stoughton*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, First Merchants Group Limited Partnership, appeals from the decision of the trial court remanding the case to an arbitrator for further findings after denying summary judgment in a declaratory judgment action in which the primary issue was whether the arbitration had ended. The plaintiff claims that once the court denied summary judgment on whether the arbitration had ended, it lacked authority to send any issues back to the arbitrator without first hearing evidence and deciding the merits of the declaratory judgment action. We agree and reverse the judgment of the trial court.

This is the second time this case is before us on appeal. We first adjudicated similar issues in *First Merchants Group Ltd. Partnership* v. *Fordham*, 121 Conn. App. 135, 994 A.2d 289 (2010). Our decision in that appeal laid out the relevant facts and procedural history. In that case, we reversed the trial court's dismissal, on the basis of the lack of subject matter jurisdiction, of the plaintiff's declaratory judgment action. The complaint alleged that the plaintiff, First Merchants Group Limited Partnership, and the defendant, Harriet Fordham, were the sole members of a limited liability company. The parties' amended operating agreement, dated January 25, 2002, provided that any disputes between

them were to be settled by arbitration. In October, 2006, the defendant filed a demand for arbitration in connection with certain disputed issues arising out of the operating agreement. The plaintiff filed an answering statement the following month. Subsequently, the plaintiff and the defendant signed a " '[m]emorandum of [u]nderstanding as to [a]rbitration' " dated December 12, 2006.[1] Id., 137. Less than two weeks later, the arbitrator prepared a letter dated December 21, 2006, setting forth the terms under which the arbitration was to proceed.[2] Thereafter, both parties submitted substantial materials to the arbitrator, who issued a decision on February 23, 2007, "disposing of all of the issues submitted to her pursuant to the . . . December 21, 2006 [letter]." (Internal quotation marks omitted.) Id. No party filed an application with the Superior Court to confirm, vacate or modify the award pursuant to General Statutes §§ 52-417 through 52-420.[3] The plaintiff alleged that it made certain payments to the defendant and took other actions that purported to satisfy the arbitrator's February 23, 2007 decision.

After the arbitrator's February 23, 2007 decision, the defendant continued to serve the arbitrator with additional pleadings, seeking relief related to that decision and for issues that arose after the decision was issued. Almost one year after she had issued her decision, by correspondence dated February 19, 2008, the arbitrator suggested that her February 23, 2007 decision was not a final award.

[1] The " '[m]emorandum of [u]nderstanding as to [a]rbitration' " was signed by the plaintiff and the defendant, but not the arbitrator. *First Merchants Group Ltd. Partnership* v. *Fordham*, supra, 121 Conn. App. 137 n.1.

[2] The arbitrator's letter was signed by the arbitrator and by counsel for the plaintiff and the defendant.

[3] General Statutes §§ 52-417 through 52-420 allow any party to an arbitration to apply to the Superior Court to confirm, vacate or modify a final award of an arbitrator.

The plaintiff then commenced this declaratory judgment action under General Statutes § 52-29 in accordance with the provisions of Practice Book § 17-54 et seq. In its prayer for relief, the plaintiff requested a judgment determining whether the February 23, 2007 decision was a final award that had resolved fully the rights of the parties as set forth in the December 21, 2006 memorandum of agreement with the arbitrator. Specifically, the plaintiff contends that if the February 23, 2007 decision was a final award, the arbitrator had no further authority over the matter and all subsequent rulings by her had no legal effect. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 271 Conn. 474, 484, 857 A.2d 893 (2004), cert. denied, 544 U.S. 974, 125 S. Ct. 1826, 161 L. Ed. 2d 723 (2005). The defendant filed a motion to dismiss the action for lack of subject matter jurisdiction. Without holding an evidentiary hearing, the court granted the motion to dismiss. The court concluded that it lacked subject matter jurisdiction because the arbitrator, in her February 19, 2008 correspondence to the parties, had concluded that the arbitration proceeding had not yet closed.

We reversed the judgment of the court after concluding that it improperly granted the defendant's motion to dismiss without an evidentiary hearing when material issues of fact were in dispute. *First Merchants Group Ltd. Partnership* v. *Fordham*, supra, 121 Conn. App. 139–40. We expressly held that the court had jurisdiction over a declaratory action to determine whether the arbitrator's February 23, 2007 decision was an interim decision or a final award. Id., 142. We remanded the case back to the court for further proceedings according to law. Id., 144.

On remand, the defendant filed an answer to the original complaint and a counterclaim, in which she sought a declaratory ruling that the arbitrator's decision

was not final. On September 17, 2010, the defendant filed a motion for summary judgment, asserting that there was no genuine issue regarding any material fact. The court denied summary judgment, finding that at least three issues of material fact remained in dispute, including whether the arbitration was to continue, whether the defendant's attorney had the authority to enter into the December 21, 2006 agreement and whether that agreement superseded the December 12, 2006 agreement.[4] Despite its denial of summary judgment, the court remanded the case to the arbitrator "to make any findings she deem[ed] appropriate to conclude this matter of arbitration." The plaintiff filed a motion to reargue and/or reconsider, which the court denied. The defendant also filed a motion to reargue, which the court denied. The plaintiff subsequently filed this appeal.

"The denial of a motion for summary judgment ordinarily is an interlocutory ruling and, accordingly, not a final judgment for purposes of appeal. . . . We previously have determined [however] that certain interlocutory orders have the attributes of a final judgment and consequently are appealable under [General Statutes] § 52-263. . . . In *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)], we explicated two situations in which a party can appeal an otherwise interlocutory order: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Citation omitted; internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 785, 865 A.2d 1163 (2005). "The second test for finality, where the order on appeal so concludes the rights of the parties that further proceedings cannot affect them, focuses not on

[4] The court also found that the amount of attorney's fees due to the prevailing party also remained a disputed issue of fact.

the proceeding involved, but on the potential harm to the appellant's rights." *State* v. *Curcio*, supra, 33.[5]

Here, the effect of the remand to the arbitrator is to deny to the plaintiff the right that it seeks to have adjudicated in the declaratory judgment action: the right to foreclose any further proceedings before the arbitrator.[6] It also denies the plaintiff's right to an evidentiary hearing when there is a genuine issue of fact over the finality of the arbitration. In that sense, the court's remand, despite its denying summary judgment, has the same effect as granting summary judgment. Therefore, under the second prong of *Curcio*, the trial court's remand to the arbitrator is appealable as a final judgment.

"The court's consideration of a motion for summary judgment is limited to the evaluation as a matter of law of the documentary proof submitted . . . ." *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 13 Conn. App. 712, 721–22, 539 A.2d 595, cert. denied, 208 Conn. 803, 545 A.2d 1101 (1988). "The function of the trial court in ruling on a motion for summary judgment is to determine whether there is a genuine issue as to any material fact, but not to decide that issue if it does exist until the parties are afforded a full hearing." *Town Bank & Trust Co.* v. *Benson*, 176 Conn. 304, 306, 407 A.2d 971 (1978).

Section 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

[5] We note that neither party seeks to overturn the denial of summary judgment; the plaintiff on appeal challenges only the remand to the arbitrator.

[6] We do not decide that issue; that is precisely the purpose of a hearing before the trial court.

The defendant asserts that under *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, supra, 271 Conn. 474, the trial court may remand the case to the arbitrator to determine what issues remain to be resolved. That case, however, concerned whether a trial court could remand a case to the arbitrator when there had been a request by one side to confirm and by the other side to vacate what both parties agreed was a final award. Similarly, the other cases that the defendant cites for the same proposition addressed whether a court had improperly vacated an arbitration award; see *Marulli* v. *Wood Frame Construction Co., LLC*, 124 Conn. App. 505, 5 A.3d 957 (2010) (trial court improperly vacated arbitrator's award without conducting evidentiary hearing), cert. denied, 300 Conn. 912, 13 A.3d 1102 (2011); and whether the trial court had improperly confirmed an award without considering the arbitrator's clarification. See *All Seasons Services, Inc.* v. *Guildner*, 94 Conn. App. 1, 6, 891 A.2d 97 (2006) (court properly remanded matter to arbitrator for clarification after one party filed timely request to confirm award). All three cases concerned whether remand was appropriate after an application by a party to confirm, vacate or modify an award under §§ 52-417 through 52-420. This case does not.

Having determined in the previous appeal that the court had jurisdiction over whether the arbitrator's decision was final, we need only decide whether the court had the authority, once it had denied summary judgment, to remand the case to the arbitrator before holding an evidentiary hearing. We conclude that it did not.

As we stated in our prior opinion, "[t]he court, in concluding that the arbitration decision was not final, addressed the very issue that the plaintiff sought to have adjudicated by way of a declaratory ruling." *First*

Merchants Group Ltd. Partnership v. *Fordham*, supra, 121 Conn. App. 139–40. We also concluded that because of unresolved questions over whether the arbitrator had failed to meet certain deadlines and whether that failure deprived her of authority over the case, the arbitrator's opinion about whether the arbitration was still ongoing was not dispositive and not binding on the court. Id., 143–44. Nothing in the subsequent procedural history has changed that conclusion, except that the trial court found issues of material fact, including whether the arbitration should continue. The court's finding that genuine issues of material fact existed precluded summary judgment on the action for a declaratory ruling, and therefore foreclosed the possibility of remanding any issues to the arbitrator until the court had considered evidence on the merits of the declaratory judgment action. We concluded in the first appeal that "whether the February 23, 2007 decision was a final award could not have been determined on the record before the court." Id., 142. "When 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." (Internal quotation marks omitted.) *Schaghticoke Tribal Nation* v. *Harrison*, 264 Conn. 829, 833, 826 A.2d 1102 (2003). Such a hearing was never held.

No authority cited by the defendant supports its proposition that a court may remand a case to an arbitrator or any other entity after finding material issues of fact that preclude summary judgment. The dispute before the court remains whether the award is final and, therefore, whether the arbitrator still has jurisdiction. It is on that question that the court determined that disputed issues of material fact remain, and on that question that the court must hear evidence before deciding whether to remand the case to the arbitrator.

The judgment is reversed only as to the order remanding the case to the arbitrator and the case is remanded to the trial court for further proceedings according to law. The judgment is affirmed in all other respects.

STATE OF CONNECTICUT *v.* TERRELL WILLIAMS POND
(AC 32468)

Beach, Alvord and Borden, Js.

Syllabus

Convicted of the crime of conspiracy to commit robbery in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he and H stopped the victim as he was walking down the sidewalk. H lifted his jacket, displayed a pistol in his waistband, and ordered the victim to remove everything from his pockets. The victim then ran away and called the police, who later detained and arrested the defendant and H. The defendant claimed that there was insufficient evidence of his specific intent that, in the course of the robbery, H would display or threaten the use of what H represented to be a deadly weapon or dangerous instrument, and that the trial court improperly failed to instruct the jury that the state had to prove that the defendant had such specific intent. *Held*:

1. The evidence was sufficient to support the jury's verdict on the conspiracy charge, the state having presented sufficient evidence of both an agreement and the defendant's specific intent that a deadly weapon or dangerous instrument would be displayed, as the jury reasonably could have concluded that the defendant and H intended to stop the victim and display the gun in such a way that would threaten the victim into giving up his money; the specific intent required by the conspiracy statute (§ 53a-48 [a]) requires specific intent to bring about all of the elements of the conspired offense, even those that do not by themselves carry a specific intent with them and, thus, in order to prove that the defendant was guilty of conspiracy to commit robbery in the second degree in violation of statute (§ 53a-135 [a] [2]), the state needed to prove that he and his coconspirator specifically had an agreement to display a deadly weapon or dangerous instrument and that the defendant had the specific intent that such a weapon or instrument would be displayed.
2. The trial court improperly failed to instruct the jury that, with respect to the conspiracy charge, the state was required to prove that the defendant

specifically intended that, in the course of the robbery, what was represented to be a deadly weapon or dangerous instrument would be used or displayed; accordingly, a new trial was warranted because the court's instruction on the specific intent required for the conspiracy charge was constitutionally defective, was likely to have misled the jury in arriving at its verdict, and was not harmless.

(*One judge concurring separately*)

Argued March 20—officially released September 25, 2012

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit robbery in the second degree and conspiracy to commit robbery in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *Matasavage*, *J.*; verdict and judgment of guilty of conspiracy to commit robbery in the second degree, from which the defendant appealed to this court; thereafter, the court, *Matasavage*, *J.*, issued a rectification of the trial record. *Reversed; new trial.*

Kate MacLeman, certified legal intern, with whom were *Timothy H. Everett*, special public defender, *Sabrina Copp* and *Andrew Veale*, certified legal interns, and, on the brief, *Matthew Bristol*, *Irene Kim* and *Louisa Lindberg*, certified legal interns, for the appellant (defendant).

Leonard C. Boyle, deputy chief state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *John Lion*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The crime of robbery in the second degree in violation of General Statutes § 53a-135 (a)

(2)[1] provides that a person is guilty of that crime when he commits robbery[2] and "in the course of the commission of the crime . . . he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument." The inchoate crime of conspiracy in violation of General Statutes § 53a-48 (a)[3] provides that "[a] person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any of them commits an overt act in pursuance of such conspiracy."[4] The two related issues in this appeal present the question of whether, in order to convict a defendant of conspiracy to commit robbery in the second degree in violation of §§ 53a-48 (a) and 53a-135 (a) (2), the state must prove that the defendant conspirator had the specific intent that there would be a display or threat of the use of what was represented to be a deadly weapon or dangerous instrument, even if that specific intent is not required for proof of the underlying crime of robbery in the second degree. We conclude that our

[1] General Statutes § 53a-135 (a) provides in relevant part: "A person is guilty of robbery in the second degree when he commits robbery . . . [and] (2) in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument."

[2] Robbery is defined by General Statutes § 53a-133 as, in general terms, committing a larceny, defined by General Statutes § 53a-119, by the use or immediate threat of physical force for the purpose of compelling the giving up of property. Neither the definition nor the application of those particular statutes is pertinent to this appeal.

[3] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[4] This appeal does not involve any question about the "overt act" element of the crime of conspiracy.

Supreme Court authority requires the state to prove such specific intent.

On appeal, the defendant, Terrell Williams Pond, claims that (1) there was insufficient evidence of his specific intent that, in the course of the robbery, another participant in the robbery would display or threaten the use of what that participant represented to be a deadly weapon or dangerous instrument and (2) the trial court improperly failed to instruct the jury that the state had to prove that the defendant had such specific intent. We agree with the defendant's second claim and, accordingly, reverse the judgment of conviction.

The jury reasonably could have found the following facts. On October 27, 2008, Stanislaw Grzadko, the victim, returned home from work at approximately 5:45 p.m. Grzadko's home is located on Church Street in Hamden. Upon returning home, he ate dinner and then went for his evening walk. At approximately 6:45 p.m., while he was walking on the Dixwell Avenue sidewalk, he was approached from behind by the defendant and Montel Harris, both of whom were riding bicycles on the sidewalk. Harris approached the victim on his left, the defendant approached on his right, each wearing a dark hooded sweatshirt and dark pants. Harris asked the victim where he was going and then demanded that he stop, repeating the order "two [or] three times . . . ." When the victim continued to walk, the defendant pushed his bicycle in front of the victim, forcing him to stop. With the victim now unable to move forward, Harris raised his jacket and lifted the handle of what appeared to be a gun, later determined to be a CO_2 pistol, from his waistband, asking the victim, "do you know what it is?" When the victim responded, "yes, yes, I know," and as the defendant continued to block the victim from moving, Harris ordered the victim to remove everything from his pockets. Rather than turn his belongings over to the two young men, the victim

turned to the side and ran into traffic on Dixwell Avenue in order to escape. The defendant and Harris rode off on their bicycles. Shortly thereafter, the victim called the Hamden police and reported the incident. Later that evening, the Hamden police detained the defendant and Harris, and the victim later identified them as the two young men who had accosted him.

The defendant was charged with attempt to commit robbery in the second degree in violation of General Statutes §§ 53a-49 and 53a-135 (a) (2), and conspiracy to commit robbery in the second degree in violation of §§ 53a-48 and 53a-135 (a) (2). Following a jury trial, the defendant was convicted of the conspiracy count and acquitted of the attempt count. The court sentenced the defendant to five years incarceration, suspended after fifteen months, and three years probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support the jury's verdict on the conspiracy charge. Specifically, he claims that the charge of conspiracy to commit robbery in the second degree required the state to prove that (1) he and Harris specifically "had an agreement to display a deadly weapon or dangerous instrument" and (2) he had the specific intent that such a weapon or instrument would be displayed by Harris. The defendant argues further that the evidence was insufficient to prove that he and Harris had such a specific agreement and that he had such a specific intent.

The state responds that, as a legal matter, in order to prove a conspiracy to commit robbery in the second degree under § 53a-135 (a) (2), "the state is not required to offer independent proof that the defendant specifically intended that a dangerous instrument or deadly

weapon would be displayed." The state further contends, however, that as a factual matter, if there is such a requirement, it produced sufficient evidence thereof. While we disagree with the state's legal contention, we agree that, nevertheless, the state produced sufficient evidence for the jury reasonably to conclude that the defendant specifically intended that a dangerous instrument or deadly weapon would be displayed.

We begin with the pertinent language of the conspiracy statute. Section 53a-48 (a) provides in relevant part that a "person is guilty of conspiracy when, *with intent that conduct constituting a crime be performed*, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." (Emphasis added.) Although the language of the conspiracy statute does not, by its terms, establish whether the specific intent provided by the statute—the "intent that conduct constituting a crime be performed"—requires proof of a specific intent to perform all of the elements of the crime conspired, including any aggravating elements, our Supreme Court addressed this issue in *State* v. *Padua*, 273 Conn. 138, 869 A.2d 192 (2005).

In *Padua*, the defendants were convicted of conspiracy to sell marijuana within 1500 feet of a public housing project. Id., 145. The court stated that it was an essential element of the conspiracy charge that the conspirators agreed to sell marijuana specifically within 1500 feet of a public housing project. Id., 166. Our Supreme Court held, in accord with the state's concession, that the trial court's instruction, which had omitted this element, was improper but that the impropriety was harmless beyond a reasonable doubt. Id. In doing so, the court stated that "[p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) Id., 167. This means

that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those that do not by themselves carry a specific intent with them. We must reach this conclusion because, when *Padua* was decided, it was already settled law that in a prosecution for sale of drugs within 1000 feet of a school, the state was not required to prove that the defendant knew that his sale was within 1000 feet of a school. See *State* v. *Denby*, 235 Conn. 477, 482, 668 A.2d 682 (1995) ("[T]he plain language of [General Statutes] § 21a-278a (b) requires as an element of the offense an intent to sell or dispense the narcotics at a location that is within 1000 feet of a school. The state is not, however, required to prove that the defendant knew that this location was within the zone.").

In the present case, we are bound by the holding in *Padua* to conclude that, in order to prove the defendant guilty of conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2), the state needed to prove that he and his coconspirator specifically had an agreement to display a deadly weapon or dangerous instrument and that the defendant had the specific intent that such a weapon or instrument would be displayed. We agree with the state that there was sufficient evidence of both an agreement and the defendant's specific intent that such a weapon or instrument would be displayed.

"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 that the cumulative force of the evidence established

guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Martin*, 285 Conn. 135, 147, 939 A.2d 524, cert. denied, 555 U.S. 859, 129 S. Ct. 133, 172 L. Ed. 2d 101, after remand, 110 Conn. App. 171, 954 A.2d 256 (2008), appeal dismissed, 295 Conn. 192, 989 A.2d 1072 (2010). "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 guilty." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 543, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

The law in this regard is well established. There need not be evidence of a formal agreement; it is sufficient to show that the alleged conspirators were knowingly engaged in a mutual plan to do a forbidden act. *State* v. *Millan*, 290 Conn. 816, 825–26, 966 A.2d 699 (2009). The requisite agreement may be inferred from the separate acts of the individuals accused as coconspirators, the circumstances surrounding their commission and from the activities of the accused. Id., 826. Furthermore, a "coconspirator's conduct at the scene can provide the requisite evidence of an agreement." Id., 828.

In the present case, as the state points out, the jury reasonably could have found that the defendant and Harris intended to rob the victim by the display of what was represented to be a deadly weapon or dangerous instrument. As they approached the victim, neither struck nor touched him; thus, it was inferable that this was not intended to be simply "a strong-arm robbery." When the victim ignored Harris' demand to stop, neither the defendant nor Harris restrained him. Instead, it was only after the defendant had positioned himself to block the victim's path and both the defendant and Harris were less than an arm's length away from him that

Harris displayed the pistol in his waistband and demanded the victim's money. Therefore, there was ample evidence that they intended to stop the victim and display the gun in such a way that would threaten the victim into giving up his money without, at the same time, attracting the attention of anyone else who might be in the area. Furthermore, "[t]he fact that the defendant stood by silently when a gun was displayed in order to [force the victim to give up his property] . . . is evidence from which the jury might reasonably have inferred the defendant's acquiescence in [an] enlarged criminal enterprise." *State* v. *Crosswell*, 223 Conn. 243, 256, 612 A.2d 1174 (1992). Accordingly, we conclude that there is a reasonable view of the evidence that supports the jury's verdict of guilty.

II

The defendant's second claim is that the trial court improperly "failed to instruct the jury that the agreement element of the conspiracy charge required that the state prove . . . the defendant had an agreement with . . . Harris to commit a robbery in which one of them would display" what was represented to be a deadly weapon or dangerous instrument. In this regard, the defendant seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989),[5] because, although he did not raise this claim at trial, the omitted part of the instruction involves an essential element of the crime, and, therefore, its omission from the jury instruction is a constitutional violation. We agree.

[5] "[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." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

The following additional facts are necessary for the resolution of this claim. At the close of evidence, the court offered both parties the opportunity to submit proposed jury instructions. The defendant's proposed instruction set forth the applicable language from §§ 53a-48 and 53a-135 (a) (2). The proposed instructions asked the court to instruct the jury that "the [s]tate must prove the following elements beyond a reasonable doubt: (1) that the [d]efendant and Montel Harris agreed to commit a robbery, (2) that the [d]efendant committed a robbery;[6] and (3) that in the course of the commission of the robbery or of immediate flight [therefrom] the [d]efendant or another participant in the crime displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument." The court received the defendant's proposed instructions, and they were discussed in a charging conference that was held off the record. The state did not submit a formal request to charge.

The trial court's instructions were to the effect that the specific intent required for the conspiracy charge was that as for a charge of larceny. After reading the conspiracy statute to the jury, giving general instructions on what was and was not required to prove an agreement and instructing on the necessity of an overt act, the court stated: "The third element is that the defendant had the intent to commit robbery in the second degree. The intent for that crime is that at the time of the agreement he intended to commit larceny. The defendant may not be found guilty unless the state has proved beyond a reasonable doubt that he specifically intended to commit a larceny when he entered into the agreement. In summary, the state must prove beyond a reasonable doubt that the defendant had an agreement with one or more other persons to commit robbery in

[6] This was obviously incorrect, as there is no requirement, in a conspiracy charge, that the defendant have committed the completed crime.

the second degree, at least one of the coconspirators did an overt act in furtherance of the conspiracy, and the defendant specifically intended to deprive the owner of his property."

We first consider the state's argument that the defendant induced the instructional error of which he now complains.[7] Specifically, the state points out that the defendant submitted a request to charge that had *no* specific intent requirement in it. Thus, the state contends that, because the trial court instructed on the specific intent requirement as it did—namely, the specific intent to commit a larceny—the defendant "received a jury instruction that imposed a higher burden on the state than the defendant himself proposed . . . ." We reject this contention and see no justification for the application of the induced error doctrine where the defendant has simply requested one erroneous instruction and received another. See *State* v. *Kitchens*, 299 Conn. 447, 469, 10 A.3d 942 (2011) ("[t]his court has found induced error undeserving of appellate review in the context of a jury instruction claim when the defense has affirmatively requested the challenged jury instruction . . . or has encouraged or prompted the court to refrain from giving an instruction that arguably should have been given" [citations omitted]).

In light of our discussion in part I of this opinion, it is clear to us that the court's instruction on the specific intent required for the charge of conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2) was constitutionally defective and was likely to have misled the jury in arriving at its verdict. The court did not tell the jury that the state was required to prove that the defendant specifically intended that, in the

[7] The state does not appear to rely on the waiver doctrine of *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). The state acknowledges that the trial court neither held a charging conference on the record nor provided the defendant with a copy of its charge in advance.

course of the robbery, what was represented to be a deadly weapon or dangerous instrument would be used or displayed. Contrary to the state's argument, there is nothing in the rest of the language of the jury instructions that would render this omission in the instruction harmless.

The judgment is reversed and the case is remanded for a new trial.

In this opinion BEACH, J., concurred.

BORDEN, J., concurring. I agree with and join the well reasoned opinion of the majority. I write separately, however, to point out what I regard as an anomaly in our Supreme Court's interpretation of the conspiracy section of the Penal Code that our Supreme Court may wish to revisit.

I agree that we are constrained by the decision of our Supreme Court in *State* v. *Padua*, 273 Conn. 138, 869 A.2d 192 (2005), to conclude that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those elements that do not by themselves carry a specific intent with them. For me, however, that should not end the discussion. I am also constrained to discuss what may well be regarded as an anomaly in our Supreme Court's interpretation of the conspiracy section of the Penal Code. I begin with the case law that has produced that anomaly.

The competing legal contentions of the defendant, Terrell Williams Pond, and the state raise a fundamental question about the scienter requirement under General Statutes § 53a-48 (a), the conspiracy statute, as applied to General Statutes § 53a-135 (a) (2), robbery in the second degree by the display or threat of use of what is represented to be a deadly weapon or dangerous

instrument. That question is: must the state prove that the conspirators specifically agreed that such a weapon or instrument would be displayed or threatened to be used, as the defendant contends; or, as the state contends, is it sufficient for the state to prove that the conspirators agreed to commit a robbery and that, irrespective of any specific scienter requirement on the part of any one conspirator, one of the participants did display or threaten the use of such a weapon or instrument?

The pertinent language of the conspiracy statute, § 53a-48 (a), provides in relevant part that a "person is guilty of conspiracy when, *with intent that conduct constituting a crime be performed*, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." (Emphasis added.) The language of the conspiracy statute does not, by its terms, answer the question posed by this case, namely, whether the specific intent provided by the statute—the "intent that conduct constituting a crime be performed"—requires proof of a specific intent to perform all of the elements of the crime conspired, including any aggravating elements.

The Supreme Court first addressed this question in *State* v. *Beccia*, 199 Conn. 1, 505 A.2d 683 (1986). In that case, in which the defendant had been convicted of conspiracy to commit arson in the third degree, the court stated: "Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they *intended to commit the elements of the offense*." (Emphasis in original; internal quotation marks omitted.) Id., 3–4. "[P]roof of a conspiracy to commit a

specific offense requires proof that the conspirators *intended* to bring about the elements of the conspired offense." (Emphasis in original; internal quotation marks omitted.) Id., 5. The court therefore vacated the conviction because one of the elements of the crime was the reckless damage to or destruction of a building and, the court concluded, "conspirators cannot agree to accomplish a result recklessly when that result is an essential element of the crime . . . ." Id. Thus, *Beccia* stands for the proposition that a conspiracy charge requires proof of intent to commit all of the elements of the conspired offense. *Beccia* does not answer the question posed by the present case, however, because, unlike the present case, in which the questioned element—namely, the display of what is represented to be a deadly weapon—does not carry any specific mens rea with it, in *Beccia* the questioned element—recklessly causing damage to property—does carry a specific mens rea with it, namely, recklessness. See General Statutes § 53a-5.[1]

In *State* v. *Crosswell*, 223 Conn. 243, 256, 612 A.2d 1174 (1992), the court posed the question in the following terms: "If two or more persons conspire to take particular property from someone who has a superior right of possession, and agree to do so peacefully, do subsequent changes in the modus operandi to accomplish the taking operate to discharge a willing participant from culpability?" The court did not need to answer that question, however, because there was sufficient evidence "from which the jury might reasonably

[1] General Statutes § 53a-5 provides: "When the commission of an offense defined in this title, or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally', 'knowingly', 'recklessly' or 'criminal negligence', or by use of terms, such as 'with intent to defraud' and 'knowing it to be false', describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears."

have inferred the defendant's acquiescence in this enlarged criminal enterprise." Id.

The question has been answered, however, at least implicitly, by our Supreme Court in *State* v. *Padua*, supra, 273 Conn. 138. In that case, the defendants were convicted of conspiracy to sell marijuana within 1500 feet of a public housing project. Id., 145. The court stated that it was an essential element of the conspiracy charge that the conspirators agreed to sell marijuana specifically within 1500 feet of a public housing project. Id., 166. The Supreme Court held, in accord with the state's concession, that the trial court's instruction, which had omitted this element, was improper but that the impropriety was harmless beyond a reasonable doubt. Id. In doing so, the court again reaffirmed the notion that "[p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) Id., 167. This must be read to establish the notion that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those that do not by themselves carry a specific intent with them, because it was already settled law that in a prosecution for sale of drugs within 1000 feet of a school, the state need not prove that the defendant knew that his sale was within 1000 feet of a school. See *State* v. *Denby*, 235 Conn. 477, 482, 668 A.2d 682 (1995) ("[T]he plain language of [General Statutes] § 21a-278a [b] requires as an element of the offense an intent to sell or dispense the narcotics at a location that is within 1000 feet of a school. The state is not, however, required to prove that the defendant knew that this location was within the zone.").

This court's case law, however, is somewhat in conflict on this issue. In *State* v. *Leggett*, 94 Conn. App. 392, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899

A.2d 39 (2006), the defendant was convicted of the same offense as that involved in the present case, namely, conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2). In rejecting the defendant's argument that "the state must prove separately his intent to use or threaten the use of physical force," this court held that "[t]he larceny component of robbery, as described in General Statutes § 53a-119, is an intent crime. The use or threatened use of force described in General Statutes § 53a-133, however, has no additional intent element. The state, therefore, need only prove that the defendant intended the larceny and carried it out through the use or threatened use of physical force." Id., 402–403 n.14. A fortiori, in such a case the state need not prove the additional aggravating circumstance of the use or threat of the use of what is represented to be a deadly weapon or dangerous instrument.

Leggett, however, has been essentially overtaken by subsequent case law in this court. In *State* v. *Haywood*, 109 Conn. App. 460, 952 A.2d 84, cert. denied, 289 Conn. 928, 958 A.2d 161 (2008), this court read *Padua* as answering the question posed by the Supreme Court in *Crosswell*. We stated: "We believe, moreover, that the question posed in *Crosswell* was later answered in *Padua*, which, as noted, held that, for culpability, one must conspire to commit the particular crime and not merely to perform an undefined criminal act." Id., 476 n.13.

Furthermore, in *State* v. *Palangio*, 115 Conn. App. 355, 973 A.2d 110 (2009), the defendant was charged with conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4).[2] Robbery in the first degree under that

[2] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threat-

section is defined as robbery during the course of which the robber or another participant "displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver . . . or other firearm . . . ." General Statutes § 53a-134 (a) (4). The state in *Palangio* contended that it was not necessary to prove that the defendant knew that his coconspirator would use a firearm during the robbery. *State* v. *Palangio*, supra, 362. This court disagreed, relying on *State* v. *Padua*, supra, 273 Conn. 138, for the proposition that "[p]roof of conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) *State* v. *Palangio*, supra, 362. Thus, the court in *Palangio* concluded that the state was required to prove that the defendant and his coconspirator agreed to commit robbery, and that he "intended to commit robbery with a firearm . . . ." Id.

With this background in mind, I now turn to the anomaly that it has produced. It is fundamental in our criminal law that there is no legal difference between liability as an accessory and liability as a principal. *State* v. *Gonzalez*, 300 Conn. 490, 507, 15 A.3d 1049 (2011). Liability as an accessory is "legally indistinguishable" from liability as a principal because the accessory statute specifically provides that an accessory may be "prosecuted and punished as if he were the principal offender." (Internal quotation marks omitted.) Id. Put another way: "Under [General Statutes] § 53a-8, accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Internal quotation marks omitted.) Id., 500. It is also well established, under the Supreme Court's holding in *State* v. *Crosswell*, supra, 223 Conn.

ens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

261 n.14, "that when a defendant is charged with robbery in the first degree on the basis that he or another participant . . . is armed with a deadly weapon; General Statutes § 53a-134 (a) (2); the defendant need not be proven to have intended to possess a deadly weapon." (Internal quotation marks omitted.) Under our Supreme Court's similar holding in *State* v. *Avila*, 223 Conn. 595, 609, 613 A.2d 731 (1992), it is also well recognized that a defendant charged as an accessory to robbery in the first degree under the same section need not be proven to have intended to possess a deadly weapon.

These principles of interpretation were recently reaffirmed and explained—as I will discuss in more detail—by our Supreme Court in *State* v. *Gonzalez*, supra, 300 Conn. 502. In *Gonzalez*, the defendant was charged as an accessory to manslaughter in the first degree with a firearm under General Statutes §§ 53a-8 and 53a-55a, which requires proof that "in the commission of [the offense of manslaughter in the first degree] he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses, a firearm.[3] General Statutes § 53a-55a (a). The court held that the language referred to previously—namely, that the perpetrator "uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses," a firearm—is simply an aggravating circumstance of the underlying crime for which no specific mental state is required and which, therefore, "drops out of the calculation" insofar as proof of a mental state is required. (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 505. Thus, in *Gonzalez*, our Supreme Court affirmed the defendant's conviction of manslaughter in the first degree with a firearm as an accessory, concluding that the state did not have to prove that the defendant specifically intended that

[3] I note the singular similarity of this statutory language to that in the present case.

a firearm be used in the commission of the offense. Id., 506.

Consequently, if a defendant is charged either *as a principal or an accessory* to robbery in the second degree in violation of § 53a-135 (a) (2), under *Crosswell*, *Avila* and *Gonzalez* the state *would not be required* to prove that he, or another participant, specifically intended to possess or display a deadly weapon or dangerous instrument. Yet, if the defendant is charged with *conspiring* to commit robbery in the second degree, the offense involved in the present case, under the same Penal Code provision, according to *Padua*, *Haywood* and *Palangio* the state *is required* to prove that he or another participant specifically intended to possess or display a deadly weapon or dangerous instrument.

The anomaly in these lines of precedent is this: it means that, in charging the *inchoate*[4]—or *incompleted*—crime of conspiracy to commit a particular offense, the state is required to prove *more*, by way of mens rea, than it is required to prove when it charges the *completed crime* itself. It is difficult, if not impossible, to see why the legislature would put that anomalous burden on the state. Our statutes are to be read, where possible, with common sense; see *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010); and as forming a coherent, rational whole, rather than as forming an anomalous, inconsistent scheme. See *Aspetuck Valley Country Club, Inc.* v. *Weston*, 292 Conn. 817, 829, 975 A.2d 1241 (2009) ("we read related statutes to form a consistent, rational whole, rather than to create irrational distinctions" [internal quotation marks omitted]). That principle is particularly appropriate for interpretation of the Penal Code, which was enacted to rationalize our state's former patchwork quilt of criminal laws. It

[4] See part III of the Penal Code, titled "Inchoate Offenses," the very first of which is the conspiracy statute, § 53a-48.

is simply anomalous that the state would be required to prove a greater mens rea for an *inchoate crime*—conspiracy—than for the *completed crime* itself.

Furthermore, the conspiracy section of our Penal Code, § 53a-48, is based on the New York Revised Penal Law. Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-48 (West 2007). Thus, decisions by the New York courts construing the same language as that in our Penal Code have long been held to be instructive in construing our Penal Code language. See *State* v. *Courchesne*, supra, 296 Conn. 671 ("this court may turn to the parallel statutory provisions set forth in the Model Penal Code and the [revised] New York . . . Penal Law . . . for guidance" [internal quotation marks omitted]); see also *State* v. *Henry*, 253 Conn. 354, 363, 752 A.2d 40 (2000) ("[w]e note that our Penal Code is modeled after the New York Penal [Law]"). In this regard, the Appellate Division of the Supreme Court of New York has characterized Penal Law § 105.00, which is the basic conspiracy statute in New York and which contains precisely the same language as our § 53a-48,[5] as "a general conspiracy statute."[6] *People* v. *Joyce*, 100 App. Div. 2d 343, 347, 474 N.Y.S.2d 337, leave to appeal denied, 62 N.Y.2d 807 (1984). Thus, the court in *Joyce* contrasted New York's § 105.00, which, in its view, did not require a specific intent to commit aggravating circumstances, with Penal Law § 105.10,[7] which had more specific mens

[5] New York Penal Law § 105.00 (McKinney 2009) provides: "A person is guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."

[6] I have not found any decision of the New York Court of Appeals construing Penal Law § 105.00.

[7] New York Penal Law § 105.10 (McKinney 2009) provides in relevant part: "A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting . . . a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct . . . ."

rea language and did, therefore, require proof of intent to commit the aggravating circumstance. Id.

It may well be that this anomaly can be explained by the fact that our courts, in interpreting the language of the conspiracy statute, lost sight of the difference between the criminal law concepts of general intent and specific intent, and assumed that the mens rea language of § 53a-48 referred to general as well as specific intent.[8] That difference has recently been illuminatingly discussed by our Supreme Court in *State* v. *Gonzalez*, supra, 300 Conn. 490. In that case, as I noted previously, the defendant was charged, as an accessory, with manslaughter in the first degree with a firearm, and the issue was whether the court was required to instruct the jury that he specifically intended to use or display what was represented to be a firearm. Id., 498–99. In answering that question in the negative, the court explained the difference between general and specific intent.

The term "general intent" refers, in criminal law parlance, to the fact that "the perpetrator act volitionally in some way"; id., 502; as opposed to the perpetrator acting inadvertently. It requires no more than "an intention to make the bodily movement which constitutes the act which the crime requires. . . . Such an intent, to perform certain acts proscribed by a statute, we have referred to as the general intent ordinarily required for crimes of commission rather than omission." (Internal quotation marks omitted.) Id. In such crimes, that general intent is always "implicitly a part of the state's burden of proof and, in that sense, an element of the crime." (Internal quotation marks omitted.) Id., 502 n.14. Furthermore, unless there is some evidence in the case indicating that the perpetrator's conduct may not

[8] I acknowledge that I was part of the Supreme Court panel that decided *State* v. *Padua*, supra, 273 Conn. 138.

have been voluntary in this sense—may have been inadvertent or accidental, for example—there is ordinarily no need for a jury charge on that aspect of the case. Id. The term "specific intent," by contrast, requires more; it refers to the specific criminal mental state provided by the statute defining the crime charged.[9] See id., 501–502; see also *State* v. *Nixon*, 32 Conn. App. 224, 249, 630 A.2d 74 (1993) ("[w]hen the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent"), aff'd, 231 Conn. 545, 651 A.2d 1264 (1995).

Therefore, the court concluded in *Gonzalez*, the language, "in the commission of such offense [the perpetrator] uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses" a firearm, "[l]ack[s] a specifically enumerated mental state . . . clearly indicat[ing] . . . that the firearm element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to use a firearm in the commission of the offense." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 501–502; accord *State* v. *Miller*, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006). Our Supreme Court made clear in this context that the element of the use or threat of a firearm was one of general intent, and not specific intent, and, therefore, the state was not required to prove it and the court was not required to instruct on that element. *State* v. *Gonzalez*, supra, 503. Significantly, the court stated that, in such a prosecution, "the state must prove only that the perpetrator acted voluntarily to use, possess or threaten to

[9] This is the type of intent to which the Penal Code refers in § 53a-5, namely, such states of mind as intentionally, knowingly, recklessly or criminal negligence.

use a firearm in the commission of the offense, *with no obligation to prove any mental state beyond that required by the underlying manslaughter statute*." (Emphasis added.) Id. Thus, the court drew a parallel between the specific intent required for the underlying substantive crime and the specific intent required for committing it as an accessory; an accessory perpetrator need have no more of a specific mental state than the specific mental state required for the crime to which he is an accessory.

This discussion may illuminate where our precedents on conspiracy may have gone off the track, so to speak. Viewing the present case through this prism, the element of use or threat of the use of, or display of, what is represented to be a deadly weapon or dangerous instrument, under § 53a-135 (a) (2), would be an element of general, not specific, intent, and would simply be viewed as an aggravating circumstance of the crime that does not carry with it a specific intent. See id., 502. As applied to the conspiracy statute, this would mean that the mens rea element of § 53a-48, namely, that the defendant, acting "with intent that conduct constituting a crime be performed . . . agrees with one or more persons to engage in or cause the performance of such conduct," refers, not to the general intent aspects of the crime conspired to be committed, but only to the specific intent aspects thereof. It would also mean that when a conspiracy is charged, the state would be required to prove that the defendant had the same *specific* intent required for the underlying crime, but not the *general* intent attached to that crime. Under that analysis, a conspiracy charge would carry the same mens rea burden as the substantive crime—no less, but no more. And this analysis would eliminate the anomaly that I have identified.

This analysis would also be consistent with that part of the official commentary to § 53a-48 of the Penal Code

that refers to the mens rea for conspiracy. That commentary provides: "A second change is the requirement that the defendant must have a specific intent to agree in the performance or causation of criminal conduct. A general intent to promote or facilitate the criminal object or means is not sufficient to establish guilt." Commission to Revise the Criminal Statutes, Penal Code Comments, supra, commission comment, § 53a-48. The reference to "performance or causation of criminal conduct" refers simply to the underlying crime conspired to be committed, including, however, only its specific intent elements. Thus, it means that the conspiracy charge requires the same specific intent as is required for the underlying crime—no less, but no more.

Although it is a legitimate function of a judge of an intermediate appellate court to point out, where appropriate, an anomaly in governing Supreme Court precedent and possible reasons and solutions, as I have done here, it is not my function to do anything more. See *State* v. *Robinson*, 105 Conn. App. 179, 201, 937 A.2d 717 (2008) ("as an intermediate appellate court, it is beyond our function to overrule controlling Connecticut Supreme Court precedent"), aff'd, 290 Conn. 381, 963 A.2d 59 (2009). If anything is to be done to correct such an anomaly, it is for our Supreme Court to do so.

GEORGINA SPILKE *v.* JOSEPH M. WICKLOW III ET AL.
(AC 33712)

Lavine, Robinson and Espinosa, Js.

Syllabus

The plaintiff sought to recover damages from the defendant S, her former husband, and the defendant B for vexatious litigation, which was based on a postjudgment motion for contempt that S had filed against the

plaintiff for her alleged violation of a provision in the dissolution judgment. The trial court had determined that S did not meet his burden of proving that the plaintiff was in violation of the dissolution judgment and ruled in favor of the plaintiff on the motion for contempt, and this action followed. After the defendants were defaulted for failure to plead, a hearing in damages was held and the trial court rendered judgment for the plaintiff, awarding her $30,003 in damages against S and $1 in nominal damages against B, from which the plaintiff appealed and the defendants cross appealed to this court. *Held*:

1. Contrary to the plaintiff's claim, the trial court did not err in determining that B did not participate in the filing of the motion for contempt; although the plaintiff alleged that B was involved in a purported conspiracy to hide S's assets from the plaintiff, the vexatious litigation claim stemmed solely from the motion for contempt filed by S, and not the divorce proceedings that took place between S and the plaintiff, and the plaintiff did not allege in the complaint or demonstrate at the hearing in damages that B played any part in the actual filing of the motion for contempt.

2. The plaintiff could not prevail on her claim that the trial court improperly limited the proximate cause for the vexatious litigation claim to S's motion for contempt, which was based on her claim that all of the proceedings surrounding the divorce were vexatious; the plaintiff's vexatious litigation claim stemmed from the filing of the motion for contempt, not from the divorce proceedings, and the trial court therefore properly limited its review to damages arising out of the filing of the motion for contempt.

3. The trial court did not abuse its discretion in awarding only nominal damages as to B, that court not having erred in concluding that B did not participate in the filing of the motion for contempt, and because the vexatious litigation claim stemmed from the motion for contempt, the trial court properly limited its damages award to only damages that resulted from the filing of the motion; moreover, the court's award of $10,001 in damages against S on the plaintiff's vexatious litigation claim also was not an abuse of discretion, as the court reasonably could have inferred that S's filing of the motion for contempt caused the plaintiff emotional distress.

4. The defendants could not prevail on their claim on cross appeal that the trial court improperly denied their motion to strike the case from the hearing in damages list, which was based on their claim that the default against them was extinguished when the plaintiff had filed an amended complaint after the default was entered: although the plaintiff filed four amended complaints after the defendants were defaulted, three of those amendments were filed after other defendants in the case had filed requests to revise, the substituted complaints did not relate to the defaulted defendants and the substantive allegations remained the same, and, therefore, the amendments worked no substantial change in the

cause of action, and the defendants failed to demonstrate any prejudice suffered; moreover, the trial court did not abuse its discretion in failing to set aside the default judgment, as the alleged health problems of the defendants' counsel did not begin until nearly two years after the default was entered against the defendants, and the default had been entered more than three years prior to the motion to set aside the default.

Argued May 14—officially released September 25, 2012

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant Kenneth Spilke et al. were defaulted for failure to plead; thereafter, the court, *Cosgrove*, *J.*, granted the motion to strike filed by the named defendant et al.; subsequently, the court, *Keegan*, *J.*, granted the motion for partial judgment filed by the named defendant et al. and rendered judgment thereon; thereafter, the court, *Silbert*, *J.*, denied the motion to strike the matter from the hearing in damages list filed by the defendant Kenneth Spilke et al.; subsequently, the court, *Silbert*, *J.*, denied the motion to open the judgment filed by the defendant Kenneth Spilke et al.; thereafter, the court, *Hon. Thomas J. Corradino*, judge trial referee, after a hearing in damages, rendered judgment for the plaintiff, from which the plaintiff appealed and the defendant Kenneth Spilke et al. filed separate cross appeals to this court. *Affirmed.*

Georgina Spilke, pro se, the appellant-appellee (plaintiff).

Glenn L. Formica, for the appellees-appellants (defendant Kenneth Spilke et al.).

Opinion

ROBINSON, J. The self-represented plaintiff, Georgina Spilke, appeals from the judgment of the trial court awarding her $30,003 against the defendant, her former husband, Kenneth Spilke, and $1 in nominal damages

against the defendant Jennifer Ballard[1] on her vexatious litigation claim. The defendants cross appeal from the judgment rendered against them. The vexatious litigation action stemmed from a motion for contempt brought by Spilke against the plaintiff. On appeal, the plaintiff argues that the trial court erred in (1) determining that Ballard did not materially participate in the motion for contempt filed by Spilke, (2) limiting the proximate cause for her vexatious litigation claim to Spilke's motion for contempt, and (3) not holding Ballard liable for damages and not awarding a larger damages award. In Spilke's cross appeal, he argues that the trial court erred in (1) finding that the plaintiff had proven emotional distress and (2) awarding the plaintiff damages for emotional distress. In both Spilke's and Ballard's cross appeals, they argue that the trial court (1) erred in denying their motion to strike the case from the hearing in damages list when the plaintiff had repleaded her complaint and (2) abused its discretion in failing to open the default judgment entered against the defendants. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the plaintiff's and the defendants' claims on appeal. The plaintiff and Spilke were divorced in 2003. In 2004, Spilke filed a postjudgment motion for contempt against the plaintiff. In its memorandum of decision, the court, *Frazzini*, *J.*, detailed the background of the motion for contempt: "[Kenneth Spilke's] motion for contempt claims that his ex-wife

[1] Ballard is presently married to Kenneth Spilke. Kenneth Spilke will be referred to as Spilke or jointly with Ballard as the defendants, and Georgina Spilke will be referred to as the plaintiff. The plaintiff originally brought suit against Spilke and Ballard as well as Spilke's attorney, Joseph M. Wicklow III, and the law firm of Lasala, Walsh, Wicklow & Velardi, LLC. The court granted a motion to strike count one and count two of the complaint as to Wicklow and Lasala, Walsh, Wicklow & Velardi, LLC.

[Georgina Spilke] has violated a provision in the dissolution decree barring her from pursuing a deficiency judgment against him in a foreclosure action on a condominium unit that was once the marital home. [Kenneth Spilke] claims [that Georgina Spilke] has violated this clause because a limited liability company (LLC) owned by [Georgina Spilke's] sons has acquired and exercised the right to proceed on the deficiency judgment. [Georgina Spilke] denies that the LLC, owned by her sons, is acting on her behalf." The court determined that Spilke did not meet his burden of proving that the plaintiff was in violation of the dissolution judgment and ruled in the plaintiff's favor on the motion for contempt.

The plaintiff filed a complaint in January, 2007, alleging vexatious litigation based on Spilke's motion for contempt.[2] As to the defendants, the complaint asserted that Spilke at no time had "any facts or evidence to demonstrate that [she] in any way violated the [d]ivorce [j]udgment [a]greement." The plaintiff provided detailed background of the relationship between her and Spilke, and she asserted that the filing of the motion for contempt was used as a means to prevent a deficiency judgment against Spilke in another matter and to prevent the plaintiff, creditors and the Internal Revenue Service from discovering Spilke's hidden assets and income.

On March 9, 2007, the plaintiff filed a motion for default for failure to plead against the defendants. The court granted the motion as to Spilke on March 15,

[2] The plaintiff filed revised complaints on May 4 and August, 20, 2007, and on April 14, 2008, after the defendant Joseph M. Wicklow III and the defendant law firm of Lasala, Walsh, Wicklow & Velardi, LLC, filed requests to revise. The court subsequently granted a motion to strike as to those defendants. See footnote 1 of this opinion. The plaintiff also filed an amended complaint on July 28, 2008.

2007, and as to Ballard on March 26, 2007.[3] On April 12, 2010, the plaintiff filed a certificate of closed pleadings and requested a hearing in damages. The hearing in damages was held on February 21, 2011. In its memorandum of decision, the court noted that, because the defendants did not give notice that the allegations of the complaint would be contested under Practice Book § 17-34, the entry of a default operated as a confession by the defendants of the material facts alleged in the complaint. Construing the pleadings liberally, the court determined that the complaint made a claim for vexatious litigation at common law and also under the vexatious litigation statute, General Statutes § 52-568. The court found that the plaintiff "is entitled to $1 in nominal damages for economic damages and $10,000 in noneconomic damages on her common-law claim [and that] she would also be entitled to the same compensatory damage claim on the statutory claim under § 52-568 of the General Statutes. . . . Given the serious allegations of the complaint, treble damages would be warranted under the statute, which will make the total judgment $30,003." The court continued by determining that, on the basis of the complaint, it could not "conclude how or in what manner the defendant Ballard was directly responsible for instigating the motion for contempt or [what] can be said, in any ascertainable way, to have caused the damage resulting from the unsupported and unjust motion as dictated by the complaint." The court therefore awarded damages in the amount of $30,003 against Spilke and $1 in nominal damages against Ballard. These appeals followed. Additional facts will be provided when necessary.

I

PLAINTIFF'S APPEAL

We begin with the plaintiff's claims. She argues that the trial court erred in (1) determining that Ballard did

[3] There is a handwritten note on the order page, dated January 30, 2008, which states that "[u]pon review [t]he court recognizes an appearance for

not materially participate in the motion for contempt filed by Spilke, (2) limiting the proximate cause for the vexatious litigation claim to Spilke's motion for contempt, and (3) not holding Ballard liable for damages and not awarding a larger damages award. We address each argument in turn.

A

The plaintiff's first claim on appeal is that the court erred in determining that Ballard did not materially participate in the motion for contempt filed by Spilke. In her complaint, the plaintiff detailed what she deemed to be an intricate conspiracy between Spilke and Ballard, stemming from 1997, to hide Spilke's assets and income. The plaintiff argues that the complaint detailed the "plan" to transfer assets to Ballard, and to defraud the plaintiff, creditors and the Internal Revenue Service. She argues that the "collusive transfer of assets in 1999, just prior to [the] divorce proceedings," ultimately led to Spilke's motion for contempt. We disagree.

The court determined that the complaint did not demonstrate a link between Ballard and the motion for contempt filed by Spilke. The court found: "The original complaint contains a litany of how the defendants . . . conspired to conceal marital assets, and Mr. Spilke falsely testified as to his business activities. It then claims [that the defendants] hired an attorney and his firm, who were originally defendants but who were removed from the case pursuant to a motion to strike. In any event the attorney is said to have filed the motion for contempt at issue here 'on behalf of his client Kenneth Spilke.' In the fifty-five paragraphs of the entire complaint there is no actual link between any efforts made to hide Mr. Spilke's assets by Ballard to the actual

Jennifer Ballard was in file as of 3/22/07 so default for failure to plead should have been granted on 3/26/07."

filing of the motion for contempt; for all the complaint alleges this was an adventure he pursued on his own."

"A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant. . . . If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations. . . . Therefore, the only issue before the court following a default is the determination of damages. . . . A plaintiff ordinarily is entitled to at least nominal damages following an entry of default against a defendant in a legal action. . . .

"In an action at law, the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive. . . .

"Thus, we must examine whether the allegations set forth in each count of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested. . . . Our review of the legal sufficiency of pleadings is plenary. . . . To the extent that our analysis goes beyond the facial validity of the complaint and into the court's findings of fact at the hearing in

damages, such findings will be reversed only if they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Whitaker* v. *Taylor*, 99 Conn. App. 719, 725–27, 916 A.2d 834 (2007).

"The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages. . . . In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Citations omitted; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 553–54, 944 A.2d 329 (2008).

We conclude that the court did not err in determining that Ballard did not participate in the motion for contempt that is the basis of the plaintiff's vexatious litigation claim. Although the plaintiff argues that Ballard was involved in a purported conspiracy to hide Spilke's assets from the plaintiff, the vexatious litigation claim stems solely from the motion for contempt filed by Spilke, and not the divorce proceedings that took place between Spilke and the plaintiff. Taking the allegations set forth in the complaint as true, Ballard may have assisted Spilke in concealing assets from the plaintiff. The plaintiff, however, did not allege in the complaint, nor demonstrate at the hearing in damages, that Ballard played any part in the actual filing of the motion for contempt. As the trial court correctly noted, the complaint specifically asserts that Spilke filed the motion

for contempt on October 27, 2004. The court therefore did not err in determining that Ballard did not participate in the filing of the motion for contempt.

B

The plaintiff's second claim on appeal is that the court erred in limiting the proximate cause for the vexatious litigation claim to Spilke's motion for contempt. She argues that the defendants' conspiracy stemming from the time of the divorce proceedings is the cause of all subsequent tortious litigation, including Spilke's motion for contempt. She contends that all of the proceedings surrounding the divorce were "vexatious litigation superimposed on a simple divorce . . . ." We disagree.

In its memorandum of decision, the court stated: "The court in no way disputes [the plaintiff's] assertions about her past treatment, but given the specific nature of the action brought and the requirements of proximate cause it concludes the claims made are far beyond what is just and reasonable. The issue before the court, however, must be the damages caused the plaintiff by the vexatious suit at hand—i.e., the bringing of the contempt motion. It cannot be the function of this court to make amends through this judgment for every past misdeed and unfair and irresponsible act now alleged against the defendant Spilke. . . . There was much testimony and argument presented about [Spilke's] abandonment of the children, his fraudulent concealment of assets to avoid marital obligations and tax responsibilities, and all of the pain and suffering caused the plaintiff long before the contempt action was brought, let alone contemplated. . . . The plaintiff's basic theory seems to be that the motion [for] contempt was another fraudulent attempt to keep hidden assets concealed, since, if a deficiency judgment were allowed those assets would be discovered. Default has entered,

so the court accepts this allegation made in the complaint as true. But on the separate question of damages emanating from this contempt action the court cannot piggyback on this claim all the deleterious effects of similarly fraudulent activities perpetrated by Mr. Spilke in the past; those effects long antedated the contempt litigation."

"Proximate cause is ordinarily a question of fact. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . ." (Citation omitted; internal quotation marks omitted.) *Gurguis* v. *Frankel*, 93 Conn. App. 162, 168, 888 A.2d 1083, cert. denied, 277 Conn. 916, 895 A.2d 789 (2006).

We conclude that the court did not err in limiting the vexatious litigation claim and the resulting damages the plaintiff suffered from the time of the filing of the motion for contempt onward. A vexatious litigation claim arises when a plaintiff has wrongfully been sued by another individual. *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, supra, 286 Conn. 553. An individual is entitled to recover damages that resulted from the unlawful lawsuit. Id., 554. In the present case, the wrongful lawsuit at issue was the filing of the motion for contempt. Although the divorce between the plaintiff and Spilke may have been acrimonious, the plaintiff's vexatious litigation claim stems from the filing of the motion of contempt, and not from the divorce proceedings. The alleged concealment of assets and fraudulent financial affidavits happened prior to the filing of the motion for contempt and are not relevant to the plaintiff's damages for her vexatious litigation claim. Although the plaintiff asserts that all of the proceedings between the parties, including the divorce itself, were vexatious, the complaint asserts a claim for

vexatious litigation based on the filing of the motion for contempt, and the court therefore properly limited its review to damages arising out of the filing of the motion for contempt in October, 2004. We therefore conclude that the court did not err in limiting the proximate cause for the vexatious litigation claim to the filing of the motion for contempt.

C

The plaintiff's last claim is that the court erred in not assessing damages against Ballard, and also in not awarding the plaintiff "for all [of] the maltreatment" she suffered over the extensive period of litigation. On his cross appeal, Spilke contends that the court erred in finding that the plaintiff had proven emotional distress and in awarding $10,001 in damages. Because both the plaintiff and Spilke contend that the court's award for damages was improper, we analyze these claims together.

A trial court is vested with "broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed . . . absent a clear abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 90, 752 A.2d 1037 (1999).

Because we already have determined that the court did not err in concluding that Ballard did not participate in the filing of the motion for contempt, we conclude that the court did not abuse its discretion in awarding only nominal damages as to Ballard. The plaintiff, however, also claims that the court erred in not assessing a greater damages award for all of the "maltreatment" that she suffered. As indicated in part I B of this opinion, the court correctly limited its focus as to what occurred after the filing of the motion for contempt. The plaintiff's vexatious litigation claim stemmed from the motion for contempt, and, therefore, the court properly

limited its damages award to only damages that resulted from the filing of the motion. We therefore must determine whether the court abused its discretion in awarding $10,001 in damages against Spilke on the plaintiff's vexatious litigation claim.

The court found that the plaintiff was entitled to $10,001 in noneconomic damages for emotional distress and was entitled to treble damages.[4] The court took the allegations of the complaint as true and found that the plaintiff "was threatened with contempt for violating a paragraph of a settlement agreement entered into by the parties just two years before and according to the complaint was instituted solely to hide fraudulently concealed assets, which, although apparently known about by her, was not further pursued because she wanted to settle the case and apparently move on with her life. One can imagine her aggravation and distress in being accused of violating a provision of an agreement she entered into despite her belief that the defendant had acted in the improper way alleged in concealing and transferring his assets. This litigation, even if it need not have prevented [the plaintiff] from moving to Chicago to be with her mother, complicated the decision whether or not to do so and must have been a source of emotional distress. She also must have experienced distress proceeding from her annoyance in having to spend

[4] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages." We note that Spilke only claims on appeal that the plaintiff did not prove her damages for emotional distress and therefore that the court erred in awarding $10,001. Spilke does not argue that the court erred in awarding treble damages under § 52-568; therefore, we limit our analysis as to whether the court abused its discretion in awarding $10,001 in damages for emotional distress.

eighty to 100 hours to prepare for what was knowingly bogus litigation."

Giving every reasonable presumption in favor of the correctness of the court's ruling, we conclude that the trial court did not abuse its discretion when it awarded the plaintiff $1 in nominal damages and $10,001 in non-economic damages for her emotional distress. The plaintiff testified that she was prevented from going to live with her mother in Chicago due to the filing of the motion for contempt. The plaintiff testified that she was planning to move to Chicago to be with her ailing mother and to move closer to her friends and family. She testified that during the planning of this move, however, Spilke filed the motion for contempt, which forced her to stay in Connecticut. Although she may have been able to move and still defend herself in the motion for contempt, she thought that the better decision for the purpose of defending herself as to the motion for contempt was to remain in Connecticut, which prevented her from taking care of her mother and from reuniting with her children and friends in Chicago. The court properly could infer that this decision likely caused the plaintiff some distress.

Spilke argues that the plaintiff provided no evidence to the court regarding her emotional distress and that her testimony referenced events that occurred prior to the filing of the motion for contempt. While it is true that the plaintiff often testified in generalities, referencing what in her opinion were all of the atrocities that Spilke had committed against her without specific regard to the motion for contempt, we find that the court could have inferred that the plaintiff suffered emotional distress from the filing of the motion for contempt.[5] The plaintiff testified regarding the distress

[5] We also note that the plaintiff represented herself during the hearing in damages as well as in the present appeal. "Connecticut courts are solicitous of self-represented parties when it does not interfere with the rights of other parties." *Argentinis* v. *Fortuna*, 134 Conn. App. 538, 539, 39 A.3d 1207 (2012).

of the divorce proceedings, the aftermath of the divorce and her belief that Spilke had perpetrated fraud against her at the time of the divorce. It is clear from the record that the plaintiff had endured a contentious divorce with Spilke and that after the divorce was finalized, she was served with a motion for contempt, resulting in even more time in litigation with Spilke. She testified that "in terms of . . . emotional distress, you could see that previously . . . I was really quite upset. It is that it can never—it's never really straightened out." Furthermore, the plaintiff testified that, after the divorce from Spilke, "I felt like a burdened beast, insulted by this former husband . . . who has said some horrible things about me to the children; at the end of all this I had at least an opportunity to spring to life and then [Spilke] brought postjudgment action against me without any evidence that I participated in anything unlawful." We therefore conclude that the court did not abuse its discretion in finding that the plaintiff suffered emotional distress and awarding $10,001 in compensatory damages. As for the plaintiff's claim, she has provided no reason why the court abused its discretion in awarding only $10,001 in compensatory damages other than her own belief that she is entitled to more damages. We find that the award was not unreasonable and conclude that the court did not abuse its discretion in its award of damages as to Spilke.

II

DEFENDANTS' CROSS APPEALS

We next address the remainder of the defendants' claims raised in their cross appeals. The defendants claim that the court erred in denying their motion to strike the case from the hearing in damages list when the plaintiff had repleaded her complaint. They argue that the plaintiff filed an amended complaint on July

28, 2008, well after default was entered as to the defendants, and that no new motion for default was filed by the plaintiff. The defendants argue, therefore, that the amended complaint extinguished their default. Furthermore, the defendants claim that the court abused its discretion in failing to open the default judgment entered against them.

The complaint originally was brought against the two defendants as well as Spilke's attorney, Joseph M. Wicklow III, and the law firm of Lasala, Walsh, Wicklow & Velardi, LLC (law firm). Wicklow and the law firm filed a motion to strike count one and count two of the plaintiff's complaint, which was granted by the court on July 11, 2008. The plaintiff filed an amended complaint on July 25, 2008, including counts against Wicklow and the law firm. Wicklow and the law firm filed a motion to strike the counts of the complaint directed against them, which was granted by the court on October 2, 2008.

On April 12, 2010, the plaintiff filed a certificate of closed pleadings and requested a hearing in damages. The defendants filed a motion to strike the matter from the hearing in damages docket on September 16, 2010, arguing that the plaintiff had amended her complaint numerous times since the entry of default against the defendants, which, in turn, extinguished the default. They also filed an answer to the plaintiff's complaint, pending the court's decision on the motion. The court denied the motion on September 16, 2010.

The court's order denying the defendants' motion to strike stated: "The defendants . . . move to strike this case from the hearing in damages list, to which it was assigned following the entry of a default for failure to plead. They rely on the fact that following the granting of a motion to strike the complaint as to the other defendants in this case, the plaintiff filed a substitute

pleading in an effort to cure the defects that the court had found in the stricken pleading. . . . They have filed an answer and special defenses, and they seek to have the case removed from the hearing in damages docket so that it can be claimed for a trial on the merits. The problem with the defendants' argument is that the plaintiff, in the previously mentioned substituted complaint, makes it abundantly clear that the substitution relates only to the former defendants Joseph Wicklow III and Walsh, Lasala, Wicklow and Velardi, LLC, and that it does not seek to be a substitute for the original counts against the defendants Kenneth Spilke and Jennifer Ballard. In light of the foregoing, the default against Kenneth Spilke and Jennifer Ballard still stands, and the case is appropriately docketed on the hearing in damages list."

The defendants then filed a motion to open the default for failure to plead on October 18, 2010. In the motion, the defendants argued that the default was due to miscommunication between the defendants and their attorney as well as their attorney's chronic illness. Attached to the motion was an affidavit from the defendants' attorney, Henry N. Silverman. The defendants also argued that there was no prejudice to the plaintiff because the default was pending for three years before the plaintiff claimed the matter to the hearing in damages docket.

The motion was denied by the court on December 23, 2010. In denying the defendants' motion, the court noted that "[t]he gravamen of the defendants' argument in support of the instant motion is that they were prevented by a combination [of] their misunderstanding of the status of the case and prior defense counsel's health problems from responding to the plaintiff's complaint." The court stated that, although the defendants had apprised it that their attorney had health issues in late 2009, that "does not answer, or even address, the

question of how or why defaults which entered in March, 2007, were permitted to stand unchallenged for more than three years. The only explanation given, essentially that [the defendants] had instructed [their counsel] to try to handle their case 'on the cheap' . . . is hardly 'good cause' for allowing three years . . . or even the first two of those years, before [the defendants' attorney's] health problems created additional problems . . . to pass without taking any action with respect to the defaults." The court therefore determined that there was no good cause to set aside the default and denied the defendants' motion.

As for the defendants' first claim, even though the defendants' motion was labeled a motion to strike, "a motion is to be decided on the basis of the substance of the relief sought rather than on the form or the label affixed to the motion. . . . It is the substance of a motion, therefore, that governs its outcome, rather than how it is characterized in the title given to it by the movant." (Citations omitted.) *State* v. *Taylor*, 91 Conn. App. 788, 791–92, 882 A.2d 682, cert. denied, 276 Conn. 928, 889 A.2d 819 (2005). The defendants labeled the motion as one to strike the matter from the hearing in damages docket. The stated reason for the motion was that, because the plaintiff had filed amended complaints, the defendants' default had been extinguished. Essentially, the defendants sought to set aside the default because the plaintiff had filed an amended complaint. We therefore apply the same standard of review to the defendants' claim as we would to a motion to set aside a default, namely, we must determine if the trial court abused its discretion. See *Higgins* v. *Karp*, 243 Conn. 495, 508, 706 A.2d 1 (1998).

Although not completely analogous, we find this court's recent decision in *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 38

A.3d 1212 (2012), instructive. In *Willamette Management Associates, Inc.*, the plaintiff served a complaint on May 28, 2008, that included an erroneous return date. Id., 62–63. In June and July, 2008, the court granted the plaintiff's motions for default against the defendant for failure to appear and failure to plead to the complaint. Id., 62. In October, 2008, the defendant filed an answer, special defenses and counterclaim. Id. In April, 2009, the error in the return date was discovered, and the court ruled that it was a defect that was curable by amendment, and, at the court's direction, the plaintiff amended the writ of summons and served an amended complaint to reflect the correct return date. Id., 63. At the scheduled hearing in damages in August, 2009, the defendant moved to strike the matter from the hearing in damages list, claiming that the plaintiff had not filed a reply to the special defenses asserted by the defendant, and, therefore, the pleadings were still open. Id., 64. The trial court rejected the defendant's argument. Id.

On appeal, the defendant argued that "because the court granted the plaintiff leave to amend the writ of summons and complaint to correct the return date, [the defendant] should have been allowed to plead to the amended complaint." Id., 65. The defendant argued that, due to the filing of the amended complaint, "the default was in effect opened and she should have been allowed to plead to the newly filed amended complaint." Id., 66–67. This court determined that the trial court did not abuse its discretion in prohibiting the defendant from filing a pleading as to the amended complaint. Id., 69. In reaching that conclusion, this court noted that the "only change between the original complaint and the amended complaint was the return date and the date of the complaint. All substantive allegations in the complaint remained precisely the same. . . . The defendant's substantive rights were not affected by the amendment, and she has not demonstrated prejudice.

If the effect of an amendment of a complaint so made is to substantially change the cause of action originally stated, the defendant is entitled to file new or amended pleadings and present further evidence. Also, if the amendment interjects material new issues, the adversary is entitled to reasonable opportunity to meet them by pleading and proof.'' (Internal quotation marks omitted.) Id., 68–69. This court determined that no substantial change was made to the action, and, therefore, the trial court did not abuse its discretion by prohibiting the defendant from filing pleadings as to the amended complaint. Id., 69.

Although the question in *Willamette Management Associates*, *Inc.*, was whether the court abused its discretion by prohibiting the defendant from filing pleadings, and in this case it is whether the court abused its discretion in denying the motion to strike the matter from the hearing in damages list, in both cases the question primarily was whether the filing of an amended complaint after a finding of default extinguished the default and allowed the defendant to plead in response. In the present case, the plaintiff filed four amended complaints after the defendants were defaulted. Three of those amended complaints were filed after Wicklow and the law firm filed requests to revise. Although the complaints differed in some respects from the original complaint, the substantive allegations remained the same. As in *Willamette Management Associates*, *Inc.*, we conclude that the amendments worked no substantial change in the cause of action and that the defendants have not demonstrated any prejudice suffered. Further, we note that the defendants did not file their motion to strike until September 16, 2010, more than three years after the defendants had been defaulted. We therefore conclude that the court did not abuse its discretion in denying the motion to strike the matter from the hearing in damages list.

The defendants also claim that the court abused its discretion in failing to set aside the default judgment.[6] "[T]he determination of whether to set aside [a] default is within the discretion of the trial court . . . and will not be disturbed unless that discretion has been abused or where injustice will result. In the exercise of its discretion, the trial court may consider not only the presence of mistake, accident, inadvertence, misfortune or other reasonable cause . . . factors such as [t]he seriousness of the default, its duration, the reasons for it and the degree of contumacy involved . . . but also, the totality of the circumstances, including whether the delay has caused prejudice to the nondefaulting party." (Citations omitted; internal quotation marks omitted.) *Higgins* v. *Karp*, supra, 243 Conn. 508.

The defendants argue that the motion to set aside the default should have been granted because the default was entered due to "prior counsel's inadvertence and subsequent health issues." The affidavit from the defendants' prior counsel, which was attached to the motion, stated that the defendants "had a misunderstanding as to the nature of this lawsuit, they had it confused with other legal proceedings" and that the

[6] The defendants also claim that the court abused its discretion because its decision was based on a misapprehension that the defendants wanted the case handled "on the cheap," when they never instructed counsel not to defend the lawsuit or to compromise their defense in order to save money. In the court's decision on the motion, the court stated that "[t]he only explanation given, essentially that [the defendants] had instructed [their counsel] to try to handle their case 'on the cheap' . . . is hardly 'good cause' for allowing three years . . . or even the first two of those years, before [the defendants' attorney's] health problems created additional problems . . . to pass without taking any action with respect to the defaults." We do not believe that the court misapprehended the affidavit attached to the motion, which explicitly stated that counsel was instructed by the defendants that "they would appreciate it if I would keep the expense of this lawsuit to a minimal amount in order to mitigate the amount of legal fees as it was their hope that the Plaintiff . . . would abandon what they considered to be a malicious lawsuit . . . ."

defendants instructed him that "they would appreciate it if I would keep the expense of this lawsuit to a minimal amount in order to mitigate the amount of legal fees . . . ." The affidavit also mentioned that counsel endured health problems in late 2009 and early 2010, and therefore was unable to handle claims relating to this case.

Given the assertions in the affidavit, we cannot conclude that the court abused its discretion in denying the motion to set aside the default judgment. Counsel's health problems did not begin until nearly two years after the default was entered against the defendants. We also note that the default had been entered more than three years prior to the motion to set aside the default. On the basis of the foregoing, we conclude that the court did not abuse its discretion in denying the motion to set aside the default judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER LARSON *v.* MATILDE LARSON
(AC 33082)
(AC 33334)

Alvord, Espinosa 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 reducing the amount of alimony and child support payable by him to the defendant and granting the defendant's motions for contempt and for attorney's fees. Thereafter, the trial court issued a corrected memorandum of decision, and the plaintiff filed a separate appeal to this court, which consolidated the appeals. *Held*:

1. The plaintiff could not prevail on his claim that the trial court made several errors in its calculation of the new child support and alimony orders and in applying those orders retroactively; that court, which found that there had been a substantial change in circumstances and

reduced the plaintiff's obligation on the basis of its calculation of the parties' presumptive child support, did not abuse its discretion in its formation of the new alimony and child support awards.

2. The plaintiff's claim that the trial court improperly found him in contempt for failure to pay child support and alimony and ordered him to pay $99,809.12 in arrearages was unavailing; that court's finding that the plaintiff had the ability to pay his child support and alimony obligations was not clearly erroneous and, thus, its determination that the plaintiff wilfully had failed to comply with the court's orders was not an abuse of discretion.

3. The trial court did not abuse its discretion in awarding attorney's fees to the defendant, that court having afforded the plaintiff an effective opportunity to challenge the reasonableness of the fees, and the plaintiff having failed to present any evidence challenging the reasonableness of those fees.

Argued April 12—officially released September 25, 2012

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 Harrigan*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shay, J.*, granted the plaintiff's motion to modify child support and alimony and granted the defendant's motions for contempt and for attorney's fees, and the plaintiff appealed to this court; subsequently, the court, *Shay, J.*, issued a corrected memorandum of decision, and the plaintiff filed a separate appeal; thereafter, this court consolidated the appeals. *Affirmed.*

Peter J. Larson, pro se, the appellant (plaintiff).

Matilde Larson, pro se, the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Peter Larson, appeals from the judgment of the trial court (1) reducing the amount of alimony and child support payable by him to the defendant, Matilde Larson, (2) finding him in

contempt for failure to comply with the prior child support and alimony orders and (3) ordering him to pay the defendant's attorney's fees.[1] On appeal, the plaintiff claims that each of the court's orders was an abuse of discretion. We affirm the judgment of the trial court.

The following undisputed facts are necessary for our resolution of the plaintiff's claims. The parties were married on June 19, 1982, and have two minor children. The marriage of the parties was dissolved on January 31, 2003. Under the terms of the judgment of dissolution, the plaintiff was ordered to pay alimony in the amount of $500 per week and child support in the amount of $347 per week. Prior to the modification from which the plaintiff appeals in the present case, the court twice had modified the plaintiff's child support obligations, and, as of the last modification, the plaintiff was ordered to pay $424 per week.[2] On November 17, 2010, the plaintiff filed an amended motion for modification,[3] seeking a reduction in alimony and child support orders due to a change in income of the parties.[4] The defendant filed

[1] The plaintiff initially appealed from the court's December 7, 2010 judgment. The court issued a corrected memorandum of decision on March 24, 2011, from which the plaintiff brought another appeal. This court consolidated these appeals.

[2] On May 27, 2004, the plaintiff moved for a modification of the parenting arrangement and alimony and support orders. On January 11, 2005, the court denied the motion for modification of alimony but reduced the child support order to $280 per week. The defendant moved to open and modify the child support order on July 12, 2005. The court granted the motion and increased child support to $424 per week on the basis of a finding that the plaintiff's net income was $118,924 and the defendant's net income was $30,680. The plaintiff appealed the modification, and this court affirmed the trial court's judgment. See *Larson* v. *Larson*, 99 Conn. App. 904, 916 A.2d 129 (2007).

[3] The court allowed the plaintiff to amend his motion for modification to raise the issue of the change in income of the parties.

[4] On April 6, 2006, the plaintiff filed his original motion for modification of custody and visitation, child support, alimony and life insurance. In his motion for modification, the plaintiff asserted that (1) there was a substantial change in circumstances on the basis of his move to California, (2) the defendant had "conducted a campaign of fraud and parental alienation" and (3) the underlying decision was "illegal from [the] inception [for] violating

a motion for contempt for failure to comply with child support and alimony awards and a motion for counsel fees.

On December 7, 2010, the court issued a memorandum of decision reducing the plaintiff's alimony and child support obligations and granting the defendant's motions for contempt and counsel fees. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court erred in (1) the calculation of the reduction in his child support and alimony obligations, (2) finding that he was in contempt for failure to comply fully with the child support and alimony orders and (3) ordering him to pay attorney's fees to the defendant.

Although the court's orders significantly reduced the plaintiff's child support and alimony obligations, the plaintiff argues that the court made several errors in its calculation of the new child support and alimony orders and erred in applying the orders retroactively. None of the plaintiff's arguments have merit. "[I]n reviewing a trial court's decision on a motion to modify, every reasonable presumption will be made in favor of the trial court's exercise of discretion. . . . Its decision will not be disturbed unless it acted illegally or unreasonably." (Citation omitted; internal quotation marks omitted.) *Nicholson* v. *Nicholson*, 66 Conn. App. 885, 887, 786 A.2d 462 (2001). The court found that, at the time of his motion for modification, the plaintiff was unemployed and his net income was $21,648, compared to $85,452 at the time of the judgment of dissolution. On these grounds the court determined that there had been a substantial change in circumstances and reduced the alimony order to a sum of $1 per year. With regard to child support, the court had found in connection

[General Statutes §] 46b-215d." In its December 7, 2010 memorandum of decision, the court rejected all three grounds.

with its previous modification, that the net income of the plaintiff was $118,000 per year and that the defendant's net income was $30,680 per year. The court, in considering the present motion to modify child support, determined that there had been a substantial change in circumstances, and, on the basis of the court's calculation that the parties' presumptive child support was $348 per week, reduced the plaintiff's obligation to $115 per week.[5] The court applied the new child support and alimony awards retroactively to March 1, 2010.[6] After our careful review of the record, we conclude that the court did not abuse its discretion in its formation of the new alimony and child support awards.

Next, the plaintiff claims that the court erred in finding him in contempt for failure to pay child support and alimony and ordering him to pay $99,809.12 in arrearages. We must determine "whether the trial court abused its discretion in issuing . . . a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." *In re Leah S.*, 284 Conn. 685, 694, 935 A.2d 1021 (2007).[7] "We review the court's factual findings in the context of a

[5] The court based its calculation on the defendant's stipulated income of $55,000. On March 24, 2011, the court issued a corrected memorandum of decision. The court noted that, in its December 7, 2010 memorandum of decision, in listing the defendant's *net* weekly income, it erroneously recited the defendant's *gross* weekly income. Nevertheless, the court stated that it properly based its calculation of the plaintiff's child support obligation on the *net* weekly income of both parties. Therefore, despite this scrivener's error, the court used the correct figures in its calculation.

[6] Prior to the court's December 7, 2010 order, the parties stipulated that any order would not be retroactive prior to January 1, 2009, and each party reserved the right to argue for or against any retroactive order.

[7] We first must determine "whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt." *In re Leah S.*, supra, 284 Conn. 693. We agree with the undisputed finding of the court that the underlying child support and alimony orders were clear and unambiguous.

motion for contempt to determine whether they are clearly erroneous." (Internal quotation marks omitted.) *Oldani* v. *Oldani*, 132 Conn. App. 609, 626, 34 A.3d 407 (2011). The plaintiff contends that, because he was unable to pay alimony and child support due to a lack of funds, his failure to pay was not wilful or without good cause. The court found that the plaintiff had the means to comply with the orders due to his employment from 2006 through 2009. After our review of the record, we conclude that the trial court's finding that the plaintiff had the ability to pay his child support and alimony obligations was not clearly erroneous. Therefore, we conclude that the court's determination that the plaintiff wilfully failed to comply with the court's orders was not an abuse of discretion.

Lastly, the plaintiff claims that the court erred in ordering him to pay the defendant's attorney's fees in the amount of $26,795. The plaintiff does not claim that the award of attorney's fees was unreasonable, but instead claims that he was denied the opportunity to challenge the reasonableness of the fees. "Our law for awarding attorney's fees in contempt proceedings is clear. General Statutes § 46b–87 provides that the court may award attorney's fees to the prevailing party in a contempt proceeding. The award of attorney's fees in contempt proceedings is within the discretion of the court. . . . In making its determination, the court is allowed to rely on its familiarity with the complexity of the legal issues involved. . . . [T]he award of attorney's fees pursuant to § 46b–87 is punitive, rather than compensatory . . . ." (Internal quotation marks omitted.) *Allen* v. *Allen*, 134 Conn. App. 486, 502–503, 39 A.3d 1190 (2012). "Once a contempt has been found, § 46b-87 establishes a trial court's power to *sanction* a noncomplying party through the award of attorney's fees. . . . Pursuant to § 46b-87, that sanction may be

imposed without balancing the parties' respective financial abilities." (Citations omitted; emphasis in original.) *Dobozy* v. *Dobozy*, 241 Conn. 490, 499, 697 A.2d 1117 (1997). The party found in contempt, however, must be given an "effective opportunity to challenge the reasonableness of the attorney's fees." Id., 501.

In the present case, the court scheduled a separate hearing for the plaintiff to challenge the reasonableness of the affidavit of attorney's fees filed by the defendant. At the November 12, 2010 hearing, the plaintiff did not present any evidence challenging the reasonableness of the attorney's fees. Therefore, we conclude that the court did not abuse its discretion in awarding attorney's fees to the defendant after providing the plaintiff with an "effective opportunity" to challenge such fees.

The judgment is affirmed.

MICHAEL F. CHEBRO ET AL.
v. JONATHAN C. AUDETTE
(AC 33262)

Lavine, Alvord and Schaller, Js.

Syllabus

The plaintiffs sought to quiet title to certain real property in connection with a dispute over the location of the boundary between the plaintiffs' parcel of land and the defendant's parcel of land. The trial court rendered judgment for the plaintiffs on their complaint and on a counterclaim filed by the defendant, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court's judgment rested on clearly erroneous findings that were unsupported by the record: the trial court heard extensive testimony from the plaintiffs' surveyor and the defendant's surveyor, both of whom explained in detail the bases for their conclusions with respect to the location of the boundary line, and in light of their testimony and the ample evidence, that court's factual findings were not clearly erroneous; furthermore, the defendant's claim that his evidence should have carried more weight was unavailing, as it was the function of the trial court to weigh the evidence and the credibility of the witnesses, and the trial court having

resolved the disputed question of fact as to the location of the contested boundary, this court would not disturb that finding.

2. The defendant's claim that the trial court abused its discretion in admitting into evidence as a business record a survey prepared by the plaintiffs' expert was not preserved for appellate review, as the defendant did not make a proper and timely objection at trial on the basis of the business record exception to the hearsay rule.

3. The trial court did not abuse its discretion in permitting the plaintiffs' expert, C, to testify about a survey that was prepared by his firm; C testified about his professional qualifications as a surveyor without objection from the defendant and, therefore, any objections to C's testimony went to its weight, not its admissibility.

Argued March 13—officially released September 25, 2012

Procedural History

Action to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Windham, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Riley, J.*; judgment for the plaintiffs on the complaint and on the counterclaim; subsequently, the court granted the defendant's motion to reargue, and the defendant appealed to this court. *Affirmed.*

Matthew G. Berger, for the appellant (defendant).

Brian J. Murphy, for the appellees (plaintiffs).

Opinion

LAVINE, J. This appeal arises out of a quiet title action, brought pursuant to General Statutes § 47-31, concerning the location of a boundary between two parcels of land in Woodstock. The defendant, Jonathan C. Audette, appeals from the judgment rendered in favor of the plaintiffs, Michael F. Chebro and Jeanne E. Curtin-Chebro, after a trial to the court. On appeal, the defendant claims (1) that the court's findings of fact are clearly erroneous and (2) that the court abused its discretion (a) in permitting the plaintiffs' expert to testify and (b) in admitting into evidence as a business

record a survey that the plaintiffs' expert prepared. We affirm the judgment of the trial court.

The court made the following findings of fact in its memoranda of decision issued September 23, 2010, and March 4, 2011. In 1975, predecessors in title to the defendant engaged in a land swap with predecessors in title to the plaintiffs. The plaintiffs' predecessors in title hired Gilbert F. Perry to survey the land in preparation for the conveyance. Perry prepared a survey, the Pine Brook Manor survey, dated June 23, 1975, and recorded it in the Woodstock land records.

The Pine Brook Manor survey consists of a legal description of the location of the boundaries of the property, utilizing physical features, angles, bearings and distances. Further, the Pine Brook Manor survey incorporates by reference a map depicting the premises, also dated June 23, 1975, filed with the Woodstock town clerk. The parties agree that this survey is ambiguous and inaccurate in its mathematical calculations. The description of the property states that the boundaries it details come back around to where they begin, creating a "closed" geometric shape. Yet, the angles and distances in the description do not actually come back to where they begin and do not actually form a closed geometric shape. Nevertheless, deeds to both the plaintiffs' and the defendant's properties have referred to the Pine Brook Manor survey since it was completed.

The plaintiffs took title to their parcel in 1994, and this boundary dispute began soon after the defendant acquired title to his parcel in 2006. The plaintiffs commenced an action to quiet title pursuant to § 47-31, and the defendant filed a counterclaim seeking essentially the same relief. In an attempt to discern the intent of the predecessors in title who engaged in the land swap, the parties each hired surveyors to prepare surveys of the defendant's parcel. The defendant employed Jeffrey

Stefanik; the plaintiffs employed Barry Clarke, who completed his survey after Stefanik completed his.[1] Additional facts are set forth as necessary.

At trial, the case largely turned on the expert testimony of the surveyors and their explanations of various exhibits.[2] After hearing and analyzing the evidence, the court rendered judgment in favor of the plaintiffs, adopting the Clarke survey in its decision.[3] This appeal followed.

I

The defendant first claims that the court's judgment rests on clearly erroneous findings of fact that are unsupported by the record.[4] Specifically, the defendant claims that the court committed clear error in finding Stefanik's opinion on the recorded dimensions to be less accurate than Clarke's opinion and in crediting Clarke's reliance on certain iron pins.[5] Additionally, at

[1] The parties agree that Stefanik personally visited the site to take measurements, and that Clarke utilized measurements, handwritten reports and computerized data that his firm's field crew collected.

[2] The court also heard testimony from the plaintiffs and the defendant, as well as from a neighbor, Ernest St. Jean.

[3] There was a factual misstatement in the opinion due to a transcription error, which suggested that Clarke completed his survey before Stefanik. The defendant filed a motion for reargument, which the court granted. The court corrected its error, clarifying that the misstatement had no bearing on the outcome of the case and that Clarke "presented the better or weightier evidence for the court's consideration."

[4] The precise nature of the defendant's claim is not clear at first blush. The defendant simply claims that "[t]he [t]rial [c]ourt erred in entering judgment for the [p]laintiffs." A review of the defendant's briefs and oral argument to this court demonstrates that the defendant takes issue with the court's findings of fact.

[5] The defendant also claims that the court erroneously found that Stefanik did not rely on monuments at all. The court's September 23, 2010 memorandum of decision specifically finds otherwise. The court points out that Stefanik "locate[d] an iron pin" other than the pin Clarke used, and that "Stefanik utilized the iron pin" to determine starting points. The court's statement that "the surveyor retained by the defendant did not rely upon fixed monuments," when read in context, pertains only to a particular portion of the survey. We discuss that portion subsequently in this opinion.

oral argument before this court, the defendant claimed that although the court corrected its erroneous finding of fact; see footnote 3 of this opinion; it erred by not changing its judgment. We do not agree.

The following additional facts and procedural history are pertinent to resolving this claim. The ambiguous Pine Brook Manor survey describes the disputed boundary between the plaintiffs' and the defendant's parcels in the form of two lines: "[From] a point on the stone wall; thence approximately N. 57 degrees 00' W. 190 feet, more or less; thence approximately S. 81 degrees 45' W. 200 feet, more or less, to a fence corner post . . . ." At oral argument before this court, the defendant pointed out that the parties agree as to both the location of the "point in a stone wall" and the "fence corner post." According to the defendant, the substance of the dispute is the location of the point where the two lines converge.

Clarke and Stefanik employed different methods in determining the intended location of the two lines, as well as the point where they converge. Clarke testified that he relied on the mutually agreed upon point on the wall and corner post, as well as an *additional monument*: a pin depicted in the map that the Pine Brook Manor survey incorporates by reference. In his survey, Clarke further utilized angles, and in scrutinizing the map the Pine Brook Manor survey incorporates by reference, he utilized distances. Stefanik, by contrast, did not rely on the additional monument. In ascertaining the intended boundary, Stefanik testified that he utilized *only distances* in addition to the mutually agreed on point on the wall and corner post. The court adopted the boundary line that Clarke submitted.

The following legal principles guide our analysis of this claim. "The resolution of conflicting factual claims falls within the province of the trial court. . . . The

trial court's findings are binding upon [a reviewing] court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole." (Internal quotation marks omitted.) *Herbert S. Newman & Partners, P.C.* v. *CFC Construction Ltd. Partnership*, 236 Conn. 750, 762, 674 A.2d 1313 (1996). Ordinarily, "[t]he construction of a deed in order to ascertain the intent expressed in the deed presents a question of law . . . ." (Internal quotation marks omitted.) *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 780, 687 A.2d 1270 (1997). Yet, "[w]here there is an ambiguity in the description of a boundary line in a deed, the question of what the parties intended that line to be is one of fact for the trial court." *Lake Garda Improvement Assn.* v. *Battistoni*, 160 Conn. 503, 511, 280 A.2d 877 (1971); see also 12 Am. Jur. 2d, Boundaries §§ 112 and 114 (2009); 23 Am. Jur. 2d 201–202, Deeds § 192 (2009). Additionally, "[a] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein." (Internal quotation marks omitted.) *Schwartz* v. *Murphy*, 74 Conn. App. 286, 291, 812 A.2d 87 (2002), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005); see also General Statutes § 7-31 (governing incorporation of recorded maps into deeds).

"An expert witness testifies to assist the trier of fact in understanding the evidence or in determining a fact in issue." (Internal quotation marks omitted.) *Lisiewski* v. *Seidel*, 72 Conn. App. 861, 871, 806 A.2d 1121, cert. denied, 262 Conn. 921, 922, 812 A.2d 865 (2002), quoting Conn. Code Evid. § 7-2. "The credibility of the witnesses and the *weight* to be accorded to their testimony is for the trier of fact. . . . [An appellate] court does not try issues of fact or pass upon the credibility of witnesses." (Emphasis added; internal quotation marks omitted.)

Wasniewski v. *Quick & Reilly, Inc.*, 292 Conn. 98, 103, 971 A.2d 8 (2009). "The [trial] court [i]s free to accept or to reject, in whole or in part, the testimony of one expert over another." *Palmieri* v. *Cirino*, 90 Conn. App. 841, 847, 880 A.2d 172, cert. denied, 276 Conn. 927, 889 A.2d 817 (2005).

In the present case, the court heard extensive testimony from the plaintiffs' and the defendant's surveyors, Clarke and Stefanik, both of whom explained in detail the bases for their conclusions. With respect to the location of the disputed boundary line, Clarke testified that he relied on a monument: a pin referenced on the map incorporated by reference into the Pine Brook Manor survey. See *Frank Towers Corp.* v. *Laviana*, 140 Conn. 45, 50, 97 A.2d 567 (1953) ("[w]here the boundaries of land are described by known and fixed monuments which are definite and certain, the monuments will prevail over courses and distances"). He also relied on scaled distances on the map, as well as angles in the description. Stefanik testified that he did not utilize that monument. In light of their testimony and ample additional evidence, we conclude that the court's factual findings were not clearly erroneous.

The defendant does not claim that there was no evidence to support the court's findings; rather, he claims that his evidence carried more weight. "[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). This court "do[es] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 222, 435 A.2d

24 (1980). Both parties produced witnesses, and it was the function of the trier of fact to determine credibility. See *Dooley* v. *Leo*, 184 Conn. 583, 586, 440 A.2d 236 (1981). In doing so, the court could believe all, some or none of the testimony of any particular witness, including either expert witness. Id. The court resolved the disputed question of fact as to the location of the contested boundary, and this court will not disturb the findings of the trial court.

II

The defendant claims that the court abused its discretion in issuing two evidentiary rulings. In particular, the defendant claims (1) that the court should not have admitted Clarke's survey into evidence as a business record, and (2) that the court should not have permitted Clarke to testify about his survey because he was unqualified to do so. The plaintiffs contend that neither claim was preserved properly and argue in the alternative that each claim should fail on its merits. We agree with the plaintiffs that the objection to the survey as a business record was not preserved properly. Although the defendant's objection to Clarke's testimony was preserved properly, the substance of the claim is without merit. As such, both of the defendant's claims fail.

Both claims arise from the same point in the trial. When the plaintiffs' counsel sought to offer Clarke's survey, the defendant's counsel questioned Clarke on voir dire. The defendant's counsel then stated: "I'm going to object to [the survey] coming in, Your Honor. I think this witness isn't really qualified to testify about what at least purports to be on [it]s own face, [Kenneth] Peterson's[6] survey."

Ordinarily, this court "will not review an issue that has not been properly raised before the trial court."

[6] Clarke testified that Peterson was his supervisor and that Peterson signed the surveys pursuant to the firm's ordinary course of business.

Bell Atlantic Mobile, Inc. v. *Dept. of Public Utility Control*, 253 Conn. 453, 485, 754 A.2d 128 (2000); see also Practice Book § 60-5. The standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. "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 court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Bush*, 249 Conn. 423, 427–28, 735 A.2d 778 (1999); see also Practice Book § 5-5.

"[T]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed." (Internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 157, 971 A.2d 676 (2009). "Appellate review of the admission of a document under [the business record exception to the rule against hearsay] is limited to determining whether the trial court abused its discretion." *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 795, 595 A.2d 839 (1991).

A

The defendant claims that the court abused its discretion by admitting into evidence as a business record a survey prepared by the plaintiffs' expert. Because the defendant did not make a proper and timely objection, the claim is not preserved for appeal and we decline to afford it review.

Business records are an exception to the hearsay rule. See Conn. Code Evid. § 8-4 (a) and commentary; General Statutes § 52-180. The defendant's counsel mentioned neither the business record exception, nor

the hearsay rule, when objecting at this point in the trial. As we state in part II B of this opinion, the defendant's counsel raised an objection to the survey based on Clarke's *qualifications*.[7] Elsewhere in the trial, the defendant's counsel distinctly raised objections on hearsay grounds. "Counsel thus failed to state distinctly the matter objected to and the ground of objection as required . . . for appellate review." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 371, 33 A.3d 239 (2012). For this court "[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." (Internal quotation marks omitted.) Id. We decline to review the claim.

B

The defendant claims that the court abused its discretion by permitting Clarke to testify about a survey signed by someone other than Clarke when he did not personally visit the location.[8] The defendant further argues that Clarke "did not possess the requisite first-hand knowledge to testify . . . ." (Citation omitted.) We disagree.

[7] While overruling the objection that Clarke was not qualified to testify about the survey, the court did state that the business record exception would apply. Earlier statements at trial offer illuminating context. It is clear that the court identified the exception in the interest of expediency. ("I'm just trying to speed things up a bit—if we use the business records exception to the hearsay"). At the point in the trial in question, the defendant's counsel did not object to the survey being admitted on the ground that it was inadmissible pursuant to the business record exception.

[8] The substance of the defendant's claim is not immediately clear. In his brief, the defendant argues that "[t]he [t]rial [c]ourt erred in permitting the expert testimony of Barry Clarke." Initially, it would seem that the defendant's claim is directed at *all* of Clarke's testimony. Such a claim was not preserved. Clarke testified about his professional qualifications as a surveyor, and his resume was admitted into evidence without objection from the defendant, and Clarke offered extensive testimony before the objection to the testimony about the survey. A review of the defendant's briefs and oral argument to this court demonstrates that the defendant takes issue with Clarke's testimony about the survey.

As a preliminary matter, we address the plaintiffs' contention that the issue has not been preserved properly. At trial, the defendant's counsel stated, "I'm going to object to [the survey] coming in, Your Honor. I think [Clarke] isn't really qualified to testify about what at least purports to be on [it]s own face, Mr. Peterson's survey." In overruling the objection, the court stated, among other things, "I think [Clarke is] qualified to testify with regard to the survey that was prepared by his firm." The statement of the defendant's counsel served 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." (Internal quotation marks omitted.) *State* v. *Bush*, supra, 249 Conn. 427–28. The defendant properly preserved the issue of whether Clarke was qualified to testify about the survey.

"Generally, if a proponent of testimony establishes reasonable expert qualifications for a witness, further objections to that expert's testimony go to its weight, not its admissibility." *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 63, 717 A.2d 724 (1998). "[I]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 158; see also Conn. Code Evid. § 7-2. "[A]n expert's testimony may be based on reports of others if the reports are those customarily relied on by such an expert in formulating an opinion." *State* v. *Cosgrove*, 181 Conn. 562, 584, 436 A.2d 33 (1980); see also Conn. Code Evid. § 7-4 (b), commentary ("[t]he expert's opinion may be based on facts made known to the expert before trial and of which the expert has no firsthand knowledge").

The general rule controls the present case. Clarke testified about his professional qualifications as a surveyor, and his resume was admitted into evidence without objection from the defendant. The defendant has not challenged the proof of Clarke's qualifications. "Where a surveyor, whose qualifications are accepted by the court, has made a map showing the sum of various acquisitions based upon an examination of the chain of title of all the parties affected, a review of the maps of record and information in the town records, an inspection of the property in question, field work and calculations, his testimony may be accepted as that of an expert." *Bond* v. *Benning*, 175 Conn. 308, 312–13, 398 A.2d 1158 (1978). The plaintiffs "establishe[d] reasonable expert qualifications for [their surveyor, and] further objections to that expert's testimony [went] to its weight, not its admissibility." *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, supra, 247 Conn. 63. We conclude that the court did not abuse its discretion in permitting Clarke to testify.

The judgment is affirmed.

In this opinion the other judges concurred.

CHASE AND CHASE, LLC *v.* WATERBURY REALTY, LLC, ET AL.
(AC 33532)

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

Syllabus

The plaintiff brought this action seeking injunctive and declaratory relief to determine the rights of the parties with respect to a shared driveway that is located on property of the defendant W Co. and which is used to access both W Co.'s parcel and the plaintiff's parcel. The plaintiff brought this action after W Co. erected a fence on the driveway that prevented vehicular traffic from accessing the main building on the plaintiff's property. The trial court rendered judgment for the plaintiff, from which W Co. appealed to this court. *Held*:

1. The trial court properly found that the plaintiff had acquired a prescriptive easement over the driveway: W Co.'s claim that the plaintiff did not use the property under a claim of right because its predecessors in interest did not know the location of the property line was unavailing, as the requirement that the use must be exercised under a claim of right does not necessitate proof of a claim actually made and brought to the attention of the owner and, thus, the plaintiff and its predecessors in interest did not have to be aware that they were using the property now owned by the defendant and did not have to make an overt claim to any ownership, and the trial court's finding that the plaintiff and its predecessors in interest used the driveway as if they had the right to use it was adequately supported by the evidence and was not clearly erroneous; moreover, the record supported the trial court's finding that W Co. did not meet its burden of proving that the plaintiff used the driveway with permission or that the use by the plaintiff and its predecessors in interest was the same as that of the general public, and there was sufficient evidence presented to support the trial court's finding as to the scope of the easement.

2. W Co. could not prevail on its claim that the trial court made clearly erroneous findings of fact in determining that W Co.'s actions in erecting the fence on the driveway constituted a malicious erection of a structure; that court's findings that the plaintiff's use of certain loading docks did not negatively affect W Co.'s property and that the fence was useless to W Co. was not clearly erroneous.

Argued May 15—officially released September 25, 2012

Procedural History

Action, inter alia, for injunctive and declaratory relief declaring the rights of the parties with respect to certain real property, and enjoining the named defendant from interfering with the plaintiff's use of that property, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the named defendant filed a counterclaim; thereafter, the defendant Great Brook Realty, Inc., was defaulted for failure to appear; subsequently, the named defendant withdrew its counterclaim and the plaintiff withdrew its claim for damages; thereafter, the matter was tried to the court, *Hon. Joseph H. Pellegrino*, judge trial referee; judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

James R. Winkel, with whom, on the brief, was *William T. Blake*, for the appellant (named defendant).

Bridget C. Gallagher, with whom was *Jared D. Cantor*, for the appellee (plaintiff).

Opinion

LAVINE, J. This appeal centers on an easement for shared use of a commercial driveway over one parcel of land in Waterbury to access an adjacent parcel. The defendant Waterbury Realty, LLC,[1] appeals from the judgment of the trial court, rendered in favor of the plaintiff, Chase & Chase, LLC. On appeal, the defendant claims that the trial court improperly found that (1) the plaintiff was entitled to a prescriptive easement over the driveway, (2) the plaintiff was entitled to an implied easement over the driveway[2] and (3) the defendant's actions in placing a fence in front of the driveway constituted a malicious erection of a structure. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Prior to 1973, the plaintiff's parcel and the defendant's parcel constituted a single parcel of land owned by Great Brook Realty, Inc. (Great Brook). In 1973, Great Brook subdivided the property into two parcels, one known as 40 East Farm Street (East Farm property) and the other known as 730 North Main Street (North Main property). In 1973, Great Brook transferred the East Farm property to Marktel Realty.

[1] Great Brook Realty, Inc., also was a defendant in this action. On July 22, 2009, the trial court granted the plaintiff's motion for a default judgment against Great Brook Realty, Inc., for its failure to appear. We therefore refer to Waterbury Realty, LLC, as the defendant.

[2] Because we conclude that the court properly found that the plaintiff was entitled to a prescriptive easement over the driveway and the court found that the implied easement has the same scope as the prescriptive easement, we need not address the defendant's claim that the court improperly found that the plaintiff was entitled to an implied easement.

After various conveyances,[3] the plaintiff acquired title to the East Farm property in 1997. In 2001, Great Brook conveyed the North Main property to the defendant.

The East Farm property borders East Farm Street to its north and Orange Street to its east. It contains two structures: a large main building located at the corner of East Farm Street and Orange Street, and a smaller garage to the south of the main building. The North Main property is west of the East Farm property and also borders East Farm Street to its north. There is approximately twelve feet between the western side of the East Farm property main building and the North Main property boundary line.

A driveway located mostly on the North Main property opens onto East Farm Street and leads south adjacent to the western side of the East Farm property main building.[4] The owners and occupants of both properties use the driveway to access the properties. From at least the time of the subdivision to the present, the only means of ingress and egress for vehicles using the East Farm property has been the driveway.[5] Tenants, customers and suppliers, using various sized trucks, travel on the driveway to access loading docks attached to the main building on the East Farm property. Additionally, tenants, customers and suppliers travel on the driveway to access parking spaces on the west and south side of the main building. Because there is only twelve feet

[3] Specifically, Marktel Realty conveyed the East Farm property to Frank LaPorta and Concetta LaPorta in 1981. In 1986, the LaPortas conveyed the property to Chase Realty, which was owned and controlled by the LaPorta family. In 1997, Chase Realty conveyed the East Farm property to the plaintiff, the current owner. The plaintiff also is owned and controlled by the LaPorta family. The LaPorta family, therefore, has had an ownership interest in the East Farm property since 1981.

[4] The entranceway to the driveway is approximately twenty-eight feet wide and is located almost entirely on the North Main property.

[5] Vehicles using the North Main property, however, also could use another entrance on North Main Street to access the North Main property.

between the western side of the main building and the North Main property boundary line, trucks and smaller vehicles also cross onto the North Main property when parked at the loading docks or the parking spaces on the west side of the main building. These uses of the defendant's property have been continuous from 1973 until the time of trial.

Since at least the time of the subdivision, the entranceway to the driveway has had a locked gate. The lock's purpose was to keep trespassers off the North Main and East Farm properties at night. The last person to leave the premises locked the gate at night, and the first person to arrive in the morning unlocked it. The owners of both properties gave their respective tenants keys to the lock. The owners of the East Farm property replaced the lock over the years. At least one tenant of the North Main property replaced the lock on his own initiative without obtaining the consent of the owner of the North Main property. In 2004, the defendant replaced the gate with a new one and distributed keys to the tenants of the North Main property and to the plaintiff and the tenants of the East Farm property.

In February, 2009, the defendant informed the plaintiff that the defendant intended to erect a fence on the driveway along the boundary between the two parcels. The fence would prevent all vehicular traffic from accessing the main building on the East Farm property. The plaintiff's attorney informed the defendant that the plaintiff claimed to have a prescriptive easement over the driveway. Despite this claim, the defendant erected the fence.[6] The plaintiff then brought this action against the defendant alleging that it had acquired a prescriptive easement and an implied easement over the driveway,

[6] In anticipation of litigation, the parties entered into a temporary agreement pursuant to which the defendant removed portions of the fence, thus allowing the plaintiff to gain limited access to the East Farm property until the case was resolved.

and seeking to quiet title to its easements and injunctive relief in accordance with the easements. The plaintiff also alleged that the defendant maliciously erected a fence over the easement area and sought injunctive relief in accordance with its malicious erection of a fence claim.[7]

Following a trial to the court, during which the court heard testimony from, among others, current and former tenants, relatives of deceased predecessors in interest, and agents of predecessors in interest, the court found that the plaintiff had established that it acquired a prescriptive easement and an implied easement over the driveway. The court found that the scope of the two easements was depicted in the plaintiff's exhibit number one, a surveyor's map entitled "Map Showing Historic Truck Access Off Of East Farm Street," and the plaintiff's exhibit 1A, which described the proposed easement area in metes and bounds.[8] The court also explained that "[t]he plaintiff's use of said easement shall include the right to pass and repass and to maneuver and park trucks, including trailer trucks, within said easement while using the loading docks all as shown on [the] plaintiff's exhibit [number one]."

Regarding the prescriptive easement, the court found that since 1973, the use of the easement area was open, visible, continuous and uninterrupted for fifteen years and made under claim of right. The court also found that the defendant did not meet its burden of proving, as a special defense, that the plaintiff's use was permissive. Specifically, the court found that "[t]here is no credible evidence that [the defendant] or its predecessors in

[7] The plaintiff also alleged a count in trespass and sought damages but subsequently withdrew those claims. Additionally, the defendant filed a counterclaim but withdrew it prior to trial.

[8] The easement area varies in width "but is approximately 28 feet in width" in most locations, which is the width of the entranceway to the driveway.

interest installed a lock before 2004, well after the plaintiff acquired its prescriptive easement. Additionally, there is no evidence that before 2004, [the defendant] or its predecessors in interest ever exercised any dominion over the driveway, ever gave permission to the plaintiff to use the driveway or ever told the plaintiff that it could not use the driveway."

The court also found for the plaintiff on its malicious erection of a fence count, explaining that the plaintiff proved the necessary elements under General Statutes § 52-480. Specifically, the court found: (1) the defendant erected a fence that "was useless to it"; (2) the defendant "erected the fence with the intention to injure the enjoyment of the plaintiff's East Farm property"; and (3) "the erection of the fence has impaired the plaintiff's use of its East Farm property and its value because the fence prohibits the plaintiff, its tenants and their customers from accessing the loading docks of the main building." The court granted the plaintiff a permanent injunction barring the defendant "from constructing any obstacle that would interfere with the plaintiff's use and enjoyment of said easement" and ordered the defendant to remove the remainder of "the fence that it constructed on the boundary of the North Main and East Farm properties and [to] restore the East Farm Street driveway to its former condition in the area where the fence was constructed."

I

The defendant first claims that the court improperly found that the plaintiff was entitled to a prescriptive easement. Specifically, the defendant argues that the plaintiff's use of the driveway was not under a claim of right, was permissive and was the same as that of the general public. The defendant also argues that the plaintiff did not establish the scope of the easement to a reasonable degree of certainty. The plaintiff argues

that there was adequate evidentiary support for the court's findings.

The following principles of law and standard of review govern this claim. General Statutes § 47-37 "provides for the acquisition of an easement by adverse use, or prescription. That section provides: No person may 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. . . . A party claiming an easement by prescription must demonstrate that the use has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. . . . The standard of proof that is required to establish an easement by prescription is a fair preponderance of the evidence." (Citations omitted; internal quotation marks omitted.) *St. Germain* v. *Hurd*, 128 Conn. App. 497, 501–502, 17 A.3d 516 (2011).

"Whether a right of way by prescription has been acquired presents primarily a question of fact for the trier after the nature and character of the use and the surrounding circumstances have been considered. . . . When the factual basis of a trial court's decision [regarding the existence of a prescriptive easement] is challenged, our function is to determine whether, in light of the pleadings and evidence in the whole record, these findings of fact are 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.) Id., 500.

The defendant argues that the plaintiff did not use the property under a claim of right because the plaintiff's

predecessors in interest, Frank LaPorta and Concetta LaPorta, in 1981, did not know the location of the property line. According to the defendant, "one cannot act under a claim of right when one does not even know that such a right exists." Moreover, the defendant argues that neither the plaintiff nor its predecessors in interest made any "overt claim to any ownership" in the driveway. The defendant supports this argument by pointing to an affidavit of title by Great Brook provided to the defendant when the defendant bought the North Main property, stating that Great Brook did not believe that the plaintiff or its predecessors claimed any legal ownership or interest in the driveway.[9]

The defendant misconstrues the claim of right requirement. "The requirement that the [use] must be exercised under a claim of right does not necessitate proof of a claim actually made and brought to the attention of the owner . . . . It means nothing more than a [use] as of right, that is, without recognition of the right of the landowner, and that phraseology more accurately describes it than to say that it must be under a claim of right. . . . [When] there is no proof of an express permission from the owner of the servient estate, on the one hand, or of an express claim of right by the person or persons using the way, on the other, the character of the [use], whether adverse or permissive, can be determined as an inference from the circumstances of the parties and the nature of the [use]. . . . A trier has a wide latitude in drawing an inference that a [use] was under a claim of right." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, 294 Conn. 418, 428, 984 A.2d 734 (2009).

[9] The defendant also argues that the plaintiff acknowledged the defendant's ownership of the driveway, and thus did not act under a claim of right, when the plaintiff did not question the defendant's replacement of the entranceway gate in 2004. The defendant concedes, however, that 2004 was outside of the timeframe within which the court found that the prescriptive easement had ripened, which was in 1988. We therefore do not address this argument.

Contrary to the defendant's argument, the plaintiff and its predecessors in interest did not have to be aware that they were using the North Main property and did not have to make "an overt claim to any ownership." See *Crandall* v. *Gould*, 244 Conn. 583, 591 and n.6, 711 A.2d 682 (1998). The trial court's finding that the plaintiff and its predecessors in interest used the driveway "as if they had the 'right' to use it" is adequately supported by the evidence. In particular, the East Farm property owners, tenants and customers continuously used the driveway in an open manner since the time of the subdivision, and there was no evidence that the defendant objected to this use until 2009. Additionally, there was evidence that the East Farm property owners and tenants maintained the driveway by plowing it, repairing cracks and filling potholes. The court's finding regarding the claim of right requirement, therefore, was not clearly erroneous.

The defendant next argues that the evidence demonstrates that its predecessor in interest installed the lock on the gate across the entranceway to the driveway, and, thus, the use of the driveway was permissive. "[I]t is not the plaintiff's burden to establish that an otherwise apparently adverse use of the defendant's property was conducted without the defendant's permission or license. . . . When the defendant raises permission by way of a special or affirmative defense, the burden of proof rests on the defendant . . . who must prove the special defense by a fair preponderance of the evidence. . . . Indeed, a contrary rule would unfairly charge a party with proving a negative." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, supra, 294 Conn. 435.

The record supports the court's finding that the defendant did not meet its burden of proving that it or its predecessors in interest "installed a lock before 2004" or "gave permission to the plaintiff to use the driveway."

Carl Begley, a tenant of the North Main property and one of the defendant's witnesses, testified that the gate was unlocked when he first became a tenant and that he installed a lock. He also testified that he spoke with the LaPortas before installing the lock but not with Great Brook, the owner of the North Farm property at the time. Moreover, Frank LaPorta, one of the principals of the plaintiff, testified that he did not believe Great Brook ever installed a lock on the gate. Therefore, the court's finding that the defendant failed to meets its burden to prove permission was not clearly erroneous.

The defendant next argues that the plaintiff's use and the use by its predecessors in interest was the same as that of the general public. "Where the use of a right-of-way is in common with the public, the common use is considered to negate a presumption of grant to any individual use. In such a case, the individual user must, in order to establish an independent prescriptive right, perform some act of which the servient owner is aware and which clearly indicates his individual claim of right. . . . A finding that the use made by the claimant and his predecessors in title was not different from that made by the general public is fatal to the establishment of any prescriptive right in the claimant." (Citation omitted; internal quotation marks omitted.) *Gioielli* v. *Mallard Cove Condominium Assn., Inc.*, 37 Conn. App. 822, 829–30, 658 A.2d 134 (1995). The trial court did not make such a finding in this case. As mentioned, there was evidence that the owners of the East Farm property maintained the driveway over the years. Therefore, the fact that the court did not find the use to be the same as that of the general public was not clearly erroneous.

The defendant also argues that the plaintiff did not establish the boundaries of the easement to a reasonable degree of certainty. Specifically, the defendant argues that the plaintiff failed to establish that WB-67 tractor trailer trucks, the size of which factored into

the court's analysis of the scope of the easement,[10] were used continuously from 1973 to 1988.[11] Therefore, according to the defendant, the easement boundary "is larger than that which would have been established as of 1988 and the plaintiff failed to adequately establish the proper bounds of the claimed easement."

"[A] prescriptive right extends only to the portion of the servient estate actually used . . . and is circumscribed by the manner of its use . . . . A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Internal quotation marks omitted.) *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 124, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006). "It is not always necessary or even possible for the party claiming a prescriptive right to establish the precise metes and bounds of the easement. . . . Nor must the common and ordinary use be without any deviation." (Citation omitted.) *St. Germain* v. *Hurd*, supra, 128 Conn. App. 503.

There was sufficient evidence presented to support the court's finding as to the scope of the easement.

[10] A WB-67 tractor trailer truck measures sixty-seven feet from the middle of the front tires to the middle of the rear tires. The trailer attached to the truck measures fifty-three feet, and the total length of the truck measures seventy-three and one-half feet. The plaintiff's surveyor utilized WB-67 tractor trailer trucks in depicting the proposed easement area, which the court ultimately accepted, on plaintiff's exhibit number one.

[11] The defendant also argues that, during trial, Frank LaPorta "admitted that the area depicted in [the plaintiff's exhibit number one] was in fact not necessarily what was needed as an easement, and actually that the easement [area depicted in the exhibit] was significantly longer than that needed and used by the plaintiff." According to the defendant, "[t]he court either overlooked this pertinent testimony, or completely ignored this admission by the plaintiff in finding that the easement to which the plaintiff was entitled consisted of the entire easement [area] set forth in [the plaintiff's exhibit number one]." We disagree. Frank LaPorta was testifying as to an earlier map prepared by the plaintiff's surveyor, which depicted the easement area as extending past the southern boundary of the East Farm property. The plaintiff's exhibit number one, in contrast, depicted an easement area that ended at the southern boundary of the East Farm property.

For example, George Telesco, who was a principal of Marktel Realty, testified that his brother shipped furniture from the main building on the East Farm property using a pickup truck and "a trailer." Douglas Beardsworth, who had been a tenant of the East Farm property since 1978, testified that he and multiple other tenants received deliveries to and shipped goods from various loading docks on the main building via box trucks and tractor trailer trucks. Frank LaPorta testified that WB-67 tractor trailer trucks used the driveway weekly. Multiple witnesses also testified that the easement area depicted on the plaintiff's exhibit number one accurately set forth the area used by vehicles traveling to and from the East Farm property over the years. This evidence supports an inference that tractor trailer trucks as large as WB-67 used the easement area continuously from 1972 to 1988 and, therefore, that the plaintiff established the easement boundaries to a reasonable degree of certainty.

We therefore conclude that the court properly found that the plaintiff was entitled to a prescriptive easement over the driveway.

II

The defendant also claims that the trial court made clearly erroneous findings of fact in determining that the defendant's actions in placing a fence on the driveway constituted a malicious erection of a structure. Specifically, the defendant takes issue with the court's findings that the fence was useless to the defendant and that the plaintiff's use of the main building's western loading docks did not negatively affect the defendant's property. The defendant argues that "there was substantial evidence as to the negative impact that the plaintiff's use of the west loading docks would have on the defendant's development and use of the North Main property." The

plaintiff argues that there was adequate evidentiary support for the court's findings.

"The Connecticut progenitor of what have commonly been called the spite fence cases appears to be *Whitlock* v. *Uhle*, 75 Conn. 423, 53 A. 891 (1903). . . . In [*Whitlock*], our Supreme Court construed and applied the predecessors to General Statutes §§ 52-480 and 52-570 and set forth the elements necessary to state a cause of action under §§ 52-480[12] and 52-570.[13] The court held that the essential elements are: (1) a structure erected on the [defendant's] land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure is useless to the defendant; and (6) the enjoyment of the adjacent landowner's land is in fact impaired." (Citation omitted; internal quotation marks omitted.) *Jackson* v. *Lee*, 51 Conn. Sup. 399, 416–17, 996 A.2d 762 (2009), aff'd, 121 Conn. App. 375, 996 A.2d 302, cert. denied, 297 Conn. 926, 998 A.2d 1194 (2010). "Whether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it." *DeCecco* v. *Beach*, 174 Conn. 29, 32, 381 A.2d 543 (1977). Because the defendant is challenging the court's factual findings, we employ the clearly erroneous standard of review. See *Berube* v. *Nagle*, 81 Conn. App. 681, 696–97, 842 A.2d 724 (2004).

[12] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

[13] General Statutes § 52-570 provides: "An action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land."

The defendant argues, citing photographic evidence of trucks parked at loading docks on the East Farm property, that "the court ignored the evidence presented showing tractor trailer trucks parked on the . . . loading docks of the East Farm property substantially, if not entirely, obstructing access to the North Main property as well as impeding potential parking." These photographs, however, were taken after the defendant constructed the fence at issue, thus necessitating the trucks to intrude on the driveway more than if the fence had not been erected. Additionally, on the basis of our review of the photographs, the court reasonably could have found there to be adequate room for vehicles to maneuver around the trucks in the photographs. We also note that there was evidence that the North Main property, unlike the East Farm property, was accessible from another entranceway. Accordingly, we cannot conclude that the court's finding—that the plaintiff's use of the loading docks did not negatively impact the North Main property—is clearly erroneous.

The defendant also argues that the fence was not useless to the defendant in light of the testimony of the LaPortas indicating that "security was a legitimate concern." The testimony to which the defendant refers, however, established that the *gate* across the entranceway to the driveway was locked at night because of security concerns, not that the *fence* blocking access to the East Farm property was erected based on legitimate security concerns. Moreover, the evidence indicated that there were secondary gates already in existence securing the North Main property. Accordingly, we conclude that the court's finding that the fence was useless to the defendant was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

AMERICO D'APPOLLONIO, JR., ET AL. *v.* SARINA GRIFFO-BRANDAO ET AL.
(AC 32187)

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

Syllabus

The plaintiffs sought a declaratory judgment determining the rights of the parties as to an easement over certain real property of the defendant G, an abutting landowner, claiming that the defendants' construction of retaining walls in the easement area deprived the plaintiffs of the use of the easement area. The trial court rendered judgment for the defendants on the complaint and on their counterclaim in part, and the plaintiffs appealed to this court. *Held*:

1. The defendants could not prevail on their claim that because the plaintiffs failed to raise their claim regarding indispensable parties at trial, they were barred from raising an unpreserved claim that the trial court lacked subject matter jurisdiction, as subject matter jurisdictional defects can be raised for the first time on appeal and the claim, thus, was properly before this court.
2. The plaintiffs could not prevail on their claim that the trial court lacked subject matter jurisdiction to adjudicate the dispute because certain other abutting landowners with an interest in the easement area were indispensable parties and were never joined as parties to the action: the plaintiffs' claim failed because the general rule that the failure to notify or to join indispensable parties does not deprive the trial court of subject matter jurisdiction applied to the parties' claims for injunctive and declaratory relief, and the only exception to that rule, which applies when a statute expressly mandates the naming and serving of a party, did not apply here because the only such statute invoked by either party in this matter was the plaintiffs' action to quiet title (§ 47-31), and our Supreme Court previously has determined that the failure to join parties who may claim the adverse estate or interest under § 47-31 does not constitute error because only the parties to a quiet title action are bound by the judgment; accordingly, the failure to join the other abutting landowners with an interest in the easement did not implicate the trial court's subject matter jurisdiction, nor did it infringe on their due process rights.
3. The trial court's finding that the plaintiffs had consented to the construction of both retaining walls in the easement area was supported by ample evidence and was not clearly erroneous; moreover, the plaintiffs did not sustain their burden to show that the trial court committed clear error in determining that they consented to the erection of the first retaining wall as constructed and, therefore, it was unnecessary for this

court to determine whether the construction of the retaining walls was consistent with the terms of the easement covenants.

4. There was no merit to the plaintiffs' claim that the trial court committed error in determining that consent of the other abutting landowners who had an interest in the easement area was not a prerequisite to allowing the construction of the retaining walls within the easement area; this court having concluded that it was not improper for the court to render judgment in the absence of those other abutting landowners, the plaintiffs failed to show how they were aggrieved by the absence of those parties from the action, as their absence affected only their respective interests and the plaintiffs failed to show that any right that those parties might have had to grant or to withhold consent to the construction of the retaining walls was somehow the plaintiffs' specific, personal and legal interest.

5. The plaintiffs could not prevail on their claim that the trial court committed error in determining that their plantings in the easement area violated G's property rights; that court's finding that the plantings violated the terms of the easement was legally and logically correct given the facts found that appeared in the record, which showed that the plantings encroached on the easement area and blocked or obstructed it.

Argued November 16, 2011—officially released October 2, 2012

Procedural History

Action for, inter alia, a declaratory judgment determining the rights of the parties as to an easement over certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Julius J. Kremski*, judge trial referee; judgment for the defendants on the complaint and on the counterclaim in part; subsequently, the court denied the plaintiffs' motion to reconsider, and the plaintiffs appealed to this court; thereafter, the court, *Hon. Julius J. Kremski*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Jeffrey M. Sachs, for the appellants (plaintiffs).

Gennaro Bizzarro, for the appellees (defendants).

Opinion

FLYNN, J. The plaintiffs, Americo D'Appollonio, Jr., and Carmela L. D'Appollonio, appeal from the judgment of the trial court, rendered after a court trial, in favor of the defendants, Sarina Griffo-Brandao and her father, Pasquale Griffo, on their claims arising from the defendants' partial construction of two retaining walls in an easement area located on Griffo-Brandao's property in a residential subdivision, known as West Ridge Estates, in Rocky Hill. On appeal, the plaintiffs claim that the trial court committed error by (1) exercising subject matter jurisdiction over the controversy when all indispensable parties were not joined, (2) determining that the construction of the walls within the easement area was consistent with the easement covenants, (3) determining that the consent of the neighboring lot owners was not a prerequisite to construction of the walls within the easement area, and (4) determining that the consent of the plaintiffs to the construction of the second wall was procured. The plaintiffs additionally claim the court committed error by finding in favor of the defendants on their counterclaim—that the plaintiffs' plantings within the easement area violated Griffo-Brandao's property rights. We affirm the judgment of the trial court.

The following undisputed facts and procedural history inform our review. The plaintiffs are husband and wife who own lot 4 in the residential subdivision. The plaintiffs and Griffo-Brandao own lots abutting one another in the residential subdivision. Although the plaintiffs' lot 4 has street access to New Britain Avenue, a public highway, lot 13 does not. The easement area at issue in this case is located on lot 13, owned by Griffo-Brandao. The easement area is approximately thirty feet in width where the walls at issue were constructed, and it permits ingress and egress for lot 4 and for lots 2 and 3 owned, respectively, by Lambrine

Sideriadis and Diana Hughes.[1] Sideriadis and Hughes never were joined as parties in this action, although they did testify as witnesses at trial. The easement area lies within the northern boundary of lot 13 where it begins at West Ridge Drive and runs in a northeasterly direction before ending at lot 13. At the time of the court's decision, the easement area was paved from West Ridge Drive only to the driveway of plaintiffs' lot 4, with the remaining portion of the easement area, extending to the front of Griffo-Brandao's lot 13, remaining unpaved.

The plaintiffs and Griffo-Brandao both purchased their respective properties subject to the provisions of the "Declaration of Easements and Covenants" (easement declaration), recorded on March 9, 2004, at volume 452, page 414, of the Rocky Hill land records.

Paragraph 8 of the easement declaration, recorded in volume 452, page 416 of the Rocky Hill land records, provides that "[w]hereas, the Declarant intends on subdividing its land to the south of said Lots 2, 3 and 4, it reserves the right to solely amend this Declaration to incorporate newly created lots or reference a new subdivision map."

Paragraph 9 provides that "[t]his Declaration may be amended by the written agreement of [75] . . . percent of the owners of lots or land which utilize the easement area."

Paragraph 2 provides that the purpose of the easement area shall be for "[a] mutual driveway for passing and repassing on and over the easement area by foot or by vehicle to gain access to and from said Lots and land" and "[l]aying, installing, using, maintaining,

[1] The trial court describes the access easement as situated on Griffo-Brandao's lot 13 and abutting the boundary of and serving the plaintiffs' lot 4. However, it is clear from the record that the access easement also serves lots 2 and 3.

repairing or replacing . . . utilities, pavement, gravel or other improvements on or under the easement area as may reasonably be necessary . . . ."

Paragraph 5 expressly provides that no lot owner shall obstruct an easement by the parking of vehicles, erection of structures, or planting of bushes or trees. The easement declaration was amended on December 3, 2004, with express provisions incorporating lot 13 into the residential subdivision and establishing the easement area across lot 13 in favor of lots 2, 3 and 4. The amendment also expressly subjects lot 13 to the easements and covenants previously set forth in the easement declaration.

The court made the following factual findings. "The plaintiffs . . . are the owners of lot 4 and . . . Griffo-Brandao is the owner of lot 13 in [the] residential . . . subdivision. These lots abut each other with [the easement area] located for ingress and egress on lot 13 with covenants for the improving and maintenance of the easement [area] together with the liability for the proportional costs associated with the individual lot benefits received from the use of these lots . . . .

"The easement [area] at the present time is paved to the driveway of [the] plaintiffs' lot 4. The remaining portion of the easement [area] is not paved as lot 13 was not built up or improved at that time. The construction of [Griffo-Brandao's] residence is under way on lot 13 together with a driveway to the easement [area].

"[Griffo-Brandao] proposes to improve that portion of the unpaved easement [area] from the paved section ending at the plaintiffs' driveway to the driveway at lot 13. To accomplish this . . . Griffo . . . who was overseeing the construction of lot 13, obtained the necessary town permits and approvals. He also contacted lot owner Americo D'Appollonio, Jr., and obtained permission to enter onto lot 4 during construction of a concrete

retaining wall for improving the unpaved portion of the easement [area] . . . .

"The wall being constructed by the defendants along the mutual boundary of lots 4 and 13 was located on lot 13 but within the easement area. At the same time, concrete footings were being constructed on the opposite side of the easement [area] for a parallel wall. These walls would slope the paved easement [area] from the higher ground of lot 13 to the lower level of lot 4.

"This construction by the defendants within the easement [area] was permitted by and consistent with the easement covenants. The construction costs are the liability of . . . Griffo-Brandao, since the complete benefits of the easement [area] improvement is to lot 13.

"The plaintiffs have obtained a separate ingress and egress access from their lot 4 to a public highway and thus no longer use the easement [area] as a passway and have suffered no injury to their easement rights as a result of the defendants' construction activity on the easement [area].

"The plaintiffs' contention that the concrete wall being built by the defendants is an eyesore was based upon its personal appearance during the course of construction and does not indicate what the final result will be. In any case, the plaintiffs are benefitting from the construction of the wall as surface water from lot 13's higher ground has drained into [the] plaintiffs' yard and the wall will reduce surface flow onto lot 4." (Citations omitted.)

On June 9, 2009, the plaintiffs filed a complaint alleging generally that the defendants' construction of the retaining walls deprived the plaintiffs of the use of the easement area. On August 6, 2009, the defendants filed an answer generally denying liability and raised a counterclaim seeking in count one compensatory and consequential damages from the plaintiffs for causing delay

to the construction of the two retaining walls. In count two of the counterclaim, they sought an injunction against the plaintiffs to remove plantings and other obstructions from the easement area that were hostile to Griffo-Brandao's underlying title.

The plaintiffs filed an amended complaint on October 6, 2009, again alleging the defendants' construction of the two retaining walls violated paragraph 5 of the easement declaration by obstructing and preventing the plaintiffs from fully utilizing the easement area. The amended complaint, however, for the first time, alleged that the defendants' decision to raise the grade of the easement area and to place a garbage dumpster and portable toilet within the easement area violated the "Declaration of Covenants and Restrictions" (restrictive declaration). The amended complaint also reiterated a claim for a declaratory judgment determining the rights of the parties to the easement and settling title thereto in accordance with General Statutes § 47-31. The defendants never filed an answer to the plaintiffs' amended complaint, which was permitted over objection on the first day of trial, and a court trial on the merits ensued despite the absence of closed pleadings.[2]

After a court trial on the merits, the court, *Hon. Julius J. Kremski*, judge trial referee, rendered judgment in favor of the defendants on both counts of the plaintiffs' amended complaint. The court observed that the construction of the two retaining walls within the easement area was consistent with and permitted by the easement covenants and that it benefited the plaintiffs by reducing the surface flow of water onto lot 4. The court also noted that the plaintiffs had obtained a separate ingress and egress from lot 4 to a public highway which no

[2] Although the court allowed the trial to proceed in the absence of closed pleadings, we are not prohibited from reviewing its judgment in this appeal. See *Berlingo* v. *Sterling Ocean House, Inc.*, 203 Conn. 103, 106, 523 A.2d 888 (1987); *Rummel* v. *Rummel*, 33 Conn. App. 214, 219, 635 A.2d 295 (1993).

longer necessitates their use of the easement area as a passway and therefore had suffered no injury as a result of the construction of the retaining walls. Regarding the placement of the temporary toilet and garbage dumpster, the court concluded that they were acceptable as temporary inconveniences and that no evidence was presented to show that the defendants were made aware that the presence of these objects troubled the plaintiffs.

As to the counterclaim, the court rendered judgment in favor of the plaintiffs on the first count and in favor of the defendants on the second count. On the first count, in which the defendants claimed construction delay damages, the court's judgment was not appealed. On the judgment on the second count, from which the plaintiffs appeal, the court ordered the plaintiffs to remove all plantings and encroachments from the easement area within ninety days after which the defendants could proceed and remove the encroachments at the plaintiffs' cost.[3] This appeal followed.[4]

[3] The plaintiffs requested that the trial court articulate its decision. Following the court's denial of that motion, the plaintiffs, pursuant to Practice Book § 66-7, filed a motion for review with this court on October 28, 2010, to compel the trial court to issue an articulation to ensure an adequate record for appellate review. On January 5, 2011, this court granted in part the plaintiffs' motion and ordered the trial court to articulate (1) whether it found that the defendants had obtained approval for their construction from any of the other subdivision lot owners, other than Americo D'Appollonio, and, if so, from whom did they obtain such consent and (2) whether or not it made any ruling that the plaintiffs' passway rights over the easement area were extinguished, abandoned or terminated as a matter of law. On April 1, 2011, the court issued its response by answering in the negative to each requested articulation.

[4] Pursuant to Practice Book § 60-5, and Practice Book § 60-2, which provides in relevant part that a reviewing court may, "on its own motion or upon motion of any party, (1) order a judge to take any action necessary to complete the trial record for the proper presentation of the appeal," this court sua sponte ordered the trial court to specify and articulate whether all of the factual references in the "factual situation" portion of the decision were findings of fact. On April 20, 2012, the court issued the requested articulation and clarified that all of the references in the "factual situation" section were findings of fact. Furthermore, the court corrected the last

I

We commence our review by addressing first the plaintiffs' claim that the trial court lacked subject matter jurisdiction to adjudicate the dispute because Sideriadis and Hughes, the owners of lots 2 and 3, were indispensable parties who were never joined as parties to the action. We disagree with the plaintiffs and conclude that the trial court possessed the necessary subject matter jurisdiction to adjudicate all of the claims and the counterclaim brought before it. We also conclude that failure to join a party who may claim an interest does not defeat jurisdiction of the court to hear the matter unless a statute or due process mandates otherwise. We further conclude that the statutory mandate found in the quiet title statute, § 47-31, although on its face mandating joinder, is subject to an exception drawn by our Supreme Court which permits such an action to proceed in the absence of some parties. We finally conclude that the failure to join Sideriadis and Hughes did not violate their due process rights.

We begin by setting forth our well established standard of review. "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.) *Ventres* v. *Goodspeed Airport*, 275 Conn. 105, 135, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . . [A] court

sentence on page two of its memorandum of decision from "[T]hereafter, the plaintiffs sought and received a court order enjoining further work of the walls by the defendants" to "[T]hereafter, the plaintiffs sought and never received a court order enjoining further work of the walls by the defendants."

lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." *Catrini* v. *Erickson*, 113 Conn. App. 195, 196, 966 A.2d 275 (2009).

A

At the outset, we address the defendants' argument that the plaintiffs failed to raise their claim regarding indispensable parties at trial and that they, therefore, are barred from raising an unpreserved claim that the trial court lacked subject matter jurisdiction. We disagree. Subject matter jurisdiction is a question of law and cannot be waived or conferred by consent. *Serrani* v. *Board of Ethics*, 225 Conn. 305, 308, 622 A.2d 1009 (1993). Unlike most unpreserved claims, subject matter jurisdictional defects can be raised for the first time on appeal. *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 567 n.11, 775 A.2d 284 (2001). Subject matter jurisdiction may also be raised sua sponte by the court. *Serrani* v. *Board of Ethics*, supra, 308. The plaintiffs' claim that the trial court lacked subject matter jurisdiction therefore is properly before this court.

B

We now turn to the plaintiffs' claim that the trial court lacked subject matter jurisdiction because Sideriadis and Hughes, as parties that maintain an interest in the easement area, were never joined in the action. We disagree.

It is clear that Sideriadis and Hughes, as property owners within the same residential subdivision and having an interest in the easement area, were never joined as parties to this action. It is well established, however, that an action cannot be defeated due to the nonjoinder or misjoinder of parties, and failure to notify or join indispensable parties does not deprive a court of subject matter jurisdiction. General Statutes § 52-108; *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn.

277, 288–89, 914 A.2d 996 (2007); *Bauer* v. *Souto*, 277 Conn. 829, 838–39, 896 A.2d 90 (2006). Instead, the remedy for nonjoinder of parties is by motion to strike. *Bauer* v. *Souto*, supra, 839. The nonjoinder of a party will generally implicate the court's subject matter jurisdiction and require dismissal, however, if a statute mandates the naming and serving of the party. *Yellow Cab Co. of New London & Groton, Inc.* v. *Dept. of Transportation*, 127 Conn. App. 170, 176–77, 13 A.3d 690, cert. denied, 301 Conn. 908, 19 A.3d 178 (2011); *Sullivan* v. *Thorndike*, 104 Conn. App. 297, 301, 934 A.2d 827 (2007), cert. denied, 285 Conn. 907, 908, 942 A.2d 415, 416 (2008).

Our plenary review of the claims brought before the court reveals no jurisdictional defect, by nonjoinder of parties who may claim an interest in the subject matter, that implicates the trial court's subject matter jurisdiction. Only three types of relief were requested by the parties at trial, and only one of those requests for relief was a statutory action that mandated the joining of certain parties. In addition to seeking injunctive relief to remove and enjoin further construction of the retaining walls, the plaintiffs also sought a judgment quieting title under § 47-31 as a statutory action. The defendants, via counterclaim, also sought (1) injunctive relief ordering the plaintiffs to cease interference with the construction of the retaining walls and to remove plantings, landscaping and stone curbings from the easement area, (2) a declaratory judgment declaring the right of the defendants to complete the construction of the improvements within the easement area in accordance with the permits obtained from the town of Rocky Hill and (3) a finding that the plaintiffs had abandoned their right to enforce the easement as to the retaining wall.

The plaintiffs' claim that the trial court lacked subject matter jurisdiction fails because the general rule that failure to notify or to join claimed indispensable parties

does not implicate a court's subject matter jurisdiction applies to the parties' claims for injunctive and declaratory relief. See General Statutes § 52-108; *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 281 Conn. 288–89; *Bauer* v. *Souto*, supra, 277 Conn. 838–39; see also *Cappo* v. *Suda*, 126 Conn. App. 1, 13–15, 10 A.3d 560 (2011) (failure to join parties who may claim interest for claims involving declaratory and injunctive relief did not deprive trial court of subject matter jurisdiction to render judgment for both claims). As mentioned previously, the only exception to this general rule is when a statute expressly mandates the naming and serving of a party. The only such statute invoked by either party in the instant matter is the plaintiffs' action to quiet title pursuant to § 47-31 (b), which mandates that the complaint "shall . . . name the [party] or [parties] who may claim the adverse estate or interest." However, our Supreme Court, despite that mandate, has established that failure to join such parties under § 47-31 does not constitute error. See *Swenson* v. *Dittner*, 183 Conn. 289, 292, 439 A.2d 334 (1981) ("[Section 47-31] requires the plaintiffs to name the person or persons who may claim [an] adverse estate or interest. . . . So that the trial court can make a full determination of the rights of the parties to the land, an action to quiet title is brought against persons who claim title to or have an interest in the land. . . . Only the parties to an action to quiet title are bound by the judgment. . . . The failure to include [parties who may claim an interest] . . . is not error because the decision to join a party in a suit to quiet title is made by the plaintiff." [Citations omitted.]) After careful review of the record, we conclude that the failure to join Sideriadis and Hughes does not implicate the court's subject matter jurisdiction.

C

Having concluded that the court possessed the necessary subject matter jurisdiction, we next must consider

whether the due process interests of Sideriadis and Hughes were violated. Although failure to join parties who may claim an interest does not generally implicate the court's subject matter jurisdiction, failure to provide notice may nonetheless implicate due process concerns that would compel a court to require notice or joinder before proceeding with the action. *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 281 Conn. 289. "[A] court may refuse to proceed with litigation if a claim cannot properly be adjudicated without the presence of those indispensable [parties] whose substantive rights and interests will be necessarily and materially affected by its outcome. . . . Joinder of indispensable parties is mandated because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action]. . . . *Hilton* v. *New Haven*, 233 Conn. 701, 722–23, 661 A.2d 973 (1995)." (Internal quotation marks omitted.) *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 289–90.

We conclude that the failure to join Sideriadis and Hughes did not infringe on their due process rights. "[A] person who is not a party will generally not be bound by a declaratory ruling. . . . [A]n interested person who is not notified of the action is subject only to the stare decisis impact of the judgment. If the situation of an interested person is quite similar to that of one of the parties, then the stare decisis impact of the interested person may be strong, but, because of the similarity of interests, the existing parties are likely to have represented well the nonparty's interests." Id., 291. Sideriadis and Hughes, the unjoined owners of lots 2 and 3, had rights and interests in the easement area identical to the named parties in the present case. Both Sideriadis and Hughes and the named parties possessed title subject to the terms and provisions of both the easement

declaration and the restrictive declaration. Should Sideriadis and Hughes seek a future declaratory judgment or injunctive relief relating to similar conduct brought before the trial court in this action, they will be subject to only the stare decisis impact of this ruling. Accordingly, we decline to remand this case so that Sideriadis and Hughes may be joined or afforded notice. We conclude, as a matter of law, that the plaintiffs and defendants were entitled to judgments arising from their claims for declaratory and injunctive relief as set forth in the plaintiffs' amended complaint and in the defendants' counterclaim, respectively. See *Cappo* v. *Suda*, supra, 126 Conn. App. 16–17.

II

Having determined that the court properly exercised jurisdiction and did not violate the due process rights of Sideriadis and Hughes, we now consider the merits of the plaintiffs' additional claims on appeal. We first consider the plaintiffs' claim that the court committed error in determining that the plaintiffs consented to the construction of the retaining walls. The plaintiffs argue that it is unclear whether the court found that they consented to the construction of both retaining walls. The plaintiffs further argue that even if the court made such a finding, it is erroneous because they did not consent to the construction of the first retaining wall as built,[5] and never consented to any construction whatsoever of a second retaining wall. We disagree with the plaintiffs that the court committed error in determining that the plaintiffs consented to the erection of both walls as constructed.

[5] The plaintiffs do not dispute that they consented to the construction of the first retaining wall. However, they claim that the wall, as constructed, exceeded the terms of the original agreement with one of the key differences being that the wall was ultimately installed in a different location than what Griffo had originally represented.

We first set forth our standard of review. Because this claim challenges the accuracy of the court's factual findings, our review is limited to the clearly erroneous standard. "In 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 will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous." *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 184–85, 2 A.3d 873 (2010). "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.) *Goodspeed Airport, LLC* v. *East Haddam*, 302 Conn. 70, 76, 24 A.3d 1205 (2011). "Under the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 368, 28 A.3d 272 (2011).

We conclude that the court made a finding that the plaintiffs consented to the construction of both walls in the easement area. The following factual findings and analysis, as set forth in the court's memorandum of decision, are necessary for the clarification and resolution of this claim. On the basis of a May 4, 2009 letter (May 4 letter) sent by the plaintiffs to the defendants, which was introduced into evidence, the court found that "[a] written document was signed by Americo D'Appollonio and given to . . . Griffo . . . agreeing with

and permitting the easement construction by the defendants and to enter on [the] plaintiffs' lot 4 during construction."[6] (Citation omitted.) Our review of the May 4 letter reveals that the court's use of the word "construction" indicates that the court found that the plaintiffs acquiesced in the construction of both retaining walls. The May 4 letter states that "the *retaining walls*. . . will have to be built outside and away from [the plaintiffs'] property" and that "[i]t is [the plaintiffs'] understanding that the to-be-built retaining wall along with the footings and supports will be constructed *within the easement area*." (Emphasis added.) The court made a similar finding, later in the memorandum of decision, when it stated: "[Griffo] . . . contacted . . . Americo D'Appollonio . . . and obtained permission to enter onto lot 4 during construction of a concrete retaining wall improving the unpaved portion of the easement [area]."

The court further found that "subsequently, the plaintiffs changed their minds and asked the defendants to delay construction," but that "[t]he [d]efendants refused pointing out that they had executed the construction contracts and the work was to begin the following day."

The court then concluded its findings as follows: "Carmela D'Appollonio . . . pointed out that as a coowner, she had not signed the approval. She did admit that she had discussed the matter with . . . Americo

[6] We note that the court erroneously references exhibit 35 as the document in question where Americo D'Appollonio expressly grants permission to the defendants to enter onto the plaintiffs' property for the purpose of undertaking the easement construction. Exhibit 35, in fact, is a letter signed by Griffo-Brandao thanking the plaintiffs for granting their permission to allow the defendants access to the plaintiffs' property for construction of the retaining walls. This error by the court, however, is harmless. It is clear that the document the court intended to reference is exhibit B. Exhibit B is signed by Americo D'Appollonio and contains the language that the court references in its memorandum of decision.

[D'Appollonio] . . . had been to the town building offices . . . had checked the defendants' construction documents on file . . . was aware of the wall construction and . . . had not objected to [Americo D'Appollonio] representing her in [the] matter. She did . . . raise objections to the approximately six foot height of the wall and its rough appearance . . . ."

There was ample evidence at trial to support the court's finding that the plaintiffs consented to the construction of the retaining walls. During redirect examination, Carmela D'Appollonio testified that when she composed the May 4 letter, it was her intention to convey to the defendants that the retaining walls could not be built on the plaintiffs' property. When asked by counsel if she was indicating and consenting that the retaining walls could be constructed in the easement area, she answered as follows: "I was more concerned with the fact that there was a potential for part of this wall to be on our property. That's what I was trying to emphasize [in the letter]." She later testified that she composed a letter dated May 13, 2009, in which she expressed her position that she no longer agreed to the construction of the first retaining wall. Americo D'Appollonio then testified that he did not have any concerns about the construction until after the footings and forms were installed. He also testified that when he later asked Griffo to stop pouring the concrete for the wall, Griffo asked if he would pay but that he did not answer. Griffo then testified that both plaintiffs orally agreed to the construction of the two walls. Perhaps the most important testimony the court could have credited to justify its finding was that of Jean Pierre Langolis, the building official for the town of Rocky Hill, who supplemented Griffo's testimony by testifying that his department issued building permits for the construction of *two* retaining walls. Langolis further testified that these permits were issued pursuant to the

plaintiffs' consent to the construction of both walls as evidenced by the May 4 letter. The plaintiffs have therefore failed to demonstrate that the court's finding that they consented to the construction of both walls was infected by clear error.

We address next the plaintiffs' claim that they did not consent to the erection of the first retaining wall as constructed. We disagree. The plaintiffs argue that the dimensions of the constructed retaining wall differ substantially from a hand drawn sketch of the proposed wall attached to an April 24, 2009 letter authored by Griffo thanking the plaintiffs for allowing the defendants to "work from [the plaintiffs'] side of [the] property line as [the defendants] construct [their] needed retaining wall." The sketch depicts a retaining wall that is 125 feet long and 6 feet in height at its highest point. The plaintiffs claim that the wall that actually was erected was 165 feet long and 8.8 feet high at its highest point. Although the completed wall was 8.8 feet high at its highest point, the record reveals that the plaintiffs are mistaken and that the wall was only 116 feet in length. Furthermore, Griffo testified that the plaintiffs refused to sign the letter attached to the sketch thereby allowing the court to infer that they did not consent at all to the proposed dimensions indicated in the sketch. Instead, Griffo testified that the plaintiffs told him they would write and send him their own letter through which they would indicate their consent to the construction. This letter was the May 4 letter which Griffo testified he eventually received sometime thereafter. The May 4 letter makes no reference to Griffo's April 24 letter or the sketch attached thereto. Although the May 4 letter grants consent to the defendants to construct a retaining wall, it gives no instruction that the wall should be built according to any specific set of dimensions. Consequently, the plaintiffs did not sustain their burden to show that the court committed clear error

in determining that the plaintiffs consented to the erection of the first retaining wall as constructed.

III

We turn now to the plaintiffs' claim that the court erred in its determination that the construction of both retaining walls was consistent with the easement covenants. Because we have already determined that the plaintiffs consented to the construction of both retaining walls, it is unnecessary for us to examine whether that construction was consistent with the terms of the easement covenants. Accordingly, we decline to review this claim.

IV

We next consider the plaintiffs' claim that the court committed error in determining that consent of Sideriadis and Hughes, the other lot owners who maintained an interest in the easement area, was not a prerequisite to allow the construction of the retaining walls within the easement area. The plaintiffs raise this claim on a presumption that the court found, as a factual matter, that the plaintiffs consented to the construction of both walls. We conclude that this claim has no merit. Having already concluded, in part I of this opinion, that it was not error for the court to render judgment in the absence of Sideriadis and Hughes, we now conclude that the plaintiffs have failed to show how they were aggrieved by Sideriadis' and Hughes' absence as parties to the action. "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 specifically and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *Eder Bros., Inc.* v. *Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 369, 880 A.2d 138 (2005). Although it may be argued that Sideriadis and Hughes might have had an interest in the controversy that they wished to protect, their absence in this action affects only their own respective interests. The plaintiffs have not shown that any right that Sideriadis and Hughes might have to grant or to withhold consent to the construction of the walls is somehow the plaintiffs' specific, personal and legal interest. Accordingly, we decline to review this claim.

V

The plaintiffs' final claim is that the trial court committed error in determining that the plaintiffs' plantings in the easement area violated Griffo-Brandao's property rights. We disagree with the plaintiffs.

This issue arises from the second count of the defendants' counterclaim, which alleged that the plaintiffs installed and maintained plantings in the easement area that were open and hostile to Griffo-Brandao's title and were not permitted under the terms of the easement declaration. The plaintiffs concede that their plantings encroach into the easement area but dispute the court's conclusion that the plantings violated Griffo-Brandao's easement rights by creating an obstruction. Our review of the court's conclusion that the plantings violated Griffo-Brandao's easement rights involves a mixed question of fact and law. "[S]o-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. . . . [Such questions require] plenary review by this court unfettered by the clearly erroneous standard. . . . When legal conclusions of the trial court are challenged on appeal, we must decide

whether [those] . . . conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Crews* v. *Crews*, 295 Conn. 153, 162–63, 989 A.2d 1060 (2010).

It is clear that the court based its ultimate conclusion that the plantings violated the terms of the easement declaration upon a finding that the plantings obstructed the easement area. First, the court concluded that the plaintiffs "have planted shrubs on the [easement area] in violation of the easement's terms and [in] violation of [Griffo-Brandao's] rights to the underlying title." Later, the court made a finding that the plantings obstructed the easement area when it characterized the defendants' claim as follows: "[T]he defendants seek to have the plaintiffs remove *plantings and other obstructions* from the easement area in that they are not authorized by the terms of the easement and are in fact hostile to [Griffo-Brandao's] underlying title." (Emphasis added.) Our examination of the terms of the easement declaration reveals that the court's ultimate conclusion that the plantings violated the terms of the easement was legally and logically correct given the facts found that appear in the record. Paragraph 5 of the easement declaration provides in relevant part: "No owner shall block or permit obstruction of the easement area by the . . . planting of bushes . . . or otherwise." The American Heritage Dictionary defines "block" as "to stop or impede the passage of or movement through, hinder or obstruct." American Heritage Dictionary (2d College Ed. 1985) "Obstruct" is defined by Black's Law Dictionary to mean "[t]o block up; to interpose obstacles; to render impassable; to fill with barriers or impediments, as to obstruct a road or way." Black's Law Dictionary (6th Ed. 1990). Paragraph 5 makes expressly clear that plantings within the easement area violate the easement declaration if the plantings block or obstruct the easement area. The plaintiffs

concede in their appellate brief that their plantings encroached into the easement area. Furthermore, the court heard Griffo's testimony that the plantings interfere with his ability to drive through the easement area. The court was also free to consider the fact that the entirety of the easement area crosses over Griffo-Brandao's property which it could weigh toward its finding that her property rights were violated. Accordingly, we conclude that the court properly determined that the plaintiffs' plantings violated the terms of the easement declaration because the plantings encroached on the easement area and blocked or obstructed it.

The judgment is affirmed.

In this opinion the other judges concurred.

MARIO FIALLO *v.* ALLSTATE INSURANCE COMPANY (AC 32766)

Beach, Alvord and Borden, Js.

Syllabus

The plaintiff sought to recover underinsured motorist benefits allegedly due under an automobile insurance policy issued by the defendant. The matter was tried to a jury, which returned a verdict in favor of the plaintiff. Thereafter, the trial court denied the plaintiff's request for leave to amend the complaint, granted the defendant's motion to reduce the verdict and rendered judgment for the plaintiff in accordance with the reduced verdict, and the plaintiff appealed to this court. *Held*:

1. The trial court did not abuse its discretion in denying the plaintiff's postverdict request to amend his complaint, in which he sought to allege bad faith on the part of the defendant by adding certain counts for breach of the covenant of good faith, breach of contract and violations of the Connecticut Unfair Insurance Practices Act (§ 38a-815 et seq.) and the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); although the plaintiff claimed that he was required to amend his complaint to bring the bad faith claims in this action so that he would not be barred by res judicata from bringing them in a later action, the trial court found that the plaintiff likely would not be barred from bringing a separate action if facts supporting the bad faith were not known to

him so that he could have amended his complaint in a timely manner and it repeatedly requested authority from the plaintiff to support his position and found that none was persuasive, the facts alleged in support of the bad faith claim were the type of facts that were sufficiently known before trial to have been timely alleged, and there was no substantial injustice as a result of the trial court's denial of the amendment to the complaint.

2. The trial court improperly failed to find an ambiguity in certain language on the declarations page of the insurance policy, which was reasonably susceptible to more than one reading, and because the issue of whether the plaintiff purchased standard uninsured/underinsured motorist coverage or uninsured/underinsured motorist conversion coverage presented a question of historical fact, rather than one of contract construction, and involved an inquiry into the circumstances of the purchase of the policy to determine which variety of coverage the plaintiff opted to purchase, extrinsic evidence had to be examined to determine the parties' intentions; accordingly, because the trial court did not make a finding regarding the parties' intentions other than its conclusion that the policy and declarations page were unambiguous, it was necessary for the trial court to engage in fact-finding as to the intent of the parties and the case was remanded for a determination of which coverage the parties intended.

(*One judge concurring separately*)

Argued January 12—officially released October 2, 2012

Procedural History

Action to recover underinsured motorist benefits allegedly due under an automobile insurance policy issued by the defendant, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Tobin*, *J.*; verdict for the plaintiff; thereafter, the court granted the defendant's motion to reduce the verdict, denied the plaintiff's request for leave to amend the complaint, and rendered judgment for the plaintiff in accordance with the reduced verdict, and the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Jeremy C. Virgil, for the appellant (plaintiff).

Thomas A. Mulligan, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, Mario Fiallo, appeals from the judgment of the trial court denying his request to amend his complaint to add bad faith claims after a jury verdict in his favor and granting the motion of the defendant, Allstate Insurance Company, to subtract amounts from the jury verdict, as contemplated by the plaintiff's insurance policy, before rendering judgment. On appeal, the plaintiff claims that the court (1) applied the law erroneously in denying his request to amend his complaint and (2) erred in failing to find an ambiguity in the insurance policy. We affirm in part and reverse in part the judgment of the trial court.

The following facts set forth by the court in its September 23, 2010 memorandum of decision on postverdict motions are relevant to the plaintiff's appeal. "On July 24, 2006, the plaintiff, Mario Fiallo, was employed by Eagle Hill School in Fairfield as a maintenance worker. While he was engaged in yard work at the campus of Eagle Hill School he was struck by an automobile operated by Michelle Igesias and sustained injuries. Igesias was covered by an automobile liability insurance policy with $20,000 in policy limits. The plaintiff was paid the entire $20,000 under Igesias' policy and brought this action against [the] defendant, Allstate Insurance Company, pursuant to the underinsured motorists provision of a policy issued to the plaintiff by the defendant.

"The defendant filed an answer and special defenses claiming that its liability under the policy was limited to $50,000 and that, pursuant to the terms of the policy, it was entitled to credits equal to the amounts received by the plaintiff from Igesias and the amounts of benefits paid or payable by workers' compensation. A jury trial was conducted from May 25 to May 27, 2010, in Bridgeport Superior Court. On May 27, 2010, the jury returned

a verdict awarding the plaintiff [$95,000, which comprised] $30,287.14 in economic damages and $64,712.86 in noneconomic damages."

The jury had been instructed that its "only task [was] to determine whether the plaintiff sustained injuries as a result of the accident and, if so, what amount of money will fully and fairly compensate the plaintiff." The court found that "the parties had agreed to reserve all issues relating to reductions in underinsured motorists coverage under the provisions of [the] policy, including those which might otherwise [have] been submitted to the jury, for postverdict determination by the court."

On June 7, 2010, the defendant filed a motion to reduce the verdict to $0 in accordance with the plaintiff's insurance policy. On June 11, 2010, the plaintiff requested to amend his complaint "to conform [to] the evidence produced and discovered during trial and reflect the misconduct of the [d]efendant, Allstate by adding counts for breach of the covenant of good faith, breach of contract, violations of [the Connecticut Unfair Insurance Practices Act] CUIPA [General Statutes § 38a-815 et seq.] and violations of [the Connecticut Unfair Trade Practices Act] CUTPA [General Statutes § 42-110a et seq.]." The court denied the plaintiff's request, and the plaintiff thereafter filed motions to reargue and to reconsider, which also were denied. On September 23, 2010, the court granted in part the defendant's motion to reduce the verdict and reduced the judgment to $24,596.29. Judgment was rendered in that amount, and the plaintiff appealed to this court. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court erred in denying his request to amend his complaint to allege bad faith on the part of the insurer. He asserts two related

grounds for his claim: the court erred (1) in declining to allow new claims to be alleged after the jury returned its verdict and was dismissed, and (2) in predicting that his bad faith claims could be asserted in a separate action after the conclusion of the underlying action, if the claims were truly unknown prior to or during trial. We disagree.

The following additional facts are relevant. On June 11, 2010, the plaintiff filed a request for leave to amend his complaint "to conform [to] the evidence produced and discovered during trial and reflect the misconduct of the [d]efendant, Allstate by adding counts for breach of the covenant of good faith, breach of contract, violations of CUIPA and violations of CUTPA." In the five count proposed amended complaint, count one was identical to the original complaint. In counts two through five, the plaintiff claimed, inter alia, that the defendant "failed to investigate the value of the claim, failed to make a good faith effort to settle this claim, failed to disclose the basis for [its] refusal to negotiate the claim, and improperly refused to settle within the policy limits."

On June 22, 2010, the court heard argument on the request. Although the plaintiff asserted in his request to amend his complaint that the proposed amendment was filed, inter alia, so that the pleadings conformed to the evidence at trial, the court stated that the amended complaint set forth a new action that relied on "facts that were not shown at trial." The plaintiff acknowledged that the court was correct. The plaintiff argued that he was required, however, to raise the new claims in the present case because "the Supreme Court has said in multiple decisions . . . once a judgment has entered I'm estopped from pursuing a further action because all claims that could have been brought and . . . the facts underlying them didn't arise until the trial began . . . ." The plaintiff stated that he "had some

idea that [the misconduct that formed the basis of his additional claims] may have been occurring during the trial . . . .'' The court stated: ''I have trouble seeing your right to amend the complaint for . . . making a claim of fully defending themselves, albeit perhaps not successfully, who knows—I don't see that that amounts to bad faith and reverts back. I just don't see it. In any event, I think you're going to have to provide me with better authority before I would consider allowing the—a new case to be built based upon a postjudgment motion to amend a complaint. . . . [I]t does not make any sense to me. . . . Just because you can't bring another claim does not mean that you can do it in the fashion you're proposing to do it.'' The court informed the parties that it was not prepared to rule on the motion and set a date for another hearing in mid-July.

At the hearing on July 22, 2010, the plaintiff cited *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 922 A.2d 1073 (2007), in support of his argument that he was required to amend his complaint to bring the bad faith claims in the present case so that he would not be barred by res judicata from bringing them in a later action. In *Powell*, the court held that res judicata barred the insured's claims of bad faith, breach of contract, violation of CUIPA and violation of CUTPA because they could have been brought in a prior action for uninsured motorist benefits. Id., 596. The court in the present case responded that ''this *Powell* case may be distinguishable if the facts that gave rise to these new causes of action were unknown to you [and] did not arise in time for you to amend the complaint. What I need from you, before I can consider entertaining this, is some authority from some appellate court saying that after a cause of action is tried to a verdict, which has been accepted by the court, that there's authority to amend the complaint to add additional causes of action . . . .'' The plaintiff cited *Landry* v. *Spitz*, 102 Conn.

App. 34, 925 A.2d 334 (2007), in support of his argument. The court distinguished *Landry* because in that case, although the plaintiff's complaint did not allege bad faith, it was actually litigated at trial; in the present case, bad faith was never litigated. The plaintiff informed the court that he had "suspicions going into the trial, as the trial began," about the bad faith, but that it did not "[crystallize] as being . . . bad faith conduct until after the trial . . . ." The court asked the plaintiff: "[C]an you point to any case in Connecticut that has been without agreement to bifurcate, or to separate causes of action or otherwise motions to sever parties, or sever causes of action, can you point to any case that has proceeded along the path that you're inviting this court to take?" The plaintiff did not provide any authority, but stated that he included in his reply brief cases that were bifurcated "because these are the types of issues that specifically should not be tried together."[1] The court stated that in those cases "bad faith was already in the case . . . ." The court denied the request for leave to amend the complaint.

We first set forth the applicable standard of review. "A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden . . . to demonstrate that the trial court clearly abused its discretion. . . . A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to

[1] The plaintiff maintains that there was a bifurcated trial in the present case. The court appears to have recognized that it was not a bifurcated trial, and, from the record, the action appears to have been tried to a jury, and certain issues were reserved for postverdict motions.

the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Beckenstein* v. *Reid & Riege, P.C.*, 113 Conn. App. 428, 435–36, 967 A.2d 513 (2009).

The plaintiff argues that the court erred in determining that he could not amend his complaint after the jury verdict and before judgment was rendered on the verdict. Both parties agree that the standard of review is abuse of discretion. In light of the facts recounted previously, we do not conclude that the court abused its discretion in denying the plaintiff's request.

The court repeatedly requested authority from the plaintiff in support of his position and found that none was persuasive. The court examined *Powell* and opined that the plaintiff likely would not be barred from bringing a separate action if facts supporting bad faith were not known to him so that he could have amended his complaint in a timely manner. In *Powell*, our Supreme Court held that res judicata barred the plaintiffs' action alleging bad faith, breach of contract, violation of CUTPA and violation of CUIPA brought one year after judgment was rendered in an action against their insurer asserting claims brought pursuant to the uninsured motorist coverage of the automobile insurance policy. *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 595–96. Our Supreme Court's reasoning in *Powell* is instructive. There, the plaintiffs brought the first action against their insurance company seeking payment for damages sustained by the plaintiffs that exceeded the tortfeasor's liability policy limit. The second action sought damages arising from their insurer's "bad faith" in processing

the first claim. The court held that both actions fundamentally arose from the insurer's alleged breach of its contractual obligation. Because the same transaction or series of transactions were implicated in both actions, they should both have been brought, if at all, together in one action. Although some of the evidence may not have been known until after commencement of the first action, the gravamen of the "bad faith" should have been known prior to the first trial.

An analogous situation arose in the present case. The first action alleged a breach of contract by failing to pay the damages due, which, were it not for an underinsured scenario, would have been paid by the tortfeasor's insurer. By agreement, the court tried the amount of the tortfeasor's liability to a jury, reserving the issue of deductions called for in the policy for later determination. Only after the insurer moved to reduce the judgment to nothing did the plaintiff seek to amend his complaint to allege bad faith. The facts alleged included the defendant's having undertaken "no discovery other than filing standard interrogatories," failure "to conduct a reasonable investigation," failure "to make any offer to settle this claim until immediately prior to trial," a pattern of unscrupulous business practices and a very low settlement offer just prior to trial. The plaintiff alleges that these acts occurred despite his expressed willingness to settle within the policy limits. These are the same kinds of facts that the court in *Powell* held were sufficiently known before trial to have been timely alleged.

The court in the present case, then, faced the discretionary decision of how to proceed when the plaintiff attempted to amend the complaint after a jury verdict but before the rendering of judgment. Delay, of course, was a significant factor weighing against allowing the amendment. The primary issue in the circumstances of this case was whether the ruling of the court would

work a substantial injustice to either party. The court appropriately grappled with the effects of *Powell* in its decision-making process.

The merits of the bad faith claims either could be reached or could not be reached in a second trial. If the merits could be reached, then the plaintiff would not be seriously prejudiced by the denial of the request for leave to amend in the first action, and there would be no unfairness at all. If the merits could not be reached in a second action, because of *Powell*, then serious unfairness would arise only if the plaintiff in fact had been unable to raise the claim in a more timely manner. The court in *Powell* noted that the bad faith claims stemmed from the same transaction as the straightforward uninsured/underinsured motorist claim; id., 604–605; both arose from the defendant's refusal to pay under the policy "despite its contractual obligations." Id., 606; see also *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364–66, 511 A.2d 333 (1986) (discussing principles governing res judicata and holding CUTPA claim barred by res judicata when claim turned only on insurer's refusal to pay under policy). Critically, the plaintiffs in *Powell* argued that the bad faith action should not have been barred by res judicata partly because not all the facts were known at the time of the commencement of the first action. The trial court had recognized, however, that facts necessary for the claim were known at the time of such commencement, and it was inconsequential that additional evidence may have been discovered after commencement of the action, and the trial date could have been adjusted. *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 608.

The trial court in the present case impliedly recognized that if the claims were subject to being barred in a second action on res judicata grounds, then they should have been seasonably raised in the first action. If the claims were not raised in a timely manner when they

should have been so raised, then there is no unfair prejudice in disallowing the amendment. If the claims could not have been timely raised, then they will not be barred, at least by the denial of the request for leave to amend the complaint, in a second action. It will be for the trial court in the second action to decide whether res judicata is a bar; we hold only that the trial court in this case did not abuse its discretion.[2]

II

The plaintiff also claims that the court erred in failing to find an ambiguity in the language of the insurance

[2] We presume that the court considered the relevant factors. See *Przekopski* v. *Zoning Board of Appeals*, 131 Conn. App. 178, 195, 26 A.3d 657 ("The correctness of a judgment of a court of general jurisdiction is presumed in the absence of evidence to the contrary. We do not presume error. The burden is on the appellant to prove harmful error." [Internal quotation marks omitted.]), cert. denied, 302 Conn. 946, 30 A.3d 1 (2011); *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 691, 974 A.2d 764 (this court has "*never* found an abuse of discretion in denying an amendment on the eve of trial, long after the conclusion of pretrial proceedings" [emphasis added; internal quotation marks omitted]), cert. denied, 293 Conn. 916, 979 A.2d 488 (2009).

We note also that our Supreme Court has declined to find an abuse of discretion in the denial of a plaintiff's motion to amend his complaint brought eight days after a verdict in a trial in which the only issue was damages. *Leone* v. *Knighton*, 196 Conn. 494, 495–96, 493 A.2d 887 (1985). In *Leone*, the plaintiff sought to insert facts in his amended complaint to bring the case under a statute providing for double or treble damages and to strike all allegations of negligence inapplicable to that statute. Id., 495. Citing the wide discretion of trial courts in granting and denying amendments and reasoning that the plaintiff sought "totally to transform his cause of action after a jury verdict had already been returned," the Supreme Court did not find abuse of discretion in the trial court's denial of the motion. Id., 496.

This court has also declined to find an abuse of discretion in a trial court's decision to permit an amendment to the complaint after the granting of a directed verdict. *Burton* v. *Stamford*, 115 Conn. App. 47, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009). The court in *Burton* stated that a trial court may allow amendment to a complaint after verdict or judgment, but the granting of such a motion depends on the particular circumstances of the case. Id., 59. As discussed previously, the particular circumstances of this case do not demonstrate that denying the plaintiff's request for leave to amend his complaint after the jury verdict was an abuse of discretion.

policy, including the declarations page.[3] We agree and remand the case to the trial court for further proceedings.

The following additional facts are relevant. The plaintiff's automobile insurance policy was introduced as an exhibit at a postverdict hearing. Each declaration page for each of the three vehicles for which the plaintiff was insured included a column entitled "COVERAGE." Under that column, one of the rows read in its entirety, "Uninsured/Underinsured Motorists," and reflected a policy limit of $50,000 per person and $100,000 per accident.[4]

Part V of the policy was entitled "Uninsured Motorist Insurance Underinsured Motorist Insurance Coverage SS." It provided in relevant part: "If a premium is shown on the declarations page for Coverage SS, Uninsured Motorist Insurance and Underinsured Motorist Insurance, we will pay those damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto or underinsured auto because of bodily injury sustained by an insured person." Part V additionally provided: "The *limits of this coverage will be reduced* by: 1. all amounts paid by or on behalf of the owner or operator of the uninsured auto or underinsured auto . . . . 2. all amounts paid or payable under any worker's compensation law . . . ." (Emphasis added.)

[3] The declarations page "is regarded as part of the insurance contract . . . and contains the terms most likely to have been requested by the insured . . . ." 16 S. Williston, Contracts (4th Ed. Lord 2000) § 49:25, p. 139.

[4] The policy provided: "The coverage limit shown on the Policy Declarations for:

"1. 'each person' is the most that we will pay for damages arising out of bodily injury to one person in any one motor vehicle accident. . . .

"2. 'each accident' is the most that we will pay for damages arising out of bodily injury to two or more persons in any one motor vehicle accident."

Part VI of the policy was entitled "Uninsured Motorist Insurance Underinsured Motorist Conversion Insurance Coverage SC." It provided in relevant part: "If a premium is shown on the declarations page for Coverage SC, Uninsured Motorist Insurance and Underinsured Motorist Conversion Insurance, we will pay those damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto or underinsured auto because of bodily injury sustained by an insured person." Part VI additionally provided: "In the case of accidents involving a legally liable underinsured motorist, the *damages payable will be reduced* by: 1. all amounts paid by or on behalf of the owner or operator of the underinsured auto . . . . 2. all amounts paid or payable under any worker's compensation law . . . ." (Emphasis added.)

Under part V of the policy, the limits of the coverage are reduced by the amount recovered from the tortfeasor's insurer.[5] In the present case, if part V applied, the limits of the coverage would be reduced to $30,000, which is $20,000, the amount recovered from Igesias' insurer, subtracted from $50,000, the limit provided for on the declarations page. Under part VI of the policy, the damages payable are to be reduced by the amount recovered from the tortfeasor's insurer. In the present case, if part VI applied, the damages payable would be reduced to $75,000, which is $20,000, the amount recovered from Igesias' insurer, subtracted from $95,000, the full award of damages. The amount of the judgment would, of course, be subject to any other deduction and additionally subject to the policy limit of $50,000.

The court rejected the plaintiff's argument that an ambiguity existed in the policy because of the failure

[5] In order to recover uninsured/underinsured benefits, of course, the tortfeasor's liability policy must be exhausted.

of the declarations page to specify code "SS" or code "SC." The court found: "There is nothing on the declaration[s] page to suggest that conversion coverage was being provided by the defendant. Under these circumstances, the court finds no ambiguity in the policy and finds that the plaintiff is entitled to coverage afforded under part V of the policy and [is] not entitled to coverage under part VI of the policy."

We first set forth the applicable standard of review. "[A]n insurance policy is a contract that is construed to effectuate the intent of the parties as expressed by their words and purposes. . . . [U]nambiguous terms are to be given their plain and ordinary meaning. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide." (Citations omitted; internal quotation marks omitted.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 255 Conn. 295, 305–306, 765 A.2d 891 (2001). It is a "basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters . . . ." *Cody* v. *Remington Electric Shavers*, 179 Conn. 494, 497, 427 A.2d 810 (1980).

The plaintiff argues that, because the declarations page failed to state "Coverage SS" or "Coverage SC," the policy is ambiguous and should be construed in his favor. The policy provides: "A Coverage applies only when a premium for it is shown on the declarations page." Both part V and part VI of the policy provide that the insurer will pay damages "[i]f a premium is shown on the declarations page for Coverage [SS in part V or SC in part VI]." The declarations page expressly states coverage for "Uninsured/Underinsured

Motorists." Part V is entitled "Uninsured Motorist Insurance Underinsured Motorist Insurance Coverage SS." Part VI is entitled "Uninsured Motorist Insurance Underinsured Motorist Conversion Insurance Coverage SC." Applying a layperson standard, a reader cannot clearly discern to which type of insurance "Uninsured/Underinsured Motorists" refers. The only three words that appear on the declarations page are "Uninsured/Underinsured Motorists," all of which appear in both coverage options. The language used on the declarations page is reasonably susceptible to more than one reading, i.e., "Uninsured/Underinsured Motorists" could refer either to uninsured/underinsured motorist insurance coverage or uninsured/underinsured motorist conversion insurance coverage.[6] Coverage pursuant to either part V or part VI is uninsured/underinsured motorist coverage.

Having found an ambiguity in the language, we next determine how to resolve it. As our Supreme Court has stated, "Ordinarily, if an ambiguity arises that cannot be resolved by examining the parties' intentions . . . the ambiguous language should be construed in accordance with the reasonable expectations of the insured when he entered into the contract. . . . Courts in such situations often apply the contra proferentem rule and interpret a policy against the insurer." (Citation omitted; internal quotation marks omitted.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 255

[6] In support of its position, the defendant relies on *Herrick* v. *Bordonaro*, Superior Court, judicial district of Litchfield, Docket No. CV-06-5001420-S (October 17, 2008) (46 Conn. L. Rptr. 402), and *Carron* v. *Allstate Ins. Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-06-5001037 (March 26, 2008). In both cases, the court concluded that the applicable Allstate policy was unambiguous and that the phrase "Uninsured/Underinsured Motorists" on the declarations page clearly did not refer to conversion coverage because the word "conversion" did not appear on the page. These decisions are not binding on this court, and we respectfully disagree with them for the reasons stated previously.

Conn. 306. In the present case, however, the issue of whether the plaintiff purchased standard uninsured/underinsured motorist coverage or uninsured/underinsured motorist conversion coverage presents a question of historical fact, rather than one of contract construction. Accordingly, the canon of contra proferentem[7] need not be applied automatically. See 2 S. Plitt, D. Maldonado & J. Rogers, Couch on Insurance (3d Ed. Rev. 2010) § 22:16, pp. 22-93–22-94 ("since rule of strict construction of an ambiguous policy against insurer is a rule of last resort, and not to be permitted to frustrate parties' expressed intention if such intention could be otherwise ascertained, where there is extrinsic evidence of parties' intention, which is proferred and admissible, and which resolved ambiguity, albeit in favor of noncoverage, the rule of strict construction need not be applied"); cf. 1 New Appleman on Insurance Law, Library Edition (J. Thomas & F. Mootz III eds., 2011) § 5:04 [3] [a] [iii], p. 5-37 ("[r]eliance on extrinsic evidence . . . is not the norm because the *contra proferentem* doctrine allows a court to construe the policy without reference to such evidence" [emphasis in original]). The issue in the present case does not require an interpretation of a policy term that is written by the insurer; see *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 789 n.7, 900 A.2d 18 (2006) ("The premise behind the rule [of contra proferentem] is simple. The party who actually does the writing of an instrument will presumably be guided by his own interests and goals in the transaction. He may choose shadings of expression, words more specific or more imprecise, according to the dictates of these interests. . . . A further, related rationale for the rule is that [s]ince one who speaks or writes, can by exactness of expression

[7] "Contra proferentem" is a principle of construction according to which ambiguities will be construed against the party who drafted the document. See 11 S. Williston, Contracts (4th Ed. Lord 1999) § 32:12.

more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity are resolved in favor of the latter." [Internal quotation marks omitted.]); but rather warrants an inquiry into the circumstances of the purchase of the policy to determine which variety of uninsured/underinsured motorist coverage the plaintiff opted to purchase so that the intentions of the parties may be discovered and put into effect.

The determination of what policy was bought may be resolved by examining extrinsic evidence. "If the policy is ambiguous, extrinsic evidence may be introduced to support a particular interpretation. . . . If the extrinsic evidence presents issues of credibility or a choice among reasonable inferences, the decision on the intent of the parties is a job for the trier of fact." (Citation omitted; internal quotation marks omitted.) *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 255 Conn. 306;[8] see also *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 284 Conn. 744, 771, 936 A.2d 224 (2007) ("extrinsic evidence may be considered in determining contractual intent only if a contract is ambiguous"); M. Taylor, K. Dowd & B. Levesque, Connecticut Insurance Law (2011) § 2-5:1, p. 35 ("[o]nce a determination is made that the policy is ambiguous, then the court may consider any relevant evidence which demonstrates the intent of the parties at the time that they entered into the policy"). Because the reasonable expectations of the insured control

[8] In *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 255 Conn. 306, our Supreme Court analyzed the scope of the "per occurrence" limit of liability under excess insurance policies issued by the defendant health insurers to the plaintiff. The court analyzed the language of the policies and held that they were not ambiguous. Id., 306–307. The court noted that even if it found an ambiguity, the contra proferentem rule would not apply because the rule is inapplicable in actions brought by one insurer against another. Id., 329. That proviso, of course, does not specifically apply in the context of this case.

when enforcing insurance contracts; *Ceci* v. *National Indemnity Co.*, 225 Conn. 165, 175 n.6, 622 A.2d 545 (1993); we conclude that the process best suited to effectuate the intent of the parties where the language is ambiguous as to the issue of historical fact whether the insured elected to buy a particular policy is to examine extrinsic evidence to determine the parties' intentions, and if this examination does not resolve the question, other canons of construction, including perhaps the doctrine of contra proferentem, may be applied. There is a fundamental distinction between deciding what policy language means, on the one hand, and deciding, on the other hand, whether a particular policy option was bought.

Under different circumstances, our Supreme Court has examined extrinsic evidence in resolving an ambiguity in an insurance policy. In *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, supra, 278 Conn. 779, our Supreme Court analyzed whether the phrase "because of bodily injury" was ambiguous with respect to a claim for loss of consortium where the insurer had "agree[d] with the named insured to pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damage because of bodily injury or property damage to which this insurance applies caused by a medical incident . . . ." (Internal quotation marks omitted.) Id., 786. The court examined the dictionary definition of "because of" and concluded that the policy was ambiguous because two reasonable meanings existed: the phrase could limit the insurer's obligation to pay damages caused only by direct injury to the body of the injured individual or the phrase could encompass claims such as loss of consortium that are derivative of bodily injury. Id., 787. The court then stated: "Thus, having concluded that the relevant policy language is ambiguous, we ordinarily would be free to consider extrinsic evidence, although [i]f the extrinsic evidence

presents issues of credibility or a choice among reasonable inferences, the decision on the intent of the parties is a job for the trier of fact." (Internal quotation marks omitted.) Id., 788. The court concluded, however, that extrinsic evidence was not applicable because the case was before the Supreme Court and the trial court on a statement of stipulated facts, and, thus, the Supreme Court applied contra proferentem to hold that the policy covered loss of consortium claims. Id., 788–89; see 2 S. Plitt, D. Maldonado & J. Rogers, supra, § 22:22 ("[s]ome of the cases which do not follow the rule that insurance policy will be construed against insurer actually appear to apply the rule at a different point in the analytical process, following a procedure of ascertaining the intention of parties from the policy as a whole, considering extrinsic and parol evidence to construe any ambiguity, and then, only if ambiguity still remains after the examination of such evidence, construing the policy against the insurer").

In *Connecticut Ins. Guaranty Assn.*, the issue was the determination of the meaning of a particular phrase in the policy language, whereas the issue before this court in the present case is the determination of a historical fact, to wit, which type of uninsured/underinsured motorist insurance coverage the plaintiff selected for purchase. Although this distinction, and the fact that the case in *Connecticut Ins. Guaranty Assn.* was before the court on a set of stipulated facts, distinguishes the two cases, the framing of the analysis upon determining that there was an ambiguity is instructive. The court in *Connecticut Ins. Guaranty Assn.* wrote: "Thus, having concluded that the relevant policy language is ambiguous, we ordinarily would be free to consider extrinsic evidence, although [i]f the extrinsic evidence presents issues of credibility or a choice among reasonable inferences, the decision on the intent of the parties is a job for the trier of fact." (Internal quotation marks omitted.)

Connecticut Ins. Guaranty Assn. v. *Fontaine*, supra, 278 Conn. 788. The court acknowledged that, upon concluding that policy language is ambiguous, a court may admit extrinsic evidence to resolve the ambiguity, rather than apply contra proferentem automatically. In the present case, the intentions of the parties as to which plan of uninsured/underinsured motorist insurance coverage was chosen cannot be determined from the policy; accordingly, extrinsic evidence is appropriate.

Our search of the case law has not yielded cases within our jurisdiction that have addressed the issue of resolving an ambiguity as to which particular option was selected for purchase in an insurance policy.[9] There are, however, cases from other jurisdictions that have addressed analogous situations.

In *General Star Indemnity Co.* v. *Custom Editions Upholstery Corp.*, 940 F. Supp. 645 (S.D.N.Y. 1996), the plaintiff insured two defendant corporations against fire. There was a fire on the defendants' premises, and the defendant Custom Editions' customers filed claims totaling $85,545.12 for personal property on the premises at the time of the fire. Id., 648. The plaintiff interpreted the relevant insurance policy to cover no more than $2500 to Custom Editions' customers. Id. The policy provided that the insurer would pay for loss of or damage to any "Covered Property," which was defined as "the following types of property for which a [l]imit of [i]nsurance is shown in the [d]eclarations." (Internal quotation marks omitted.) Id., 653. The policy also defined three kinds of property that may be covered: "Building," "Your Business Personal Property" and "Personal Property of Others." (Internal quotation marks omitted.) Id. The declarations page showed coverage for "Building," "Contents" and "Bus Income."

[9] See footnote 6 of this opinion. The cases cited by the defendant concluded that there was not an ambiguity.

(Internal quotation marks omitted.) Id., 654. A section of the policy entitled "Coverage Extensions," provided: "You may extend the insurance that applies to *Your Business Personal Property* to apply to . . . (2) Personal Property of others in your care, custody or control. The most we will pay for loss or damage under this Extension is $2,500 for each described premises." (Emphasis added; internal quotation marks omitted.) Id. The customer claimants argued that the personal property of individuals within the custody of the defendant insured was covered on the basis of the word "Contents" on the declarations page. (Internal quotation marks omitted.) Id. The claimants asserted that the term "Contents" was not limited to "Business Personal Property," and, thus, did not exclude "Personal Property of Others." (Internal quotation marks omitted.) Id. The plaintiff argued that "Contents" included "Business Personal Property" only and that had Custom Editions requested coverage for the personal property of others, such coverage would have been itemized separately on the declarations page. (Internal quotation marks omitted.) Id.

The court began its analysis by noting: "An insurance contract, like any other, must be construed to effect the intent of the parties as expressed by their words and purposes." Id. The court stated that, in the event of an ambiguity, the parties may introduce extrinsic evidence. Id. "If the extrinsic evidence does not yield a conclusive answer as to the parties' intent, it is appropriate for a court to resort to other rules of construction, including the contra-insurer rule, which states that any ambiguity in an insurance policy should be resolved in favor of the insured." (Internal quotation marks omitted.) Id., 655. The court concluded that the policy was ambiguous. The use of the word "Contents" on the declarations page was reasonably susceptible to more

than one meaning, i.e., it could encompass both "Business Personal Property" and "Personal Property of Others," or it could not encompass both types of coverage because the declarations page did not itemize them separately. (Internal quotation marks omitted.) Id. The court then examined the plaintiff's extrinsic evidence—an interview with the owner of Custom Editions, the policy application and sworn testimony of its underwriter—and concluded that such evidence did not eliminate the ambiguity. Id. "When extrinsic evidence fails to resolve the ambiguity in the policy, the contra-insurer rule—i.e., all ambiguities in a policy must be interpreted against the insurer—must be applied, and the ambiguous clause must be interpreted in favor of the insured." Id., 656. Accordingly, the court concluded that the policy included coverage for "Personal Property of Others." (Internal quotation marks omitted.) Id.; but see *Simon* v. *Continental Ins. Co.*, 724 S.W.2d 210 (Ky. 1986) (where declarations page indicated insured purchased underinsured motorist insurance and uninsured coverage but failed to specify separate coverage amount for underinsured coverage or itemize separate premiums, ambiguity was present and insured entitled to have ambiguity resolved against insurer).

In the present case, as in *General Star Indemnity Co.*, there is an issue as to which coverage was selected for purchase. The court in *General Star Indemnity Co.* looked to extrinsic evidence to resolve the ambiguity first before applying the doctrine of contra proferentem. In the present case, it is unclear which coverage—standard uninsured/underinsured coverage or uninsured/underinsured conversion coverage—the plaintiff selected. Accordingly, extrinsic evidence, such as any relevant testimony and the policy application, may be admitted by the trial court to resolve the ambiguity.[10]

[10] The trial court in the present case concluded that there was no ambiguity, although it did hear extrinsic evidence. The court heard the testimony of an employee of the defendant regarding the policy language and the defendant's

In *East Troy* v. *St. Paul Fire & Marine Ins. Co.*, Wisconsin Court of Appeals, Docket No. 96-2501 (August 13, 1997) (unpublished), the defendant issued umbrella liability policies to the "Township of East Troy-Water Distribution Department." The plaintiff sought defense and indemnification for its remediation work at a landfill site unrelated to water distribution. The trial court concluded that the coverage under the insurance policies was limited to water distribution operations and did not cover the work at the landfill site, and, accordingly, granted the defendant's motion for summary judgment. The appellate court affirmed. It concluded that the identity of the named insured was ambiguous. The court explained that where there is an ambiguity in a contract, it may consider extrinsic evidence of the parties' intent. See *Grange Mutual Casualty Co.* v. *Snipes*, 298 Ga. App. 405, 407–409, 680 S.E.2d 438 (2009) (examining extrinsic evidence to resolve ambiguity as to identity of insured when certificate of insurance named "Savannah Sugar Refinery" as holder of certificate of insurance while endorsements on renewal policy named "Imperial-Savannah & Industries, Inc.," as additional insured); 2 S. Plitt, D. Maldonado & J. Rogers, supra, § 22:14 (contra proferentem does not apply in determining whether particular party is an insured). The court considered extrinsic evidence and concluded that such evidence made apparent that the policies were intended to insure risks associated with water distribution work only.

As in *East Troy*, the issue in the present case called for a factual determination rather than a construction of the terms of the policy drafted by the insurer. The

internal procedures used to produce the language regarding coverages reflected on the declarations page. Her testimony implied that, according to the defendant, the language of the declarations page circumstantially indicated that the plaintiff did not have conversion coverage. No other evidence, such as a copy of the application, was submitted.

court in *East Troy* concluded that the trial court was properly assisted by extrinsic evidence in determining the identity of the named insured. In the present case, extrinsic evidence regarding the circumstances of the plaintiff's selection of uninsured/underinsured motorist coverage would likely be helpful in resolving the ambiguity as to which variety of coverage he chose.

The court here did not make a finding regarding the parties' intentions other than its conclusion that the policy and declarations page were unambiguous. As discussed previously, we conclude that there is an ambiguity. Accordingly, we conclude that the court should engage in fact-finding as to the intent of the parties; see M. Taylor, K. Dowd & B. Levesque, supra, § 2-4:2 ("[a] finding of ambiguity permits the use of extrinsic evidence that normally would be precluded by the parol evidence rule, which provides that generally, when there is a written agreement, no other evidence will be considered on the terms of that agreement"); and we reverse the judgment in part and remand the case to the court to determine which coverage the parties intended.[11]

The judgment is reversed only as to the granting of the motion to reduce the jury verdict and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed in all other respects.

In this opinion ALVORD, J., concurred.

BORDEN, J., concurring. I agree with and join the well reasoned opinion of the majority, with two minor

[11] The concurrence suggests that on remand, the burden of proof should be shifted to the defendant. We respectfully disagree. On the facts of this case, of course, if no evidence other than the policy, including the declarations page, is introduced on remand, then, consonant with the authority previously cited, the plaintiff presumably would prevail by the application of contra proferentem. The plaintiff would prevail, however, not because the burden of proof has been shifted but rather because it has been satisfied.

linguistic exceptions, which I will discuss. I write separately only to give the trial court some guidance for its determinations on remand.

First, I take issue with the following language in part II of the majority opinion: "The issue in the present case does not require an interpretation of a policy term that is written by the insurer . . . ." (Citation omitted.) I also take issue with the following similar language in part II of the majority opinion: "There is a fundamental distinction between deciding what policy language means, on the one hand, and deciding, on the other hand, whether a particular policy option was bought." That may or may not be so. In a case such as this, if there is no persuasive extrinsic evidence that resolves the question of what kind of coverage the plaintiff, Mario Fiallo, purchased, in my view "what [the] policy language means" will determine what policy was bought. In other words, the question is not "what policy option was bought," but what coverage was provided by the policy that the plaintiff bought, and that question has to be decided by, first, deciding whether the policy language was ambiguous and, second, if so, whether there is persuasive extrinsic evidence that overcomes the contra proferentem rule.

This brings me to what I regard as some further guidance for the trial court on the remand. In my view, the defendant, Allstate Insurance Company, should have the burden of proof on the question of whether the coverage was straight uninsured and underinsured, as the defendant claims, or conversion coverage, as the plaintiff claims. This is because, consistent with the policy underlying the contra proferentem rule, the defendant had the best opportunity to make that clear in its policy papers, including the application. Furthermore, in the trial court, the defendant had the opportunity to bring forth extrinsic evidence to show the

parties' intentions, and the only evidence that it produced was the testimony of an underwriter, which I will discuss, and which did not shed any persuasive light on the factual issue involved. This means that if the defendant does not carry its burden of proof on this issue, the court should apply the contra proferentem rule and, consistent with the majority's conclusion that the policy is ambiguous, construe it as a matter of the parties' intentions against the defendant and in favor of the plaintiff.

One final word about what evidence may or may not suffice on the remand. As the majority rightly states: It is a "basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters . . . ." *Cody* v. *Remington Electric Shavers*, 179 Conn. 494, 497, 427 A.2d 810 (1980). The same principle should apply when applying extrinsic evidence to illuminate the meaning of policy language; when applying that extrinsic evidence, the court as fact finder should construe the language, in light of that application, as laymen would understand that language.

In the present case, the only evidence adduced by the defendant in the postverdict hearing held by the court on the coverage issue was testimony by an underwriter for the defendant regarding the function and meaning—as an internal coding matter—of the terms "Coverage SS" and "Coverage SC" generally within the defendant company. Indeed, she did not even relate that testimony to the specific policy purchased by the plaintiff. My point here is that extrinsic evidence such as this would be wholly unhelpful in resolving the question of what coverage the plaintiff purchased from the defendant. Put another way, no reasonable fact finder could rely on it to construe the meaning of the ambiguous language of the policy. Only evidence communicated to the plaintiff and bearing on what the plaintiff,

as a layman unschooled in the inner workings of the defendant and its coding operations would understand, would be persuasive to resolve the factual question remaining to be determined on the remand.

MARISOL PEREZ, ADMINISTRATRIX (ESTATE OF HIRAM D. COLON, JR.) *v.* ELIZABETH CUMBA (AC 33590)

Gruendel, Beach and Schaller, Js.

Syllabus

The plaintiff administratrix of the estate of C sought to recover damages from the defendant for negligence in connection with C's wrongful death. The defendant had hosted a party at her residence for her daughter that was attended by numerous high school teenagers. After the defendant observed C yelling at another guest, she asked C to leave and escorted him off her property. C later reentered the defendant's property and confronted a group of guests, who then chased C to a neighbor's yard where a fight ensued, during which C was fatally stabbed. The plaintiff's complaint alleged that the defendant failed to exercise reasonable care and control to protect C from dangers posed by other social invitees that could reasonably be anticipated to arise from the activities taking place on her premises. The defendant denied the allegations of the complaint and alleged special defenses of contributory negligence and superseding cause. The jury returned a verdict in favor of the defendant. The trial court thereafter denied the plaintiff's motions 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. *Held*:

1. The defendant's claim to the contrary notwithstanding, the general verdict rule did not preclude review of the plaintiff's claim of instructional error on appeal, as the plaintiff presented interrogatories intended to frame the issue of superseding cause, which would have fleshed out the grounds for the jury's verdict, and the trial court's failure to submit the proposed interrogatories to the jury rendered its findings as to the special defense of superseding cause unascertainable.
2. The trial court improperly instructed the jury that to find the defendant liable, it must find that she possessed notice of the specific dangerous condition that caused C's death, namely, that the defendant had actual or constructive notice that a person on her property possessed a knife and was willing to use it to inflict injury on C: the requirement of notice of a specific defective condition applies in the context of a negligence action based on a defective condition on a defendant's premises, and the plaintiff's complaint here did not advance a traditional defective

premises theory of liability but, rather, alleged a negligence claim predicated on social invitee liability arising from the intentional acts of a third party, and by requiring proof that the defendant had notice that a person on her property possessed a knife and was willing to use it to inflict injury on C, the court improperly elevated the plaintiff's burden of proof on her premises liability claim involving intentional acts of a third party, as the proper inquiry should have focused on the likelihood of the harm incurred, rather than the specific instrumentality by which the harm was inflicted; accordingly, because the improper instruction was not harmless and it could not reasonably be determined that the jury was not misled by the court's erroneous instruction, a new trial was warranted.

Argued May 23—officially released October 2, 2012

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Miller*, *J.*; verdict for the defendant; thereafter, the court denied the plaintiff's motions 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. *Reversed; new trial.*

Richard L. Zayas, with whom, on the brief, was *Maximiliano Zayas*, for the appellant (plaintiff).

W. Glen Pierson, with whom, on the brief, was *Eileen R. Becker*, for the appellee (defendant).

Opinion

GRUENDEL, J. This unconventional premises liability case concerns injuries sustained by a social invitee as a result of the intentional and criminal acts of a third party. The plaintiff, Marisol Perez, administratrix of the estate of Hiram D. Colon, Jr., appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, Elizabeth Cumba. The plaintiff claims that the court improperly instructed the jury that, to

find in her favor, it must find that the defendant possessed notice of the specific dangerous condition that caused the death of her decedent. We agree and reverse the judgment of the trial court.

The relevant facts largely are undisputed. On the evening of November 17, 2006, the defendant hosted a birthday party at her residence in East Hartford for her fifteen year old daughter. Although she originally told her daughter that she could invite five to ten friends, forty to fifty high school teenagers attended the party, including the decedent.[1] Because the crowd was larger than she expected, the defendant called other adults for assistance as part of her efforts to ensure that "there were no fights." Nevertheless, a fight occurred in the defendant's basement at approximately 10 p.m. that involved several guests. The defendant intervened and stopped that fight. She testified that she thereafter was concerned that another fight would transpire.

Less than one hour later, the defendant observed the decedent yelling in a stairway. After learning that the decedent had just arrived at the party, the defendant took him outside, grabbing him by the hand and telling him that "you need to leave. You can't come here, start a fight. This is my daughter's birthday." As the defendant and the decedent exited the home, a group of six to eight individuals followed. The defendant and her teenage nephew escorted the decedent off her property and across the street to a bus stop[2] as the decedent and the group of individuals continued to yell at each other. When she offered the decedent a ride somewhere, he

[1] The defendant's daughter and her friends had created and circulated a flyer about the party. Although she did not recall the precise wording contained therein, the defendant testified that it was something akin to, "come to [her daughter's] birthday party, have a good time, but no fights or don't cause problems . . . ."

[2] Asked why she took the decedent across the street, the defendant testified, "[b]ecause I just wanted to make sure he left."

stated that one was on the way. For several minutes, the defendant waited there with the decedent for his ride to arrive.

Another teenager then ran across the street and whispered something in the decedent's ear, agitating the decedent. As the defendant testified: "He whispered something in [the decedent's] ear. Then [the decedent] got louder. He started screaming at the [group of] kids. And that's when I . . . tried to hold him back. And then I told my nephew, just hold him here because they were getting rowdier. . . . I told him, hold him here and I'll try to get these kids to go in the basement or in the garage or something. . . . The decedent was getting rowdier after his friend whispered something in his ear." The defendant then crossed the street to remove the group of teenagers, at which time the decedent ran past her, reentered her property and confronted the group in her driveway.[3] The defendant at that time unsuccessfully attempted to diffuse the situation, threatening to call the police and telling "all of them to leave" her property. The decedent continued to argue with the group as the confrontation escalated. Eventually, the group moved past the defendant and chased the decedent to the front of her neighbor's yard, where a fight ensued. During that fight, the decedent was fatally stabbed.

The plaintiff thereafter commenced this wrongful death action. The operative complaint, the plaintiff's May 4, 2011 amended complaint, contains one count that does not specify any particular cause of action, but sounds in negligence. The complaint alleges that the defendant "owned and/or was in possession and/or control of" the premises in question and that the

[3] We do not consider whether the decedent lost his status as a social invitee by exceeding the limits of the invitation; see, e.g., *Frankovitch* v. *Burton*, 185 Conn. 14, 21, 440 A.2d 254 (1981); as that issue is not before us in this appeal.

decedent "was a social guest, an invitee, at the home of the defendant . . . ."[4] The complaint alleges that the defendant "breached the duty she owed to the decedent" in seven respects: (1) "she did not exercise the power of control or expulsion which her occupation of the premises gave her over the social invitees at the party to prevent injury and death to the [d]ecedent"; (2) "she failed to act as a reasonable person to avoid harm to the [d]ecedent even from intentional attacks on the part of third persons"; (3) "she failed to call the police to control or expel the social invitees that were causing the problems and ultimately stabbed and killed the [d]ecedent"; (4) "she failed to act to control the fight and conduct of the social guests that assaulted the [d]ecedent when the harm of the general nature suffered by the [d]ecedent was reasonably foreseeable"; (5) "she failed to properly supervise the party in order to deter or stop conduct such as the fight from occurring"; (6) "she failed to provide proper security to control and police the party to prevent harm to the social invitees"; and (7) "she failed to warn the [d]ecedent of the dangerous condition . . . ." The complaint further alleges that as a "result of the negligence of the [d]efendant," the plaintiff incurred various expenses. In her answer, the defendant denied those allegations. The defendant also filed two special defenses, in which she alleged that (1) the decedent was contributorily negligent and (2) "[t]he decedent's death was the result of the intentional and/or criminal actions of a third

[4] "Invitees fall into certain general categories. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. . . . A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. . . . [General Statutes § 52-557a], which provides that [t]he standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee, in effect recognizes a third kind of invitee, namely, the social invitee." (Citations omitted; internal quotation marks omitted.) *Corcoran* v. *Jacovino*, 161 Conn. 462, 465, 290 A.2d 225 (1971).

person that superseded any possible negligence on the part of the [d]efendant." In response, the plaintiff filed an answer denying in general terms the special defenses.

A jury trial followed, during which the issue of the defendant's special defense of superseding cause arose when her counsel questioned the decedent's mother as to whether any criminal proceedings resulted from the stabbing of her son. The parties thereafter stipulated that six males who assaulted the decedent were criminally prosecuted and convicted of assault in the first degree in connection therewith. The court at that time explained to the jury that "[w]hat that means is, you may treat those facts as having been proven for purposes of this case."

At the close of evidence, the court provided detailed instructions to the jury. It instructed the jury on the issue of notice as follows: "If the plaintiff is to prove that the defendant was negligent by maintaining her premises in a way which caused the deceased's injuries and death, she must also prove two other things. The first of these is that the defendant was in control of the premises, which is admitted. But the plaintiff must also prove that [the defendant] had notice of the specific dangerous condition which caused the death of her decedent. *The 'specific dangerous condition' which caused the death was the presence at the party of a group of people who were having some disagreement with the decedent, one of whom possessed a deadly weapon, a knife, and the willingness to use it to inflict injury on* [*the decedent*].

"The plaintiff must prove actual or constructive notice of both these conditions in order to prove that the defendant had the required notice. 'Constructive notice' means *that the weapon was present on her property long enough for* [*the defendant*] *to know that it*

was there and for her to have enough time to correct the problem. [*The plaintiff*] *cannot establish notice of the presence of the knife* unless she proves that [the defendant] had actual or constructive knowledge of the specific dangerous condition which caused the injury and death. It is not enough for the . . . plaintiff to have proven conditions which were likely to produce the dangerous conditions which produced the risk, even if those dangerous conditions did produce the risk. You must focus your attention and your inquiries on the question of whether [the defendant] had actual or constructive notice of the specific dangerous condition which injured the plaintiff's decedent.

"In deciding the issue of notice, the subsidiary question is whether the defect or dangerous condition had existed for such a length of time that the defendant, in the exercise of due care, should have discovered it in time to have remedied it prior to the plaintiff being injured. What constitutes a reasonable time is a question of fact for you to determine based on the circumstances you find to have existed in this case." (Emphasis added.)

The court later instructed the jury on superseding cause, stating: "The defendant . . . claims that she did not legally cause the plaintiff's injury and death because the injury and death were produced, in material part, by a superseding cause. A superseding cause is any intentionally harmful act, force of nature or criminal event, unforeseeable by the defendant, which intervenes in the sequence of events leading from the defendant's alleged negligence to the plaintiff's . . . alleged injury and proximately causes that injury. Under our law, the intervention of such a superseding cause prevents the defendant from being held liable for the plaintiff's injury on the . . . theory that due to such superseding cause, the defendant . . . did not legally cause the injury even though her negligence was a substantial factor in bringing the injury about. Therefore,

when a claim of superseding cause is made at trial, the plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove, by that standard, its own conflicting claim of legal causation.

"In this case, [the defendant] claims that the conduct of [the six males whom the parties stipulated were convicted of assault in the first degree], in participating in the killing of [the] plaintiff's decedent, was a superseding cause of the . . . death, and, thus, that [she] did not legally cause that injury. Because such an intentionally harmful criminal event, if unforeseeable . . . by the defendant, would constitute a superseding cause of the plaintiff's alleged injury if it occurred as claimed by [the defendant], and if it proximately caused the . . . plaintiff's death.

"The plaintiff must disprove at least one essential element of that claim by a fair preponderance of the evidence in order to prove that the defendant legally caused that injury. The plaintiff can meet this burden by proving either, one, that the conduct claimed to constitute a superseding cause did not occur as claimed by the defendant, either because it did not occur at all or because it was . . . not engaged in with the intent to cause harm; or, two, that such conduct was foreseeable by the defendant in that the injury in question was in the scope of the risk created by the defendant's conduct; or, three, that such conduct was not a substantial factor in bringing about the plaintiff's alleged injury.

"These, of course, are questions of fact for you to determine based on the evidence. Keep in mind, however, that the defendant does not have any burden to prove the existence of a superseding cause. The burden at all times rests upon the plaintiff to disprove the defendant's claim of a superseding cause as a necessary part of her proof that the defendant legally caused the

plaintiff's injury. If you find that the actions of the [the six males whom the parties stipulated were convicted of assault in the first degree for their involvement in the incident], or others, intervened and superseded any negligence on the part of [the defendant], then [the defendant] cannot be responsible to the plaintiff and your verdicts must be for the defendant.

"If you find the . . . intentional acts [of the six males] were not within the scope of the risk which may have been created by [the defendant's] alleged negligent conduct, then the actions of [those] individuals may be found by you . . . to be the proximate cause of the decedent's death, thus relieving [the defendant] of liability even if you find that [the defendant] was negligent and her negligence created a situation which afforded an opportunity to the above-listed individuals to commit a crime."

After completing its instructions and excusing the jury, the court permitted the parties to offer any objections to its charge. At that time, the plaintiff objected to "paragraph nineteen of the charge to the jury . . . specifically regarding the notice of the specific dangerous condition . . . which injured the plaintiff's decedent. . . . Our contention is that is not the law to be applied to this case. The law to be applied to this case is laid out in [*Merhi* v. *Becker*, 164 Conn. 516, 325 A.2d 270 (1973), which held that] as a possessor of the premises on that day . . . [the defendant] had the duty of exercising reasonable care and control to protect its invitees from dangers which might reasonably be anticipated to arise from the conditions of the premises or the activities taking place there. . . . [I]n particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm, even

from intentional attacks on the part of such third persons. . . . That's the exception we have to this charge. We feel that the law that was given to the jury [on] the fact that they have to find notice of a deadly weapon or constructive notice . . . is the incorrect instruction, and the instruction should be based off of the language of *Merhi* . . . ."

The plaintiff also reminded the court that she had filed both an initial proposed verdict form with jury interrogatories and a supplemental verdict form and jury interrogatories. Although the court noted the plaintiff's exceptions, it nonetheless presented its own verdict form to the jury, which first asked, "[d]o you find that the defendant . . . was negligent, and that her negligence was a proximate cause of the incident which occurred on November 17, 2006?" The form then instructed that "[i]f the answer to question [one] is 'No,' then your deliberations are over and your foreperson should sign and date the verdict form." In returning a verdict in favor of the defendant on May 6, 2011, the jury answered that first interrogatory in the negative. The jury therefore did not proceed to a consideration of the three remaining interrogatories, which asked the jury whether the decedent was negligent and a proximate cause of the incident; for an allocation of the respective percentages of responsibility of the defendant and the decedent; and for a finding on the amount of damages incurred by the plaintiff. The plaintiff subsequently filed motions to set aside the verdict and for a new trial, which renewed the plaintiff's earlier objection to the court's instruction on the issue of notice. On June 13, 2011, the court denied those motions and rendered judgment in accordance with the jury's verdict. This appeal followed.

I

Before addressing the merits of the plaintiff's claim of instructional error, we first consider whether the

general verdict rule applies. "[The general verdict] rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated. Declining in such a case to afford appellate scrutiny of the appellant's claims is consistent with the general principle of appellate jurisprudence that it is the appellant's responsibility to provide a record upon which reversible error may be predicated. . . . In the trial court, the rule relieves the judicial system from the necessity of affording a second trial if the result of the first trial potentially did not depend upon the trial errors claimed by the appellant. Thus, unless an appellant can provide a record to indicate that the result the appellant wishes to reverse derives from the trial errors claimed, rather than from the other, independent issues at trial, there is no reason to spend the judicial resources to provide a second trial." (Citation omitted; internal quotation marks omitted.) *Dowling* v. *Finley Associates, Inc.*, 248 Conn. 364, 371–72, 727 A.2d 1245 (1999).

"The general verdict rule operates when a jury deliberates and returns a general verdict without special interrogatories. Under the general verdict doctrine, an appellate court will presume that the jury found every issue in favor of the prevailing party . . . and decline further appellate review. It operates, inter alia, where there is a denial of the allegations of a complaint and the raising of a special defense by the defendant, and the claimed error affects one but not the other. . . . Where there was an error free path available to the jury to reach its verdict, and no special interrogatories were submitted showing which road the jury went down, any judgment rendered on such a verdict must be affirmed." (Citations omitted.) *Jackson* v. *H.N.S. Management Co.*,

109 Conn. App. 371, 372–73, 951 A.2d 701 (2008). "Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." *Gajewski* v. *Pavelo*, 229 Conn. 829, 836, 643 A.2d 1276 (1994).

In the present case, the defendant denied the plaintiff's allegations of negligence and raised the special defense of superseding cause,[5] which constituted separate and distinct defenses, either of which may have supported the jury's verdict. See generally *Turturino* v. *Hurley*, 98 Conn. App. 259, 263, 907 A.2d 1266 (2006). Following trial, the jury returned a general verdict, as the plaintiff conceded in her motions to set aside the verdict and for a new trial.[6] On appeal, the defendant contends that, because "a review of the interrogatories submitted to the trial court by [the] plaintiff's counsel [does] not reveal any questions pertaining to [the] defendant's superseding cause defense," the general verdict rule applies.[7] We disagree.

[5] The doctrine of superseding cause may be raised as a special defense by a defendant claiming "that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct." *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 439 n.16, 820 A.2d 258 (2003); see also *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 167, 971 A.2d 676 (2009) (defendant properly asserted as special defense "theory that the criminal acts of a third party superseded any possible negligence on its part" [internal quotation marks omitted]).

[6] The plaintiff averred in her motions to set aside the verdict and for a new trial that "the verdict was a general verdict on negligence because the jury was not given interrogatories about status, duty, etc., as proposed by the [p]laintiff."

[7] The defendant also asserts in her appellate brief that the general verdict rule applies because the plaintiff's one count complaint asserted "separate legal theories" of "social invitee liability and premises liability." She thus posits that "[b]y combining separate legal theories of recovery in a single count, the plaintiff has prevented the court from determining the legal theory upon which the jury rendered its verdict," thus implicating the general verdict rule. For three reasons, we reject that claim.

First, as discussed in part II A of this opinion, we conclude that the complaint does not advance a theory of defective premises liability. Second, assuming arguendo that the complaint did set forth separate legal theories,

As this court explained in *Fabrizio* v. *Glaser*, 38 Conn. App. 458, 463, 661 A.2d 126 (1995), aff'd, 237 Conn. 25, 675 A.2d 844 (1996), "it is crucial for an appellant to provide us with a record that enables us, as a reviewing court, to determine which claims or defenses the jury resolved and in whose favor they resolved them. It is not the *mere submission* of interrogatories that enables us to make that determination; rather, it is the submission of properly framed interrogatories that discloses the grounds for the jury's decision. Therefore, the efficacy of the interrogatories and the preclusion of the general verdict rule depends on their being framed in such a way that this court is able to determine the grounds for the jury's decision." (Emphasis in original.) Accord *Malaguit* v. *Ski Sundown, Inc.*, 136 Conn.

we nevertheless disagree with the defendant that the general verdict rule is implicated in this case. While it is true that our Supreme Court has held that the general verdict rule applies in, inter alia, the scenario involving the "denial of separate legal theories of recovery or defense pleaded in one count"; *Curry* v. *Burns*, 225 Conn. 782, 801, 626 A.2d 719 (1993); the defendant has provided this court with no authority, nor have we discovered any, in which the general verdict rule applied to such a scenario involving a verdict in favor of a defendant. To the contrary, it appears that all such cases involved verdicts in favor of the plaintiff. See, e.g., *Ziman* v. *Whitley*, 110 Conn. 108, 147 A. 370 (1929); *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 781–82, 720 A.2d 242 (1998). The general verdict rule operates when an "error free path" exists to the verdict reached by the jury. *Jackson* v. *H.N.S. Management Co.*, supra, 109 Conn. App. 373. The plaintiff submits that "[i]f there are at least two causes of action, a defendant's verdict means that the jury found against the plaintiff in all of them. If there was an error in one of the causes of action, there was no error free path . . . ." We agree.

Third, on a more basic level, we note that premises liability theories of recovery, whether the traditional defective premises variety or one involving intentional acts of a third party, are grounded in negligence. It is well established that "the general verdict rule does not apply if a plaintiff submits to the jury several different specifications of negligent conduct in support of a single cause of action for negligence . . . ." (Internal quotation marks omitted.) *Curry* v. *Burns*, supra, 225 Conn. 787. The plaintiff's complaint set forth different allegations of negligent conduct on the part of the defendant to support of her negligence claim. We therefore reject the defendant's alternate contention.

App. 381, 388, 44 A.3d 901 (2012) (general verdict applicable because interrogatories proposed by plaintiff addressed only defendant's first special defense and did not address defendant's denial of allegations of the complaint or its second special defense); *Mazuroski* v. *Hernovich*, 42 Conn. App. 574, 576–77, 680 A.2d 1007 ("absent interrogatories that reveal the basis for the verdict," general verdict rule applies when defendant both denies plaintiff's claims and raises special defenses), cert. denied, 239 Conn. 922, 682 A.2d 1003 (1996).

Our Supreme Court has "adopted the standard [for superseding cause] set forth in [2 Restatement (Second), Torts] § 442B [(1965)], that [w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, *except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct*." (Emphasis added; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 607–608, 662 A.2d 753 (1995). In its charge on superseding cause, the court instructed the jury in relevant part that, to disprove that defense, "[t]he plaintiff [must prove] either, one, that the conduct claimed to constitute a superseding cause did not occur as claimed by the defendant . . . or, two, *that such conduct was foreseeable by the defendant in that the injury in question was in the scope of the risk created by the defendant's conduct*; or, three, that such conduct was not a substantial factor in bringing about the plaintiff's alleged injury."[8] (Emphasis added.) The plaintiff's proposed jury interrogatories asked, inter alia, "[d]id [the

[8] The court's charge on superseding cause mirrored the civil jury instruction set forth on the Judicial Branch website. See Conn. Civil Jury Instruction 3.1-8, available at http://www.jud.ct.gov/JI/civil/part3/3.1-8.htm.

defendant's] failure to use reasonable care to protect her invitees . . . within the premises from criminal conduct create or increase the likelihood of injury to an invitee . . . as a result of a criminal act on the property," and "[i]f [the defendant] was negligent, was the harm to [the decedent] within or without the scope of the risk created by the defendant's negligence?"[9] Those interrogatories plainly pertain to whether the plaintiff disproved the defendant's defense of superseding cause.

Had the court submitted those proposed interrogatories to the jury, its findings as to that defense would be readily ascertainable. Because the plaintiff presented interrogatories intended to properly frame the issue of superseding cause, thereby fleshing out the grounds for the jury's verdict; see *Pedersen* v. *Vahidy*, 209 Conn. 510, 513–14, 552 A.2d 419 (1989); *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 686, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009); the general verdict rule does not preclude review of her claim of instructional error.

II

We now turn our attention to that claim. The plaintiff maintains that the court improperly provided a standard defective premises instruction. More specifically, she claims that the court erroneously instructed the jury that, to establish the defendant's liability, the plaintiff must prove that the defendant possessed actual or constructive notice that a person on her property possessed a knife and was willing to use it to inflict injury on the decedent. Because her complaint does not set forth a negligence claim based on a defective condition on the defendant's premises, but rather one based on the

[9] The plaintiff's proposed interrogatories on superseding cause closely resemble those provided to the jury in *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 602 n.3.

intentional conduct of third parties thereon, the plaintiff submits that an instruction requiring such notice is unwarranted and contrary to the precedent of this state's highest court. We agree.

The standard by which we review claims of instructional error is well established. "The court should . . . submit to the jury the issues as outlined by the pleadings and as reasonably supported by the evidence." (Internal quotation marks omitted.) *DiStefano* v. *Milardo*, 276 Conn. 416, 421, 886 A.2d 415 (2005). "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. . . . Instructions are adequate if they give the jury a clear understanding of the issues and proper guidance in determining those issues." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Greenwich*, 278 Conn. 428, 437, 899 A.2d 563 (2006).

A

At the outset, we note that the parties dispute precisely what legal theories of recovery are contained in the plaintiff's one count complaint. The defendant asserts that the count sets forth either a negligence claim of defective premises liability or, alternatively, "separate legal theories" of "social invitee liability and

[defective] premises liability."[10] The defendant contends that, because the plaintiff couched the complaint in premises liability terms and specifically alleged, inter alia, that she "failed to warn the [d]ecedent of the dangerous condition," it was proper for the defendant to request, and for the court to provide, a defective premises instruction requiring actual or constructive notice of the specific defect that caused the decedent's injuries.[11]

By contrast, the plaintiff claims that her complaint does not allege a defective premises theory of recovery. She argues instead that the complaint sets forth various allegations of social invitee liability arising from the intentional acts of a third party, which were predicated on the precedent of our Supreme Court in *Merhi* v. *Becker*, supra, 164 Conn. 516.

In Connecticut, "[p]leadings 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 on the 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). The construction of pleadings is a question of law over which our review is plenary. *Miller* v. *Egan*, 265 Conn. 301, 308, 828 A.2d 549 (2003).

The complaint in the present case does not contain an allegation that the defendant's property was defective in

[10] In their appellate briefs and at oral argument, the parties repeatedly distinguished between defective premises liability and "social invitee liability." As used therein, the phrase "social invitee liability" pertains to liability for injuries sustained by a social invitee due to the intentional act of a third person on a defendant's property. For clarity, we adopt the nomenclature used by the parties in discussing the present claim.

[11] It is undisputed that the court's instruction contained an accurate statement of the law with respect to a defective premises claim.

any respect; indeed, it does not even contain the word "defect." Rather, it alleges that the defendant failed in various manners to exercise reasonable care and control to protect the decedent from dangers posed by other social invitees that could reasonably be anticipated to arise from the activities taking place on her premises.[12] Unlike the standard premises liability case in which the actual condition of the property gave rise to a dangerous condition; see, e.g., *Riccio* v. *Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 162, 914 A.2d 529 (2007) (black ice on pavement in condominium common area); *James* v. *Valley-Shore Y.M.C.A., Inc.*, 125 Conn. App. 174, 176, 6 A.3d 1199 (2010) (slippery substance on swimming pool ladder), cert. denied, 300 Conn. 916, 13 A.3d 1103 (2011); cf. *Doe* v. *Manheimer*, 212 Conn. 748, 764, 563 A.2d 699 (1989) ("It is unexceptional to impose upon a landowner liability resulting from injuries caused directly and without intervening criminal conduct by 'dangerous conditions' on the land. Thus, where the plaintiff stumbles on accumulated debris on the defendant's land, and injures himself, the defendant may be liable."), overruled in part on other grounds by *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 608, 662 A.2d 753 (1995); the complaint in the present case alleges that it was

[12] We repeat that the complaint alleges that the defendant breached her duty to the decedent as a social invitee as follows: (1) "she did not exercise the power of control or expulsion which her occupation of the premises gave her over the social invitees at the party to prevent injury and death to the [d]ecedent"; (2) "she failed to act as a reasonable person to avoid harm to the [d]ecedent even from intentional attacks on the part of third persons"; (3) "she failed to call the police to control or expel the social invitees that were causing the problems and ultimately stabbed and killed the [d]ecedent"; (4) "she failed to act to control the fight and the conduct of the social guests that assaulted the [d]ecedent when the harm of the general nature suffered by the [d]ecedent was reasonably foreseeable"; (5) "she failed to properly supervise the party in order to deter or stop conduct such as the fight from occurring"; (6) "she failed to provide proper security to control and police the party to prevent harm to the social invitees"; and (7) "she failed to warn the [d]ecedent of the dangerous condition . . . ."

the intentional conduct of third persons on the property, rather than the property itself, that created the dangerous condition. Accordingly, we agree with the plaintiff that her allegations do not advance a traditional defective premises theory of recovery, but rather one predicated on social invitee liability arising from the intentional acts of a third party, as recognized in *Merhi*.[13]

B

We therefore turn our attention to that seminal decision of our Supreme Court. At issue in *Merhi* was whether the defendant could be held liable, as the possessor of the premises, for the intentional violent act committed against the plaintiff by a third person while on the premises. On the date in question, the defendant union held an outdoor picnic on grounds it rented in Newtown. *Merhi* v. *Becker*, supra, 164 Conn. 518. The plaintiff attended the picnic as a social invitee. Id., 519. As the court recounted: "The committee designated by the [defendant] to be in charge of the picnic decided to have three or four policemen on duty at the grounds and a member of the committee was paid by the [defendant] to hire the policemen. In fact, however, only one person was assigned to police the grounds and he was not a regular member of any police force, normally worked in a shop, and was sixty years of age. On the morning of the picnic, the chairman of the committee determined that more police protection was needed. No additional police, however, were obtained.

[13] Even if we were to accept the defendant's contention that the allegation that she "failed to warn the [d]ecedent of the dangerous condition" advanced a legal theory of defective premises liability; but see 62 Am. Jur. 2d, Premises Liability § 410 (2005) (homeowner may have duty to warn social guest that third person on premises may present threat of criminal behavior); we nevertheless would have to review the propriety of the court's instruction in light of our conclusion that the other six allegations of negligence pertain to a theory of social invitee liability.

"The admission price entitled the patrons to all the food and beer they desired. Some of the [patrons] brought their own liquor. The tenor of the picnic became noisy and inharmonious. Many men and women went swimming in the pool with their clothes on. Richard Becker [the assailant] testified that during the day he had more than five beers and 'it could have been more than a thousand.' Everyone had been drinking quite a bit. Becker was involved in two fights during the picnic, one with John Keiper, a member of the committee sponsoring the picnic. This altercation with Keiper was characterized by Becker as a 'brawl' . . . . Becker was not arrested, evicted or escorted from the grounds after his physical involvement with Keiper. About a half-hour later Becker went to his car which was parked in the picnic area, drove the car into the area of the picnickers, aimed and steered it in the direction of Keiper, but struck and injured the plaintiff instead." Id., 518–19.

In considering the defendant's liability to the plaintiff as a social invitee injured by the intentional acts of a third person on its premises, our Supreme Court explained that "[t]he [defendant], as the possessor of the premises on that day, had the duty of exercising reasonable care and control to protect its invitees from dangers which might reasonably be anticipated to arise from the conditions of the premises or the activities taking place there. . . . In particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm . . . even from intentional attacks on the part of such third persons. . . . On the evidence, the jury could properly find that the [defendant] had failed to perform its duty to provide adequate police protection or otherwise to control the

activities of its beer drinking guests, especially after the earlier outbreak of fisticuffs."[14] (Citations omitted; internal quotation marks omitted.) Id., 520.

Notably, the defendant union in *Merhi* claimed that even if it had been negligent, its negligence could not have proximately caused the plaintiff's injuries because it could not "have anticipated that the harm of the nature suffered by the plaintiff was likely to result." Id., 521. The court flatly rejected that contention. As it stated: "If the . . . [defendant's] conduct is a substantial factor in bringing about harm to another, the fact that the . . . [defendant] neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. . . . Neither foreseeability of the extent nor the manner of the injury constitutes the criteria for deciding questions of proximate cause. The test is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence. . . . Here, the jury could have found that the events at the picnic fulfilled the test for proximate cause; that the inadequate policing of a large crowd served alcoholic beverages all day created the foreseeable risk that boisterous and angry occurrences might result in injury to bystanders, and that this risk became more obvious once the brawls involving Becker

[14] "Evidence of prior incidents is generally admissible to show a defendant's notice or knowledge of a dangerous condition that could cause an injury." 62 Am. Jur. 2d, Premises Liability § 39 (2005); see also *Pickel* v. *Automated Waste Disposal, Inc.*, 65 Conn. App. 176, 185, 782 A.2d 231 (2001) (evidence of other similar accidents admissible to prove existence of particular physical condition, situation, or defect); cf. *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 121, 869 A.2d 179 (2005) (adopting totality of circumstances test to determine whether parking lot owners have duty of care to business invitees who are attacked intentionally on premises by third parties and observing that fact that "there is no evidence of a prior similar incident on the defendants' premises, although significant to foreseeability, is not dispositive").

occurred. Consequently, no matter how one characterizes the exact nature of Becker's action in harming the plaintiff, the jury could reasonably have found that it constituted an instance of the general kind of harm that the defendant's negligence would cause, i.e., harm to patrons from inadequately deterred, raucous, violent conduct." (Citations omitted; internal quotation marks omitted.) Id., 521–22.

The plaintiff posits, and we agree, that the holding of *Merhi* cannot be reconciled with the court's instruction to the jury that it could only find the defendant liable if she had actual or constructive notice that a person on her property possessed a knife and was willing to use it to inflict injury on the decedent. Our Supreme Court has explained that the long-standing requirement of notice of the specific defective condition applies "in the context of a negligence action *based on a defective condition* on the defendant's premises . . . ." (Emphasis added.) *Riccio* v. *Harbour Village Condominium Assn., Inc.*, supra, 281 Conn. 163. This is not such a case. This case involves a negligence action based on the intentional, and criminal, acts of third parties against a social invitee on the defendant's premises. In such instances, the appropriate inquiry is into "whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." *Merhi* v. *Becker*, supra, 164 Conn. 521; see also *Doe* v. *Manheimer*, supra, 212 Conn. 762 (in case where plaintiff raped by third party on defendant's property, court emphasized that there was no evidence demonstrating that defendant "had any past experience that might reasonably have led him" to anticipate "violent criminal activity" on property).

Our Supreme Court has stated that it has "expressly disavowed any intention to elevate the burden of proof in premises liability claims involving criminal or intentional acts beyond foreseeability." *Monk* v. *Temple*

George Associates, LLC, 273 Conn. 108, 116, 869 A.2d 179 (2005). By requiring proof that the defendant had notice that a person on her property possessed a knife and was willing to use it to inflict injury on the decedent, the court elevated the plaintiff's burden of proof well beyond the parameters of *Merhi*. Tellingly, the defendant has provided this court with not a single authority in which that elevated burden of proof has been applied to a premises liability claim involving intentional acts of a third party.

Perhaps mindful of the dearth of such authority, the defendant alternatively argues that "there is no reason that the [specific] notice requirements applied to [defective premises] actions should not also be applied" to social invitee liability claims involving intentional acts of a third party. For two reasons, we disagree with the defendant. First and foremost, her proposal runs contrary to *Merhi* and *Monk*. As an intermediate appellate tribunal, this court is not free to depart from or modify the precedent of our Supreme Court. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010).

Second, the defendant's proposition fails to appreciate that cases involving the intentional acts of a third party on a defendant's property necessarily implicate the doctrine of superseding cause. As we already discussed, our Supreme Court has adopted the standard for superseding cause set forth in the Restatement (Second) of Torts, which provides that "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within

the scope of the risk created by the actor's conduct." 2 Restatement (Second), supra, § 442B. The Supreme Court further has clarified that "[o]ur cases make it clear that, to be within the scope of the risk, the harm actually suffered must be of *the same general type* as that which makes the defendant's conduct negligent in the first instance." (Emphasis altered; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 609.

In a similar vein, the Restatement further provides that "[t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." 2 Restatement (Second), supra, § 448. As the commentary to that section states, no liability attaches "when the actor's conduct creates a situation which is utilized by a third person to inflict intentional harm upon another . . . but the actor has no reason to expect the third person would so act." Id., comment (a); see also *Mulvihill* v. *Wegmans Food Markets, Inc.*, 266 App. Div. 2d 851, 698 N.Y.S.2d 130 (1999) (possessor of land has no duty to take protective measures unless it knows or has reason to know from past experience that there is likelihood of conduct on the part of third persons likely to endanger safety of visitors). Accordingly, the proper inquiry focuses on the likelihood of the harm incurred, rather than the specific instrumentalities by which it was inflicted.[15]

[15] Accord 62 Am. Jur. 2d, Premises Liability § 409 (2005). Titled "Injury inflicted on social guest by third persons, criminal behavior," that authority provides in relevant part: "Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal conduct of third parties, because the foreseeability of the risk is slight, and because

That precept is exemplified in *Hanna* v. *Stone*, 329 N.J. Super. 385, 748 A.2d 115 (App. Div. 2000), which involved a fight between social invitees on the defendants' premises. Like the defendant in the present case, the defendants in *Hanna* hosted a birthday party for their teenage child that was attended by approximately forty or fifty acquaintances. Id., 388. As the court recounted, "[t]he teenagers were in different parts of the house but the party was concentrated in the basement, where it was estimated that approximately thirty teenagers were present at the time of the incident. . . . The party had been in progress uneventfully for approximately one and one-half or two hours when one boy struck another boy in the face causing injury and eventually leading to the present litigation. Although unknown to [the defendants], approximately five or six months before the party these two boys had had words on a school bus and a day or two later had entered into some voluntary fisticuffs outside school near a basketball court." Id.

The "theory of liability" alleged against the defendants "was a negligent failure to properly supervise all

of the social and economic consequences of placing such a duty on a person. However, an exception exists if the owner, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party or if it is shown that the landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor."

Although pertaining to the duty to control a licensee, rather than an invitee, § 318 of the Restatement similarly provides that a possessor of land who permits others to use his land "is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control." 2 Restatement (Second), supra, § 318. Like the aforementioned authorities, that rule focuses on whether the possessor of land had notice that harm to others would likely result from the intentional acts of a third person.

visitors and invitees on the premises for the birthday party." (Internal quotation marks omitted.) Id., 389. In considering the liability of the defendants, the court distinguished cases involving "a condition of property" from the case before it, in which "the primary focus must be on the activity conducted on the premises." Id. The court noted that "[t]his is not a situation where a parent has failed to supervise his or her own child and that failure has resulted in injury to others. . . . Nor do we have a situation where parents permitted liquor or drugs to be served to minors. No precursor event occurred that evening to put the parents on notice of animosity between particular guests. The basement may have been overcrowded but that condition played no apparent role in the injury to the [boy]. Indeed the blow was struck, it seems, because of preexisting ill-will between the two boys. . . . Nothing in the record supports the claim that the defendants did something or failed to do something that helped to bring about the injury in question." (Citations omitted.) Id., 389–90. The court emphasized that "there was no evidence from which a reasonable jury might conclude that they knew or should have known that there was a necessity and opportunity for exercising . . . control" over the boy who threw the punch on their property; id., 391; and further reasoned that "even if [the] defendants had known that the two boys had had a fight in the school yard approximately five months prior to the party, that information without more would not have made foreseeable the single punch thrown at their son's birthday party." Id., 390. Accordingly, the court held that the defendants could not be held liable for the acts of the third party on their property. Id., 391.

Hanna thus stands for the proposition, consistent with the aforementioned authorities and the holding of *Merhi*, that the focus in cases involving intentional acts by a third party is on the general harm suffered, and

whether that harm was reasonably foreseeable to the possessor of the premises. Our Supreme Court applied that very standard in *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 234 Conn. 613, in concluding that "the jury reasonably could have found that the particular harm involved, [the victim's] robbery and murder," had been within the scope of the risk foreseeable to the defendant property owner. Although the victim in *Stewart*, like the decedent here, died as the result of a stabbing, the court did not require notice that the third party on the defendant's premises possessed a knife and the willingness to use it. Instead, the trial court "instructed the jury that it was to consider the general nature of the harm"; id., 609; and the Supreme Court thereafter held that the jury "could have concluded that the defendant had both actual and constructive notice that robbery *and its associated violent consequences* were likely to occur" on its premises. (Emphasis added.) Id., 613. That precedent informs our analysis.

Returning our attention to the case at hand, the allegations of the complaint appear to be modeled principally on the teaching of *Merhi* that "[t]he [defendant] as the possessor of the premises . . . had the duty of exercising reasonable care and control to protect its invitees from dangers which might reasonably be anticipated to arise from the conditions of the premises or the activities taking place there. . . . In particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm . . . even from intentional attacks on the part of such third persons." (Citation omitted; internal quotation marks omitted.) *Merhi* v. *Becker*, supra, 164 Conn. 520. The complaint alleges, inter alia, that the defendant "did not exercise the power of control or expulsion which her occupation

of the premises gave her over the social invitees at the party to prevent injury and death to the [d]ecedent," that "she failed to act as a reasonable person to avoid harm to the [d]ecedent even from intentional attacks on the part of third persons," and that "she failed to act to control the fight and the conduct of the social guests that assaulted the [d]ecedent when the harm of the general nature suffered by the [d]ecedent was reasonably foreseeable . . . ." At trial, the plaintiff produced evidence in an effort to substantiate those claims.

It thus was incumbent on the court to provide the jury with instructions adapted to those issues. *DiStefano* v. *Milardo*, supra, 276 Conn. 421. That it failed to do. In instructing the jury that, to establish the defendant's liability, the plaintiff must prove that the defendant possessed actual or constructive notice that a person on her property possessed a knife and was willing to use it to inflict injury on the decedent, the court improperly elevated the burden of proof in premises liability claims involving criminal or intentional acts beyond foreseeability.[16] By requiring the plaintiff to prove notice of the specific instrumentality by which the harm was inflicted, as well as the perpetrator's willingness to injure a specific invitee, the court's instruction departed from Connecticut law. It thus failed to provide the jury with proper guidance, the sine qua non of instructional error.

Moreover, this is not an occasion in which we may conclude that the improper instruction was harmless. "[B]efore 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

[16] If the instruction given by the court was applied to the facts of *Merhi*, the jury's verdict in favor of the plaintiff could not stand, as there was no evidence in that case that the defendant had actual or constructive notice that the third party assailant was willing to use a motor vehicle specifically to inflict injury on a social invitee.

it is likely that it affected the verdict." (Citation omitted; internal quotation marks omitted.) *Scanlon* v. *Connecticut Light & Power Co.*, 258 Conn. 436, 448, 782 A.2d 87 (2001). We conclude that the plaintiff has met that burden, as we cannot fathom how the jury was not misled by the court's erroneous instruction. The defendant has not argued otherwise in this appeal.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEAN STEVEN VLAHOS (AC 30217)

Beach, Sheldon and Borden, Js.

Syllabus

Convicted of the crime of operating a motor vehicle without a driver's license in violation of statute (§ 14-36 [a]), the defendant, whose sentence was enhanced for a prior conviction under a part B information, appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the information failed to state an offense because an element of § 14-36 (a), namely, operation on a public highway, was omitted; the substitute information provided the defendant with the statutory section under which he was charged, as well as the time and place of the incident, which was sufficient to inform the defendant of the charges against him.
2. The defendant could not prevail on his claim that the state improperly charged him with operating a motor vehicle without a driver's license in violation of § 14-36 (a), rather than driving with an expired license in violation of statute (§ 14-41 [c]) or driving after the expiration of a period of suspension in violation of statute (§ 14-215b), which was based on his claim that because he had obtained a driver's license in 1982, he satisfied the requirements of § 14-36 (a) for all time and could not logically be charged under that statute; the state's choice to charge a violation of § 14-36 (a) was not illogical and the evidence was sufficient to sustain the defendant's conviction, as the language of § 14-36 (a) does not limit its applicability to only those persons who have not obtained an initial driver's license, the legislature has expressly stated that § 14-36 applies to situations other than failure to obtain an initial license,

§§ 14-41 and 14-215b do not apply to a person who operates a motor vehicle more than sixty days after his license has expired or after his license suspension has ended, and both statutes clearly provide that § 14-36 applies after a sixty day period.

3. The defendant's claim to the contrary notwithstanding, the jury was not likely to have been misled by the trial court's jury instructions as to the elements of § 14-36 (a); the court instructed the jury several times that the defendant was charged with a violation of § 14-36 (a) and the elements were clearly stated, and although the instructions explaining license suspensions under § 14-215 (a) and the requirements for obtaining a license under § 14-36 (e) (3) were extraneous and not essential to the charge, the additional instructions did not omit any elements from § 14-36 (a).

4. The trial court did not abuse its discretion in denying the defendant's motion for a bill of particulars; the trial court determined that the information was sufficient to allow the defendant to prepare a defense and to avoid surprise, the additional information requested by the defendant in his motion was not necessary to fulfill the purposes of the bill of particulars because the issue of how the defendant came to be without a license was not an element of § 14-36 (a) and was not essential as to time and place, the defendant nevertheless was aware of the requested information because he had access to the state's disclosure of department of motor vehicles documents, which included his suspension notices, and the defendant failed to show that he was prejudiced by the denial of his motion for a bill of particulars or that the information requested was necessary to his defense.

5. The defendant could not prevail on his claim that the trial court improperly denied his motion for a judgment of acquittal on the amended part B information; the defendant's claim that he did not qualify as a subsequent offender under § 14-36 (h) (2) because his prior convictions occurred more than three years prior to the offense in the part A information was unavailing, as the defendant's prior convictions were properly taken into account in the imposition of penalties under that statute.

Argued June 5—officially released October 2, 2012

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of operating a motor vehicle without a license, and with the infractions of making an improper turn, operating an unregistered motor vehicle and operating a motor vehicle without insurance, and, in the second part, with having previously been convicted of operating a motor vehicle without a license, brought to the Superior Court in the

judicial district of Danbury, geographical area number three, where the court, *Sommer*, *J.*, denied the defendant's motion for a bill of particulars; thereafter, the defendant was presented to the court on a plea of guilty to the charge of operating an unregistered motor vehicle; subsequently, the state entered a nolle prosequi as to the charges of making an improper turn and operating a motor vehicle without insurance; thereafter, the matter was tried to the jury; verdict of guilty of operating a motor vehicle without a license; subsequently, the second part of the information was tried to the court; judgment of guilty in accordance with the plea and verdict; thereafter, the court denied the defendant's motion for a judgment of acquittal, and the defendant appealed to this court; subsequently, the court, *Sommer*, *J.*, issued a rectification and an articulation of its decision. *Affirmed.*

Dean Steven Vlahos, pro se, the appellant (defendant).

James M. Ralls, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sharmese L. Hodge*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Dean Steven Vlahos, appeals from the judgment of conviction, rendered after a jury trial, of operating a motor vehicle without a driver's license in violation of General Statutes (Rev. to 2007) § 14-36 (a). Pursuant to a part B information, the defendant's sentence was enhanced by virtue of § 14-36 (h) (2) (B). The defendant claims that (1) the information failed to state an offense, (2) the state erred in charging him under § 14-36 (a), (3) the court's instructions misled the jury, (4) the court erred in denying his motion for a bill of particulars and (5) the court erred in denying his motion for a judgment of acquittal on the

amended part B information. We affirm the judgment of the trial court.

The following facts, as the jury reasonably could have found, and procedural history are relevant. The defendant obtained his first driver's license in 1982. On March 7, 2001, the defendant's license was suspended for one year due to a conviction for operating a motor vehicle while his license was under suspension. On March 14, 2001, his license was suspended for five years due to a second conviction for operating a motor vehicle while his license was under suspension. On August 15, 2001, his license was suspended for five years due to a third conviction for operating a motor vehicle while his license was under suspension.[1] These periods of suspension ended at the latest on August 15, 2006.[2]

On February 6, 2007, at approximately 8:26 p.m., Gregory Topa, an officer with the Danbury police department, stopped the defendant for a motor vehicle violation. When Topa asked the defendant for his driver's license, registration and insurance, the defendant responded that he did not have a driver's license, that his vehicle was unregistered and that he did not have

[1] Evidence submitted at the hearing on the part B information showed that in January, 2003, the defendant was convicted of operating under a suspension in violation of General Statutes § 14-215 and operating without a license in violation of § 14-36 (a). Evidence submitted at the trial on the part A information showed that the defendant's license was suspended in 2003. A motor vehicle analyst with the department of motor vehicles testified that the suspension was removed at the defendant's request when that case was appealed. Although the defendant's 2003 convictions were affirmed in 2004; *State* v. *Vlahos*, 81 Conn. App. 904, 841 A.2d 1238 (2004); the department apparently never reinstated the 2003 suspension.

[2] In 2005, General Statutes § 14-111 (b) was amended to reduce the five year suspension period to two years. The defendant argues that the department of motor vehicles did not notify him when this new law went into effect. Regardless of whether the defendant's suspension ended on August 15, 2003, or in August, 2006, the defendant had not renewed his license when he was stopped by a police officer on February 6, 2007, and his effective suspension terminated more than sixty days prior to his arrest.

an insurance card. At the time of the incident, the defendant's license had not been reinstated; he did not reinstate his license until February 27, 2007. The defendant was arrested.

By way of a substitute long form part A information, the state charged the defendant with operating a motor vehicle without a license in violation of § 14-36 (a).[3] By way of a substitute part B information, the state charged the defendant with previously having been convicted of operating a motor vehicle while his license was under suspension in violation of General Statutes §§ 14-215 (a) and 14-36 (a). Following a jury trial on the part A information, the jury found the defendant guilty of operating a motor vehicle without a license. Following a court trial on the part B information, the court found the defendant guilty. The court sentenced the defendant to ninety days incarceration.[4] This appeal followed.

I

The defendant first claims that the information failed to state an offense because an element of § 14-36 (a),[5]

[3] The defendant was also charged with operation of an unregistered motor vehicle in violation of General Statutes § 14-12 (a). He pleaded guilty to this charge, and a judgment of guilty was rendered in accordance with the plea. In connection with this charge, the court imposed a $50 fine, which the court remitted.

The defendant was also charged with operation of a motor vehicle without insurance in violation of General Statutes § 14-213b and making an improper turn in violation of General Statutes § 14-242. These counts were nolled.

[4] General Statutes (Rev. to 2007) § 14-36 (h) (2) (B) provides that a person in the defendant's circumstances "shall be sentenced to a term of imprisonment of ninety days which may not be suspended or reduced in any manner." The record indicates that the court imposed a "term of ninety days to serve, of which ninety days are a mandatory minimum."

In 2009, subsection (h) was editorially redesignated by the revisors of the General Statutes as subsection (i).

[5] General Statutes § 14-36 (a) provides in relevant part: "[N]o person shall operate a motor vehicle on any public highway of this state . . . until such person has obtained a motor vehicle operator's license."

operation on a public highway, was omitted.[6] We disagree.

The one count substitute long form information (substitute information) charged the defendant with "operating a motor vehicle without a license and charge[d] that in the city of Danbury on or about the 6th day of February 2007 at approximately 8:26 p.m., [the defendant] did operate a motor vehicle without a license in violation of Connecticut General Statute § 14-36 (a)." Section 14-36 (a) provides in relevant part that "no person shall operate a motor vehicle on any public highway of this state or private road on which a speed limit has been established in accordance with subsection (a) of [General Statutes §] 14-218a until such person has obtained a motor vehicle operator's license."

"The underlying purpose of the constitutional right to be informed of the nature and cause of a criminal charge is to inform the defendant of the charge against him with sufficient precision to enable him to prepare his defense and to avoid prejudicial surprise and to make the charge definite enough to enable [the defendant] to plead his acquittal or conviction in bar of any future prosecution for the same offense . . . . When reviewing a claim, not raised prior to the verdict,[7] that an information fails to charge all the essential elements of an offense, we must construe the information liberally in favor of the state. . . . Under the applicable standard of review, a conviction based upon a challenged information is valid unless the information is so

[6] The defendant further asserts that the defect is jurisdictional and thus no other prejudice need be shown. We need not address this issue. Whether such a defect is jurisdictional or not, the defendant's claim fails because the information was not deficient.

[7] Practice Book § 41-5 provides in relevant part that "defenses and objections alleging lack of jurisdiction over the offense charged or failure of the information to charge an offense may be raised by the defendant or noticed by the judicial authority at any time during the pendency of the proceedings." See also *State* v. *McMurray*, 217 Conn. 243, 249–50 n.8, 585 A.2d 677 (1991).

obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." (Citations omitted; internal quotation marks omitted.) *State* v. *McMurray*, 217 Conn. 243, 249–50, 585 A.2d 677 (1991).

In *State* v. *Reed*, 55 Conn. App. 170, 740 A.2d 383, cert. denied, 251 Conn. 921, 742 A.2d 361 (1999), this court addressed a case in which the defendant was charged with sexual assault in the first degree. The long form information filed by the state in that case alleged that the defendant had "engaged in sexual intercourse with another person and such other person was under thirteen . . . years of age, in violation of section 53a-70 (a) (2) of the Connecticut General Statutes." (Internal quotation marks omitted.) Id., 175. In rejecting the plaintiff's claim that this allegation failed to set forth the essential elements of sexual assault in the first degree, this court stated: "Neither information in this case specifically articulated each of the elements required to prove sexual assault in the first degree. *The long form information, however, provided the defendant with the exact section and subsection of the statute under which he was charged.* . . . We conclude that a reasonable construction of the information shows that it charged the defendant with the offense for which he was convicted. Moreover, the information was sufficiently precise to enable him adequately to prepare his defense." (Emphasis added.) Id., 176–77.

In this case, the substitute information did not specifically state the element of operation on a public highway. It did, however, provide the defendant with the statutory section under which he was charged as well as the time and place of the incident. The state's inclusion of these items in the information was sufficient to inform the defendant of the charges against him.

II

The defendant next claims that the state erred in charging him under § 14-36 (a), rather than under General Statutes § 14-41 (c), driving with an expired license, or General Statutes § 14-215b, driving after the expiration of a period of suspension. We disagree.

We first set forth our standard of review. "The issue in this case . . . raises a question of statutory construction, which is a [question] 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, [we] first . . . 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.) *State* v. *Marsh & McLennan Cos.*, 286 Conn. 454, 464–65, 944 A.2d 315 (2008).

The defendant argues that it was improper for the state to charge him with violating § 14-36 (a) because that statute does not apply to persons who previously have obtained valid Connecticut driver's licenses but

only to persons who have never obtained valid Connecticut driver's licenses. He argues that the language of § 14-36 (a)—that a person shall not operate a motor vehicle on a public highway "until such person has obtained a motor vehicle operator's license"—prohibits a person from operating a motor vehicle on a public highway until that person has obtained his or her first driver's license. He claims that this interpretation is buttressed by § 14-36 (e),[8] which sets forth the requirements for obtaining an initial driver's license. Once a person has satisfied the requirements of § 14-36 (e) for obtaining an initial driver's license, he argues, that person has satisfied the requirements of § 14-36 (a). He claims that, because he had obtained a driver's license in 1982, he satisfied the requirements of § 14-36 (a) for all time and, accordingly, cannot logically be charged under that statute on the facts of this case. He argues that if the state wanted to subject a person, who operated a motor vehicle without renewing his license after the period of license suspension had ended, to the penalties of § 14-36, the state would have to charge and to prove a violation of § 14-41 or § 14-215b.

We conclude that, on the facts of this case, the state's choice to charge a violation of § 14-36 (a) was not illogical and that the evidence was sufficient to sustain the conviction. Section 14-36 (a) provides in relevant part that "no person shall operate a motor vehicle on any public highway of this state or private road on which a speed limit has been established . . . until such person has obtained a motor vehicle operator's license." The language of the statute does not limit its applicability to only those persons who have not obtained an

[8] General Statutes § 14-36 (e) provides in relevant part: "(1) No motor vehicle operator's license shall be issued until (A) the applicant signs and files with the commissioner an application under oath, or made subject to penalties for false statement in accordance with section 53a-157b, and (B) the commissioner is satisfied that the applicant is sixteen years of age or older and is a suitable person to receive the license. . . ."

initial driver's license. The legislature in § 14-36 (e) (2) set forth the proof needed by an applicant for a new driver's license in order to establish his or her identity, and set forth in § 14-36 (e) (3) the requirements that an "applicant who has not previously held a Connecticut motor vehicle operator's license" must satisfy before obtaining a license. Accordingly, the legislature knew how to limit the applicability of a statute to applicants for initial driver's licenses, but did not include any such limiting language in § 14-36 (a). See *State* v. *Fernando A.*, 294 Conn. 1, 21, 981 A.2d 427 (2009) ("[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" [internal quotation marks omitted]).

Additionally, § 14-41 (c)[9] provides that when a person has allowed a license to expire, he or she has a grace period of sixty days to renew, and the penalty for driving during that grace period is minimal. In contrast, "section 14-36 shall apply after the sixty-day period." General Statutes § 14-41 (c). The legislature, therefore, expressly stated that § 14-36 applies to situations other than failure to obtain an initial license. Similarly, § 14-215b refers to § 14-36 in terms of "operating . . . without a license . . . ." General Statutes § 14-215b.

Contrary to the defendant's contention, the state was not required to charge him under §§ 14-41 or 14-215b. Neither section applies to a person who operates a

[9] General Statutes § 14-41 (c) provides in relevant part that "[a]ny previously licensed operator who operates a motor vehicle within sixty days after the expiration date of the operator's license without obtaining a renewal of the license shall be deemed to have failed to renew a motor vehicle operator's license and shall be fined . . . . Any operator so charged shall not be prosecuted under section 14-36 for the same act constituting a violation under this section but section 14-36 shall apply after the sixty-day period."

motor vehicle more than sixty days after his or her license has expired or after his or her license suspension has ended. Section 14-41 (c) provides that "section 14-36 shall" apply to a previously licensed operator who operates a motor vehicle after the sixty day period following the expiration of his or her operator's license. Section 14-215b provides that a person whose motor vehicle operator's license has been suspended and who operates a motor vehicle more than sixty days after the expiration of such period of suspension without obtaining the reinstatement of such license shall "be subject to the penalty for operating a motor vehicle without a license under section 14-36 . . . ."[10] Both statutes clearly provide that after a sixty day period, § 14-36 applies.[11]

The overall legislative scheme is quite plain and unambiguous. Section 14-36 (a) provides that no person shall operate a motor vehicle on a public highway until such person has obtained an operator's license. If one then loses driving privileges, through either suspension or inadvertence, one may not operate again until he or she has obtained a license. Sections 14-215b and 14-41 provide exceptions, but functionally one's status reverts to that of an unlicensed driver until one becomes licensed again. Because the defendant was operating a motor vehicle without a valid license, § 14-36 applies.

[10] General Statutes § 14-215b provides that "[a]ny person whose motor vehicle operator's license has been suspended who operates a motor vehicle after the expiration of such period of suspension without obtaining the reinstatement of such license shall (1) during the first sixty days after such expiration, be deemed to have failed to renew such license and be subject to the penalty for failure to renew a motor vehicle operator's license under subsection (c) of section 14-41, and (2) after said sixty-day period, be subject to the penalty for operating a motor vehicle without a license under section 14-36. Any operator so charged shall not be prosecuted under section 14-215 for the same act constituting a violation under this section."

[11] General Statutes § 14-215b is textually less clear than § 14-41 (c), as § 14-215b provides that "the penalty" under § 14-36 is applicable to operating without a license after the grace period. The difference does not undermine the ability to proceed under § 14-36.

III

The defendant next claims that the court's jury instructions misled the jury as to the elements of § 14-36 (a). We disagree.

"When reviewing the 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. . . . [I]n appeals involving a constitutional question, [the standard is] whether it is reasonably possible that the jury [was] misled. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . The test to be applied to any part of a charge is whether the charge, considered as a whole, presents the case to the jury so that no injustice will result." (Citations omitted; internal quotation marks omitted.) *State* v. *Betances*, 265 Conn. 493, 509–10, 828 A.2d 1248 (2003).

The court instructed the jury as to the elements of § 14-36 (a) as follows: "It is the burden of the state to prove beyond a reasonable doubt each fact, which is essential to obtain a conviction under the statute allegedly violated, § 14-36 (a). . . . The defendant in this information is charged with the operation of a motor vehicle, without a license, in violation of Connecticut General Statutes § 14-36 (a). This statute, insofar as it is applicable to this case reads as follows: No person

shall operate a motor vehicle on any public highway of this state or private road on which a speed limit has been established in accordance with subsection (a) of § 14-218a, until such person has obtained a motor vehicle operator's license.'' The court then defined the term ''operator's license'' under General Statutes § 14-1.

The court continued: ''You have heard evidence about license suspensions as well. Connecticut General Statutes § 14-215 (a) provides as a matter of law, no person to whom an operator's license has been refused or whose operator's license or right to operate a motor vehicle in this state has been suspended or revoked, shall operate any motor vehicle during the period of such refusal, suspension or revocation. It is important that you be aware of these statutory definitions and rules in order to decide whether the defendant has, in fact, violated Connecticut General Statutes § 14-36 (a). As I advised you earlier, this statute states, no person shall operate a motor vehicle on a public highway until such person has . . . obtained a motor vehicle operator's license. What does the phrase, obtain a motor vehicle operator's license, mean? This same statute, § 14-36, also sets forth in subsection (e) (3) the requirements for obtaining a motor vehicle operator's license as follows: Before granting a license to any applicant, who has not operated a motor vehicle, during the preceding two years, the commissioner [of motor vehicles] shall require the applicant to demonstrate personally to the commissioner, in such manner as the commissioner directs, that the applicant is a proper person to operate motor vehicles of the class for which such applicant has applied, has sufficient knowledge of the mechanism of the motor vehicles to ensure their safe operation by him or her and has satisfactory knowledge of the laws concerning motor vehicles and the rules of the road. When the commissioner is satisfied as to the ability

and competency of an applicant, the commissioner may issue to such applicant a license . . . .''

The court instructed the jury that § 14-36 (a) is a general intent statute. The court then said: ''Thus, if you find on the facts presented that as of February 6, 2007, the defendant . . . was operating a motor vehicle and at that time, he had not obtained a valid motor vehicle operator's license, as defined by Connecticut General Statutes § 14-1 (23), because he had not complied with the statutory requirements for obtaining a motor vehicle operator's license, required by Connecticut General Statutes § 14-36 (e) (3), then you must find the defendant guilty of [a] violation of Connecticut General Statutes § 14-36 (a), the crime charged.''

The defendant claims that the jury instructions did not clearly set forth the essential elements of § 14-36 (a). He argues that the court erred by explaining license suspension under § 14-215 (a) and license requirements under § 14-36 (e) (3), both statutes with which the defendant had not been charged in the part A information. He argues that ''[f]rom the instruction that it was 'important' to consider §§ 14-215 (a) and 14-36 (e) (3) to determine if [the] defendant was guilty of a violation of § 14-36 (a), and without explaining how or why those statutes were relevant or should be applied to the evidence in the case, the court erroneously failed to properly interpret § 14-36 (a) and failed to furnish the jury with adequate guidance in applying § 14-36 (a) to the evidence in the case.''

The jury was not likely to have been misled because the court clearly instructed the jury as to the elements of § 14-36 (a).[12] It instructed several times that the defendant was charged with a violation of § 14-36 (a) and

[12] The defendant further argues that the court failed to instruct the jury that to be found guilty of § 14-36 (a), it had to find that he had never obtained a valid license, that his license had become invalid or that operation on a public highway was an essential element. In part II of this opinion, we rejected the defendant's argument that § 14-36 (a) only applies to persons

that that statute provided that no person shall operate a motor vehicle on a public highway or private road on which the speed limit has been established until such person has obtained a motor vehicle operator's license. The elements were clearly stated to the jury.

Although the instructions regarding license suspensions under § 14-215 (a) and the requirements for obtaining a license under § 14-36 (e) (3) were extraneous and not essential to the charge, the additional instructions did not omit any elements from § 14-36 (a). The instruction regarding § 14-215 (a) gave the jury an example of one specific way of violating § 14-36 (a). The instruction regarding § 14-36 (e) (3) provided the jury with details for the requirements for reinstatement of a driver's license after two years; the jury was informed that reinstatement was not automatic. The reference to procedures for reinstatement did not diminish the state's burden. See *State* v. *Clark*, 264 Conn. 723, 736, 826 A.2d 128 (2003) (inclusion of additional elements in charge was, if anything, detrimental to state rather than defendant); see also *State* v. *Rosado*, 107 Conn. App. 517, 537, 945 A.2d 1028 (defendant could not prevail on claim that instruction on additional element misled jury), cert. denied, 287 Conn. 919, 951 A.2d 571 (2008).

IV

The defendant next claims that the court erred in denying his motion for a bill of particulars. We disagree.

who have never obtained an initial driver's license. The court instructed the jury on the element of operation on a public highway; it stated that § 14-36 (a) provides that "no person shall operate a motor vehicle on any public highway . . . ."

He further argues that the court's instructions could have misled the jury to believe that he had not obtained a license under § 14-36 (a) until he had demonstrated driving skills under § 14-36 (e) (3), when all that is required for a person whose license has been suspended to obtain a license is a payment of a fee under General Statutes § 14-50b (a). Although § 14-50b (a) imposes a fee for reinstatement of driver's licenses, § 14-36 (e) (3) imposes additional requirements when a suspension exceeds two years.

The following additional facts are relevant to our resolution of this claim. On August 16, 2007, the state filed a one count long form information charging the defendant with operation of a motor vehicle with a suspended license in violation of § 14-215 (a). On June 19, 2008, the state filed a one count substitute information, charging that "in the city of Danbury on or about the 6th day of February 2007 at approximately 8:26 p.m., [the defendant] did operate a motor vehicle without a license in violation of Connecticut General Statute § 14-36 (a)." On July 7, 2008, the defendant filed a motion for a bill of particulars in which he requested the state to clarify: "(1) what was the period of suspension alleged by the [s]tate and when did it expire; (2) what notice of suspension and of the expiration of such suspension was the [d]efendant issued, and when; (3) each of the essential elements of the offense charged." Following argument on the motion, the court concluded that the substitute information gave the defendant reasonable notice of the charge, including the specific statute with which he was charged and the date, time and place of the incident. The court determined that the information was sufficient to allow the defendant to prepare a defense and avoid surprise.

"A motion for a bill of particulars is addressed to the sound discretion of the trial court. . . . [A]n abuse of discretion in the denial of a motion for a bill of particulars can be premised only upon a clear and specific showing of prejudice to the defense. . . . The defendant has the burden of showing why the additional particulars were necessary to the preparation of his defense. . . . The sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution guarantee a criminal defendant the right to be informed of the nature and cause of the charges against him with sufficient precision to enable him to meet them at trial. . . . [That] the offense

should be described with sufficient definiteness and particularity to apprise the accused of the nature of the charge so he can prepare to meet it at his trial . . . are principles of constitutional law [that] are inveterate and sacrosanct. . . . Moreover, [t]he state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed." (Citations omitted; internal quotation marks omitted.) *State* v. *Vumback*, 263 Conn. 215, 221–22, 819 A.2d 250 (2003).

The defendant claims that the court's denial of his motion for a bill of particulars prejudiced his defense.[13] He argues that the substitute information alleged that he violated § 14-36 (a) by operating a motor vehicle "without a license" but does not specify the means by which he drove "without a license," namely, whether he never obtained a valid license, failed to renew a valid license, had a suspended license or failed to reinstate a suspended license. He contends that the substitute information did not give him notice of the essential facts that the state would have the burden of proving beyond a reasonable doubt.

The additional information requested by the defendant in his motion for a bill of particulars was not necessary to fulfill the purposes of the bill of particulars. Section 14-36 (a) provides that a person shall not operate a motor vehicle on a public highway or a private road with an established speed limit "until such person has obtained a motor vehicle operator's license." Thus, an element of § 14-36 (a) is driving without a license,

[13] The state argues that the defendant's claim is unreviewable because his motion for a bill of particulars was untimely. The court addressed the merits of the motion and stated that, although the motion was untimely, the issue of untimeliness would be relevant when considering prejudice. It appears from the transcript that the court exercised discretion under Practice Book § 41-5 to permit the defendant's late filing. Under the facts of this case, we will review the defendant's claim.

but how a defendant came to be without a license, though perhaps germane as background information, is not an element of § 14-36 (a) and is not essential as to time and place.

That notwithstanding, the defendant was aware of the requested information in any event. At the time of the hearing on the defendant's motion for a bill of particulars, both parties agreed that the defendant had access to the state's disclosure of department of motor vehicles documents. The documents included the defendant's suspension notices, which gave the beginning and end dates for his license suspensions, with the last end date being August 15, 2006. From this information, the defendant was able to determine the information he requested in his bill of particulars. "[T]his court has on numerous occasions adverted to sources extrinsic to the specific count or information to determine whether the defendant was sufficiently apprised of the offense charged. See, e.g., *State* v. *Frazier*, [194 Conn. 233, 237, 478 A.2d 1013 (1984)] (defendant sufficiently apprised where he had access to state's file, police reports and demonstrative evidence); *State* v. *Beaulieu*, 164 Conn. 620, 626, 325 A.2d 263 (1973) (information supplied by another count, state's attorney and court) . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Madagoski*, 59 Conn. App. 394, 404, 757 A.2d 47 (2000), cert. denied, 255 Conn. 924, 767 A.2d 100 (2001); id., 402–404 (defendant not prejudiced by court's denial of motion for bill of particulars requesting state to specify manner in which crime committed; at time of hearing defendant had access to state's disclosure and thus was aware of acts on which state would proceed).

The defendant has not shown that he was prejudiced by the denial of his motion for a bill of particulars. "A defendant can gain nothing from [the claim that the pleadings are insufficient] without showing that he was

in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information. . . . To establish prejudice, the defendant must show that the information was necessary to his defense, and not merely that the preparation of his defense was made more burdensome or difficult by the failure to provide the information." (Citations omitted; internal quotation marks omitted.) *State* v. *Kyles*, 221 Conn. 643, 653–54, 607 A.2d 355 (1992). The defendant has not shown that the information requested was necessary to his defense. The substitute information put him on notice that he was charged with driving without a license on February 6, 2007, at approximately 8:26 p.m.—whether he was driving without a license because he had never obtained a valid license, had failed to renew a valid license, had a suspended license or had failed to reinstate a suspended license is not an element of § 14-36. He properly could be convicted under § 14-36 (a) if the state proved beyond a reasonable doubt that he was driving without a license, regardless of which way he came to be without a license. Accordingly, the defendant's argument that he was caught by surprise is unavailing.[14] For the foregoing reasons, we conclude that the court did not abuse its discretion in denying the defendant's motion for a bill of particulars.

[14] The defendant also claims prejudice because the state allegedly devoted "almost all" of its closing argument to the fact that he failed to renew an expired license and because he was unaware that the court would charge on the elements of reinstating a license under § 14-36 (e) (3). The contents of the state's closing arguments and of the jury charge are not relevant to whether the substitute information gave the defendant adequate notice. Nonetheless, the defendant's argument is unavailing. In closing, the state stressed that the defendant was charged with operating a motor vehicle without a license and that he should be found guilty because he drove when he did not have a license. The state mentioned that everything else in the case was "extraneous . . . ." The court's charge on § 14-36 (e) (3), while extraneous, was not prejudicial.

V

The defendant last claims that the court erred in denying his motion for a judgment of acquittal[15] on the amended part B information. We disagree.

In an amended part B information filed July 1, 2008, the state alleged that the defendant had previously been convicted on January 30, 2001, of two counts of operating under a suspension in violation of § 14-215; and on January 29, 2003,[16] of one count of operating under a suspension in violation of § 14-215 and one count of operating without a license in violation of § 14-36 (a).[17] The defendant filed a motion for a judgment of acquittal on the amended part B information. In his motion, he argued that he did not qualify as a subsequent offender under § 14-36 (h) (2) because his prior convictions occurred more than three years prior to the offense in the part A information. The court stated that it would allow the state to introduce evidence on the part B information before it ruled on the motion. The state introduced evidence showing that on January 29, 2003, the defendant pleaded nolo contendere to operating under suspension in violation of § 14-215 (a) and operating without a license in violation of § 14-36, and that on January 30, 2001, he also pleaded nolo contendere to a part B information that charged him with two counts of operating under suspension in violation of § 14-215 (a).

Following argument, the court denied the defendant's motion. The court found that the state had established

[15] The defendant entitled his motion: "motion to dismiss/ motion for acquittal." We will treat it as a motion for a judgment of acquittal. See Practice Book §§ 42-40 and 42-42.

[16] The record reveals that the defendant's license was suspended as a result of the 2003 violations and that the license suspensions were removed and not reinstated. See footnote 1 of this opinion.

[17] The part B information also charged that the defendant had previously been convicted on June 6, 2001, with one count of operating under suspension in violation of § 14-215. The state later withdrew this count.

beyond a reasonable doubt that the defendant was convicted on January 30, 2001, of two counts of operating under a suspension in violation of § 14-215; on January 29, 2003, of one count of operating under a suspension in violation of § 14-215, and on January 29, 2003, of one count of operating without a license in violation of § 14-36 (a). The court then, pursuant to § 14-36 (h) (2), imposed a total effective sentence of ninety days incarceration on the part B information.

The issue in this claim raises a question of statutory construction, which is a "[question] 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." (Internal quotation marks omitted.) *State* v. *Marsh & McClennan Cos.*, supra, 286 Conn. 464.

The statutory language at issue in this claim is as follows. Section 14-36 (h) provides: "(1) Any person who violates any provision of this section shall, for a first offense, be deemed to have committed an infraction and be fined not less than seventy-five dollars or more than ninety dollars and, for any subsequent offense, shall be fined not less than two hundred fifty dollars or more than three hundred fifty dollars or be imprisoned not more than thirty days, or both. (2) In addition to the penalty prescribed under subdivision (1) of this subsection, any person who violates any provision of this section who (A) has, prior to the commission of the present violation, committed a violation of this section or subsection (a) of section 14-215, shall be fined not more than five hundred dollars or sentenced to perform not more than one hundred hours of community service, or (B) has, prior to the commission of the present violation, committed two or more violations of this section or subsection (a) of section

14-215, or any combination thereof, shall be sentenced to a term of imprisonment of ninety days which may not be suspended or reduced in any manner."

The defendant argues that he was not a "subsequent offender" under § 14-36 (h) (2) because his prior convictions had occurred more than three years before the present offense, and General Statutes (Rev. to 2007) § 14-1 (74) places a three year limitations period on subsequent convictions.[18] He contends that, because subsection (h) (1) of § 14-36 refers to "subsequent offense" and because the penalties under subsection (h) (2) are to be imposed "[i]n addition to" the penalties in subsection (h) (1), the penalties in subsection (h) (2) can only be applied in situations where the prior convictions are subsequent offenses as defined in § 14-1 (74).

We disagree with the defendant's interpretation of § 14-36 (h) (1), which imputes the additional term "subsequent offense" into subsection (h) (2). By its plain language, § 14-36 (h) (2) is not limited only to subsequent offenses. The legislature could have included the term "subsequent offense" in that subsection, as it did in subsection (h) (1), but did not do so. See *State* v. *Fernando A.*, supra, 294 Conn. 21 ("[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" [internal quotation marks omitted]). Accordingly, the defendant's prior convictions that occurred more than three

[18] General Statutes (Rev. to 2007) § 14-1 (74) provides: " 'Second' violation or 'subsequent' violation means an offense committed not more than three years after the date of an arrest which resulted in a previous conviction for a violation of the same statutory provision, except in the case of a violation of section 14-215 or 14-224 or subsection (a) of section 14-227a, 'second' violation or 'subsequent' violation means an offense committed not more than ten years after the date of an arrest which resulted in a previous conviction for a violation of the same statutory provision . . . ."

years before the present offense could properly have been taken into account in the imposition of penalties under § 14-36 (h) (2). The court did not err in denying the defendant's motion for a judgment of acquittal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOEL DORT (AC 34071)

Robinson, Alvord and Mihalakos, Js.

Syllabus

Convicted of the crimes of burglary in the first degree and kidnapping in the first degree, the defendant appealed to this court. He claimed that the trial court improperly denied defense counsel's request for a second competency evaluation. Pursuant to statute (§ 54-56d), the trial court had ordered an examination to determine if the defendant was competent to stand trial, and after it was completed, the parties stipulated before the court that the defendant was competent to stand trial. Thereafter, at the beginning of jury selection, defense counsel brought to the court's attention his concerns about the defendant's competence to stand trial and asked for another competency evaluation to be performed. The trial court noted that a report had been filed approximately seven months previously that found the defendant competent to understand the charges against him and to assist in his defense, that disagreements over following the advice of counsel and tactical issues happen in many cases, and that defense counsel had met with the defendant on multiple occasions but raised the issue of competency only after jury selection began. The court denied the motion, concluding that it had not been presented with substantial evidence that would give rise to a concern that the defendant was not competent at that time to proceed with trial. *Held* that the trial court abused its discretion in disregarding defense counsel's request for a second competency evaluation of the defendant without conducting an independent inquiry into the defendant's competence, and thereby violated the defendant's due process rights: due process requires a court to conduct an independent inquiry into the defendant's competence when specific factual allegations are made that, if true, would be substantial evidence of mental impairment, and defense counsel here having brought to the court's attention his concerns about the defendant's competency and whether the defendant could assist in his own defense, which, paired with counsel's statement that there may

have been relevant confidential communications at issue, were sufficient to constitute specific factual allegations that, if taken as true, would constitute substantial evidence of mental impairment; accordingly, the trial court was required to conduct an independent inquiry, namely, a hearing before the court, to determine whether a competency evaluation was justified.

Argued May 30—officially released October 2, 2012

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, kidnapping in the first degree and strangulation in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the court, *Wenzel*, *J.*, denied the defendant's motion for a competency evaluation; thereafter, the matter was tried to the jury; verdict of guilty of burglary in the first degree and kidnapping in the first degree, from which the defendant appealed to this court. *Reversed; further proceedings.*

Robert E. Byron, special public defender, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Michelle Bredefeld*, assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. The defendant, Joel Dort, appeals from the trial court's judgment of conviction, following a jury trial, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (C) and burglary in the first degree in violation of General Statutes § 53a-101 (a) (2). On appeal, the defendant claims that the court erred in denying defense counsel's request for a

second competency examination.[1] We conclude that the court erred by conducting an inadequate inquiry into the defendant's competence, and, therefore, reverse the defendant's conviction.

The jury could have reasonably found the following facts. In 2009, the defendant was discharged from his position as a computer consultant for XL Capital, an insurance and reinsurance company in Stamford. Approximately four months after the termination of his employment, the defendant entered XL Capital without proper authorization and waited for the victim, one of his supervisors, in her office. The defendant asked the victim for his job back, and she informed him that the job had been outsourced. The victim asked the defendant to leave, and when he did not, she threatened to call security. The victim reached for her telephone to call for assistance, and the defendant grabbed the telephone out of her hand and pointed a gun at her. The victim tried to escape from the defendant by stepping toward the door, and the defendant crushed the victim's hand in the doorway, grabbed the victim by the throat and slammed her head against the office wall. The victim broke free and ran out of her office. The defendant left the building and was later arrested and charged in a substitute long form information with burglary in the first degree in violation of § 53a-101 (a) (2), kidnapping in the first degree in violation of § 53a-92 (a) (2) (C) and strangulation in the second degree in violation of General Statutes § 53a-64bb (a).[2]

[1] The defendant also claims on appeal that the court erred in not allowing him to withdraw his motion for a speedy trial. Because we conclude that the court erred in denying the defendant's request for a competency examination without conducting an adequate inquiry into the defendant's competence, we need not address this claim.

[2] The jury found the defendant not guilty of strangulation in the second degree.

Pursuant to General Statutes § 54-56d,[3] the court on November 13, 2009, ordered an examination to determine if the defendant was competent to stand trial. After the examination was completed and memorialized in a report dated December 16, 2009, the parties stipulated before the court that the defendant was competent to stand trial.[4]

On June 23, 2010, the court granted the defendant's motion for a speedy trial and scheduled jury selection to commence the following day. At the beginning of jury selection on June 24, 2010, defense counsel brought to the court's attention his concerns regarding the defendant's competency to stand trial, and asked for another competency examination to be performed. The defendant's counsel stated: "I have not had a recent chance to have a long discussion with my client, but I have had chances yesterday and on the telephone and this morning, and just so the court's aware, he was evaluated, competency evaluated in or about the first months after the incidents that gave rise to these charges occurred." At that time the court noted that a § 54-56d (d) examination had been ordered. Defense counsel continued to address the court: "My understanding of the statute is that competency is not established forever. And that having been said, I know [the

[3] General Statutes § 54-56d provides in relevant part: "(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.

"(d) Examination of defendant. Report. If the court finds that the request for an examination is justified and that, in accordance with procedures established by the judges of the Superior Court, there is probable cause to believe that the defendant has committed the crime for which the defendant is charged, the court shall order an examination of the defendant as to his or her competency. . . ."

[4] The results of the defendant's competency examination were ordered sealed by the court. Although the defendant improperly included a copy of the results of the examination in the appendix to his brief, we note that we did not consider those results in making this decision.

defendant] has had a competency evaluation, but there are things that he has said to me and clear-cut advice that, both on the record and off the record, he continues not to follow when I give it to him. And these are fundamental bits of advice, Judge, I might add. So, for example, don't talk to anybody about your case or be advised that you're not obliged to incriminate yourself by making incriminating statements. And nonetheless, that has, in my view, occurred. And my largest problem at this point is that in the period of one day, since yesterday, I've been asked questions and I've observed a behavior that leads me to believe that he will continue to have difficulty and an inability to effectively communicate with counsel in such a way that it will hinder my ability to defend him, especially with regard to his understanding of the case and the facts and conditions that existed at the time that he feels are relevant to his defense. And for that reason, I would request at this juncture that the court reexamine him for competency at this juncture."

In response, the court noted that a report had been filed approximately seven months previously that found the defendant competent to understand the charges against him and to assist in his defense. The court followed up by stating: "And I'm hearing that there's disagreements over following the advice of counsel and perhaps tactical issues as to whether or not certain issues and statements might be relevant or not relevant. I'm not—I mean, that happens in many, many cases. What else do you have to offer to the court?" Counsel for the defendant responded: "I've certainly been in those many types of cases where there's disagreements, Judge. . . . And just for the record, I can represent as an officer of the court, there's a clear distinction between [disagreement] and what's going on here. There's a fundamental misunderstanding regarding what can be put forward as a defense in this case.

There's a fundamental misunderstanding of the seriousness of the charges in light of the defense. It's not only a disagreement, it's a situation where, without disclosing private communications between attorney-client, I am led to believe—and I make this statement as an officer of the court, that attempting to extrapolate the relevant information from my client in order for me to go forward with his defense is virtually impossible."

In response, the court noted that defense counsel had met with his client on multiple occasions, and, yet, the first time the court heard of an issue of competency was when jury selection was to begin. Defense counsel agreed that that was a pertinent observation and then stated: "I think that in formulating a view of a client's inability to assist at trial, one needs to take into account, A, I'm not a psychiatrist, I'm just giving you a layperson's analysis of the reasons for why I believe this. And, B, I don't think it's—I think it's uncontested that these things and the behavior that exhibits—that attracts the concern can crop up at any time. And in fact, I know there have been cases—I don't have them in front of me, where a defendant may even be ordered to be examined in the middle of the trial. . . . So, that having [been] said, in the last day my client has said things and not been able to field information between he and I that I think is necessary to his proper understanding and his ability to further instruct me. He's indicated to me that there are things that he has withheld because he was waiting for trial—I don't know what that means, of course, Judge. But the point is, I don't know that he is stable enough or he understands enough about the seriousness of these charges for me to move forward and have him assist me in his own defense. . . . You know, I've advised my client about the elements of these charges . . . that he faced last month or at the beginning of the trial, for example. And there's been things he's seized upon, including the fact that there's a

weapon in this case or an alleged weapon in this, an alleged gun. And he's been informed that that's not whether the gun is operable or whether it's a rubber gun or it's made of wood—that does not constitute a defense. I cannot for the life of me extrapolate much more in the way of facts from him at this juncture."

After defense counsel concluded his argument, the court stated: "I think the issue that's before the court is whether or not there's some substantial evidence that would give rise to a concern on the part of the court that the defendant is not competent at this time to proceed with trial. And I must say that I have not heard that. What I've heard is that there are concerns about communications, there's some fundamental misunderstandings as to the seriousness of the charge. . . . I've read the December 16 [2009] report from the three health care providers who conducted the competency examination, and, in light of that finding, the gentleman was found competent. I have not heard any new, substantial evidence. In fact, I haven't heard any evidence that would give rise to a concern that their findings are no longer accurate. So, at this point, I will deny the request."

After the court denied the motion, defense counsel asked if the defendant could address the court. The court responded by saying that the defendant could bring anything to the court's attention through his counsel. Defense counsel followed up by stating: "It's a request that's based on following up, based on what Your Honor said, and the request is that he be able to express that to you himself, not from counsel." When the court questioned what defense counsel meant by that statement, defense counsel noted that the court had made a determination on the competency issue and that the defendant "believes that there's other bases for that and wishes to convey that to the court himself."

The court responded by stating that anything the defendant wanted to apprise the court of must be done through his counsel. Defense counsel did not address the issue of competency again.

The defendant was tried and found guilty of first degree burglary and first degree kidnapping. The court sentenced him to ten years imprisonment, with seven years of special parole. This appeal followed.

"We begin with the undisputed principle that the . . . conviction of an accused person who is not legally competent to stand trial violates the due process of law guaranteed by the state and federal constitutions. . . . Connecticut jealously guards this right. Therefore, [t]his constitutional mandate is codified in . . . § 54-56d (a), which provides that [a] defendant shall not be tried, convicted or sentenced while he is not competent. . . . [A] defendant is not competent if he is unable to understand the proceedings against him or to assist in his own defense. . . . This statutory definition mirrors the federal competency standard enunciated in *Dusky* v. *United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam). According to *Dusky*, the test for competency must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him. . . . Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. . . . Although § 54-56d (b) presumes the competency of defendants, when a reasonable doubt concerning the defendant's competency is raised, the trial court must order a competency examination. . . . Thus, [a]s a matter of due process, the trial court is required to conduct an independent inquiry into the defendant's

competence whenever he makes specific factual allegations that, if true, would constitute substantial evidence of mental impairment. . . . Substantial evidence is a term of art. Evidence encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is substantial if it raises a reasonable doubt about the defendant's competency . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Johnson*, 253 Conn. 1, 20–21, 751 A.2d 298 (2000).

"We review the court's determination of competency under an abuse of discretion standard. . . . 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. . . . Our review of a trial court's exercise of the legal 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Paulino*, 127 Conn. App. 51, 61–63, 12 A.3d 628 (2011).

We begin by noting that every criminal defendant is presumed to be competent. General Statutes § 54-56d (b). If, however, during the course of the criminal proceedings, it appears that the defendant is not competent, either party or the court may request an examination to determine the defendant's competency. General Statutes § 54-56d (c). Due process requires a court to conduct an "independent inquiry" into the defendant's competence when specific factual allegations are made that, if true, would be substantial evidence of mental impairment. In interpreting what due process requires, however, "it is important to distinguish between an 'independent inquiry' by the court

and an independent competency examination of the defendant as provided by § 54-56d (d)." *State* v. *Ross*, 269 Conn. 213, 271, 849 A.2d 648 (2004). "It is clear . . . that the 'independent inquiry' required by due process whenever an allegation of incompetence has been made is a hearing before the court, not an independent psychiatric evaluation as provided by statute." Id., 272. In the present case, we believe that the proper question is not whether the court abused its discretion in failing to order a competency evaluation pursuant to § 54-56d (d); rather, the question is whether the court abused its discretion in failing to conduct an "independent inquiry" into the defendant's competence. The court's independent inquiry, in the form of a hearing before the court, necessarily precedes the step, if applicable, in which the court determines if a competency evaluation is justified under § 54-56d. We conclude that the court abused its discretion in failing to adequately conduct this independent inquiry and, thereby, violated the defendant's due process rights.

In the present case, defense counsel brought to the court's attention his concerns about the defendant's competency. He stated: "I've been asked questions and I've observed a behavior that leads me to believe that he will continue to have difficulty and an inability to effectively communicate with counsel in such a way that it will hinder my ability to defend him, especially with regard to his understanding of the case and the facts and conditions that existed at the time that he feels are relevant to his defense." Defense counsel represented as an officer of the court that there was a "fundamental misunderstanding" regarding the seriousness of the charges and the defendant's defense. Furthermore, counsel stated that, without disclosing private communications between him and his client, he believed that going forward with the defendant's defense was "virtually impossible." As previously noted,

the test for competency requires that a defendant understand the proceedings against him and be able to assist in his own defense. *State* v. *Johnson*, supra, 253 Conn. 20. Defense counsel raised a question before the court of whether the defendant could assist in his own defense. We conclude that those assertions, paired with the statement that there may have been relevant confidential communications at issue, were sufficient to constitute specific factual allegations that, if taken as true, would constitute substantial evidence of mental impairment. The court therefore was required to conduct an "independent inquiry," namely, a hearing before the court, to determine whether a competency evaluation was justified.

"Connecticut appellate courts have repeatedly held that a trial court may not be required to order a competency examination when the defendant's canvass supports a finding of competency." *State* v. *Silva*, 65 Conn. App. 234, 249, 783 A.2d 7, cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001). In the present case, however, the court dismissed any notion of whether the defendant was competent without canvassing the defendant, or speaking to the defendant at all, even after counsel requested that the defendant himself be permitted to address the court about the competency issue. Furthermore, the court did not make a record of its observation of the defendant's behavior.[5] See id., 250 ("[T]he trial

[5] We also note that the court referred to the fact that approximately seven months prior, the defendant had been found competent to stand trial and that the court had not "heard any evidence that would give rise to a concern that [the] findings [of the health care providers who had conducted the court-ordered evaluation of the defendant] are no longer accurate." Our Supreme Court has noted repeatedly, however, that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (Internal quotation marks omitted.) *State* v. *Johnson*, supra, 253 Conn. 21. The fact that the defendant was previously found to be competent did not necessarily mean that he was competent to stand trial on the day in question.

court was entitled to rely on its own observations of the defendant's responses during the canvassing, in light of his demeanor, tone, attitude and other expressive characteristics. . . . The trial court was in the best position to assess whether the defendant behaved rationally at that time." [Internal quotation marks omitted.]); see also *State* v. *DesLaurier*, 230 Conn. 572, 589, 646 A.2d 108 (1994) ("[t]hus, by not providing a sufficient description or explanation of the nature of the defendant's purported past irrationality, the observation of the defendant's counsel provided no reasonable basis for the trial court to *disregard its own*, *in-court observations* about the defendant's then present competency" [emphasis added]).

Here, in denying counsel's request for a competency examination, the court did not make any reference to the defendant's behavior or any relevant communications with the defendant. It denied the motion without further comment. The court also refused the defendant the opportunity to address the court on this issue, which would have given the court an opportunity to make these key observations. We conclude that, based on the specific facts of this case, it was an abuse of discretion to disregard defense counsel's assertions without further inquiry into the defendant's competence. This is particularly true when defense counsel made reference to confidential communications that could not be disclosed, and the court did not canvass the defendant or have an opportunity to observe the defendant's behavior. Because the court failed to conduct an appropriate inquiry into the defendant's competence, the court violated the defendant's due process rights.[6] We therefore reverse the judgment of conviction and direct the trial court to conduct a hearing to determine whether a competency evaluation is needed.

[6] We note that this decision does not determine the question of the defendant's competence to stand trial.

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

In this opinion the other judges concurred.

ACADIA INSURANCE COMPANY ET AL. *v.* JOHN T. O'REILLY ET AL.
(AC 33950)

Gruendel, Beach and Schaller, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants for, inter alia, negligence. After the defendants were defaulted for failure to appear, a hearing in damages was held, and the trial court rendered judgment for the plaintiffs. Subsequently, the trial court denied the defendants' motion to open the default judgment, and the defendants appealed to this court. *Held*:

1. The motion to open the default judgment having been filed more than twenty days after the judgment, the appeal from the denial of that motion could test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment, and, therefore, the defendants' claim that the trial court improperly rendered the default judgment was not properly before this court and review of that claim was precluded.
2. The defendants could not prevail on their claim that the trial court improperly denied their motion to open the default judgment; the trial court gave no reasons for the denial of the motion to open and the defendants failed to seek an articulation of the basis for the trial court's decision, and absent any indication of the factual and legal basis of the trial court's decision, this court could not conclude that the trial court abused its discretion in denying the defendants' motion to open the default judgment.

Argued May 17—officially released October 2, 2012

Procedural History

Action to recover damages for, inter alia, the alleged negligence of the defendant Erin O'Reilly, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendants were defaulted for failure to appear; thereafter, following a hearing in damages, the court, *Hon. William L. Hadden*,

Jr., judge trial referee, rendered judgment for the plaintiffs; subsequently, the court, *Silbert*, *J.*, denied the defendants' motion to open the judgment, and the defendants appealed to this court. *Affirmed*.

John T. O'Reilly, pro se, the appellant, with whom, on the brief, was *Erin O'Reilly*, pro se, the appellants (defendants).

Donald P. Cianci, for the appellee (named plaintiff).

Opinion

PER CURIAM. The self-represented defendants, John T. O'Reilly and Erin O'Reilly, appeal from the judgment of the trial court denying their motion to open the default judgment rendered in favor of the plaintiffs, Acadia Insurance Company and 139 Washington Avenue, LLC. On appeal, the defendants claim that the court improperly denied that motion. We affirm the judgment of the trial court.

In early November, 2010, the plaintiffs commenced a negligence action against the defendants stemming from an incident that occurred on March 14, 2010. Their complaint alleged that, at all relevant times, Acadia Insurance Company insured real property known as 1100 West Main Street in Branford (property) owned by 139 Washington Avenue, LLC. They further alleged that, at 5:57 p.m. on March 14, 2010, "the defendant, Erin O'Reilly, was operating a motor vehicle owned by the defendant, John O'Reilly, on West Main Street in Branford . . . when she propelled said motor vehicle off of the traveled portion of the road and into the [property], thereby damaging the plaintiff's realty in the amount of $7541.90." That damage allegedly was caused by the carelessness and negligence of Erin O'Reilly.

Approximately one month later, the plaintiffs filed a motion for default for failure to appear, which the trial

court clerk granted on December 21, 2010. The defendants thereafter filed pro se appearances on December 28, 2010. On February 1, 2011, the plaintiffs filed a motion for default for failure to plead, which the trial court clerk granted on February 9, 2011. The defendants then filed an answer on February 14, 2011, denying the plaintiffs' allegations. On February 18, 2011, the plaintiffs filed a certificate of closed pleadings indicating that the relief requested was less than $15,000 and requesting a court trial. On February 25, 2011, the court notified the parties that a trial on the matter was scheduled for May 11, 2011, at 9:30 a.m., stating in relevant part: "The above captioned case is assigned for court trial on the above indicated date and time in courtroom 4E. Prior to the commencement of trial, the court will hold a trial management conference. . . . All parties must comply with the standing civil trial management order. . . . Failure to appear and proceed may result in entry of nonsuit, dismissal or default and an immediate hearing in damages." In their reply brief before this court, the defendants claim that they never received that notice.

Two days before trial, the plaintiffs filed a motion to amend their complaint. The record contains no indication that the court ever acted on that motion.[1] The judgment file likewise is silent as to that motion. On May 11, 2011, the defendants failed to appear for trial. Accordingly, the court entered a default judgment against them and proceeded to a hearing in damages, at the conclusion of which the court found that the plaintiffs sustained damages as alleged in their complaint.[2]

[1] The appellants have not provided a transcript of the May 11, 2011 trial.

[2] At oral argument before this court, the plaintiffs attested that, because the trial court did not act on their motion to amend, they proceeded on their original complaint at trial.

On July 5, 2011, the defendants filed a motion to open the default judgment. That motion stated in full: "The above named defendants hereby move this court to reopen the judgment of default rendered against defendants without their knowledge and without any notice. Included with this motion is the reopening fee. It was the defendants' understanding that plaintiff was filing an amended complaint. So it came as a shock that defendants were defaulted. Included as exhibit A is a copy of the amended complaint which was filed by plaintiffs' attorney dated May [9] 2011. Defendants were completely confused by the court's action of defaulting defendants and ask this court to reopen judgment in the interest of fairness so that defendant[s] may have their day in court, especially considering that it has been less than four months since the default judgment." That motion was not properly verified, as required by General Statutes § 52-212 (b) and Practice Book § 17-43 (a). In response, the plaintiffs filed a memorandum of law in opposition to the defendants' motion that raised multiple grounds of objection. By order dated September 26, 2011, the court denied the defendants' motion to open by marking it "denied."[3] This appeal followed.

At the outset, we note that the defendants stated on their appeal form that they are appealing from both the "default judgment" and the "denial of [the] motion to reopen judgment." Likewise, the six sentence argument portion of their principal appellate brief asserts that the court improperly rendered a default judgment and that it improperly denied their motion to open that judgment. Nevertheless, the only issue properly before us is the latter claim. As we previously have explained,

[3] At oral argument before this court, the defendants complained that the trial court decided the motion to open without holding argument thereon. Like *Priest* v. *Edmonds*, 295 Conn. 132, 136, 989 A.2d 588 (2010), the defendants here did not request oral argument on their motion to open.

"[i]t is well established in our jurisprudence that [w]here an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, we have refused to entertain issues relating to the merits of the underlying case and have limited our consideration to whether the denial of the motion to open was proper. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal." (Internal quotation marks omitted.) *Langewisch* v. *New England Residential Services, Inc.*, 113 Conn. App. 290, 293, 966 A.2d 318 (2009). The defendants' failure to file their motion to open the judgment within twenty days of the notice of judgment precludes review of any claim pertaining to the entry of the default judgment.

Confined to the question of whether the court properly denied the defendants' motion to open, we first note the applicable standard of review. "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."[4]

[4] The defendants, without citation to any authority, mistakenly assert that their claim "should be considered de novo with a plenary standard of review." Contra *In re Baby Girl B.*, 224 Conn. 263, 294–95, 618 A.2d 1 (1992) ("[w]e do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment").

(Citations omitted; internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 169–70, 612 A.2d 1153 (1992).

Applying those principles, we cannot say that the court abused its discretion in the present case. As our Supreme Court explained in a similar case, "[i]n an appeal from the denial of a motion to open, the appellant must abide by established appellate procedure. [It is] fundamental . . . that [i]t is incumbent upon the [appellant] to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review. . . . Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the appellant's claims] would be entirely speculative. . . . It is the appellant's obligation 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. . . .

"[T]he trial court gave no reasons for the denial of the defendant's motion to open; it simply marked the motion denied. The trial court could have denied the motion for any one or more of the reasons raised in the plaintiffs' objection, such as, the defendant's failure to allege reasonable cause or that the motion was not properly verified as required by both . . . § 52-212 and Practice Book § 17-43. Alternatively, the trial court could have come to its own conclusion about its ability to open a judgment that, despite the absence of a direct appeal, was being collaterally attacked by the defendant. . . . The record therefore does not reveal the reasons for the trial court's ruling.

"Under these circumstances, the plaintiff should have filed a motion for articulation to preserve an adequate

record for review. See Practice Book §§ 61-10 and 66-5. . . . [A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves 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. . . . In the absence of an articulation, we are unable to determine the basis for the court's decision . . . ." (Citations omitted; internal quotation marks omitted.) *Priest* v. *Edmonds*, 295 Conn. 132, 138–40, 989 A.2d 588 (2010).

That reasoning applies with equal force in the present case. It is well established that "[t]his court does not presume error on the part of the trial court; error must be demonstrated by an appellant . . . ." *State* v. *Tocco*, 120 Conn. App. 768, 781 n.5, 993 A.2d 989, cert. denied, 297 Conn. 917, 996 A.2d 279 (2010). Our standard of review requires this court to "make every reasonable presumption in favor of [the trial court's] action" in denying a motion to open. (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 106, 952 A.2d 1 (2008). Furthermore, to the extent that the defendants' claim is predicated on their factual allegation that they never received the court's February 25, 2011 notice of trial, we are mindful that "it is axiomatic that this appellate body does not engage in fact-finding. Connecticut's appellate courts cannot find facts; that function is, according to our constitution, our statute, and our cases, exclusively assigned to the trial courts." (Internal quotation marks omitted.) *Hogan* v. *Lagosz*, 124 Conn. App. 602, 618, 6 A.3d 112 (2010), cert. denied, 299 Conn. 923, 11 A.3d 151 (2011). Absent any indication of the factual and legal basis of the court's decision, we cannot conclude that the court abused its ample discretion in denying the defendants' motion to open the default judgment.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* DAVID E. LEE (AC 31817)

Gruendel, Beach and Bear, Js.

Syllabus

Convicted of the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, operation of a motor vehicle while his license was under suspension, conspiracy to make a false statement in the second degree, conspiracy to fabricate physical evidence and tampering with a witness, the defendant appealed to this court. The defendant had been involved in a one vehicle accident, and a responding state trooper detected an odor of alcohol emanating from the interior of the vehicle and from the unconscious defendant. The defendant was taken to a hospital and medical testing revealed that he had a blood alcohol content of 0.17. Subsequently, the defendant discussed the accident with a friend, F, who said he would be willing to accept responsibility for the accident, and they fabricated a story to tell the police. Although F signed an affidavit attesting that he had been driving the vehicle involved in the accident, he later provided a written statement admitting that the affidavit contained false information. On appeal, the defendant claimed, inter alia, that the trial court improperly admitted pursuant to statute (§ 14-227a [k]) a medical record that contained the results of his blood alcohol test, without requiring any authentication or foundation for the document, thereby violating his right to confrontation. *Held*:

1. The trial court properly determined that the document containing the results of the defendant's blood alcohol test met the conditions specified in § 14-227a (k) and, therefore, that it was admissible and competent evidence; the defendant did not dispute that the blood sample was taken for the diagnosis and treatment of his injuries, that a warrant properly was sought on the basis of the officer's belief that the defendant had been operating a motor vehicle while under the influence of liquor or that a judge properly issued a warrant for the seizure of the chemical analysis of his blood; furthermore, the defendant could not prevail on his claim that the requirement that the blood sample be taken in accordance with the regulations adopted under § 14-227a (d) was not met because the commissioner of public safety declined to enact regulations to cover instances where blood alcohol testing is done as part of medical diagnosis and treatment, as the legislature, although directing the commissioner to adopt regulations governing chemical testing of blood and urine, specifically gave the commissioner discretion to adopt regulations as necessary, and the commissioner determined that it was not necessary to adopt regulations for samples collected and analyzed for the purpose of medical diagnostic testing.

2. The defendant's claim that the evidence was insufficient to support his conviction on the charges of operating a motor vehicle while under the influence of intoxicating liquor and operating a motor vehicle while his license was under suspension was unavailing; although there was no direct evidence that the defendant had been driving the vehicle at the time of the accident, the jury reasonably could have inferred that fact on the basis of the circumstantial evidence presented at trial.

3. The defendant could not prevail on his claim that there was no evidence that he induced, attempted to induce or directly caused F to testify falsely to support his conviction of the charge of tampering with a witness pursuant to statute (§ 53a-151): the state met its burden of proof that the defendant intended to prompt and directly cause F to testify falsely, as the jury reasonably could have concluded that, although F initially had approached the defendant with the idea of providing false information as a way to help the defendant, the defendant intentionally engaged in conduct meant to undermine the veracity of F's testimony; moreover, the defendant's claim that F was not a "witness" for purposes of § 53a-151 because he was not someone who would have been summoned to appear was unavailing, because once the defendant and F began discussing the defendant's case and fabricated a story, they became participants in an attempted cover-up of the defendant's offenses and F, thus, became someone who may be summoned to give testimony in an official proceeding.

4. The evidence was sufficient to support the defendant's conviction of conspiring with F to fabricate evidence and to make a false statement, as the jury reasonably could have found, on the basis of the evidence and the reasonable inferences therefrom, that the defendant knew of the falsity of F's statement.

5. The defendant could not prevail on his unpreserved claim that the trial court violated his sixth amendment right to counsel of his choice when it granted the motion to withdraw filed by his counsel, S, who withdrew from his representation of the defendant because of a potential conflict of interest stemming from S's involvement in the preparation of the affidavit signed by F, which was later alleged to contain false information; although the defendant initially objected to S's motion to withdraw, there was no indication in the record that S remained the defendant's counsel of choice after the defendant understood that it would be likely that S would be called as a witness against him, as the defendant merely wanted more time to secure alternate counsel, the trial court granted the defendant numerous continuances to retain new counsel and, therefore, the trial court's decision to grant S's motion to withdraw was not an abuse of discretion and did not deprive the defendant of his right to counsel of choice.

6. The defendant's conviction of conspiracy to make a false statement in the second degree and conspiracy to fabricate physical evidence, which arose from the same agreement, violated the constitutional prohibition

against double jeopardy, and the appropriate remedy was to combine the conviction on the two conspiracy charges, to vacate the sentence on the conviction of conspiracy to make a false statement in the second degree and to sentence the defendant only for conspiracy to fabricate physical evidence.

7. The defendant could not prevail on his unpreserved claim that the trial court's jury instructions on both conspiracy counts improperly misled the jury on the element of intent, the defendant having implicitly waived his claim of instructional error; the court gave defense counsel a written copy of its proposed instructions and sufficient time to review them, defense counsel did not voice any objection to certain changes the court had made on the basis of the parties' suggestions and acknowledged that there was no disagreement as to the court's changes, and defense counsel did not voice any objection to the court's instruction on the intent elements of the conspiracy charges.

Argued May 21—officially released October 9, 2012

Procedural History

Two part substitute information, in the first case, charging the defendant, in the first part, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and with operating a motor vehicle while his license was under suspension, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and substitute information, in the second case, charging the defendant with the crimes of conspiracy to make a false statement in the second degree, conspiracy to fabricate physical evidence, tampering with a witness and conspiracy to commit forgery in the third degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, where the court, *T. Sullivan*, *J.*, granted defense counsel's motion to withdraw in the first case; thereafter, the cases were consolidated and tried to the jury before *Solomon*, *J.*; subsequently, the state withdrew the charge of conspiracy to commit forgery in the third degree, and the court, *Solomon*, *J.*, denied the defendant's motion for judgments of acquittal; verdicts of guilty; thereafter, the defendant was

presented to the court, *Solomon*, *J.*, on a plea of nolo contendere to the second part of the information in the first case; judgments of guilty, from which the defendant appealed to this court. *Reversed in part; judgment directed; further proceedings.*

Annacarina Jacob, senior assistant public defender, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Charles W. C. Johnson*, assistant state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, David E. Lee, appeals from the judgments 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 (Rev. to 2005) § 14-227a (a) (1) and (2), operation of a motor vehicle while his license was under suspension in violation of General Statutes § 14-215 (c), conspiracy to make a false statement in the second degree in violation of General Statutes §§ 53a-48 and 53a-157b (a), conspiracy to fabricate physical evidence in violation of General Statutes §§ 53a-48 and 53a-155 (a) (2), and tampering with a witness in violation of General Statutes § 53a-151. On appeal, the defendant claims that (1) the court erred in admitting the results of his blood alcohol test without requiring any authentication or foundation for the document, (2) there was insufficient evidence to support any of his convictions, (3) the court erred in granting his counsel's motion to withdraw, (4) the court erred in convicting him on both conspiracy charges and (5) the court's jury instructions on both conspiracy charges improperly misled the jury on the element of intent. We affirm in part and reverse in part the judgments of the trial court.

The jury reasonably could have found the following facts on the basis of the evidence presented. On September 22, 2005, the defendant, while driving a 1997 Ford Expedition on Reeves Road in Ellington, lost control of the vehicle, causing it to flip over onto its roof in the middle of the roadway after hitting and knocking over a telephone pole and power lines. The vehicle was totaled, and its windows were broken out. Emergency responders arrived at the scene at approximately 3:30 a.m., and they found the defendant unconscious, lying on the interior roof of the flipped over vehicle. After being extricated from the vehicle by fire department personnel, who had to use hand tools because the door handles on the vehicle did not work, the defendant regained consciousness and stated that he did not know what had happened because he must have fallen asleep. Andrea Cloutier, a state police trooper, detected an odor of alcohol emanating from the interior of the vehicle and from the defendant. After walking the area of the scene and using thermal imaging to check for heat sources in the nearby wooded area that would indicate the presence of a person, the emergency responders determined that there were no other possible occupants of the vehicle in the area. The defendant was transported to Hartford Hospital by Life Star helicopter, where, at 4:39 a.m., medical testing revealed, among other things, that he had a blood alcohol content of 0.17.[1] The defendant underwent surgery and remained in the hospital for several weeks while recovering from very serious injuries. The defendant was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor and operating a motor vehicle while his license was under suspension.

The summer following the accident, the defendant and his friend, Joshua Figella, while working together,

[1] Pursuant to § 14-227a (a), a person has an elevated blood alcohol content if such person has "a ratio of alcohol in the blood . . . that is eight-hundredths of one per cent or more of alcohol, by weight."

discussed the accident, and Figella said he would be willing to accept responsibility for the accident. The defendant and Figella came up with a story "about what would need to be said," and the two agreed that Figella would sign an affidavit stating that he was driving the vehicle at the time of the accident, but that he had left after the accident to go find help. Each contacted the defendant's attorney, Robert D. Swartout.[2] Figella and the defendant then met with Swartout, and Figella signed an affidavit attesting that he had been driving the 1997 Ford Expedition when the accident occurred. After reopening her investigation, Cloutier spoke with Figella, who initially affirmed his statements set forth in the affidavit. Subsequently, however, Figella admitted that the affidavit contained false information. Figella later spoke with David Kenary, an inspector from the office of the state's attorney, and provided him with a written statement admitting that the affidavit contained false information. The defendant and Figella were arrested in connection with the false affidavit.

The defendant elected a trial by jury, and, after the close of evidence, the jury found him guilty of two counts of operating under the influence of intoxicating liquor and one count of operation of a motor vehicle while his license was under suspension, conspiracy to make a false statement in the second degree, conspiracy to fabricate physical evidence and tampering with a witness. The defendant then pleaded nolo contendere under a part B information to a charge of being a persistent offender with respect to operating under the influence. The court sentenced him to a total effective term of eight years and thirty days imprisonment, execution suspended after three years and ten months, followed by three years probation. This appeal followed. Additional facts will be set forth as necessary.

[2] Swartout, on May 8, 2006, had filed an appearance only in the defendant's driving under the influence case, MV-06-0354066.

I

The defendant first claims that the court erred in admitting a medical record (document), pursuant to § 14-227a (k), that contained the results of his blood alcohol test without requiring any authentication or foundation for the document and that this violated his right to confrontation. He argues that the document was hearsay and that the court should have required that the state satisfy either the hospital record exception; see General Statutes § 4-104; or the business record exception; see General Statutes § 52-180; to the hearsay rule before admitting the document. He also argues that, before the court could admit the results of the blood alcohol test pursuant to § 14-227a (k), the state had to offer evidence "as to who drew the defendant's blood [and] . . . that the blood sample [was] taken in accordance with the regulations adopted under subsection (d) of § 14-227a."[3] In response to the defendant's claim, the state argues in relevant part that the court properly admitted the document because "§ 14-227a (k) is an exception to the hearsay rule that provides an independent basis for admitting the defendant's blood alcohol test [results] without regard to the business record or the hospital record exceptions to the hearsay rule." The state also argues that, although "the statute originally contained requirements as to who had to conduct the blood test in order for it to be admissible . . . in 1999, the legislature determined that this issue was better addressed by regulations promulgated by

[3] Prior revisions of § 14-227a (k) specified who was qualified to take a blood sample from an injured operator. See, e.g., General Statutes (Rev. to 1995) § 14-227a (*l*) (blood alcohol analysis admissible provided in relevant part that "the blood sample was taken by a person licensed to practice medicine in this state, a resident physician or intern in any hospital in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse").

the [c]ommissioner of [p]ublic [s]afety[4] [(commissioner)]. . . . Thus, the legislature amended the statute to allow for the [commissioner] to adopt regulations he deemed necessary as to testing procedures . . . [and] the [commissioner] adopted Regs., Conn. State Agencies § 14-227a-2b, which specifically exempted any blood samples 'collected and analyzed for other purposes, such as medical diagnostic testing,' from the regulatory requirements." (Citations omitted.) Thus, the state argues, "the [commissioner], having been specifically authorized by the legislature to do so, determined that no specific rules or procedures were necessary for samples collected and analyzed for medical diagnostic testing."[5] We agree with the state.

We apply the following standard of review to the defendant's claim. "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary.

[4] The commissioner of public safety now is called the commissioner of emergency services and public protection. See Public Acts 2011, No. 11-51, § 134 (a). For convenience, we simply refer to him as the commissioner.

[5] The defendant, in his reply brief, responds that the state "fails to recognize that if . . . its interpretation of the statute is correct, then our legislature has created a statute that unconstitutionally infringes upon a defendant's due process right to a fair trial and to confront witnesses because it allows the admission of evidence that has not been historically recognized as reliable or trustworthy."

"We have consistently held that every statute is presumed to be constitutional . . . . [T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." (Citations omitted; internal quotation marks omitted.) *Rayhall* v. *Akim Co.*, 263 Conn. 328, 341, 819 A.2d 803 (2003). "A defendant challenging the constitutionality of a statute bears the heavy burden of establishing the statute's invalidity beyond a reasonable doubt." *State* v. *Carolina*, 40 Conn. App. 762, 766, 673 A.2d 562, cert. denied, 237 Conn. 914, 675 A.2d 886 (1996).

In this case, the defendant failed to raise a constitutional challenge to § 14-227a (k) before the trial court, he has failed to provide a constitutional analysis of § 14-227a (k) in his appellate brief and he has not requested *Golding* review. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). Accordingly, we decline to consider the defendant's statement in his reply brief challenging the constitutionality of § 14-227a (k).

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. . . . Thus . . . the function performed by the trial court in issuing its ruling should dictate the scope of review." (Citations omitted.) *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007).

"Hearsay means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted. Conn. Code Evid. § 8-1 (3). Hearsay is generally inadmissible unless an exception in the Code of Evidence, the General Statutes or the rules of practice applies. Conn. Code Evid. § 8-2." (Internal quotation marks omitted.) *State* v. *Foster*, 293 Conn. 327, 334, 977 A.2d 199 (2009).

In the present case, we must consider whether the court properly admitted the document into evidence under § 14-227a (k).[6] For such evidence to be admissible

[6] General Statutes § 14-227a (k) provides: "Seizure and admissibility of medical records of injured operator. Notwithstanding the provisions of subsection (b) of this section, evidence respecting the amount of alcohol or drug in the blood or urine of an operator of a motor vehicle involved in an

and competent under this subsection, a trial court must find that the evidence satisfies each of the four conditions set forth in § 14-227a (k): (1) the blood or urine sample must have been provided for the diagnosis and treatment of the injuries sustained by the operator involved in the motor vehicle accident; (2) if a blood sample was taken from the operator, it must have been taken in accordance with the regulations adopted under § 14-227a (d);[7] (3) a police officer must have demonstrated to a judge of the Superior Court that such officer

accident who has suffered or allegedly suffered physical injury in such accident, which evidence is derived from a chemical analysis of a blood sample taken from or a urine sample provided by such person after such accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for a violation of subsection (a) of this section and shall be admissible and competent in any subsequent prosecution thereof if: (1) The blood sample was taken or the urine sample was provided for the diagnosis and treatment of such injury; (2) if a blood sample was taken, the blood sample was taken in accordance with the regulations adopted under subsection (d) of this section; (3) a police officer has demonstrated to the satisfaction of a judge of the Superior Court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood or urine sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood or urine sample. Such search warrant may also authorize the seizure of the medical records prepared by the hospital in connection with the diagnosis or treatment of such injury."

[7] General Statutes § 14-227a (d) provides: "Testing and analysis of blood, breath and urine. The [commissioner] shall ascertain the reliability of each method and type of device offered for chemical testing and analysis purposes of blood, of breath and of urine and certify those methods and types which said commissioner finds suitable for use in testing and analysis of blood, breath and urine, respectively, in this state. The [commissioner] shall adopt regulations, in accordance with chapter 54, governing the conduct of chemical tests, the operation and use of chemical test devices, the training and certification of operators of such devices and the drawing or obtaining of blood, breath or urine samples *as said commissioner finds necessary* to protect the health and safety of persons who submit to chemical tests and to insure reasonable accuracy in testing results. Such regulations shall not

believed that the operator had been operating a motor vehicle while under the influence of intoxicating liquor, drugs or both and that the chemical analysis of the operator's blood or urine constituted evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both; and (4) that the judge had issued a search warrant for the seizure of the chemical analysis of the operator's blood or urine.

The defendant does not dispute that the blood sample was taken for the diagnosis and treatment of his injuries, that a warrant properly was sought on the basis of an officer's belief that the defendant had been operating a motor vehicle while under the influence of liquor or that a judge properly issued a warrant for the seizure of the chemical analysis of his blood. See General Statutes § 14-227a (k) (1), (3) and (4). Rather, the defendant argues that the second requirement of § 14-227a (k) (2), namely, that the blood sample must have been taken in accordance with the regulations adopted under subsection (d) of § 14-227a, was not met in this case because the commissioner declined to enact regulations to cover instances where blood alcohol testing is done as part of medical diagnosis and treatment. Without contesting the constitutionality of § 14-227a (k),[8] however, he also argues that "[t]he admission of the . . . hospital records containing the blood alcohol level violated the defendant's sixth amendment right to confrontation because by merely satisfying the requirement of [§] 14-227a (k) the state did not establish the reliability of blood alcohol tests." We conclude that the court properly determined that the document met the conditions specified in § 14-227a (k) and, therefore, that it

require recertification of a police officer solely because such officer terminates such officer's employment with the law enforcement agency for which certification was originally issued and commences employment with another such agency." (Emphasis added.)

[8] See footnote 6 of this opinion.

was admissible and competent evidence. See General Statutes § 14-227a (k) ("*evidence* respecting the amount of alcohol . . . in the blood . . . of an operator of a motor vehicle involved in an accident who has suffered . . . physical injury in such accident . . . *shall be admissible and competent* in any subsequent prosecution thereof if [four conditions are met]" [emphasis added]); see also *State* v. *Kirsch*, 263 Conn. 390, 408, 820 A.2d 236 (2003) (testing that complies with regulatory requirements, as promulgated pursuant to commissioner's authority under § 14-227a [d] "is deemed to be competent evidence"); *State* v. *Stern*, 65 Conn. App. 634, 641, 782 A.2d 1275 (testing that complies with commissioner's regulations under § 14-227a [d] "is always admissible if obtained in conformity with [the statutory] requirements" [internal quotation marks omitted]), cert. denied, 258 Conn. 935, 785 A.2d 232 (2001).

Although prior revisions of § 14-227a specified who was qualified to take a blood sample from an injured operator; see, e.g., General Statutes (Rev. to 1995) § 14-227a (*l*) (blood alcohol analysis admissible provided in relevant part that "the blood sample was taken by a person licensed to practice medicine in this state, a resident physician or intern in any hospital in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse"); the legislature, pursuant to Public Acts 1999, No. 99-255, § 1 (c), decided that this issue was better left to the commissioner to regulate, and it required that the blood test be taken "in accordance with the regulations adopted under subsection (e) [now subsection (d)] . . . ." That subsection of § 14-227a gave the commissioner the discretion to adopt regulations "as said commissioner finds necessary to protect the health and safety of persons who submit to chemical tests and to insure reasonable accuracy in testing results." See Public Acts 1999, No. 99-255, § 1 (e).

In accordance with the legislature's directive, the commissioner has adopted §§ 14-227a-1b to 14-227a-10b of the Regulations of Connecticut State Agencies to regulate forensic chemical testing of blood, breath and urine taken from motor vehicle operators. Pursuant to § 14-227a-2b of the regulations, however, "[s]ections 14-227a-1b to 14-227a-10b . . . [of the regulations do] not apply to samples collected and analyzed for other purposes, such as medical diagnostic testing." Therefore, in accordance with the discretion vested in him by the legislature, as codified in § 14-227a (d), permitting the commissioner to adopt regulations as he "finds necessary," the commissioner determined that it is not necessary to adopt regulations for samples collected and analyzed for the purpose of medical diagnostic testing.

Although the defendant argues that the court improperly admitted the document because the commissioner failed to adopt regulations when he was directed to do so, we conclude that the legislature, although directing the commissioner to adopt regulations governing chemical testing of blood and urine, specifically gave the commissioner the discretion to adopt regulations as the commissioner found necessary. Section 14-227a (k) specifically states that evidence of the chemical analysis results is *admissible and competent evidence* provided the conditions set forth within the statute are met. General Statutes § 14-227a (k) ("evidence respecting the amount of alcohol or drug in the blood or urine of an operator of a motor vehicle involved in an accident who has suffered or allegedly suffered physical injury in such accident . . . *shall be admissible and competent* in any subsequent prosecution . . . if [four conditions are met]" [emphasis added]). Accordingly, the defendant has failed to prove that the court improperly admitted the document pursuant to § 14-227a.

II

The defendant next claims that there was insufficient evidence to support any of his convictions. He claims

that the state failed to prove (1) "the element of operation for the charge[s] [under] . . . §§ 14-227a and 14-215 (c)"; (2) that he "attempted to 'induce' a 'witness' to testify falsely for the charge of tampering with a witness"; and (3) that "the defendant knew the falsity of Figella's statement for the crimes of conspiracy to fabricate evidence and conspiracy to make a false statement in the second degree." We are not persuaded.

The defendant concedes that some of his insufficiency of the evidence claims were not preserved at trial. We conclude, nonetheless, that they are entitled to review because "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]." (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 73, 3 A.3d 783 (2010). In *State* v. *Roy*, 233 Conn. 211, 658 A.2d 566 (1995), our Supreme Court explained that a defendant need not invoke the guidelines of *Golding* to be entitled to review of unpreserved insufficiency of the evidence claims because "[i]t is an essential of the due process guaranteed by the [f]ourteenth [a]mendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof . . . ." (Internal quotation marks omitted.) Id., 212–13.

"In reviewing an evidentiary insufficiency 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 [finder 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. *Rodriguez-Roman*, supra, 297

Conn. 73–74. We consider each of the defendant's claims in turn.

A

The defendant claims that there was insufficient evidence to support his conviction on the charges of operating a motor vehicle while under the influence of intoxicating liquor and operating a motor vehicle while his license was under suspension because the state failed to prove the element of operation of a motor vehicle for each of the charged offenses. We are not persuaded.

"Section 14-215 prohibits any person from operating a motor vehicle in Connecticut if that person's license or operating privileges have been suspended, revoked, or refused for any reason." *State* v. *Cook*, 36 Conn. App. 710, 713, 653 A.2d 829 (1995). "General Statutes § 14-227a (a) provides in relevant part: 'No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both.' . . . Section 14-227a (a) prohibits operating a motor vehicle while under the influence rather than merely driving a motor vehicle while under the influence. It is well settled that 'operating' encompasses a broader range of conduct than does 'driving.' " *State* v. *Haight*, 279 Conn. 546, 551, 903 A.2d 217 (2006).

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Adams*, 225 Conn. 270, 276–77, 623 A.2d 42 (1993). Although the evidence leading to the conclusion that the defendant had been the operator of the motor vehicle may have been circumstantial in this case, it is fundamental that "[t]here

is no distinction between direct and circumstantial evidence [so] far as probative force is concerned . . . . In fact, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. . . . In a case involving circumstantial evidence, we must examine the cumulative impact of a multitude of factors in order to determine whether the identification of the defendant has been satisfactorily established by the circumstantial evidence. . . . If evidence, whether direct or circumstantial, should convince a jury beyond a reasonable doubt that an accused is guilty, that is all that is required for a conviction." (Citations omitted; internal quotation marks omitted.) *State* v. *Teti*, 50 Conn. App. 34, 39, 716 A.2d 931, cert. denied, 247 Conn. 921, 722 A.2d 812 (1998).

The defendant claims that the state's evidence was insufficient to prove beyond a reasonable doubt that he was the person who operated the vehicle involved in the accident. Although there was no direct evidence that the defendant had been driving the vehicle at the time of the accident, we conclude that the jury reasonably could have inferred this fact on the basis of the circumstantial evidence presented at trial.

The evidence demonstrated that when the emergency responders arrived at the accident scene, the vehicle, which was owned by the defendant's fiancée, was on its roof, with its windows broken out, in the middle of the roadway. The defendant was inside the vehicle, unconscious. There were no signs that another person had been in the vehicle with the defendant, and no other person was found in the area. The vehicle was totaled after hitting and knocking down a nearby telephone pole, had flipped over onto its roof and, in order to extricate the defendant from the vehicle, the emergency responders had to use hand tools to open the vehicle doors because the door handles would not work. We conclude that, on the basis of this evidence,

the jury reasonably could have determined that the defendant had been operating the motor vehicle. Accordingly, "operation" being the only challenged element of the crimes of operating a motor vehicle while under the influence of intoxicating liquor and operating a motor vehicle while his license was under suspension, we conclude that the jury reasonably found the defendant guilty of these crimes beyond a reasonable doubt.

B

The defendant claims that "[t]he state failed to prove [that] the defendant attempted to 'induce' a 'witness' to testify falsely for the charge of tampering with a witness [pursuant to] § 53a-151." The defendant argues that there was no evidence that he induced, attempted to induce or directly caused Figella to testify falsely. He also argues that Figella could not be considered a witness within the meaning of the statute. We disagree.

Section 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." The defendant does not contest the requirement that the state prove that he believed that an official proceeding was pending or was about to be instituted. Rather, he challenges the state's proof that Figella was a witness and that the defendant induced or attempted to induce Figella to testify falsely. The defendant argues that "the evidence before the jury had to be sufficient for it to conclude that the defendant's conduct was intended to *prompt* Figella to testify falsely at [the] defendant's trial." (Emphasis added.) He also argues that the evidence needed to show that he "*directly cause*[*d*]" the false testimony. (Emphasis in original.) Although we agree that the state needed to prove that

the defendant intended to prompt and directly cause Figella to testify falsely, we conclude that the state met its burden of proof in this case.

"The language of § 53a-151 plainly warns potential perpetrators that the statute applies to any conduct that is intended to prompt a witness to testify falsely . . . . The legislature's unqualified use of the word 'induce' clearly informs persons of ordinary intelligence that any conduct, whether it be physical or verbal, can potentially give rise to criminal liability. Although the statute does not expressly mandate that the perpetrator intend to cause the witness to alter or withhold his testimony, this implicit requirement is apparent when the statute is read as a whole. . . . The legislature's choice of the verb 'induce' connotes a volitional component of the crime of tampering that would have been absent had it employed a more neutral verb such as 'cause.' Furthermore, the statute's application to unsuccessful, as well as successful, attempts to induce a witness to render false testimony supports our conclusion that the statute focuses on the mental state of the perpetrator to distinguish culpable conduct from innocent conduct." (Citations omitted.) *State* v. *Cavallo*, 200 Conn. 664, 668–69, 513 A.2d 646 (1986).

We explained in *State* v. *Coleman*, 83 Conn. App. 672, 678–80, 851 A.2d 329, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), cert. denied, 544 U.S. 1050, 125 S. Ct. 2290, 161 L. Ed. 2d 1091 (2005): "The clear import of [the] language [set forth in *Cavallo*] is that the respective mental states of the [witness], i.e., [his or her] purported willingness to testify falsely, is irrelevant to whether the defendant's conduct falls within the statutory bounds of proscribed conduct. The Supreme Court made clear that liability under § 53a-151 hinges on the mental state of the perpetrator in engaging in the conduct at issue—his intent to induce a witness to testify

falsely—not on whether he must overcome by coercive means the will of a witness reluctant to do so.

"As the result of our Supreme Court's lucid explanation of the type of conduct prohibited under § 53a-151, there exist[s] a judicial gloss with respect to the statute, of which the defendant must be presumed to have been aware, to the effect that the statute can be violated even though a witness may be independently willing to provide false testimony."

Here, although the defendant might be correct that the evidence tended to show that Figella, initially, had approached the defendant with the idea of providing false information as a way to help the defendant, it was the defendant who put Figella in touch with Swartout for the sole purpose of providing a false affidavit for the benefit of the defendant, and the defendant was right next to Figella when Figella signed the false affidavit in the presence of Swartout. Further, Figella testified at the defendant's trial that he and the defendant "had talked about what would need to be said . . . ." Additionally, Figella stated that he had discussed with the defendant that if, as a result of providing a false affidavit, Figella was required to pay for the broken telephone pole, the defendant actually would cover the cost.

"[A] defendant is guilty of tampering with a witness only if he intends that his conduct directly cause a particular witness to testify falsely or to refrain from testifying at all. So interpreted, § 53a-151 warns the public that it applies only to conduct intentionally undertaken to undermine the veracity of the testimony given by a witness." *State* v. *Cavallo*, supra, 200 Conn. 672. On the basis of the evidence presented, we conclude that the jury reasonably could have concluded that the defendant intentionally engaged in conduct meant to undermine the veracity of Figella's testimony.

The defendant also argues, however, that Figella cannot be considered a "witness," as that word is used in § 53a-151. He contends that, pursuant to General Statutes § 53a-146 (6), "[a] witness . . . is any person summoned, or *who may be summoned*, to give testimony in an official proceeding."[9] (Emphasis in original; internal quotation marks omitted.) He argues that Figella knew nothing about the accident, and, therefore, he was not someone who would have been summoned to appear.[10] The state, although agreeing with the definition set forth by the defendant, responds that, once the defendant and Figella began discussing the defendant's case, Figella became someone "who may be summoned" to give testimony in an official proceeding. We agree with the state.

Section 53a-151 (a) provides in relevant part: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending . . . he induces or attempts to induce a witness to testify falsely . . . ." In *Cavallo*, the witness with whom the defendant tampered was a participant in the activities that the defendant sought to cover up. *State* v. *Cavallo*, supra, 200 Conn. 665. Following the defendant's argument, and pursuant to *Cavallo*, such witness was a "person summoned, or *who may be summoned*, to give testimony in an official proceeding." (Emphasis in original; internal quotation marks omitted.) Likewise, in this case, once Figella said he would be willing to accept responsibility for the accident, and the defendant and Figella came

[9] "An 'official proceeding' is any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1).

[10] Although Figella may not have had direct knowledge of the accident, he did have direct knowledge of the conspiracy between the defendant and him, and of the falsity of the affidavit he provided to Swartout for dissemination to Cloutier.

up with a story "about what would need to be said," Figella and the defendant became participants in an attempted cover-up of the defendant's offenses, and Figella became a person likely to be summoned, or "*who may be summoned*, to give testimony in an official proceeding." (Emphasis in original; internal quotation marks omitted.) The defendant's actions thereafter, including his participation in Figella's false affidavit, constituted the offense of tampering with a witness.

C

The defendant also claims that "the state failed to prove the defendant knew the falsity of Figella's statement for the crimes of conspiracy to fabricate evidence and conspiracy to make a false statement in the second degree." He argues that "[i]n order for the jury to reasonably conclude [that] the defendant knew the falsity of . . . Figella's version of [the] car accident, it had to first conclude [that] the defendant knew what had occurred that night . . . [and] [t]he jury in this case had no evidence before it . . . [that] the defendant knew Figella's statement was false." The state responds in relevant part that the facts clearly demonstrate that the defendant knew that Figella's statement, namely, the affidavit, was false. We agree with the state.

Section 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

Section 53a-157b (a) provides: "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."

Section 53a-155 (a) provides in relevant part: "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he . . . (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding."

In part I of this opinion, we determined that the jury had before it sufficient evidence to have concluded, beyond a reasonable doubt, that the defendant had been operating the vehicle at the time of the accident. We further concluded in part II B of this opinion that "although the defendant might be correct that the evidence tended to show that Figella, initially, had approached the defendant with the idea of providing false information as a way to help the defendant, it was the defendant who put Figella in touch with Swartout for the sole purpose of providing a false affidavit for the benefit of the defendant, and the defendant was right next to Figella when Figella signed the false affidavit in the presence of Swartout. Further, Figella testified at the defendant's trial that he and the defendant 'had talked about what would need to be said . . . .' Additionally, Figella stated that he had discussed with the defendant that if, as a result of providing a false affidavit, Figella was required to pay for the broken telephone pole, the defendant actually would cover the cost." On the basis of this evidence and the reasonable inferences drawn therefrom, we conclude that the jury reasonably could have found, beyond a reasonable doubt, that the defendant was guilty of conspiring with Figella to fabricate evidence and to make a false statement.

III

The defendant claims that the court erred in granting Swartout's motion to withdraw "in contravention of [the] defendant's right to counsel of choice under the sixth amendment [to the United States constitution]." He argues that, although Swartout filed the motion to withdraw, the court's ruling was more akin to a disqualification of counsel because it was based on the state's assertion that it likely would call Swartout as a witness in the case because he had met with Figella and prepared Figella's affidavit. The defendant requests review of this claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40.[11] The state argues that Swartout's motion to withdraw was not akin to a disqualification because it was Swartout who stated that he had a conflict of interest. Furthermore, the state argues, the defendant's sixth amendment right to counsel was not violated and the court did not abuse its discretion in granting Swartout's motion because the court properly found good cause for counsel's withdrawal. We agree with the state.

"Decisions regarding the withdrawal of counsel are evaluated under an abuse of discretion standard. . . . The trial judge is the arbiter of the many circumstances which may arise during the trial in which his [or her] function is to assure a fair and just outcome." (Citations omitted; internal quotation marks omitted.) *State* v. *Fernandez*, 254 Conn. 637, 647–48, 758 A.2d 842 (2000),

[11] 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." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001). "[T]he right to counsel of one's choice is not without limitation. See, e.g., *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) ('[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects'). We never have held that the right to counsel necessarily encompasses the right to a specific attorney. Thus, even if there were some evidence in the record to establish that [a particular attorney] was the defendant's counsel of choice, that interest would have to be balanced 'against the need to preserve the highest ethical standards of professional responsibility.' *United States* v. *Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982); see also *United States* v. *Collins*, 920 F.2d 619, 626 (10th Cir. 1990), cert. denied, 500 U.S. 920, 111 S. Ct. 2022, 114 L. Ed. 2d 108 (1991) ('[c]ourts . . . must balance a defendant's constitutional right to retain counsel of his [or her] choice against the need to maintain the highest standards of professional responsibility')." *State* v. *Fernandez*, supra, 651. "Without some indication that the trial court unreasonably or arbitrarily interfered with [the] defendant's right to counsel of choice . . . [we conclude that] reversal is appropriate only when [the] defendant identifies specific prejudice resulting from [the] denial of preferred counsel, *and* when such prejudice renders the trial fundamentally unfair." (Emphasis in original; internal quotation marks omitted.) Id., 652. "[W]hen counsel makes a timely assertion of a conflict of interest, the trial court is under an affirmative obligation to make an adequate inquiry on the record to establish whether there is a conflict of interest." *State* v. *Martin*, 201 Conn. 74, 83, 513 A.2d 116 (1986).

The defendant argues that he was denied his counsel of choice in violation of the sixth amendment. Citing to *State* v. *Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003),

cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004), he contends that there only was a "potential conflict of interest" in this case and that such potential was not enough to disqualify Swartout. We disagree with the defendant's contention that the court effectively disqualified Swartout in this case.[12]

The record reveals that on May 8, 2006, Swartout filed an appearance in the defendant's driving under the influence case, MV-06-0354066. In relation to that case, on August 22, 2006, Swartout prepared and signed Figella's affidavit, which affidavit later was alleged to contain false information. On August 8, 2007, because of his involvement with the preparation and signing of the false affidavit, Swartout filed a motion to withdraw from his representation of the defendant because of a potential conflict of interest. The court, *T. Sullivan*, *J.*, considered Swartout's motion that same day. Swartout explained to the court that there were other charges pending against the defendant and that he could not represent the defendant on those charges. He stated that he was "not necessarily really wanting to withdraw [his] appearance for reasons other than the potential for . . . a conflict somewhere along the line where [he] would be a witness and an attorney . . . ." He also stated that such a conflict, or appearance of a conflict, "would preclude [him] from adequately representing [the defendant] in the event [the case] does go to trial." The defendant voiced an objection to Swartout's motion because he did not have enough money to hire another attorney, although he was looking for one. The defendant explained that he was speaking with other attorneys regarding possible representation. The court explained to the defendant that it was possible that Swartout would be called as a witness because he had

[12] The record makes clear that it was the defendant, through his actions in involving Swartout in the preparation and dissemination of the false affidavit, who effectively caused Swartout to be disqualified in this case.

drafted Figella's affidavit. The defendant stated that he understood that. He also expressed a desire that attorney T. R. Paulding represent him in all pending cases. The court then continued the matter until September 12, 2007, to give the defendant time to work out a solution.

On September 12, 2007, Judge Sullivan again considered Swartout's motion to withdraw. At that hearing, the defendant acknowledged to the court that he was in the process of securing Paulding's representation on the driving under the influence case, as well as on another case. He also acknowledged that he had hired attorney Gerald Klein to represent him in yet another case. The court, again, continued the matter to give the defendant additional time to secure alternate counsel.

On October 10, 2007, Judge Sullivan held another hearing on Swartout's motion to withdraw. The defendant explained that, although Paulding was willing to accept the case, his fees were too high. The court specifically asked the defendant what he wanted to do. The defendant requested more time to find another attorney. The court agreed and continued the matter until November 7, 2007.

At the November 7, 2007 hearing, Judge Sullivan explained to the defendant that there had been many, many continuances in the cases pending,[13] specifically, twelve continuances on one file and twenty-one continuances on another, and that the cases would be placed on the ready jury list. Judge Sullivan also explained to the defendant that he would be given at least forty-eight hours notice of trial and that, when he was able to secure another attorney, the attorney should file an appearance with the court. The court then granted Swartout's motion to withdraw, and it directed that the

[13] The cases pending before the court were docket numbers MV-06-0354066 and CR-07-0143125. On June 17, 2008, these cases were consolidated.

clerk's office notify Swartout to give the defendant his file. The defendant thanked the court and wished Judge Sullivan a "[h]appy Thanksgiving."[14]

It is clear from our review of the record in this case that the defendant's initial objection to Swartout's motion to withdraw had less to do with the defendant's strong desire to have Swartout represent him and more to do with the defendant's desire to have more time to secure alternate counsel. The defendant understood and agreed with the court that it was likely that Swartout would be called as a witness in the driving under the influence case if that case went to trial. Judge Sullivan was more than understanding of the defendant's position, and he granted numerous continuances to the defendant. These continuances "served as a reasonable opportunity to retain new counsel, which is all that the sixth amendment demands in this context. See *United States* v. *Hughey*, 147 F.3d 423, 432–33 (5th Cir.), cert. denied, 525 U.S. 1030, 119 S. Ct. 569, 142 L. Ed. 2d 474 (1998)." *State* v. *Fernandez*, supra, 254 Conn. 650.

There is no indication in the record that Swartout remained the defendant's counsel of choice after the defendant understood that it was likely Swartout would be called as a witness against him. The defendant merely wanted more time, and Judge Sullivan gave him considerably more time to find alternate counsel. After a careful review of the record in this case, we conclude that the court's decision to grant defense counsel's motion to withdraw was not an abuse of discretion, nor did it deprive the defendant of his "right to counsel of choice under the sixth amendment" to the United States constitution.

[14] The record also reveals that, on May 20, 2008, attorney Ronald Johnson filed an appearance on the defendant's behalf. When trial commenced on January 29, 2009, both Johnson and attorney Andrew Cates were representing the defendant at trial.

IV

The defendant claims that the court erred in convicting him of conspiracy to commit false statement in the second degree in violation of § 53a-157b,[15] and of conspiracy to fabricate physical evidence in violation of § 53a-155,[16] because these multiple convictions violated the constitutional prohibition against double jeopardy.[17] In his main brief, the defendant argues that the appropriate remedy, pursuant to *State* v. *Chicano*, 216 Conn. 699, 724–25, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), for such a violation is to remand the matter to the trial court with direction that it merge the two conspiracy counts and resentence the defendant. The defendant seeks review of his claim pursuant to *Golding*, and the state agrees with the defendant's claim and his suggested remedy.

In his reply brief, however, the defendant argues that *Chicano* should be reversed and that he was incorrect in his main brief because, pursuant to *Rutledge* v. *United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), his conviction for conspiracy to commit false

[15] General Statutes § 53a-157b provides in relevant part: "(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. . . ."

[16] General Statutes § 53a-155 provides in relevant part: "(a) A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he . . . (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding. . . ."

[17] "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . This constitutional provision is applicable to the states through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 172 n.39, 869 A.2d 192 (2005).

statement should be *vacated and dismissed*, and the matter should be remanded to the trial court for resentencing. We conclude that we are bound by *State* v. *Chicano*, supra, 216 Conn. 724–25, and its progeny, including *State* v. *Padua*, 273 Conn. 138, 171–73, 869 A.2d 192 (2005), and we cannot revisit for purposes of reexamination or reevaluation the precedent established by our Supreme Court. See *State* v. *Cecarelli*, 32 Conn. App. 811, 826 n.1, 631 A.2d 862 (1993) (as intermediate appellate court, we cannot revisit Supreme Court holding in *Chicano*); see also *State* v. *Polanco*, 126 Conn. App. 323, 339 and n.8, 11 A.3d 188 (relying on *Chicano* and its progeny in declining to consider defendant's claim that one conviction should be vacated rather than merged), cert. granted, 300 Conn. 933, 17 A.3d 69 (2011); but see *State* v. *Johnson*, 137 Conn. App. 733, 756, 49 A.3d 1046 (2012). Nevertheless, we also conclude that the defendant's conviction on both conspiracy counts violates the constitutional prohibition against double jeopardy. Accordingly, we agree with the state that, as charged, the conviction of conspiracy to commit false statement, a class A misdemeanor, must be merged with the conviction of conspiracy to fabricate physical evidence, a class D felony, and the sentence on the conviction of conspiracy to commit false statement must be vacated and the defendant must be resentenced.

Where a defendant is convicted of two counts of conspiracy that arise from the same agreement, resulting in two sentences, the defendant's rights under the double jeopardy clause have been violated. *State* v. *Padua*, supra, 273 Conn. 172. The appropriate remedy for such a constitutional violation, pursuant to *State* v. *Howard*, 221 Conn. 447, 604 A.2d 1294 (1992), and *State* v. *Chicano*, supra, 216 Conn. 699, is to combine the conspiracy convictions, to vacate the sentence for one of the offenses, and to sentence the defendant only

for the remaining offense, reflecting the intent of the sentencing court. *State* v. *Padua*, supra, 172, 173–74.

The state concedes, and we agree, that, in this case, the defendant was charged with two conspiracies arising from a single unlawful agreement. The information charging the defendant with both crimes alleges that both conspiracies were entered into on the same date, in the same location, with the same person: "[A]t various times and locations including, but not limited to, the [t]own of Enfield on or about August 22, 2006, [the defendant] . . . did agree with another person . . . Figella to cause the performance of such conduct and either one of them committed an overt act in pursuance of the conspiracy, to wit . . . Figella swore to and executed a false affidavit that served to exculpate [the defendant] in pursuance of the conspiracy . . . ." "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. . . . The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . . For such a violation, only the single penalty prescribed by the statute can be imposed." (Internal quotation marks omitted.) *State* v. *Padua*, supra, 273 Conn. 173. Thus, it is clear that the defendant's multiple conspiracy convictions must be merged and his sentence on one of them must be vacated. "[W]hen deciding which of two sentences to vacate when both cannot stand, the determinative factor is the intention of the sentencing judge." (Internal quotation marks omitted.) Id. In this case, the court sentenced the defendant to a consecutive term of five years imprisonment, execution suspended after three years, followed by three years of probation, on the

felony charge of conspiracy to fabricate physical evidence, and the court sentenced the defendant to a consecutive term of one year imprisonment, execution suspended, followed by two years of probation, on the misdemeanor charge of conspiracy to make a false statement in the second degree. We conclude that the sentencing court intended for the sentence on the conviction of conspiracy to fabricate physical evidence to control. See id., 174. Accordingly, on remand, we direct the trial court to merge the conviction on the two conspiracy charges, to vacate the defendant's sentence on the conviction of conspiracy to make a false statement in the second degree and to sentence the defendant only for conspiracy to fabricate physical evidence.

V

The defendant's final claim is that the court's jury instructions on both conspiracy counts improperly misled the jury on the element of intent because the court failed to inform the jury that the state had to prove that the defendant knew that Figella would sign an affidavit containing false information with the intent that the affidavit would be given to the state's attorney to mislead her or him. Although admitting that he did not submit a request to charge, he contends that counsel did object to the court's proposed conspiracy charge, but, he, nevertheless, requests review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. The state argues that the defendant waived this claim and, in the alternative, that the court properly instructed the jury on the element of intent. We conclude that the defendant waived the claim of instructional error.

The defendant did not submit proposed jury instructions to the court. On the morning of February 2, 2009, before testimony resumed, the court gave the parties a written copy of its proposed instructions. Following

witness testimony, the court recessed at 1:20 p.m., indicating that it would give counsel "some time this afternoon to review what [it had] put together and [that it would] have a meeting th[at] afternoon regarding any exceptions that [counsel] might see with respect to the charge and any additions that [they] think might be appropriate or other corrections that may be appropriate with respect to the charge." With the agreement of the state and defense counsel, the court stated that it would hold the charging conference in chambers at 3:15 p.m. The next day, the court stated that the charging conference had gone forward the previous afternoon and that the state had agreed at the conference to withdraw the charge of conspiracy to commit forgery in the third degree against the defendant. The court also stated that it had adopted a few changes to the proposed jury instructions that had been requested by the state and by defense counsel. Before proceeding to hear argument on the defendant's motion for judgments of acquittal,[18] the court then asked if it was correct that there were no disagreements on the charge. Defense counsel and counsel for the state responded that the court was correct. Following the court's charge to the jury, it asked counsel if there were any exceptions to the charge. Defense counsel responded that he had a concern about the definition of conspiracy, and the court explained that it understood the concern but that it had used the standard charge. Counsel voiced no other exceptions or concerns, nor did he indicate any objections to the court's instructions on the intent elements of the conspiracy charges.

"A defendant in a criminal prosecution may waive one or more of his or her fundamental rights. . . . [I]n the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . [A] constitutional claim

[18] The court denied the defendant's motion for judgments of acquittal.

that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial . . . . This court has stated that among the rights that may be waived by the action of counsel in a criminal proceeding is the right of a defendant to proper jury instructions." (Citations omitted; internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 467, 10 A.3d 942 (2011); see also *State* v. *Paige*, 304 Conn. 426, 435, 40 A.3d 279 (2012) ("waiver of the right to require the state to prove each element of a crime may be made by counsel" [internal quotation marks omitted]); *State* v. *Darryl W.*, 303 Conn. 353, 367 n.15, 33 A.3d 239 (2012) (no merit to defendant's "claim that the right to proper instruction on the elements of an offense is fundamental and therefore not waivable by counsel").

"[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83. "[A] defendant will not be deemed to have waived [an instructional] claim unless the court has provided counsel with a copy of the proposed instructions and a meaningful opportunity for review and comment, which can be determined in any given case only by a close examination of the record. The significance of a *meaningful opportunity* for review and comment cannot be underestimated." (Emphasis added.) Id., 495 n.28.

The defendant argues that he did not waive the right to review of this claim because the few hours given between the court's recess and the charging conference did not amount to a "meaningful opportunity" to review the court's proposed instructions and that he did raise a concern about the court's jury charge on conspiracy after the court fully instructed the jury. We are not persuaded.

The court gave defense counsel a written copy of its proposed instructions on the morning of February 2, 2009. When the court recessed at 1:20 p.m., the parties agreed to meet for the charging conference at 3:15 p.m. in chambers, and they did so. The next day, the court acknowledged that it made some changes to its proposed instructions on the basis of requests from defense counsel and the state. It also stated that the state had agreed, during the conference, to amend its information to omit one of the charges against the defendant. During the court's discussion with counsel regarding the changes it had made on the basis of the parties' suggestions, defense counsel did not voice any objections, and he acknowledged that there was no disagreement as to the court's changes. Furthermore, even after the jury was instructed, defense counsel, although stating that he had a concern about the *definition* of conspiracy, did not voice any objection to the court's instruction on the *intent elements* of the conspiracy charges.[19]

Even if we were to agree with the defendant's assertion that the time given to review the instructions on the afternoon of February 2, 2009, did not amount to a "meaningful opportunity," defense counsel had the entire evening to further review the instructions and

[19] In order to preserve an objection to a proposed jury instruction, "the defendant must plainly put the trial court on notice as to the specific basis for his objection; see Practice Book § 60-5; *State* v. *Jose G.*, 290 Conn. 331, 342–43, 963 A.2d 42 (2009) . . . ." *State* v. *Coleman*, 304 Conn. 161, 174, 37 A.3d 713 (2012).

could have raised any concerns to the court the next day. See *State* v. *Fontaine*, 134 Conn. App. 224, 231, 40 A.3d 331 (counsel, who was given overnight to review proposed jury charge, had meaningful opportunity to do so), cert. denied, 304 Conn. 926, 41 A.3d 1051 (2012). Defense counsel indicated, however, that he had no disagreement with the court's instructions and, even when he did raise a concern following the instructions, he stated only that his concern was with the *definition* of conspiracy. Accordingly, we conclude that the defendant implicitly has waived his right to review of this claim.

The judgment in the second case is reversed in part and the case is remanded with direction to merge the conviction of conspiracy to commit false statement with the conviction of conspiracy to fabricate physical evidence, to vacate the sentence on the conviction of conspiracy to commit false statement and to resentence the defendant on the conviction of conspiracy to fabricate physical evidence. The judgments are affirmed in all other respects.

In this opinion the other judges concurred.

RICHARD LAPOINTE *v.* COMMISSIONER OF CORRECTION
(AC 33452)

Alvord, Bear and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with the death of the eighty-eight year old victim from strangulation and smoke inhalation, sought habeas relief in a second amended petition for a writ of habeas corpus, in which he alleged claims of actual innocence and ineffective assistance by his prior habeas counsel, V. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. The petitioner claimed, inter alia, that V had provided ineffective assistance

in failing to pursue a claim at the first habeas trial that the petitioner was deprived of a fair trial as a result of the state's suppression of certain allegedly exculpatory material, which consisted of a note written by a detective based on his conversations with fire marshals on which the detective indicated a possible time that the fire could have been burning before responding firefighters arrived at the victim's apartment. Although the habeas court ruled that the note was potentially exculpatory and that it had been inadvertently suppressed by the state, that court concluded that the burn time referenced in the note was not material and that the petitioner was not prejudiced by V's failure to pursue the claim at the first habeas trial because none of the experts could determine the precise time that the fire was set. *Held*:

1. The habeas court properly rejected the petitioner's claim of actual innocence, which was based on new DNA testing conducted on a pair of men's gloves and a pubic hair recovered from the crime scene that he claimed excluded him as the perpetrator of the crimes for which he was convicted: that court properly determined that the petitioner failed to meet his burden of proof because none of the DNA evidence rose to the level of being clear and convincing evidence of factual innocence, as the DNA testing did not exonerate the petitioner with respect to the gloves, particularly given the fact of potential contamination by an individual who had put the gloves on his own hands, and although the DNA analysis of the pubic hair excluded the petitioner as its donor, the evidence did not clearly and convincingly demonstrate that its donor was the perpetrator; accordingly, the absence of DNA or other evidence connecting the petitioner to the gloves and the pubic hair did not amount to proof of actual or factual innocence under the circumstances here.
2. This court concluded that the state's suppression of the note and V's failure to pursue that claim in the habeas proceeding prejudiced the petitioner and deprived him of a fair trial, and, therefore, a new trial was warranted: the petitioner's trial counsel testified at the habeas trial that had the burn time information referenced in the note been disclosed prior to the petitioner's criminal trial, their trial strategy would have changed in that they would have used the information to buttress his alibi defense and that the information would have been critical to his defense because they would have called his former wife to testify that the petitioner was at home with her when the fire was set; accordingly, because there was a reasonable probability that the result of the criminal trial would have been different had the note been disclosed to trial counsel prior to trial, the nondisclosure of the note, which was exculpatory and material, affected the overall fairness of the trial so as to undermine confidence in the jury's verdict, and V was therefore deficient in failing to pursue that claim at the first habeas trial, and the petitioner was prejudiced by V's failure to do so.

Argued May 18—officially released October 9, 2012

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, *Nazzaro*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Reversed in part; new trial; appeal dismissed in part.*

Paul Casteleiro, pro hac vice, with whom was *W. James Cousins*, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, *Michael O'Hare*, senior assistant state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Richard Lapointe, appeals from the judgment of the habeas court denying his second amended petition for a second writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his actual innocence and ineffective assistance of counsel claims. We conclude that the court properly determined that the petitioner failed to prove his actual innocence claim, but we agree with the petitioner that the state's suppression of certain material evidence deprived him of a fair trial and that he was prejudiced by his prior habeas counsel's failure to pursue that issue at the first habeas proceeding. Accordingly, we reverse in part the judgment of the habeas court and order a new trial.

The record reveals the following facts and procedural history. On March 8, 1987, the petitioner, his wife and their son visited the victim, Bernice Martin, who was his wife's eighty-eight year old grandmother, from approximately 2 p.m. to 4 p.m. at her apartment in Manchester. It was an approximate ten to fifteen minute

walk from where the petitioner and his family lived to the victim's apartment. At approximately 5:45 p.m. that afternoon, Nathalie M. Howard, the victim's daughter, was driving through the neighborhood. She saw the victim walking from her apartment toward a garbage can. Later that evening, Howard telephoned the victim twice, but there was no response. She first called at approximately 7:55 p.m. and tried again shortly after 8 p.m. Being concerned, Howard telephoned the petitioner's residence, and the petitioner offered to walk over to the victim's apartment to check on her well-being.

At 8:27 p.m. that evening, the petitioner dialed 911 to report a fire at the victim's apartment. Manchester firefighters responded almost immediately and removed the victim from the smoke-filled apartment. When brought outside, the victim's body was partially clothed. Strips of fabric had been knotted together and tied tightly around her neck. She also had other fabric tied loosely about her wrists and her abdomen. Paramedics were unable to resuscitate the victim at the scene. She was transported to Manchester Hospital and was pronounced dead shortly after her arrival.

The associate medical examiner, Arkady Katsnelson, performed an autopsy on the victim and determined that she had suffered a three inch deep stab wound to her abdomen and ten less severe stab wounds to her back. He also determined that she had been asphyxiated by pressure to the right side of her neck with a blunt object; she was not manually strangled. Katsnelson observed lacerations and contusions to the victim's vaginal area as well as premortem first and second degree burns on various parts of her body. His conclusion as to the cause of death was a combination of asphyxia by strangulation and smoke inhalation.

The police investigation of the victim's homicide remained open and unresolved for more than two years.

In March, 1989, the case was reassigned to Detective Paul Lombardo. Lombardo decided to reinterview individuals who previously had given statements and asked the petitioner to come to the police station for further questioning on July 4, 1989. The petitioner arrived at the station shortly before 4 p.m. While the petitioner was being interrogated by Lombardo, Detective Michael Morrissey went to the petitioner's home and interviewed his wife, Karen Lapointe, now Karen Martin.[1] Unbeknownst to Karen Martin, Morrissey was wearing a hidden microphone, and their conversation was being monitored and recorded. When Morrissey's two hour interview with Karen Martin concluded, he returned to the police station. By that point in time, the petitioner had given two written statements to Lombardo. The statements, however, lacked detail, and Lombardo asked Morrissey to continue the petitioner's interrogation. Morrissey obtained a third written statement from the petitioner. After more than nine and one-half hours at the police station, the petitioner was told to return to his home. An arrest warrant was issued, and the petitioner was taken into custody on July 5, 1989.

The petitioner was convicted by a jury of capital felony, arson murder, felony murder, murder, arson in the first degree, assault in the first degree, sexual assault in the first degree, sexual assault in the third degree and kidnapping in the first degree.[2] The petitioner was sentenced to life in prison without the possibility of release. On direct appeal, the petitioner claimed that the trial court improperly (1) failed to suppress the oral

[1] The marriage of Karen Martin and the petitioner was dissolved on June 18, 1991, which was prior to his criminal trial in 1992.

[2] "The [petitioner's] convictions of arson murder, felony murder, murder, sexual assault in the first degree and sexual assault in the third degree were combined with his conviction on the capital felony count for purposes of sentencing in order to comport with constitutional double jeopardy protections." *State* v. *Lapointe*, 237 Conn. 694, 695 n.1, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

and written statements he gave to the Manchester police officers, (2) concluded that the police were not required to record electronically all confessions of detained suspects when feasible and (3) found that a state's witness was unavailable at trial and admitted an audio recording of that witness' testimony from a prior hearing. Our Supreme Court affirmed the judgment of conviction. *State* v. *Lapointe*, 237 Conn. 694, 695–96, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

Following his unsuccessful appeal, the petitioner's first habeas counsel, Henry Theodore Vogt, filed a petition for a writ of habeas corpus. Vogt filed several amendments to the petition, and the matter came to trial on February 23, 2000. The petitioner's claims before the first habeas court were as follows: (1) actual innocence premised on the inability of the petitioner physically and intellectually to carry out and to conceal the crimes for which he had been convicted; (2) prosecutorial impropriety in suppressing a notebook that contained Lombardo's notes from the homicide investigation; (3) discrimination by the state on the basis of the petitioner's physical and mental disabilities; (4) ineffective assistance of trial counsel, Attorneys Patrick Culligan and Christopher Cosgrove, for their failure, inter alia, to procure the Lombardo notebook, to retain appropriate experts for the defense at trial and to argue that men's gloves and certain hairs of unknown origin that had been found at the crime scene demonstrated that the petitioner was innocent of the charged crimes; and (5) ineffective assistance of appellate counsel.

After Vogt filed his posttrial brief, Attorney W. James Cousins attempted to file an appearance on behalf of the petitioner in lieu of Vogt's appearance. Vogt objected

pursuant to Practice Book § 3-8.[3] Before the court ruled on Vogt's objection, Cousins filed several motions. Cousins moved to open the evidentiary portion of the trial, moved to admit Paul Casteleiro, an attorney licensed to practice law in New Jersey, as counsel pro hac vice and moved to strike Vogt's posttrial brief. *Lapointe* v. *Commissioner of Correction*, 67 Conn. App. 674, 677, 789 A.2d 491, cert. denied, 259 Conn. 932, 793 A.2d 1084 (2002). Ultimately, the first habeas court ruled that Vogt would remain in the case to file a reply to the respondent's posttrial brief, if he chose to do so, but that his services as counsel to the petitioner would be concluded upon the filing of that reply. Id., 677–78. Further, the court allowed the pleadings that had been filed prematurely by Cousins to remain as part of the court file, granted the motion to admit Casteleiro pro hac vice and denied the request to present additional evidence. Id., 678.

After concluding that the petitioner "failed to prove by the appropriate standards" any of the five claims in his petition, the first habeas court, *Freed*, *J.*, dismissed his first petition for a writ of habeas corpus. The petitioner appealed from the judgment of the first habeas court. Then represented by Cousins and Casteleiro, the petitioner did not contend that the first habeas court improperly dismissed the petition on the basis of the evidence that had been presented to that court. Rather, the petitioner claimed that the first habeas court improperly denied his multiple motions to open the evidentiary portion of the first habeas hearing and failed to grant him a new trial because Vogt had rendered ineffective assistance during that first habeas trial.

[3] Practice Book § 3-8 provides in relevant part: "Unless a written objection is filed within ten days after the filing of an in-lieu-of appearance, the appearance or appearances to be replaced by the new appearance shall be deemed to have been withdrawn and the clerk shall make appropriate entries for such purpose on the file and docket. . . ."

Lapointe v. *Commissioner of Correction*, supra, 67 Conn. App. 678. This court concluded that the first habeas court did not abuse its discretion in refusing to allow additional evidence after the hearing had concluded; id., 679; and further determined that a claim of ineffective assistance of habeas counsel was not properly before the court because an appellate tribunal cannot find facts. Accordingly, the judgment of the first habeas court was affirmed. Id., 679–81.

In August, 2002, the petitioner filed his second petition for a writ of habeas corpus. He alleged that his previous habeas counsel, Vogt, failed to address issues concerning (1) the suppression of exculpatory evidence, (2) the ineffective assistance of his trial counsel and (3) the effect of newly discovered evidence relating to Dandy-Walker Syndrome.[4] *Lapointe* v. *Commissioner of Correction*, 113 Conn. App. 378, 387, 404, 966 A.2d 780 (2009). After the close of the petitioner's case, the respondent commissioner of correction moved for a judgment of dismissal for failure to establish the prima facie elements of the petitioner's claims pursuant to Practice Book § 15-8. The court, *Fuger*, *J.*, granted the motion as to all three counts, and the petitioner appealed from that judgment to this court. Id. We affirmed in part and reversed in part the judgment of dismissal. Specifically, we reversed the judgment on count one as it related to a potentially exculpatory expert opinion contained in a note written by Detective Michael Ludlow (Ludlow note) regarding the burn time of the fire set at the victim's apartment; id., 396–97, 404; and we further reversed the court's judgment on those portions of count two concerning trial counsel's failure to utilize evidence to prove the factual unreliability of the petitioner's inculpatory statements to the police. The case was remanded to the habeas court for further proceedings. Id., 404.

[4] The petitioner has been diagnosed with Dandy-Walker Syndrome.

On remand, Judge Fuger declared a mistrial as to the issues remanded by this court and disqualified himself from any further proceedings in the petitioner's matter. The case then was assigned to the present habeas court (second habeas court), *Nazzaro*, *J.*, to adjudicate the remanded claims. With permission of the second habeas court, the petitioner was allowed to amend his second petition for a writ of habeas corpus to include a claim of actual innocence based on newly discovered DNA evidence.[5] The operative three count complaint set forth the following three claims: (1) Vogt provided ineffective assistance as first habeas counsel by failing to raise as an issue the state's suppression of its arson expert's opinion that the burn time of the fire set in the victim's apartment was between "30–40 mins. Poss."; (2) Vogt provided ineffective assistance as habeas counsel by failing to prove that Culligan and Cosgrove, the petitioner's trial counsel, provided ineffective assistance as trial counsel by failing to utilize available evidence to demonstrate the factual unreliability of the petitioner's inculpatory statements to the police; and (3) the petitioner was actually innocent of the crimes for which he was convicted as evidenced by DNA testing on gloves and a pubic hair collected at the crime scene.

During the nine day trial, the second habeas court heard testimony from eighteen witnesses, including Vogt, Culligan, Cosgrove, Morrissey and Ludlow. Stephen Igoe, the state's fire expert who had testified at the criminal trial,[6] also testified at the second habeas proceeding. The petitioner claimed that the information in the Ludlow note regarding the burn time came from Igoe. Other witnesses at the second habeas proceeding

[5] The second habeas court also permitted the petitioner to amend his petition further to incorporate additional evidence in support of his actual innocence claim. The second amended petition filed on March 5, 2010, is the operative complaint.

[6] At the criminal trial, Igoe testified as an expert in the field of fire investigation and the determination of the cause and origin of fires.

included fire investigators and arson experts, who specialized in the reconstruction of fires and explosions, a criminalist, various experts in DNA analysis and Karen Martin. More than 200 exhibits were admitted as full exhibits, including transcripts from the trial and first habeas proceeding, police reports, and statements from witnesses obtained during the homicide investigation. The parties filed simultaneous posttrial and reply briefs.

The second habeas court issued its memorandum of decision on April 15, 2011. After summarizing the testimony of the witnesses for the petitioner and the respondent, the court rejected the petitioner's actual innocence claim. Although the court found that the petitioner had presented newly discovered evidence with respect to DNA analysis, it concluded that the results were unreliable, particularly as to the pair of gloves, because of contaminated or potentially contaminated DNA samples. With respect to the pubic hair, the court stated that it could not be determined with any degree of certainty how the hair came to rest on the blue sweater. Although the DNA analysis excluded the petitioner as a donor, the court reasoned that the hair could have come from the perpetrator or it could have been transferred to the crime scene in a manner unassociated with the attack on the victim.

The second habeas court also rejected the petitioner's claims of ineffective assistance of habeas and trial counsel. The court, bound by the conclusion of this court in *Lapointe* v. *Commissioner of Correction*, supra, 113 Conn. App. 390–92, treated the Ludlow note as potentially exculpatory and assumed that Vogt's performance was defective for failing to pursue that issue as a claim in the first habeas proceeding. The court determined, however, after evaluating the testimony of the forensic scientists on burn time, that the respondent's expert was "more persuasive" in this "contest among experts." The court also noted that the experts were unable to

determine the precise time that the fire had been set. Accordingly, the court concluded that the evidence regarding burn time was not material and that the petitioner failed to prove that he was prejudiced by Vogt's deficient performance with respect to the suppressed Ludlow note.

Finally, the second habeas court found that the petitioner failed to prove that habeas and trial counsel were ineffective for failing to utilize the evidence admitted at trial to demonstrate the unreliability of the petitioner's inculpatory statements to the police. The court agreed with the respondent's argument that the gravamen of the petitioner's claim was that trial counsel should have done more to emphasize or to highlight the state's evidence that was inconsistent with the petitioner's statements. It was the court's conclusion that the evidence itself made the discrepancies readily discernable: "The discrepancies between the petitioner's statements and evidence in the victim's apartment necessitated little additional emphasis from trial counsel, and the court is very hard pressed to somehow fault Attorney Vogt's decision not to dwell on such a claim." Accordingly, the second habeas court denied the petitioner's second petition for a writ of habeas corpus. This appeal followed.

I

We first address the petitioner's claim that the second habeas court improperly rejected his actual innocence claim. In the third count of his second amended petition for a writ of habeas corpus, the petitioner alleged actual innocence due to new DNA testing conducted on a pair of men's gloves and a pubic hair recovered from the crime scene. He claims that the testing results excluded him as the perpetrator of the crimes for which he was convicted. Specifically, the petitioner argues that because mitochondrial DNA evidence established that

the pubic hair found on the victim's blue sweater was neither the victim's nor the petitioner's pubic hair, it "defies logic" that a pubic hair of unknown origin could have been deposited innocently at the crime scene. With respect to the DNA testing on the gloves, the petitioner argues that the court improperly concluded that the method of testing was not widely accepted in the forensic community and not accepted in postconviction criminal matters.

The following additional facts are relevant to the petitioner's claim. The pubic hair retrieved from the victim's blue sweater, which was located on the floor near the bed at the crime scene, was subjected to mitochondrial DNA testing. The DNA analysis of the pubic hair excluded the victim and the petitioner as the donor. The second habeas court credited the testimony of the experts with respect to that conclusion.

With respect to the testing of the gloves, Jody Hynds, a forensic DNA consultant, testified how she collected the samples. She stated that she turned each glove inside out and used a scalpel blade to scrape material for DNA analysis. Using a postamplification cleanup procedure, with the low quantity of available DNA, Hynds concluded that the petitioner was not a contributor to the DNA retrieved from either the right or left glove. The testing of the sample from each glove revealed a partial mixed DNA profile, which indicated that more than one individual contributed to the extracted scrapings. Hynds testified that contamination is an important concern when utilizing such a procedure and that the results from the testing would not indicate how old the DNA was or when it had been deposited on the gloves. She also testified that it is possible for an individual to transfer his or her DNA to a glove simply by putting the glove on one's hand.

One of the respondent's witnesses, a court officer for criminal matters at the Superior Court for the judicial

district of Hartford, testified that members of the public are permitted to handle evidence that has been admitted at a criminal trial, after the clerk's office first segregates any evidence sealed by statute or court order. Plastic or latex gloves are available for anyone handling the evidence who chooses to use them. She testified that evidence from the petitioner's criminal case had been stored at the courthouse and had been available for examination by the public. Another witness for the respondent, a reporter for a local Manchester newspaper, testified that in 1994, he viewed the evidence from the petitioner's criminal case at the clerk's office and slipped the evidence gloves on his own hands without using latex gloves.

Carll Ladd, the supervisor of the DNA section of the state forensic laboratory, testified that he did not consider the use of post-amplification cleanup procedures to be suitable for forensic applications because of concerns relating to the relevance and reliability of such methods. Ladd also stated that such procedures increase the risk of contamination. He particularly was concerned about the results from the gloves in the present case because they had been handled without precautions such as latex gloves and particle masks. According to Ladd, placing one's hands in the gloves could add to the DNA profile or mask whatever had been there in the first place, thereby making the findings invalid.

Given this background, we now set forth the standard for review in determining whether this habeas petitioner has met the standard of proof with respect to his actual innocence claim. "In consideration of a proper balance of the interests at stake in the evaluation of a freestanding claim of actual innocence, of the well established jurisprudence regarding the functions of an appropriate burden of proof for a particular category of case, and of the remedy that would follow from a

determination in a habeas proceeding of actual innocence, we conclude that the most appropriate standard of proof is as follows. First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom, as the habeas court did, no reasonable fact finder would find the petitioner guilty." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92, 700 A.2d 1108 (1997). "Our use of the term 'actual innocence' is of paramount significance. Actual innocence, also referred to as factual innocence . . . is different than legal innocence. Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime." (Citations omitted.) *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 560–61, 22 A.3d 1196 (2011).

In the present case, the second habeas court concluded that the petitioner failed to meet his burden of proof because none of the DNA evidence rose to the level of being clear and convincing evidence of factual innocence. Although the pubic hair was on the victim's sweater and the DNA analysis excluded the petitioner as its donor, the evidence did not clearly and convincingly demonstrate that its donor was the perpetrator. As stated by the court, it is possible that the transfer of the pubic hair occurred in some manner unassociated with the attack on the victim. With respect to the gloves, the court heard testimony as to the unreliability of the

results of postamplification cleanup procedures. The DNA testing did not exonerate the petitioner, particularly given the fact of contamination or potential contamination by at least one individual who put the gloves on his own hands without the protection of latex gloves. The court summarized its reasoning as follows: "[T]he fact that no direct link via DNA can be established between the petitioner and the gloves does not prove that the petitioner did not commit the assault and murder."

We agree that the absence of DNA or other evidence connecting the petitioner to the pubic hair and gloves does not amount to proof of actual or factual innocence under the circumstances of this case. The petitioner's claim on appeal that the second habeas court improperly rejected his actual innocence claim fails under the standard set forth in *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 559–61.

II

We next address the petitioner's claim that the second habeas court improperly determined that prior habeas counsel did not provide ineffective assistance by failing to pursue the claim that the state's suppression of exculpatory material, the Ludlow note, deprived him of a fair trial. The court rejected that claim, concluding that the burn time referenced in the Ludlow note was not material and that the petitioner was not prejudiced by Vogt's deficient performance because none of the experts could determine the precise time that the fire was set.

The following additional facts are necessary for the proper resolution of this claim. At the time of the victim's homicide, Ludlow was a detective with the Manchester police department and was assigned as the evidence officer for the crime scene. He subsequently assumed the position of case officer, which meant that

he was responsible for the entire criminal investigation.[7] A few days after the homicide, Ludlow had conversations with two state fire marshals who were assisting with the investigation. Ludlow took notes and wrote "CSP," which stood for Connecticut State Police, and "Steve Igoe" and "Joe Roy," the names of the state fire marshals. Underneath those notations on the Ludlow note, the words: "30–40 mins. Poss." were written. The numbers "30" and "40" were underscored twice. Ludlow testified that the notation "[p]oss." meant "possible" and that the times represented the minimum amount of time that the fire could have been burning before the first responding firefighters arrived at the victim's apartment. At the time of the second habeas trial, Ludlow stated that he could not remember who gave him the burn time information. He admitted, however, that he was not an expert on fires and that he would not have made that estimate on his own. He testified that he would have asked one of the experts for the burn time if he was trying to determine a window of time within which the fire could have been started. Ludlow also acknowledged that at the time of the first habeas proceeding, he testified that he had obtained the information as to a possible burn time from either Igoe or Roy.[8]

The Ludlow note was first disclosed to defense counsel in 1999, after the petition for habeas corpus had been filed in the first habeas action. Culligan and Cosgrove both testified that they had not seen the Ludlow note prior to the petitioner's criminal trial in 1992.[9] Vogt,

[7] He remained the lead investigator until he was replaced in March, 1989, by Lombardo.

[8] Roy testified that he was Igoe's assistant in the investigation. He further testified that he had not offered an estimate with respect to the burn time of the fire.

[9] Culligan stated that the first time he saw the Ludlow note was at the first habeas trial, which took place over several days in February, March and April, 2000.

after receiving the Ludlow note and other materials, amended the petition to allege the state's failure to disclose or to produce the Ludlow note as *Brady*[10] material, as required by the constitutions of the United States and Connecticut. He did not, however, pursue that issue during the first habeas trial. The first habeas court, in its memorandum of decision, did not address the claim regarding the Ludlow note because it deemed that claim to have been abandoned.

Vogt's failure to pursue the claim that the state suppressed the Ludlow note was alleged to be ineffective assistance of counsel in the second habeas proceeding. During the second habeas trial, Vogt testified that he had not pursued that claim because he did not believe the notation as to burn time in the Ludlow note to be exculpatory.[11] Culligan[12] and Cosgrove, in their testimony before the second habeas court, opined that the Ludlow note was exculpatory[13] and that the information could have been used by defense counsel at the criminal

[10] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "To establish a *Brady* violation, the defendant must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the defendant, and (3) it was material." *State* v. *Esposito*, 235 Conn. 802, 813, 670 A.2d 301 (1996).

[11] Vogt testified that he had never tried a habeas case prior to representing the petitioner in the first habeas proceeding involving a capital felony conviction. He also acknowledged that he had no jury trial experience in criminal cases as a trial attorney. Prior to his representation of the petitioner, Vogt testified that his experience consisted of participation in commercial litigation in a supporting capacity.

[12] Culligan testified at the second habeas proceeding that he is a career public defender employed by the state. He stated that he has been assigned to the unit that represents the accused in capital felony death penalty prosecutions since August, 1988. Culligan was lead counsel and Cosgrove assisted him at the petitioner's criminal trial.

[13] "Exculpatory has been defined to mean [c]learing or tending to clear from alleged fault or guilt; excusing." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, supra, 113 Conn. App. 390. "Evidence that tends to prove [the petitioner's] temporal inability to have committed the crime satisfies the definition of exculpatory . . . ." Id., 392.

trial to buttress the petitioner's alibi defense. Culligan and Cosgrove further testified that if the Ludlow note had been disclosed to defense counsel prior to the jury trial, their strategy would have changed.

Karen Martin was not called as a witness in the petitioner's criminal trial. Culligan stated that Karen Martin and the petitioner were divorced by that time and that the working relationship between her and the defense was no longer a good one. Although he discovered prior to trial that Morrissey had interviewed her on July 4, 1989, and that she had expressed her support for the petitioner at that time, and although he knew that she had testified at the suppression hearing that the only time the petitioner was out of her sight on the night of the homicide was when she bathed their son between 6:15 p.m. and 7 p.m., Culligan decided not to compel her testimony. He testified that he was concerned about her attitude toward the petitioner. Further, he was unaware of the existence of the Ludlow note and the importance of the start time of the fire to support the petitioner's alibi defense. Culligan testified that if he had known that Igoe, the state's fire expert, gave a burn time of thirty to forty minutes, he would have called Karen Martin as a witness because her testimony would have established that the petitioner was home when the fire was set.[14] He also acknowledged that he would have hired an arson expert had he known of the information in the Ludlow note.

Similarly, Cosgrove testified that the defense did not call Karen Martin as a witness because they considered her to be a hostile witness by the time of trial. He, too,

[14] Culligan's testimony was as follows: "I mean at that point it wouldn't have made any difference whatever her allegiance to [the petitioner] was at the—when we did the trial because this thirty to forty minute burn time would mean that he'd have to have been home as she had consistently testified during the time—seven to eight o'clock, when they were watching television with [their son]."

testified that he would have changed his assessment of the necessity of her testimony if he had known of the burn time referenced in the Ludlow note: "[I]t would have supported the alibi that [her] initial story had given."[15] Cosgrove stated that he believed the Ludlow note was exculpatory because a time frame for the commission of the crimes would have been established by the burn time, and the petitioner was not temporally available during that window of time.

The second habeas court, although ruling that the Ludlow note potentially was exculpatory and assuming that it had been "inadvertently 'suppressed' " by the state,[16] concluded that the information with respect to burn time was not material and that the petitioner was not prejudiced by Vogt's failure to pursue the claim at the first habeas proceeding. The court came to that conclusion after weighing the "[c]onsiderable and extensive testimony by arson experts/investigators" that had been presented by the petitioner and the respondent with respect to burn time. The court summarized the testimony of five witnesses, including Igoe and Roy. The petitioner's arson experts were Gerald

[15] The following questioning occurred:

"[Habeas Counsel]: "And wouldn't it have made it impossible for [the petitioner] to have set the fire. Correct?

"[Cosgrove]: Right.

"[Habeas Counsel]: [Be]cause it was undisputed that he was home from, under any version from seven o'clock till the time he got the phone call to walk over there. Correct?

"[Cosgrove]: Yes."

[16] On appeal, the respondent argues that the Ludlow note was not suppressed because it was preliminary and speculative and the petitioner's trial counsel knew of its essential facts. The second habeas court did not address those claims. In its memorandum of decision, the court stated: "There is no indication or evidence that the Ludlow note was wilfully suppressed, so this court will assume, without deciding, solely for purposes of further addressing the petitioner's claim, that the Ludlow note was inadvertently suppressed." (Internal quotation marks omitted.) Without any further analysis by the court, the record is inadequate for us to address this argument of the respondent.

Kelder, Jr., and John DeHaan. The respondent's arson expert was Robert Corry.

The court's summary included the following descriptions. Kelder, "a highly experienced fire investigator," opined that the fire burned from forty-five minutes up to one hour. His estimated burn time placed the start of the fire at approximately 7:30 p.m., which, as the second habeas court noted, would have supported the petitioner's alibi defense. DeHaan, a criminalist and forensic scientist specializing in fire and explosion reconstruction, "presented extremely thorough testimony about the numerous variables that impact a fire, even in an apartment as small and contained as the victim's." According to DeHaan, approximately twenty-five to sixty minutes elapsed from the time of ignition to the time that the fire was discovered or extinguished. Again, as noted by the court, DeHaan's opinion would have supported the petitioner's alibi defense. Corry, the respondent's expert, was "a highly experienced fire and explosion investigator, [and] also presented extremely detailed testimony about the fire and its dynamics." In Corry's opinion, the fire could have been set any time between 5:45 p.m. and 7:55 p.m. His estimate did not support the petitioner's alibi defense.

The second habeas court, in reaching its determination on materiality and prejudice, stated: "The evidence presented to this court in the form of expert testimony amounts to a contest among experts conducted many years after fact witnesses testified, and were subject to rigorous cross-examination, before the jury. The court, as the finder of fact in this proceeding, assigns far more credit or weight to the testimony of Robert Corry rather than Gerard Kelder or [John] DeHaan regarding estimation of the burn time. The petitioner, thusly, has failed to establish prejudice with respect to any claim vis-a-vis *Brady*." The court further stated that because the

precise time that the fire was set could not be determined, and Corry's estimate placed the ignition time in a range between 5:45 p.m. and 7:55 p.m., Karen Martin's testimony that the petitioner was out of her sight between 6:15 p.m. and 7 p.m. would not have been helpful to establish his whereabouts at the time the crimes had been committed.

With those additional facts in mind, we set forth the applicable standard of review for analyzing an ineffective assistance of habeas counsel claim for failure to pursue the state's suppression of *Brady* material. We begin with the familiar two part test enunciated by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "In *Strickland*, which applies to claims of ineffective assistance during criminal proceedings generally, the United States Supreme Court determined that the claim 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 is satisfied by proving that counsel made errors so serious that he was not functioning as the counsel guaranteed by the sixth amendment. The second prong is satisfied if it is demonstrated that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, supra, 113 Conn. App. 393–94.

"[When] 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. . . . [T]he 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 . . . ." (Internal quotation marks omitted.) Id., 394.

"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 unworkable. . . . Only if the petitioner succeeds in [this] 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." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 126 Conn. App. 453, 457–58, 11 A.3d 730, cert. denied, 300 Conn. 932, 17 A.3d 69 (2011).

Because the petitioner's claim of ineffective assistance involves the failure to pursue the state's suppression of *Brady* material, we also look to the standard required to establish a *Brady* violation. "[A] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error." *State* v. *Ortiz*, 280 Conn. 686, 720, 911 A.2d 1055 (2006). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in

its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Citation omitted; internal quotation marks omitted.) Id., 718. To satisfy the third prong of *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Gibson* v. *Commissioner of Correction*, 135 Conn. App. 139, 149, 41 A.3d 700, cert. denied, 305 Conn. 922, 47 A.3d 881 (2012).

We conclude that the state's suppression of the Ludlow note, and Vogt's failure to pursue that claim, warrants a new trial for the petitioner. We reach that conclusion for the following reasons. Culligan and Cosgrove testified that had the burn time information in the Ludlow note been disclosed prior to the petitioner's criminal trial, their trial strategy would have changed. They stated that they would have used the thirty to forty minute estimate to buttress the petitioner's alibi defense, particularly because the estimate came from one of the state's fire marshals assigned to the investigation. As Culligan testified, the defense would have retained the services of an arson expert. At the second habeas trial, the two experts called by the petitioner testified that the fire could not have been set any earlier than 7:30 p.m.[17] If that testimony had been presented

[17] We note that the respondent's expert testified that the fire could have been set as early as 5:45 p.m. The second habeas court found his testimony more persuasive than the testimony of the petitioner's experts. The petitioner exercised his sixth amendment right to a trial by an impartial jury. If the Ludlow note had been disclosed to trial counsel, however, it would have been the responsibility of the jury and not the court to weigh the credibility

at the criminal trial, and credited by the jury, the petitioner's whereabouts at and after 7:30 p.m. would have been critical to his defense.

For that reason, as both trial counsel testified, they would have called Karen Martin as a witness at the criminal trial. She consistently had maintained that the petitioner was in their home with her and their son the entire evening of the victim's homicide.[18] During her testimony at the suppression hearing, she stated that the only time that the petitioner was not in her sight was between 6:15 p.m. and 7 p.m., when she was bathing their son. If the jury credited Karen Martin's testimony, it could have concluded that the petitioner was at home watching television with her and their son when the fire had been set.

Further, if Karen Martin had testified and the jury believed her testimony, the jury could have concluded that the petitioner had, at most, a forty-five minute window of time within which to commit the crimes. This would mean that between 6:15 p.m. and 7 p.m., on the night of the homicide, the petitioner: (1) walked the distance between his home and the victim's apartment;[19] (2) had a cup of coffee with the victim while they were chatting on the couch; (3) used the victim's bathroom, located close to the victim's bedroom; (4)

of the arson experts. Whether the burn time evidence, which was so critical in buttressing his alibi defense, raised a reasonable doubt as to the petitioner's guilt would best be a determination left to the jury and not a habeas court.

[18] She testified at a pretrial suppression hearing that the petitioner took the dog for a twenty minute walk shortly after they had returned from their visit with the victim. According to her testimony, they had dinner at approximately 5:30 p.m., after the petitioner had returned from walking the dog. As previously noted, the victim was seen alive by her daughter at approximately 5:45 p.m. that evening.

[19] The record contains testimony that it took the petitioner approximately ten to fifteen minutes to walk from his home to the victim's apartment. There also is testimony that because the petitioner has Dandy-Walker Syndrome, he is slow and unsteady on his feet.

emerged from the bathroom, saw the victim combing her hair and decided to sexually assault her; (5) undressed himself, then tore the clothes off the victim; (6) sexually assaulted the victim; (7) retrieved a knife from the kitchen; (8) stabbed the victim ten times in the back and once in the abdomen; (9) used strips of cloth to tie them as a ligature so tightly around the victim's neck that the responding firefighters had difficulty removing the cloth; (10) loosely tied bindings around the victim's wrists and stomach area; (11) removed the victim from the bed and placed her on or near the couch;[20] (12) washed any blood from his body and dressed himself; (13) set fires in three separate locations in the victim's apartment; and (14) walked the distance from the victim's apartment back to his home.[21] According to Karen Martin's recorded statements to Morrissey on July 4, 1989, and her testimony at the suppression hearing, which the jury did not hear, the petitioner was sitting in the living room when she came downstairs from bathing their son, and there were no signs of exertion or excitement. She noticed nothing out of the ordinary in his behavior that evening.

We cannot say that the petitioner is factually innocent and did not commit the crimes for which he was convicted. However, we do conclude that there is a reasonable probability that the result of his criminal trial would have been different had the Ludlow note been disclosed to Culligan and Cosgrove prior to trial. Nondisclosure prior to trial of the portion of the Ludlow note describing the possible burn time affected the overall fairness of the trial and was so unfair as to undermine our

[20] There was testimony during the criminal trial that the petitioner, when employed at a local grocery store, could lift bags of groceries weighing up to twenty pounds but struggled with objects weighing from fifty to seventy pounds.

[21] This scenario is comprised from the petitioner's statements to the police, which the jury believed in order to find him guilty of all of the charged crimes, and the actual evidence submitted at trial.

confidence in the jury's verdict. With the burn time estimate provided by one of the state's fire marshals, trial counsel testified that they would have retained the services of an arson expert and that Karen Martin would have testified as to the petitioner's whereabouts during the critical times of that evening. That evidence, if believed by the jury, could have resulted in the jury's finding that it was temporally impossible for the petitioner to have committed the crimes for which he was convicted. The Ludlow note was exculpatory and material in these circumstances. Vogt's performance was deficient when he failed to pursue that issue at the first habeas proceeding, and the petitioner was prejudiced by his failure to do so.[22] The petitioner has demonstrated

[22] Because we conclude that the petitioner is entitled to a new trial for the reasons discussed herein, we need not address the petitioner's additional claim that Vogt rendered ineffective assistance of counsel by failing to establish that trial counsel did not utilize available evidence to prove the factual unreliability of the petitioner's inculpatory statements to the police.

During the first habeas proceeding, Vogt claimed that Culligan and Cosgrove rendered ineffective assistance of counsel by failing to argue that certain items admitted into evidence demonstrated reasonable doubt as to the petitioner's guilt. Two men's gloves found at the crime scene, one on the bed and the other by the side of the bed, were never connected to the petitioner. Nevertheless, trial counsel never questioned the petitioner, who testified at the criminal trial, or any of the state's witnesses, about the ownership of those gloves. Further, Vogt claimed that trial counsel should have stressed that certain hairs of unknown origin were found at the crime scene and demonstrated reasonable doubt as to the petitioner's guilt. Vogt failed to prevail on those claims, however, because the first habeas court stated that he had failed to ask Culligan at the first habeas proceeding why the defense did not mention the gloves or the hairs. The first habeas court, in refusing to speculate as to the reasons for the failure to argue those matters to the jury, concluded that Vogt had failed to sustain his burden to show that Culligan's actions were not strategic in nature.

In the second habeas petition, the petitioner claimed that Vogt rendered ineffective assistance by failing to question trial counsel with respect to their failure to utilize the gloves, a pubic hair of unknown origin and various other evidence admitted at trial to prove the factual unreliability of the petitioner's inculpatory statements to the police. Specifically, it is claimed that habeas and trial counsel rendered ineffective assistance because the following inconsistencies were not emphasized: (1) the petitioner did not mention the men's gloves in any of his statements to the police, and owner-

that had there been effective representation by Vogt, there is a reasonable probability that the first habeas court would have found that the petitioner was entitled to reversal of the conviction and a new trial. See *Gibson* v. *Commissioner of Correction*, supra, 135 Conn. App. 156.

The judgment denying the second amended habeas petition is reversed with respect to count one of the petition alleging ineffective assistance of counsel pertaining to the *Brady* violation claim and the case is remanded to the habeas court with direction to render judgment granting the writ of habeas corpus as to that count and to order a new trial for the petitioner. The judgment is affirmed with respect to count three of the petition alleging actual innocence. The appeal is dismissed with respect to count two of the petition alleging ineffective assistance of counsel pertaining to the petitioner's inculpatory statements as this court declined to address that claim.

In this opinion the other judges concurred.

ship of those gloves never was established; (2) a pubic hair dissimilar to samples taken from the victim and the petitioner was found on the victim's blue sweater at the side of the bed; (3) the petitioner said that he stabbed the victim on the couch, but the evidence showed that she was stabbed on the bed; (4) the petitioner never mentioned the ten stab wounds to the victim's back; (5) the petitioner said that the victim was wearing a pink housecoat when the physical evidence demonstrated that she had been wearing a blouse, slacks and blue sweater when she was attacked; (6) the petitioner indicated by hand gestures that he strangled the victim manually when the medical examiner testified that she was asphyxiated by pressure to the right side of her neck with a blunt object; and (7) the petitioner did not mention the fact that strips of cloth were tied around the victim's neck, wrists and abdominal area.

When Culligan and Cosgrove were asked at the second habeas proceeding why they failed to point out these discrepancies to the jury, they could not provide explanations for their failure. Culligan always has maintained that he and Cosgrove, early in the case, believed that the petitioner was actually innocent and that they would have to convince a jury that his confessions were coerced and false. It is difficult to discern why such discrepancies would not have been emphasized to the jury during the trial when the stated trial strategy was to demonstrate the falsity of the petitioner's statements.

GREEN FALLS ASSOCIATES, LLC *v.* ZONING BOARD OF APPEALS OF THE TOWN OF MONTVILLE ET AL.
(AC 33110)

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

Syllabus

The plaintiff appealed to the trial court from the decision by the defendant zoning board of appeals of the town of Montville denying the plaintiff's application for a variance. A hearing on the plaintiff's variance application was held before a panel of four members of the board. Three board members voted in favor of the variance application, one board member, L, abstained from voting, and the application was denied. The trial court rendered judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The board's claim that the plaintiff lacked standing to apply for a variance was unavailing; the plaintiff's contract to purchase the subject property gave it sufficient interest in the property to apply for a variance, and the trial court properly found that, because there was no express statement that time was of essence in the agreement, there was no basis to conclude that either the plaintiff or the owner of the property, D, intended to nullify the agreement on April 1, 2007, the date on which the agreement, by its terms, was set to expire, especially given that the evidence indicated that the plaintiff and D intended that the agreement to purchase remain in effect.

2. The plaintiff could not prevail on its claim that the trial court improperly determined that the variance application failed to receive the necessary votes as required by the statute (§ 8-7) that provides that the concurring vote of four members of the zoning board of appeals shall be necessary to vary the application of a zoning bylaw, ordinance, rule or regulation: the plaintiff was entitled to the full deliberation of its application by at least four of the members of the board, but not to a specific outcome or voting ratio by the board, and although L, the fourth board member, ultimately abstained from voting, L was present for the proceedings on the plaintiff's application, participated in the deliberation, was present at meeting thereon and heard the plaintiff's evidence presented at those meetings, and, therefore, L was present and qualified, which allowed the board to act on the application; moreover, the plaintiff, by proceeding with the hearing without raising the issue of an insufficient panel, accepted the board's procedures and could not now complain that it would have acted differently if it had been aware of the board's rules and procedures, and L's abstention could not be considered an affirmative vote in favor of the plaintiff's application.

3. The plaintiff could not prevail on its claim that the trial court improperly determined that there was no undue hardship on the plaintiff; that court's determination that the placement requirements for an on-site septic system, coupled with a validly nonconforming, undersized, odd shaped lot did not constitute an unusual hardship or exceptional difficulty, as required for a variance, was proper, as the plaintiff could build a smaller house on the property that likely would comply with the regulations, and the plaintiff failed to show that the inability to build a desired three bedroom house as a result of the denial of the variance application was anything other than disappointment, which does not constitute an exceptional difficulty or unusual hardship.

4. The plaintiff's claim that the denial of its variance application so greatly reduced the price of the property as to constitute a confiscation was unavailing; the evidence did not show that the plaintiff could not take advantage of any use of the property or that it lost all economically beneficial or productive use of the land, and the court found that a smaller house could be erected on the property and satisfy the requirements of the public health code for a septic system.

Argued April 9—officially released October 16, 2012

Procedural History

Appeal from the decision by the named defendant denying the plaintiff's application for a variance, 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 dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court; thereafter, the court, *Hon. Joseph J. Purtill*, judge trial referee, issued an articulation of its decision. *Affirmed*.

Harry B. Heller, for the appellant (plaintiff).

Michael P. Carey, for the appellee (named defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Green Falls Associates, LLC, appeals from the judgment of the Superior Court dismissing its appeal from the decision of the named defendant, the zoning board of appeals of the town of Montville, denying the plaintiff's application

for a variance.[1] On appeal, the plaintiff claims that the court improperly determined that (1) the variance application failed to receive the necessary votes pursuant to General Statutes § 8-7, (2) there was no unusual hardship on the plaintiff and (3) the denial of the variance application was not a confiscation. In addition to rebutting these claims, the defendant challenges the plaintiff's standing to apply for a variance. We are not persuaded by the defendant's arguments regarding standing. We disagree with the plaintiff, however, with respect to its claims on the merits, and, therefore, we affirm the judgment of the Superior Court.

The following facts and procedural history, as set forth by the court in its memorandum of decision and as supported by the record, are relevant to the resolution of this appeal. The property in question is an unimproved plot of land in the town of Montville. At the time of the plaintiff's variance application, the property was validly nonconforming[2] with respect to the minimum lot area requirements contained in §§ 5.4[3] and 5.5[4] of the Montville zoning regulations. The property is located in the WRP-160 zoning district, which requires seventy-five foot front and rear yard setbacks, as well as side yard setbacks of thirty feet.

On December 1, 2006, the plaintiff entered into an agreement to purchase the subject property owned by

[1] Paul E. Chase filed a verified pleading for intervention in the proceedings before the zoning board of appeals and was joined as a defendant in the appeal to the trial court. He is not a party to the present appeal, and therefore we refer in this opinion to the zoning board of appeals as the defendant.

[2] A nonconforming lot is one which was "developed prior to the adoption of zoning regulations . . . and is nonconforming with respect to many of the zoning requirements in the district in which it is situated." *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 438 n.6, 994 A.2d 1270 (2010).

[3] Section 5.4 of the Montville zoning regulations provides: "The minimum lot size in this district is 160,000 square feet."

[4] Section 5.5 of the Montville zoning regulations provides: "Each lot in this district shall have at least 200 feet of frontage on a street."

Arthur W. DeGezelle. The agreement contained a printed form setting forth a purchase price of $45,000 with a deposit of $500. In addition, the agreement included handwritten provisions indicating that the agreement was subject to the plaintiff's obtaining a building permit, at its expense, for a three bedroom house. In the same handwritten section, DeGezelle agreed to support the plaintiff's pursuit of any required permits, including, but not limited to, approval by the defendant. The agreement, by its terms, expired on April 1, 2007. The agreement did not contain language indicating that time was of the essence. On September 12, 2007, the plaintiff and DeGezelle appear to have amended the purchase price from $45,000 to $20,000 and changed the closing date to September 25, 2007, by way of a handwritten change on the December 1, 2006 agreement. Despite the fact that the plaintiff did not receive the permits as expected, it acquired title to the property from DeGezelle on September 28, 2007.[5]

On June 1, 2007, by application dated May 29, 2007, the plaintiff applied for a variance from the defendant. DeGezelle was listed as the owner of the property. In its application, the plaintiff requested a variance from "the strict application of Section 5.6.2 Side Yard Setback and Section 5.6.3 Rear Yard Setback." (Internal quotation marks omitted.) The plaintiff requested a variance for the purpose of building a thirty-eight by twenty-six foot, single family residence with an on-site well and septic system.

On July 11, 2007, the defendant held a public hearing on the application. At that time, John MacNeil, the chairman of the defendant, recused himself because he resided in close proximity to the property and at one time was interested in purchasing the property. The

[5] The deed conveying the property to the plaintiff indicated that the consideration paid for the property was $45,000.

hearing was continued to September 5, 2007, and, on that day, MacNeil again recused himself. At the hearing, Robert Mitchell, Jr., another member of the defendant, was absent. Four members of the defendant were available to vote on the plaintiff's application: Barbara MacFadyen, Douglas Adams, Richard Fawcett and Ellen Lakowsky. After the plaintiff's attorney presented a memorandum of law and the testimony of a soil scientist and took questions regarding the property, the attorney for an abutting landowner asked for a continuance to respond to the presentation. The plaintiff's attorney opposed the continuance, as did Fawcett, who noted his belief that the continuance was merely a "delaying tactic" by the abutting landowner's attorney. At the conclusion of the public hearing, the members of the defendant discussed the application. A motion was made and seconded to approve the application. When the members held a roll call vote, Adams, Fawcett and MacFadyen voted in favor of the variance application. Lakowsky abstained without giving a reason for her abstention. Notwithstanding the three votes in favor of the application, the defendant denied the application.

The plaintiff appealed the denial to the trial court on October 1, 2007. The court dismissed the appeal on October 28, 2010. On the granting of certification, the plaintiff appealed to this court. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the plaintiff lacked standing. This issue implicates subject matter jurisdiction, and therefore we address it before reaching the merits of the plaintiff's appeal. See *Gagnon* v. *Planning Commission*, 222 Conn. 294, 297, 608 A.2d 1181 (1992). The issue of standing is a question of law, and therefore subject to plenary review. *Water Pollution Control Authority* v. *OTP Realty, LLC*, 76 Conn. App.

711, 714, 822 A.2d 257, cert denied, 264 Conn. 920, 828 A.2d 619 (2003). After such review, we affirm the court's conclusion that the plaintiff had standing.

The defendant claims that the plaintiff lacked standing to apply for a variance. The defendant argues, specifically, that at the time of the plaintiff's June 1, 2007 application, it lacked a sufficient interest in the property. The defendant argues that the agreement was void as of April 1, 2007, and that the plaintiff therefore did not have an interest in the property after that date. We disagree.

In its motion for articulation, the defendant requested that the court articulate its response to the issue of standing, which the defendant argued was not addressed in the court's memorandum of decision. The court's response to the motion stated: "By way of articulation, it is found that the [plaintiff] did have such standing." Subsequently, the defendant filed a motion for review with this court requesting further articulation. This court granted the defendant's motion but denied the relief requested therein.

To have standing to apply for a variance, an applicant must be "in fact a real party in interest with respect to the subject property . . . whether he is in possession or has a present or . . . future right to possession . . . ." (Emphasis omitted; internal quotation marks omitted.) *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 257, 773 A.2d 300 (2001). Further, absent any express provision that states the contrary, one who has contracted to purchase property has standing to apply for a variance governing its use. *Shulman* v. *Zoning Board of Appeals*, 154 Conn. 426, 431, 226 A.2d 380 (1967).

The defendant argues that the agreement was no longer in effect after April 1, 2007, the original closing date set in the agreement. Specifically, he argues that

because the agreement conditioned the happening of the closing on the plaintiff's obtaining a building permit and the plaintiff did not have such a permit on April 1, 2007, the agreement became null and void per its own terms. Contrary to the defendant's argument, the trial court found that on "April 1, 2007, the agreement, by its terms, expired although [the plaintiff] points out that the [agreement] did not provide, time was of the essence."

"Where the agreement does not specifically state that time is of the essence, it is presumed not to be unless the parties have expressed a contrary intent." (Internal quotation marks omitted.) *Tulisano* v. *Schonberger*, 74 Conn. App. 101, 106, 810 A.2d 806 (2002). As the court correctly found, there is no express statement of "time is of the essence" in the agreement, and, therefore, there is no basis to conclude that either the plaintiff or DeGezelle intended to nullify the agreement on April 1, 2007. Further, as the court correctly found, "[t]he evidence indicates that [the plaintiff] and [DeGezelle] intended that the [agreement] to purchase remain in effect." The agreement established the plaintiff's position as the purchaser of the property, and because we agree with the court's findings that time was not of the essence and that the parties intended the agreement to remain in effect, we further agree that the plaintiff had a sufficient interest in the property to apply for a variance.

II

The plaintiff claims that the court improperly determined that the variance application failed to receive the necessary votes pursuant to § 8-7.[6] Specifically, the

[6] General Statutes § 8-7 provides in relevant part: "The concurring vote of four members of the zoning board of appeals shall be necessary to . . . decide in favor of the applicant any matter upon which it is required to pass under any bylaw, ordinance, rule or regulation or to vary the application of the zoning bylaw, ordinance, rule or regulation. . . ."

plaintiff claims that Lakowsky's abstention created a situation where it was impossible to have a sufficient vote by the defendant. The plaintiff also contends that the court improperly determined that Lakowsky's abstention could not be counted as an affirmative vote. We disagree.

We begin with the language of the statute. Section 8-7 provides in relevant part: "The concurring vote of four members of the zoning board of appeals shall be necessary to . . . vary the application of the zoning bylaw, ordinance, rule or regulation. . . ." See *Fleet National Bank* v. *Zoning Board of Appeals*, 54 Conn. App. 135, 141, 734 A.2d 592, cert. denied, 250 Conn. 930, 738 A.2d 656 (1999); *S.I.S. Enterprises, Inc.* v. *Zoning Board of Appeals*, 33 Conn. App. 281, 286, 635 A.2d 835 (1993).

With that in mind, we now turn to our rules on statutory interpretation. Pursuant to General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." "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.) *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 443, 994 A.2d 1270 (2010). Because this is a matter of statutory interpretation, our review is plenary. See *Abel* v. *Planning & Zoning Commission*, 297 Conn. 414, 427, 998 A.2d 1149 (2010).

A

The plaintiff first argues that Lakowsky's abstention left only three voting members on the board, which was insufficient for a valid vote under § 8-7. We disagree.

The plaintiff misconstrues the meaning of § 8-7 in claiming that a vote of three in favor, zero opposed

and one abstention constitutes only three votes and in concluding that therefore the composition of the defendant was insufficient. "[A] zoning board of appeals may not act unless there are at least four qualified members present and voting." *S.I.S. Enterprises, Inc.* v. *Zoning Board of Appeals*, supra, 33 Conn. App. 286. Further, "[w]herever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all the persons to whom has been intrusted the decision. . . . All the benefit, in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment of each and all the members, is endangered by any other rule." (Internal quotation marks omitted.) Id., 287. The plaintiff was entitled to the full deliberation of its application by at least four of the members of the defendant, but not to a specific outcome or voting ratio by the defendant. Here, Lakowsky was present for the proceedings as to the plaintiff's application and she participated in the deliberation. She was present for both the July 11, 2007 meeting and the September 5, 2007 meeting and heard the plaintiff's evidence presented at each. Notwithstanding her ultimate abstention, Lakowsky was present and qualified, allowing the defendant to act on the application.

Further, the plaintiff conceded at oral argument before this court that it did not raise the issue of an insufficient panel at the time of Lakowsky's abstention. By proceeding with the hearing, the plaintiff accepted the defendant's procedures and cannot now complain that if it had been apprised of the defendant's rules and procedures, it would have proceeded differently. See generally *U-Haul of Connecticut* v. *Planning & Zoning Commission*, Superior Court, judicial district of Fairfield, Docket No. CV-94-0310549-S (September 8, 1994) (12 Conn. L. Rptr. 367). We also note that "[t]he alternate

members of the board often fail to attend meetings, and if one of the regular members is not there, the board can go forward with an application if four members are present, and the applicant consents. Whether consent is given generally depends upon the best guess of the applicant or the applicant's attorney as to whether a favorable vote of 4 to 0 is likely on the application." R. Fuller, 9 Connecticut Practice Series: Land Use Law & Practice (3d Ed. 2007) § 8:2, p. 217. The plaintiff noted at oral argument before this court that had it been aware of the possibility of a three to zero with one abstention vote, it would not have proceeded with its case, but such a claim is irrelevant. The plaintiff accepted the possibility of any combination of voting outcomes when it proceeded with its application before the defendant.

B

The plaintiff next claims that Lakowsky's abstention can and should be considered an affirmative vote in favor of the plaintiff's application. We disagree.

As we have determined that a vote of three to zero with one abstention does not create an impossibility under § 8-7, we need not require that Lakowsky's abstention be either affirmative or negative. When a statute specifically requires a number of affirmative votes, an abstention is not counted with the majority. 9 R. Fuller, supra, § 21:3, p. 599. Further, "[w]hen one abstains from casting a vote, that person does not intend that their vote be either for or against the particular proposition, but only that they do not wish to be recorded on either side of the issue." *Biasucci* v. *Zoning Board of Appeals*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-94-047330-S (December 9, 1994) (13 Conn. L. Rptr. 100).[7]

[7] Although the decisions of the Superior Court are not binding authority, we find the reasoning set forth in *Biasucci* particularly persuasive. See *Johnson* v. *Atlantic Health Services, P.C.*, 83 Conn. App. 268, 277, 849 A.2d 853 (2004).

The plaintiff relies heavily on *Somers* v. *Bridgeport*, 60 Conn. 521, 22 A. 1015 (1891), to support its claim that Lakowsky's abstention should be counted as an affirmative vote. *Somers* is factually distinguishable from this case. Most importantly, *Somers* does not pertain to § 8-7, or to any land use statute or regulation. Rather, our Supreme Court in *Somers* considered whether the passage of a vote to appoint police officers by the Bridgeport board of police commissioners was valid when two members of the board abstained, two voted in favor, and the mayor voted to break the tie. Id., 525. In its consideration, our Supreme Court interpreted a city ordinance to compel the board to fulfill its duty to take action. Id., 527. That is markedly different from the present case involving a decision to grant or to deny an application for a variance. This distinction makes *Somers* inapposite.

Further, where our Supreme Court has examined wetlands regulations, a subject area more analogous to the zoning regulation at force in this case, it found that in a three to three with one abstention zoning board vote, the abstention should not be made an affirmative vote. *Huck* v. *Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 533–34, 525 A.2d 940 (1987). "[T]he failure of an application to garner enough votes for its approval amounts to a rejection of the application." (Internal quotation marks omitted.) Id., 533. The court found that the board's vote, with the abstention, constituted a valid action and that the three votes for and three votes against resulted in an appropriate denial of a landowner's application for a permit to construct a single-family dwelling on property located adjacent to a lake. Id.

Accordingly, for all of these reasons, we conclude that Lakowsky's abstention did not constitute an affirmative response to the plaintiff's application.

III

The plaintiff next claims that the court improperly determined that there was no undue hardship on the plaintiff and that the denial of the plaintiff's application for a variance did not amount to a confiscation. Specifically, the plaintiff argues that the court improperly determined that the placement requirements for an on-site septic system, coupled with a validly nonconforming, undersized, odd shaped lot did not constitute an unusual hardship or exceptional difficulty on the plaintiff, as required for a variance. Further, the plaintiff claims that the court improperly determined that the denial of the plaintiff's application did not greatly reduce or practically destroy the value of the property. We disagree with each of the plaintiff's claims.

A

We turn to the plaintiff's claim that the placement requirements for an on-site septic system on the property constitutes an unusual hardship or exceptional difficulty. We set forth our standard of review. A zoning board of appeals "is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." (Internal quotation marks omitted.) *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 152, 543 A.2d 1339 (1988). Further, "[w]hen a zoning authority has stated the reasons for its actions, a reviewing court may determine only if the reasons given are supported by the record and are pertinent to the decision." (Internal quotation marks omitted.) *Fernandes* v. *Zoning Board of Appeals*, 24 Conn. App. 49, 53, 585 A.2d 703, rev'd on other grounds, 218 Conn. 909, 591 A.2d 811 (1991). As the defendant did not provide any reasoning for its decision, and because of the unusual procedural posture created by Lakowsky's abstention, we search the entire record to find a basis

for the defendant's denial of the plaintiff's application. See *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991).

At its widest, the property is one hundred feet long at its frontage, and it narrows to thirty feet at the rear line. The property requires an on-site septic system. The Connecticut Public Health Code Technical Standards § IIA requires that a subsurface sewage disposal system be at least ten feet from any property line and fifteen feet from any building served. The plaintiff argues that in order to comply with the code it must place the septic system in the front of the property, which would leave insufficient space to build the three bedroom home it desires.

"A variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town . . . ." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 24, 966 A.2d 722 (2009). In order to prove the necessity of a variance, an applicant must show that (1) the variance will not substantially affect the comprehensive zoning plan and (2) adherence to the strict letter of the zoning ordinance will cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. Id. To support the granting of a variance, the hardship must arise from a condition different in kind from that generally affecting properties in the same zoning district and must be imposed by conditions outside the property owner's control. See *Whittaker* v. *Zoning Board of Appeals*, 179 Conn. 650, 657, 427 A.2d 1346 (1980); *Garibaldi* v. *Zoning Board of Appeals*, 163 Conn. 235, 238, 303 A.2d 743 (1972).

The plaintiff argues that *Stillman* v. *Zoning Board of Appeals*, 25 Conn. App. 631, 596 A.2d 1, cert. denied, 220 Conn. 923, 598 A.2d 365 (1991), is analogous to this

case. In *Stillman*, however, the denial of the requested variance prevented the applicant from building *any* type of addition onto her previously existing home, which was situated on a nonconforming lot. Id., 636–37. This is not the case here; the plaintiff is not prevented from building *any* structure, but rather only from building the desired three bedroom house. There are alternatives available to the plaintiff. The court noted that a smaller house "could be erected" on the property. Design flows,[8] which impact the size of a septic system, depend on the number of bedrooms in a house. See Connecticut Public Health Code, Technical Standards § IV A. A smaller house therefore would reduce the size of the septic system needed for the property's size.

As the court noted, the plaintiff can build a smaller house and likely comply with all regulations. "Disappointment in the use of property does not constitute exceptional difficulty or unusual hardship . . . . It is well established that the power to grant a variance should be sparingly exercised." (Internal quotation marks omitted.) *Garlasco* v. *Zoning Board of Appeals*, 101 Conn. App. 451, 462, 922 A.2d 227, cert. denied, 238 Conn. 908, 927 A.2d 917 (2007). The plaintiff has failed to show that the inability to build its desired house as a result of the denial of the variance application is anything beyond a disappointment.

B

Finally, the plaintiff claims that the defendant's denial of its variance application so greatly reduced the price of the property as to constitute a confiscation. We disagree.

The United States Supreme Court has found a taking where a "regulation denies all economically beneficial

[8] " 'Design flow' means the anticipated daily discharge from a building . . . ." Regs., Conn. State Agencies § 19-13-B100a (a) (5).

or productive use of land." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d. 798 (1992). In Connecticut, "[a] practical confiscation occurs when a landowner is prevented from making any beneficial use of its land—as if the government had, in fact, confiscated it. A practical confiscation does not occur when the landowner cannot take advantage of a myriad of uses acceptable under the applicable regulations because of choices the landowner itself has made that limit its land use options." *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 256, 662 A.2d 1179 (1995). Further, "[p]roof of financial hardship having a confiscatory or arbitrary effect requires more than testimony that property can be sold only for a price substantially lower than can be obtained if a variance is granted to permit a use otherwise prohibited by the zoning regulations." (Internal quotation marks omitted.) *Garlasco* v. *Zoning Board of Appeals*, supra, 101 Conn. App. 459.

The evidence does not show that the plaintiff cannot take advantage of any use of the property. The evidence shows that the plaintiff paid $45,000 to DeGezelle to purchase the property.[9] The tax assessor's card appraised the property at $6750, and the abutting landowner, Paul E. Chase, offered the plaintiff $1500 for the property. Although $1500 is significantly less than what the plaintiff paid for the property, the existence of such an offer demonstrates that the plaintiff did not lose all economically beneficial or productive use of the land, as is required under *Lucas* and *Bauer*. Further, as the court noted, a smaller house could be erected

[9] The plaintiff argues that the change in the purchase price, reflected in the handwritten edits to the plaintiff's original agreement with DeGezelle, from $45,000 to $20,000 evidences a change in the fair market value of the property. As a practical confiscation requires a *complete* loss of "any beneficial use," this argument does not affect our resolution of the question of confiscation. *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 256.

on the property and satisfy the requirements of the public health code for a septic system. While the plaintiff is not able to build on the property as it had intended, the property retains productive use, and therefore the defendant's denial of the plaintiff's variance application does not constitute a confiscation.

The judgment is affirmed.

In this opinion the other judges concurred.

LISA BRUNO *v.* REED WHIPPLE ET AL.
(AC 33584)

Beach, Bear and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, W and H Co., for breach of contract, breach of the implied covenant of good faith and fair dealing and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the construction by H Co., a limited liability company owned by W and his wife, of a new home for the plaintiff and her then husband, B. Specifically, the plaintiff claimed that W breached the contract and the implied covenant of good faith and fair dealing by conspiring with B to launder his money through the project by not performing all of the claimed construction work or by submitting multiple billings for the work actually performed, and thus deprived the plaintiff of fair and reasonable alimony and division of assets in connection with the impending dissolution of her marriage to B. The plaintiff also claimed that W committed unfair or deceptive acts or practices in the conduct of a trade or commerce by engaging in the collusive conduct with B causing the plaintiff to suffer ascertainable economic losses. The trial court granted the defendants' motion for summary judgment as to all three claims against W and as to two counts against H Co., but denied the motion as to the breach of contract count against H Co. From the judgment rendered thereon, the plaintiff appealed to this court, which dismissed the appeal in part as it pertained to the summary judgment rendered in favor of H Co. on two of the counts against it. On appeal, the plaintiff challenges the trial court's rendering of summary judgment in favor of W. *Held*:

1. The trial court properly rendered summary judgment in favor of W on the plaintiff's claim of breach of contract: in light of the facts that W signed the contract as a member of H Co., that the only parties to the contract were the plaintiff, B and H Co., and that there was no language

in the contract identifying W as a party thereto, the trial court properly determined that there was no genuine issue of material fact that W was not a party to the contract and, thus, could not be held personally liable for its breach; moreover, the plaintiff having pleaded that W was a party to the contract, W was entitled to disprove that allegation as a basis for seeking summary judgment without so pleading as a special defense, the trial court did not abuse its discretion in considering the parties' contract when assessing the merits of the motion for summary judgment, the plaintiff having failed to establish her claim that the contract on which the court relied was not properly authenticated, and W did not make a binding judicial admission that he was a party to the contract in a response to an allegation of the complaint that the plaintiff and the defendants had entered into a written contract for the construction of a new residence.

2. The trial court properly determined that W was entitled to summary judgment as to the third count of the complaint alleging breach of the implied covenant of good faith and fair dealing, the plaintiff having conceded that a person cannot be held liable for breach of the covenant of good faith and fair dealing without being a party to the contract, and the trial court here having properly determined that there was no genuine issue of material fact that W was not a party to the contract; moreover, contrary to the plaintiff's claim, the trial court properly found that the plaintiff failed to allege a potentially viable tort claim or any fact on which she would be entitled to recover against W personally on any such claim under the doctrine of piercing the corporate veil, and it was clear from the allegations of count three of the complaint that the plaintiff intended to base her claim on the alleged breach of covenants arising under the contract to which W was not a party.

3. The trial court improperly rendered summary judgment in favor of W on the plaintiff's CUTPA claim against W in count five of the complaint; the allegations of collusion and conspiracy, as pleaded, described behavior by W in the conduct of trade or commerce that, if proved at trial, would have constituted a violation of CUTPA and were sufficient to state a viable CUTPA claim against W that did not depend on the existence of a contractual relationship between W and the plaintiff.

Argued May 17—officially released October 16, 2012

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 Danbury, where the court, *Shaban*, *J.*, denied the defendants' motion to strike; thereafter, the court, *Maronich*, *J.*, granted in part the defendants' motion for summary judgment and

rendered judgment thereon; subsequently, the court, *Maronich*, *J.*, denied the plaintiff's motions for reargument, and the plaintiff appealed to this court; thereafter, this court dismissed the appeal in part. *Reversed in part; further proceedings*.

Lisa Bruno, pro se, the appellant (plaintiff).

Anthony L. Cenatiempo, with whom, on the brief, was *Stephen P. Fogerty*, for the appellee (named defendant).

Opinion

SHELDON, J. The plaintiff, Lisa Bruno, appeals from the summary judgment rendered by the trial court in favor of the defendant Reed Whipple on her claims of breach of contract, breach of the implied covenant of good faith and fair dealing and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., in connection with the construction by the defendant Heritage Homes Construction Company, LLC (Heritage Homes),[1] a limited liability company owned by Whipple and his wife, of a new home for the plaintiff and her then husband, Stephen Bruno (Bruno), in Ridgefield. Although we affirm the court's judgment as to the plaintiff's claims of breach of contract and breach of the implied covenant of good faith and fair dealing, we reverse it as to her claim of a violation of CUTPA.

On January 27, 2010, the plaintiff filed a six count amended second revised complaint against the defendants. In the complaint, the plaintiff alleged that the

[1] This court dismissed the portion of this appeal in which the plaintiff challenged the trial court's granting of summary judgment in favor of Heritage Homes on two of the plaintiff's three claims against it. Because of the continuing pendency in the trial court of the plaintiff's remaining claim against Heritage Homes, on which the defendants' motion for summary judgment was denied, this court determined that the plaintiff's appeal must be dismissed in part for lack of a final judgment. Accordingly, for the purpose of this appeal, the only appellee is Whipple.

defendants, as parties to a contract with herself and Bruno to build the new home, had breached the contract and the implied covenant of good faith and fair dealing arising thereunder by conspiring with Bruno to launder his money through the project, and thus to deprive her of fair, just and reasonable alimony and division of assets in connection with the impending dissolution of her marriage. On that score, the plaintiff alleged, more particularly, that by December, 2005, when Bruno initiated marital dissolution proceedings against her, construction of the new home was nearly complete for what by then was the total sum of approximately $1,800,000. Thereafter, however, from December, 2005, to January, 2006, and from May, 2006, to July, 2006, Bruno paid the defendants additional sums totaling approximately $2,600,000, all purportedly for expenditures on the project that she did not authorize. On that basis, the plaintiff alleged that the defendants had colluded with Bruno to launder his money through the project, either by not performing all of the construction work they claimed to have performed on the project or by submitting multiple billings for the work they did perform. The plaintiff claimed as to Whipple that by engaging in such collusive conduct with Bruno, he not only breached the contract, as alleged in count one of the complaint, and the implied covenant of good faith and fair dealing arising under the contract, as alleged in count three, but he also committed unfair or deceptive acts or practices in the conduct of a trade or commerce that caused her to suffer ascertainable economic losses in violation of CUTPA, as alleged in count five.

On March 25, 2011, the plaintiff and, on March 28, 2011, the defendants filed motions for summary judgment. In support of their motion, the defendants argued, inter alia, that Whipple was entitled to judgment as a matter of law on each of the plaintiff's claims against him because all such claims were based materially upon

alleged breaches of duties arising under a contract to which he was not a party. On that score, they argued that Whipple was not identified in the contract as a party and that, although he signed the contract in his representative capacity as a member of Heritage Homes, he did not sign it in his individual capacity. In support of that argument, the defendants submitted Whipple's personal affidavit in which he averred that he had never individually entered into any contract with the plaintiff or Bruno, nor had he ever individually performed any work or provided any labor, services or material for either of them on his own behalf. In addition, with respect to the plaintiff's core allegation of wrongdoing against him in each of her claims—that he had engaged in money laundering on behalf of Bruno by returning money to him for work billed on the home construction project—Whipple averred that all work billed by Heritage Homes on the project was performed and fully paid for by Bruno pursuant to the contract, and that neither he nor Heritage Homes ever had returned any money to Bruno or laundered money for him through the project, as the plaintiff had alleged. The defendants supported their summary judgment motion with a memorandum of law and several exhibits, including Whipple's affidavit and an unauthenticated copy of the subject contract.

In opposition to the defendants' motion, the plaintiff filed, inter alia, a memorandum of law and several exhibits, including a copy of the contract that was textually identical to that submitted by the defendants and two personal affidavits.[2] As grounds for opposing the defendants' motion, the plaintiff argued, inter alia, that

[2] The first such affidavit and eleven other exhibits originally filed in support of the plaintiff's motion for summary judgment were later redesignated as exhibits in opposition to the defendants' motion in the plaintiff's memorandum of law in support of her objection to that motion, to which her second affidavit was attached.

(1) the defendants had failed to support their motion by properly authenticated documents and materials; (2) Whipple was indeed a party to the contract in his individual capacity; (3) even if Whipple signed the contract only in his representative capacity, he nonetheless should be held liable for Heritage Homes' tortious conduct, either as a direct participant in such conduct or as a person who so completely and pervasively controlled the company as to warrant piercing the corporate veil; and (4) the defendants' documented interference with her ability to keep informed of and participate in the construction project's planning and oversight after Bruno commenced marital dissolution proceedings against her, by dealing solely and exclusively with Bruno as to costly project modifications without her knowledge or consent, supports the inference that the defendants conspired with Bruno to launder his marital assets through Heritage Homes' accounts, for Bruno's benefit and to her own great financial loss.

After hearing oral argument on the parties' motions for summary judgment, the court issued a memorandum of decision in which it granted the defendants' motion as to all three of the plaintiff's claims against Whipple. As to the plaintiff's threshold claim of breach of contract, under count one of her complaint, the court relied upon the language of the contract, as submitted to it by both parties, to conclude that Whipple could not be found liable because "there is no genuine issue of [material] fact that Whipple was not a party to the contract as pleaded by the plaintiff." As to the plaintiff's claims of breach of the implied covenant of good faith and fair dealing and a violation of CUTPA, under counts three and five of her complaint, the court determined that both of those claims were also "directly dependent upon the existence of the contractual relationship"

between the plaintiff and Whipple, and thus that Whipple could not be held liable on either such claim due to his status as a nonparty to the contract. The court's determination to this effect on the plaintiff's claim of breach of the implied covenant of good faith and fair dealing was based upon both settled case law, holding that such a claim can only be asserted against a contracting party, and its conclusion that the allegations of the third count failed to state any independent basis for establishing his liability in tort. By contrast, the court's determination that the plaintiff's CUTPA claim against Whipple was directly dependent upon the existence of a contractual relationship was based simply upon its observation that all of the allegations of her breach of contract claim against him were realleged in support of the CUTPA claim.

Following the issuance of the court's decision, the defendants asked that the decision be clarified as to whether it also was intended to apply to the plaintiff's claims against Heritage Homes, which had joined with the defendant in moving for summary judgment. In response to that request, the court promptly issued a corrected memorandum of decision in which it (1) restated nearly verbatim, in the first section of the corrected decision bearing only Whipple's name and a specific reference to the three numbered counts against him (one, three and five), its prior decision granting the defendants' motion as to each such count; and then (2) proceeded, in the second section bearing only the name of Heritage Homes and a specific reference to the three numbered counts against it (two, four and six), to deny the defendants' motion with respect to count two, alleging breach of contract, but to grant the motion as to counts four and six, alleging breach of the implied covenant of good faith and fair dealing and a violation of CUTPA. With respect to counts four and six, in particular, the court concluded its analysis as

follows: "While the plaintiff has alleged conduct that would support a finding of aggravating circumstances sufficient for a CUTPA claim or a claim for breach of covenants of good faith and fair dealing, that the defendants have engaged in a scheme to launder money through . . . Bruno through the construction contract, those allegations are conclusory and supported by no facts. The defendants have challenged those assertions in their motion for summary judgment together with supporting affidavits and documents. If the plaintiff has no evidence and her supporting documents are inadequate, the court is justified in granting summary judgment provided the defendants have met their burden of proof. . . . The plaintiff must demonstrate that a genuine issue of material fact exists through 'counter affidavits and concrete evidence.' . . . The court finds that the plaintiff has failed to meet that burden." (Citations omitted.) Following the court's later denials of the plaintiff's separate motions for reargument with respect to the court's summary judgment as to Whipple and Heritage Homes, the plaintiff filed this appeal.

On appeal, the plaintiff claims, on divers grounds, that the court erred in rendering summary judgment in favor of Whipple on each of her three claims against him. We disagree with the plaintiff as to her claims of breach of contract and breach of the implied covenant of good faith and fair dealing and thus affirm the court's summary judgment on those claims. We agree, however, with the plaintiff as to her CUTPA claim and thus reverse the court's summary judgment on that claim and remand this case for further proceedings thereon.

We first set forth the applicable standard of review as to a motion for summary judgment. "Practice Book § [17-49] requires that 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. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under the applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . The party opposing such motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See Practice Book §§ [17-44 and 17-45]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . A motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Weiner* v. *Clinton*, 106 Conn. App. 379, 382–83, 942 A.2d 469 (2008).

I

BREACH OF CONTRACT

The plaintiff's first claim on appeal is that the court improperly rendered summary judgment in favor of Whipple on her claim of breach of contract. The plaintiff claims, more particularly, that the court improperly determined that there was no genuine issue of material fact that Whipple was not a party to the subject contract because (1) he had no right to contest her claim of breach of contract on the ground that he was not a party to the subject contract without specially pleading that claim as a special defense, (2) the court improperly considered unauthenticated evidence in reaching its

conclusion that Whipple was not a party to the contract and (3) the court improperly ignored the defendants' alleged admission, in their answer to the complaint, that Whipple was in fact a party to the contract. For the following reasons, we reject each of these arguments.

A

The plaintiff initially argues that Whipple was not entitled to seek summary judgment on the ground that he was not a party to the subject contract because he failed to plead his nonparty status as a special defense. We disagree.

"As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway. . . . Whether facts must be specially pleaded depends on the nature of those facts in relation to the contested issues." (Citations omitted.) *Bennett* v. *Automobile Ins. Co. of Hartford*, 230 Conn. 795, 802, 646 A.2d 806 (1994). Consistent with this rule, and in light of its express purpose, a defendant has no obligation to specially plead facts tending to disprove any allegations of the plaintiff's complaint that he has not admitted in his answer because, by generally denying such allegations or leaving the plaintiff to her proof of them at trial, he gives the plaintiff clear notice that such allegations are disputed and will be at issue in the case.

In the present case, Whipple's assertion that he was not a contracting party is completely inconsistent with the plaintiff's factual allegations against him, which included the allegation that he was a party to the subject contract. That allegation, of course, was essential to

the plaintiff's claim of breach of contract, for it is a fundamental principle of contract law that liability for breach of contract is confined to contracting parties or those who consent to be bound by them. See *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 797, 17 A.3d 40 (2011).

Because the plaintiff had pleaded that Whipple was a party to the subject contract, he was entitled to disprove that allegation as a basis for seeking summary judgment without so pleading as a special defense.

B

The plaintiff next argues that it was improper for the court to rely on the copy of the construction contract that the defendants offered in support of their motion for summary judgment because that document was not authenticated.[3] We disagree.

Whether a trial court should consider documentary evidence submitted by a party in relation to a motion for summary judgment presents an evidentiary issue to which we apply an abuse of discretion standard. See *Wilderman* v. *Powers*, 110 Conn. App. 819, 828, 956 A.2d 613 (2008) (claim that court should not have considered unauthenticated documents in assessing motion for summary judgment presents evidentiary issue).

Both parties submitted copies of the same signed, three page "construction contract" as evidence to be

[3] Whipple contends on appeal that the issue of authentication is not reviewable because the court's summary judgment ruling did not address it. His claim is without merit. "Our review of the trial court's decision to grant the . . . motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct . . . ." (Internal quotation marks omitted.) *Navin* v. *Essex Savings Bank*, 82 Conn. App. 255, 258, 843 A.2d 679, cert. denied, 271 Conn. 902, 859 A.2d 563 (2004). In reaching our determination, we look to the evidence in the record, and, thus, the plaintiff's claim regarding the authentication of evidence is within our purview.

considered by the court in support of their respective positions on the defendants' motion for summary judgment. Although the parties attached different documents to their respective copies of the contract,[4] the texts of the two copies, with which both the plaintiff and Whipple admittedly were familiar, were identical in all respects. Because the parties were in full agreement as to the text of the subject contract, both can be understood to have admitted by their references to it in their affidavits, briefs and arguments that the contract before the court was in fact authentic. Therefore, we conclude that the court did not abuse its discretion in considering the parties' contract when assessing the merits of the defendants' motion for summary judgment.

C

The plaintiff finally argues that, notwithstanding the language of the contract or the soundness of the court's interpretation of its essential terms, the court was bound to rule that there was at least a genuine issue of material fact as to whether Whipple was a party to it because he made a binding judicial admission to that effect in the defendants' answer to the complaint.[5] We

[4] The plaintiff attached as an exhibit to her motion for summary judgment, and later redesignated as an exhibit to her opposition to the defendants' motion, a Heritage Homes cover letter and a spreadsheet of projected material and labor costs. The cover letter, printed on Heritage Homes' letterhead, provides in relevant part as follows: "Dear Steve [Bruno], Enclosed please find copies of our standard construction management contract, latest budget, and sub-contractor agreement. As you are aware, our latest budget is not reflective of the new outbuilding that is currently being designed. Please let us know if you would like us to include that in our latest budget. Thanks, Reed [Whipple]." The defendants attached a similar, albeit different, expense spreadsheet to their motion but did not submit a copy of the cover letter.

[5] Whipple claims that, because the court did not address the defendants' answer specifically in its summary judgment ruling, the plaintiff's claim of admission is barred on appeal. On appeal, our review is plenary. See *Navin* v. *Essex Savings Bank*, supra, 82 Conn. App. 258. Hence, we address the plaintiff's argument that the defendants' answer constituted an admission.

disagree that Whipple made such a judicial admission, and thus we reject this aspect of the plaintiff's claim as well.

Practice Book § 10-19 provides as follows: "Every material allegation in any pleading which is not denied by the adverse party shall be deemed to be admitted, unless such party avers that he or she has not any knowledge or information thereof sufficient to form a belief." Additionally, Practice Book § 10-48 provides in relevant part: "[A]ny pleader wishing expressly to admit or deny a portion only of a paragraph must recite that portion; except that where a recited portion of a paragraph has been either admitted or denied, the remainder of the paragraph may be denied or admitted without recital. . . ."

In the present case, paragraph four of the plaintiff's complaint alleged as follows: "On October 28, 2004, the plaintiff and the defendants entered into a written contract for the construction of a private residence at 111 Spring Valley Road, Ridgefield, Connecticut, for a total price of $2,566,550.00." In their answer to the complaint, the defendants responded to the foregoing allegation as follows: "As to the allegations in Paragraph 4, the defendants admit so much of the paragraph that there was a contract to build a residence at 111 Spring Valley Road, Ridgefield, Connecticut which is dated October 28, 2004. The defendants deny the rest of the paragraph." By this response, the defendants, pursuant to Practice Book § 10-48, clearly admitted that portion of the allegation that stated that there was a contract to build the plaintiff and Bruno's new residence but just as clearly denied the remainder of the allegation, including the statement that Whipple was a party to the contract. Therefore, the defendants did not admit in their answer that Whipple was a party to the contract.

D

Having determined that Whipple's claim that he was not a party to the contract was a proper basis for seeking summary judgment, that the contract presented to the court was properly considered by the court as evidence supporting that claim and that the defendants' answer to the complaint contained no judicial admission contradicting and requiring the rejection of that claim, we now turn to the specific language of the contract to determine if the court properly found that the plaintiff had failed to present evidence that Whipple was a party thereto. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Lawson* v. *Whitey's Frame Shop*, 241 Conn. 678, 686, 697 A.2d 1137 (1997).

In the present case, the court found that Whipple signed the contract as a member of Heritage Homes, a limited liability company. According to the contract's terms, the only parties to it were the plaintiff and Bruno, as "the Owner," and Heritage Homes, as "the Contractor." There is no language in the contract identifying Whipple as a party thereto. On the basis of the written

contract, the undisputed terms of which were properly before it, the court thus had a substantial basis for concluding that there was no genuine issue of material fact that Whipple was not a party to that contract and thus that he could not be held liable for its breach. For all of the foregoing reasons, we agree with the court that Whipple was entitled to the rendering of summary judgment in his favor on the plaintiff's claim of breach of contract.

II

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The plaintiff's next claim is that the court improperly rendered summary judgment in favor of Whipple as to the third count of her complaint, alleging breach of the implied covenant of good faith and fair dealing.

A

On that score, although the plaintiff concedes, as she must, that a person cannot be held liable for breach of the implied covenant of good faith and fair dealing without being a party to a contract, she contends initially that the court erred in determining that there was no genuine issue of material fact as to whether Whipple was a party to the contract, and thus that he could not be held liable for breach of the implied covenant of good faith and fair dealing in this case. Because her argument on that issue is identical to her argument on the same issue with respect to her claim of breach of contract, it must be rejected for the reasons set forth in part I of this opinion.

B

Even, however, if the plaintiff cannot establish Whipple's liability for breach of the implied covenant of good faith and fair dealing under her third count because he

was not a party to the subject contract, she claims that the allegations of that count are sufficient to state at least one potentially viable tort claim against Whipple as to which summary judgment should not have been granted. It was error, she claims, to have granted summary judgment as to any duly pleaded claim that was not in fact dependent upon Whipple's status as a party to the subject contract, provided that she was entitled to recover on that claim from Whipple personally, either because he participated personally in the tortious conduct upon which the claim was based or because he so completely and pervasively controlled Heritage Homes and engaged in such conduct as to warrant piercing the corporate veil and making him personally liable for such conduct. She asserts that the court erred in granting summary judgment on the third count on the basis of its stated conclusions that she had failed to plead any tort claim in that count or any facts upon which she would be entitled to recover against Whipple personally on any such claim under the doctrine of piercing the corporate veil.

The plaintiff disputes the court's finding that she failed to allege a potentially viable tort claim in her third count for two reasons. First, she claims that that finding is inconsistent with the prior ruling of a different trial court denying the defendants' motion to strike that count. According to the plaintiff, the court's ruling on the motion to strike expressly concluded that the facts alleged in that count were sufficient to state potentially viable tort claims against both defendants. Second, the plaintiff argues that, in the separate section of the court's corrected memorandum of decision which addressed the motion for summary judgment as to Heritage Homes with respect to the virtually identical claim of breach of the implied covenant of good faith and fair dealing set forth against it in the fourth count of her complaint, the court discussed her core allegations of

wrongdoing against "the defendants" in such a way as to suggest that she had in fact pleaded viable tort claims against them both.

Whipple disputes the notion that either the earlier denial of the defendants' motion to strike the third count of the plaintiff's complaint or the court's comments in its corrected memorandum of decision concerning the potential sufficiency of the allegations of the plaintiff's fourth count to support a claim of breach of the implied covenant of good faith and fair dealing against Heritage Homes lends any support to the plaintiff's present claim that the allegations of the third count are sufficient to state an independent claim against him sounding in tort. We agree.

To begin with, each ruling on which the plaintiff relies was based on the assumed or established fact that the person or entity to whom or which it applied was in fact a party to the subject contract. The ruling on the motion to strike, as addressed to the third count, was necessarily based upon the plaintiff's allegation in that count that Whipple was a party to the contract. Hence, the court's discussion in that ruling concerned only the sufficiency of the pleaded allegations to hold Whipple liable for breach of the implied covenant of good faith and fair dealing if, as a contracting party, he was shown to have engaged in the conduct alleged against him in that count. The ruling cannot be understood to have addressed the different issue of whether Whipple also could be found liable in tort based upon a subset of those allegations if he was not in fact a party to the contract.

Similarly, the court's comments about the legal sufficiency of the plaintiff's money laundering allegations against the defendants, as pleaded in her fourth count, to defeat the motion for summary judgment on that

count by Heritage Homes, concerned only the sufficiency of such allegations as "aggravating circumstances" to support a viable claim of breach of the implied covenant of good faith and fair dealing against Heritage Homes, a party to the subject contract, which was the only party named in that count. That second section of the court's corrected decision did not discuss the potential sufficiency of the allegations in question to state an independent tort claim, not based upon a contractual relationship, against either defendant. Apart, then, from loose language in the second section of the court's decision referring generally to "the defendants," rather than specifically to Heritage Homes, it is apparent that that section was never intended to apply to Whipple, whose potential liability was separately discussed in the first section of the corrected decision. Such language thus has no logical or legal bearing upon the sufficiency of the allegations of the plaintiff's third count to state a viable tort claim against Whipple as a nonparty to the contract.

Moreover, we note that the court's analysis of the challenged claim as a breach of the implied covenant of good faith and fair dealing arising under the subject contract was entirely consistent with the plaintiff's own characterization of that claim. In paragraph twenty of the third count of her complaint after repleading all nineteen paragraphs of her first count alleging breach of contract, as the first nineteen paragraphs of that count, the plaintiff pleaded simply as follows: "In the manner described above, the defendants breached their implied *contract* of good faith and fair dealing." (Emphasis added.) In light of this tellingly miswritten description by the plaintiff of her own claim, nothing could be clearer than that she intended to base that claim upon the alleged breach of covenants arising under the contract. We thus conclude that Whipple was entitled to summary judgment on this count.

III

VIOLATION OF CUTPA

Finally, the plaintiff asserts that the court improperly rendered summary judgment in favor of Whipple on her CUTPA claim against him, as pleaded in the fifth count of her complaint. We agree.

The entire basis upon which the court rendered summary judgment on that claim was that the allegations of the fifth count were identical to those of the plaintiff's first count alleging breach of contract and thus, assertedly, that the claim depended directly upon a contractual relationship between the plaintiff and Whipple. So concluding, the court ruled, as it had on the plaintiff's other claims against Whipple, that the CUTPA claim failed as a matter of law because there was no genuine issue of material fact that Whipple was not a party to the subject contract. The court thus never considered whether, apart from pleading a CUTPA violation against Whipple based upon his alleged breach of a personal contract with the plaintiff, the challenged count was sufficient to plead a CUTPA violation by Heritage Homes for which he could be held personally liable because he had personally engaged in the conduct by which the violation was committed. The plaintiff contends that such a claim is pleaded adequately in her fifth count and thus that the court's rendering of summary judgment in favor of Whipple on that count should be reversed.

We note at the outset that because the trial court based its order of summary judgment on the sufficiency of the allegations of the challenged count to state a potentially viable CUTPA claim rather than the sufficiency of the plaintiff's evidence to raise a genuine issue of material fact in support of such a claim in the face of the Whipple's averments to the contrary, our focus as well must be on the allegations of the challenged

count. We note that both parties have acted consistently with this approach throughout the appellate process, having focused almost exclusively on the sufficiency of the plaintiff's complaint to state a CUTPA claim from the filing of her appeal through oral argument. The plaintiff's statement of issues in her brief, for example, states in relevant part as follows: "The court erred by rendering summary judgment in favor of . . . Whipple by . . . misconstruing the plaintiff's pleadings as sounding only in contract and not tort. . . ." Moreover, in her brief addressing the CUTPA claim, the plaintiff argued that "[s]imply because a plaintiff relies upon the same or similar factual allegations to support both a breach of contract claim and a tort or statutory (CUTPA) claim, does not render the tort and/or statutory counts insufficient. Rather, the necessary inquiry is to determine whether the factual allegations are sufficient to support both claims." In response to these claims and arguments, Whipple argued in his brief as follows: "Two judges of the [S]uperior [C]ourt and the defendants read the complaint as a claim sounding in contract, and at the time the defendant[s] filed [their] motion to strike, the plaintiff agreed. The plaintiff would now have this court read her complaint in a manner that is unreasonable and inconsistent with the general theory of the case, i.e., breach of contract. As a nonparty, the claims against Whipple must fail." It is apparent from the record that the parties sought and opposed reversal of the court's ruling on the plaintiff's CUTPA claim solely on the basis of the sufficiency of the plaintiff's fifth count to allege such a claim.

In evaluating the sufficiency of the pleadings, we are mindful of "[t]he modern trend, which is followed in Connecticut . . . to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint

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. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Lyons* v. *Nichols*, 63 Conn. App. 761, 765, 778 A.2d 246, cert. denied, 258 Conn. 906, 782 A.2d 1244 (2001). "Whether a complaint gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant." (Internal quotation marks omitted.) *Stamford Landing Condominium Assn., Inc.* v. *Lerman*, 109 Conn. App. 261, 274, 951 A.2d 642, cert. denied, 289 Conn. 938, 958 A.2d 1246 (2008).

CUTPA provides in relevant part 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." General Statutes § 42-110b (a). "Connecticut courts, when determining whether a practice violates CUTPA, will consider (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, 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 (or competitors or other businessmen). . . . 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. . . . Whether

a practice is unfair and thus violates CUTPA is an issue of fact. . . . The facts found must be viewed within the context of the totality of the circumstances which are uniquely available to the trial court. . . . Additionally, our Supreme Court has stated that [a]ll 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 less extent it meets all three." (Citation omitted; internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 413, 867 A.2d 841 (2005).

The plaintiff alleges in part in count five of her complaint that the defendants "either did not perform all of the construction work they claimed to have performed or submitted multiple billings for such work as was performed, and in fact conspired with Bruno to launder Bruno's cash and thereby deprive the plaintiff of fair, just and reasonable alimony and division of assets in connection with the dissolution of the plaintiff's marriage to Bruno." The plaintiff also alleges in count five that such conduct constitutes "unfair and deceptive acts and practices in trade and commerce in violation of [§] 42-110b . . . ."

These allegations, construed broadly and realistically, are sufficient to state a claim that Whipple, although not a party to Heritage Homes' construction contract with the plaintiff and Bruno, personally colluded with Bruno on behalf of Heritage Homes by conspiring with him to submit multiple billings for work not actually performed under the contract in order to launder Bruno's money through Heritage Homes' accounts and secretly to return it to him in order to decrease Bruno and the plaintiff's apparent marital assets. The alleged purpose and effect of this collusive behavior, for which Whipple could be held personally liable to an injured third party even if, as alleged, he

engaged in it as an officer or agent of Heritage Homes; see *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 467–69, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011); was to cause the plaintiff an ascertainable loss of money or other property, which she would otherwise have received in her dissolution action upon the court's entry of its final financial orders. We conclude that such allegations of collusion and conspiracy, as pleaded, describe behavior by Whipple in the conduct of trade or commerce that, if proved at trial, would constitute a violation of CUTPA. Because such allegations are sufficient to state a viable CUTPA claim against Whipple that does not depend upon the existence of a contractual relationship between himself and the plaintiff, we reverse the trial court's rendering of summary judgment in favor of Whipple on the fifth count of the complaint.

The judgment is reversed only as to the plaintiff's claim in the fifth count of her complaint alleging a violation of CUTPA and the case is remanded for further proceedings on that claim. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LORENZO OSBOURNE (AC 32553)

Lavine, Bear and Sheldon, Js.

Syllabus

Convicted of the crimes of attempt to commit assault in the first degree, carrying a pistol without a permit, criminal possession of a firearm, reckless endangerment in the first degree and interfering with an officer, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which two police officers, while responding to a burglar alarm call in an area known for its high level of drug activity, observed suspicious behavior by the defendant and another man. When the officers attempted to investigate the defendant and his companion,

they attempted to flee, but one officer grabbed the defendant, who physically resisted and threw punches at him and the other officer, who used a Taser gun to try to subdue the defendant. During the struggle, a third officer arrived and took control of the defendant's companion, and the defendant reached down to his shorts pocket, from which he grabbed and partially removed a gun, which fell to the ground and discharged. One officer kicked the gun out of the defendant's reach and he subsequently was subdued and handcuffed. When the Taser gun was turned on, its camera recorded the encounter as it unfolded. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of three counts of attempt to commit assault in the first degree: the defendant's act of reaching quickly into his pocket and grabbing a cocked and loaded gun while struggling with uniformed police officers who were attempting to subdue him reasonably could have been found not only to have been the start of a line of conduct leading naturally to securing the gun and using it to shoot and cause serious physical injury to each of the three officers, but also to have been strongly corroborative of his alleged purpose to engage in such conduct and cause such results, and thus to commit assault in the first degree against each officer; moreover, the jury reasonably could have found from the officers' testimony that even though the taser was used on the defendant and he was totally incapacitated, he was restored to full function once the tasing stopped and that he acted deliberately when he reached for and grabbed the cocked and loaded pistol in his pocket between the tasing cycles; additionally, the defendant's claim that a video of the incident with the officers raised a reasonable doubt as to whether he actually grabbed the gun or pulled it from his pocket was unavailing, as any alleged inconsistencies between the officers' testimony and the video would not have required the jury to discount all of the officers' testimony and the jury might reasonably have found that the gun appeared at or near the defendant's pocket as a result of the defendant's intentional conduct in reaching for it, which thereby constituted a substantial step in a course of conduct planned to culminate in the shooting of each of the officers with the gun.

2. The defendant could not prevail on his claim that the trial court improperly failed to allow the jury to take the video of the events at issue, which had been admitted as an exhibit, into the deliberating room, and, instead, required the jury to view the video in the courtroom; at no time did the defendant ask that the jury be allowed to view the video in the deliberating room, nor did he take issue with the court's denial of the jury's request to do so and, thus, the claim was not preserved at trial, and the claim, which was not a typical evidentiary claim but related to the process by which admitted evidence was made available for the jury for its review and consideration in the course of deliberations, was not of constitutional magnitude and, therefore, was not reviewable under

State v. *Golding* (213 Conn. 233), nor did it warrant review under the plain error doctrine.

3. The defendant's unpreserved claim that the trial court, by instructing the jury on intent in general, improperly failed to instruct the jury as to the requisite intent for the charge of interfering with an officer was unavailing; defense counsel had a meaningful opportunity to review and address any deficiencies in the court's instructions, yet failed to do so, and because the court instructed the jury on the interfering charge three times and then submitted a written copy of that instruction to the jury, to which the defendant did not object, it was reasonable to infer that defense counsel had knowledge of any potential flaws in the court's instruction, yet failed to raise any claims regarding those flaws before the trial court, and thereby implicitly waived any objection to the instruction as given.

Argued April 9—officially released October 16, 2012

Procedural History

Substitute information charging the defendant with three counts of the crime of attempt to commit assault in the first degree, and with the crimes of carrying a pistol without a permit, criminal possession of a firearm, reckless endangerment in the first degree and interfering with an officer, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Hauser*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal; subsequently, the court rendered judgment in accordance with the verdict and enhanced the defendant's sentence for the commission of class A, B or C felonies with a firearm, from which the defendant appealed to this court. *Affirmed.*

Jennifer Bourn, assistant public defender, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Lorenzo Osbourne, appeals from the judgment of conviction rendered against him following a jury trial of three counts of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2), 53a-59 (a) (1) and 53-202k, and one count of interfering with an officer in violation of General Statutes § 53a-167a.[1] On appeal, the defendant claims that (1) there was insufficient evidence to sustain his conviction of three counts of attempt to commit assault in the first degree because the state failed to prove the essential elements of that offense beyond a reasonable doubt as to any of his alleged victims, three Bridgeport police officers; (2) the court erred in denying the jury's request to replay the video of the events here at issue, as recorded by the camera on the Taser gun of one of the officers, in the privacy of the deliberating room; and (3) the court erred in failing to instruct the jury on the intent element of the offense of interfering with an officer. We affirm the judgment of the trial court.

Based upon the testimony of the state's witnesses, the jury was presented with the following evidence upon which to base its verdict. On August 29, 2009, at approximately 4:30 p.m., two uniformed Bridgeport police officers, Jorge Larregui and Carlos Vasquez, responded to a burglar alarm call at a church located at the corner of Logan Street and Stratford Avenue in Bridgeport. As the officers drove toward the church in their marked police cruiser, they observed the defendant and another man standing on the corner near the church. While the officers were speaking to people in

[1] The defendant also was convicted of carrying a pistol without a permit in violation of General Statutes § 29-35 (a), criminal possession of a firearm in violation of General Statutes § 53a-217 (a) and reckless endangerment in the first degree in violation of General Statutes § 53a-63 (a). The defendant makes no claim on appeal with respect to his conviction of those charges.

the church parking lot about the burglar alarm, they observed the defendant and the other man walk past them and enter an adjacent lot on which there was an abandoned building. Upon determining that the burglary call was a false alarm, the officers returned to their vehicle and resumed patrolling the area.

As they continued their patrol, the officers made further observations of the defendant and his companion. After several minutes, because the area was known for its high level of drug activity and the defendant and his companion had emerged from the empty lot, the officers determined that the men were suspicious and decided to investigate them. To that end, they stopped their cruiser approximately ten to twenty feet in front of the men and got out to approach them. When this occurred, the defendant and the other man immediately began to flee, prompting Vasquez to grab the defendant, who physically resisted and threw punches at him, and Larregui to detain the other man, who struggled with him until he drew his Taser gun and threatened to use it if the man continued to resist. When the Taser gun was turned on, its camera began to record the encounter as it unfolded. Officer Damien Csech, another uniformed Bridgeport police officer, then arrived at the scene and took control of the man with whom Larregui had been struggling, freeing Larregui to assist Vasquez in his efforts to subdue the defendant. After Csech handcuffed the other man and searched him for weapons, he too turned his attention to the defendant.

Vasquez responded to the defendant's initial efforts to resist him by putting him in a choke hold and repeatedly ordering him to get down on the ground. Although Vasquez succeeded in getting the defendant down onto his hands and knees, the defendant continued to struggle with him and to defy his repeated orders to lie down on the ground. In the course of such continuing resistance, while both Vasquez and Csech were attempting to

restrain the defendant physically, Larregui tased the defendant in the back, causing him to holler out in pain.

The officers testified, without objection, as to the operation and effects of a Taser gun. They explained that, when a Taser is deployed, it fires two prongs at the targeted person, which stay connected to the Taser gun by conductive wire. When the Taser is activated and the target is receiving an electrical shock from it, a loud, steady ticking sound can be heard. That ticking sound continues for the duration of each tasing cycle, which lasts approximately five seconds. Generally speaking, the shock from the Taser completely incapacitates the target for the duration of the cycle. At the end of the cycle, however, the target's normal functioning is immediately restored.

After the first five second tasing cycle, when the defendant continued to struggle with Vasquez, Larregui tased him again. Immediately after that second cycle ended, the defendant quickly reached down to his right shorts pocket, from which he grabbed and partially removed a gun. Upon spotting the gun, which he first became aware of at that point, Vasquez immediately stepped in between the defendant's right side and right arm, preventing the defendant from reaching downward again. Moments later, Larregui tased the defendant a third time.

Notwithstanding Vasquez' position between the defendant's right side and right arm from the time the gun first appeared until the initiation of the third tasing cycle, the officers testified that the defendant held the gun in his right hand during this third cycle until it fell to the ground and discharged. After the gun fell, Larregui testified that he kicked it out of the defendant's reach. Thereafter, as the defendant continued to struggle, Larregui tased him twice more before he was finally placed in handcuffs.

The state also presented testimony from Marshall Robinson, a firearms examiner for the Bridgeport police department. Robinson testified, based upon his examination of the gun, that it was a five shot, .32 caliber revolver which, despite having a broken trigger return spring, was operable in either single action or double action mode. The hammer of the gun, which had to be cocked in order to be fired in either mode, could be cocked in two ways, either by pulling back the hammer manually or by pulling the trigger. Although the hammer was cocked when Robinson received the gun for examination, he could not say how or when it had been cocked. Even so, he opined that the hammer had not likely been cocked by accident. When Robinson was given the gun to examine, he was also given four live cartridges and one cartridge case from which a round had been discharged.

At the end of trial, the defendant was found guilty of three counts of attempt to commit assault in the first degree and one count each of carrying a pistol without a permit, criminal possession of a firearm, reckless endangerment in the first degree and interfering with an officer. The court sentenced the defendant on these charges to a total effective sentence of fifteen years incarceration, execution suspended after ten years, and three years probation, broken down as follows: on the three counts of attempt to commit assault in the first degree, concurrent terms of fifteen years incarceration, execution suspended after ten years, and three years probation;[2] on the count of criminal possession of a firearm, a concurrent term of two years incarceration; and on the three separate counts of carrying a pistol without a permit, reckless endangerment in the first degree and interfering with an officer, concurrent terms

[2] The court enhanced the defendant's sentence on these counts pursuant to § 53-202k.

of one year incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to sustain his conviction of three counts of attempt to commit assault in the first degree because the state failed to prove the essential elements of that offense beyond a reasonable doubt as to any of his victims. We disagree.

"The standard of review [that] we [ordinarily] 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 that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable. . . .

"[A]s we have often noted, proof 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. . . . 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 jury's verdict of guilty. . . . Furthermore, [i]n [our] 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 [that] 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 [on] the evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Hedge*, 297 Conn. 621, 656–58, 1 A.3d 1051 (2010).

As it applies to this case, § 53a-49 (a) (2) provides in relevant part that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does . . . anything which, under the circumstances as he believes them to be, is an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Section § 53a-59 (a), in turn, provides in relevant part that "[a] person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . ." Accordingly, a conviction of attempt

to commit assault in the first degree, in violation of §§ 53a-49 (a) (2) and 53a-59 (a) (1), requires proof beyond a reasonable doubt of two elements: (1) that while acting with the intent to cause serious physical injury to the victim by means of a deadly weapon or dangerous instrument, (2) the defendant intentionally took a substantial step in a course of conduct planned to cause such injury to the victim.

To understand the first element, the intent or purpose element of attempt to commit assault in the first degree, two statutory definitions must be considered. First, "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11). Second, " '[s]erious physical injury' means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4). In light of these definitions, the intent or purpose element of attempt to commit assault in the first degree requires proof that, when the defendant engaged in the conduct claimed to constitute the offense, it was his conscious objective or purpose to cause serious physical injury, defined as aforesaid, to his victim.

To understand the second element, the substantial step or conduct element of attempt to commit assault in the first degree, as here alleged, three additional statutory definitions must be considered. First, to constitute a substantial step in a course of conduct planned to culminate in the commission of a crime, an actor's conduct must be "strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative

of the actor's criminal purpose, shall not be held insufficient as a matter of law . . . (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances . . . ." General Statutes § 53a-49 (b). "This standard focuses on what the actor has already done and not what remains to be done. . . . The substantial step must be at least the start of a line of conduct which will lead naturally to the commission of a crime. . . . What constitutes a substantial step in any given case is a question of fact." (Internal quotation marks omitted.) *State* v. *Robinson*, 127 Conn. App. 1, 7, 15 A.3d 648, cert. denied, 300 Conn. 942, 17 A.3d 477 (2011). Where, then, as here, the crime allegedly attempted was assault in the first degree in violation of § 53a-59 (a) (1), the act claimed to constitute a substantial step must be proved to have been strongly corroborative of the defendant's alleged purpose of causing serious physical injury to his alleged victim by means of a deadly weapon or a dangerous instrument.

The term deadly weapon, as used in this case, means "any weapon, whether loaded or unloaded, from which a shot may be discharged . . . ." General Statutes § 53a-3 (6). The term dangerous instrument, in turn, is defined in relevant part to include "any instrument . . . which, under the circumstances in which it is used or attempted . . . to be used, is capable of causing death or serious physical injury . . . ." General Statutes § 53a-3 (7). Under those definitions, an operable pistol or revolver is a deadly weapon, which, when used or

attempted to be used to shoot and cause serious physical injury to another person, also constitutes a dangerous instrument. Thus, the state can satisfy the substantial step or conduct element of attempt to commit assault in the first degree by proving that the defendant, while acting with the conscious objective or purpose of causing serious physical injury to the alleged victim by shooting him with a gun, engaged in conduct strongly corroborative of that criminal purpose that was at least the start of a line of conduct that would lead naturally to the commission of that crime.

Here, the state argues that the defendant attempted to commit assault in the first degree as to each of his alleged victims because, while acting with the conscious objective or purpose of causing serious physical injury to the victim, he intentionally reached for and grabbed a cocked and loaded gun in the right pocket of his shorts at the end of the second tasing cycle. The state argues that this conduct, coming in the course of the defendant's prolonged physical resistance to the officers' efforts to subdue him, was strongly corroborative of his intent to secure the gun and use it against each of the officers in order to avoid being taken into their custody and control.

The defendant disputes the state's contention on several grounds, noting initially that the defendant never threatened to shoot or kill any of the officers, never pointed the gun at any of them, and, of course, never fired a shot. Recognizing, however, that a defendant's intent or purpose is usually proven by inference and that the state here sought to prove his intent to inflict serious physical injury upon the officers with a gun in reliance upon other aspects of his alleged conduct during his encounter with them, he focuses his attack on what he claims to be two critical weaknesses in the state's evidence against him. First, he claims that none

of his proven conduct can be found to have been intentional because it was immediately preceded by painful and debilitating tasing, which assertedly disabled him from engaging in deliberate physical movement. Second, he claims that, even if his physical movements at the time of his alleged conduct could have been found to be deliberate, there are irreconcilable inconsistencies between the officers' trial testimony about his encounter with them and the actual manner in which that encounter took place, as recorded by the camera on Larregui's Taser gun. The defendant contends that the recording so clearly undermines the essential basis for the state's attempt charges against him as to require the reversal of his conviction of those charges. We do not agree with either of the defendant's contentions.

It is appropriate at the outset to observe both that the theoretical basis of the state's underlying claim of criminal culpability against the defendant is legally sound and that the testimony of the three officers, if considered in the light most favorable to the state in support of that theory, is sufficient on its face to sustain the jury's guilty verdict on all three counts of attempt to commit assault in the first degree. The ultimate measure of the sufficiency of the defendant's conduct to constitute a substantial step in a course of conduct planned to culminate in the commission of assault in the first degree is not, to reiterate, how close in time or place or final execution his proven conduct came to the consummation of that crime, but whether such conduct, if at least the start of a line of conduct leading naturally to the commission of the crime, strongly corroborated his alleged criminal purpose. The defendant's act of reaching quickly into his pocket and grabbing a cocked and loaded gun while struggling with uniformed police officers who were attempting physically and by verbal command to subdue him reasonably could have been found not only to have been the start of a line of

conduct leading naturally to securing the gun and using it to shoot and cause serious physical injury to each of the three officers, but also to have been strongly corroborative of his alleged purpose to engage in such conduct and cause such results, and thus to commit assault in the first degree against each officer.

The jury also reasonably could have found that the defendant gave the officers stubborn physical resistance from the beginning of the incident until the end; that, although the defendant was being tased, and thus was incapable of voluntary physical movement until just before he reached for his gun, he was restored to full strength and function, with the capacity to engage in deliberate physical movement, as soon as each tasing cycle ended; and that, when the second tasing cycle ended, he immediately reached downward with his right hand to the right front pocket of his shorts, from which he grabbed and partially removed his cocked and loaded gun. Unless the evidence adduced at trial was such as necessarily to raise a reasonable doubt about any of these central aspects of the officers' testimony, the defendant's challenge to the sufficiency of the evidence to support his conviction of three counts of attempt to commit assault in the first degree must be rejected.

The defendant does not claim that he did not struggle with the three officers while they attempted to subdue him. The most he claims on that subject is that once he was tased, he lost all capacity to engage in deliberate physical movement. He claims, on that basis, that his alleged conduct of reaching toward his shorts pocket at the end of the second tasing cycle cannot be found to have been an intentional act, since he was still under the influence of the shock from the Taser at that time.

Other than the officers' testimony and the video of the incident, no evidence was presented at trial as to the effects of a Taser gun on a target's capacity for

deliberate bodily movement. The officers explained that, although the target of a Taser is totally incapacitated while the Taser is deployed, he is restored to full function, and thus able to act deliberately, as soon as the tasing stops. If the jury accepted this testimony, as was their prerogative, the defendant reasonably could have been found to have acted deliberately when, as the officers testified, he reached for and grabbed the cocked and loaded pistol in his pocket between tasing cycles.

Even, however, if the evidence permitted the jury to find that the defendant was capable of engaging in deliberate physical movement at the time he is alleged to have reached for and grabbed the gun in his pocket, the defendant insists that the video of the incident definitively raises a reasonable doubt as to whether he actually grabbed the gun or pulled it from his pocket at that time, and thus that the state's evidence against him is fatally undermined. With this claim in mind, we turn to the video, which was played during trial and intermittently paused so that each officer could describe the events depicted therein.

According to the defendant, "[t]he video establishes that the events occurred as follows: When the second [Taser] charge stopped at 00:28, the defendant's hand had not come in contact with the gun, nor had his hand come in contact with the pocket containing the gun. At 00:28, the defendant had experienced nearly 11 straight seconds of intense pain, incapacitation and electrocution-like effects from the Taser. At 00:28, the defendant's right hand can be seen near his pants pocket which contained the gun. The defendant did not touch the gun or pull it out of his pocket. At 00:29, the view of the defendant's pocket is blocked for a fraction of a second and then (also at 00:29) when the pocket becomes visible again, we can see the defendant's arm stretched out away from his body and the pocket. At

00:30, the video shows Larregui's leg and foot in between the defendant's arm and his body.[3] At 00:30 to 00:31, the gun comes out of or falls from the defendant's pocket on its own. At this time the defendant's arm is still outstretched and not near his pocket or the gun. At 00:30 of the video, someone other than the defendant is heard saying to get the 'fucking gun out of that pocket.' The clicking from the Taser can be heard at the very end of the 00:31 mark, meaning Larregui has begun to [tase] the defendant for the third time. When the [tasing] starts, the defendant does not have, nor could he have, the gun. Thereafter, while the camera is pointed at the ground and the defendant is yelling in pain, someone other than the defendant says, 'I got the gun' immediately before the gun discharges at 00:35. Confirming that someone other than the defendant picked up the gun and dropped it, a voice that is not the defendant's is heard at 01:30 of the video saying, 'Dude, I went to go grab it and it went right off. . . . It bounced right off the ground."

If the jury saw and understood the video exactly as the defendant has described it, it might well have had questions about certain aspects of the officers' trial testimony. The most significant of those questions might have concerned the defendant's claim that the video fails to show his hand ever reaching into his pocket and grabbing a gun therefrom. The defendant would have us rely upon his description of the incident, as assertedly shown in the video, to discredit the officers' testimony in its entirety. We reject this claim for two reasons. First, any alleged inconsistencies between the officers' testimony and the video would not have required the jury to discount all of the officers' testimony. It is axiomatic that "it is the jury's role as the

[3] We note that the testimony at trial indicated that it was Vasquez, not Larregui, who stepped between the defendant's arm and his body. This inconsistency is immaterial in light of the active role of each of the officers in attempting to subdue the defendant.

sole trier of the facts to weigh the conflicting evidence and to determine the credibility of witnesses. . . . It is the right and duty of the jury to determine whether to accept or to reject the testimony of a witness . . . and what weight, if any, to lend to the testimony of a witness and the evidence presented at trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Morgan*, 274 Conn. 790, 802, 877 A.2d 739 (2005). The jury could have discounted those portions of the officers' testimony that were inconsistent with the video and credited the remainder.

Second, the jury reasonably could have determined that the video does not necessarily raise reasonable doubt as to whether the defendant reached into his pocket and grabbed his gun after the second tasing cycle. The jury reasonably could have found that the video shows the defendant reaching toward his pocket and then a silver gun appearing at or near the pocket before falling to the ground beneath him. Viewing the video's contents in this manner, the jury might reasonably have found that the reason the gun appeared at or near the defendant's pocket immediately after he reached for it is that, in fact, he intentionally grabbed it, and thereby dislodged it, causing it to fall. On that basis, the jury reasonably could have found that the defendant took a substantial step in a course of conduct planned to culminate in the shooting of each of the officers with the gun. The evidence was thus sufficient to sustain the jury's verdict of guilty of three counts of attempt to commit assault in the first degree.[4]

[4] Following oral argument, we asked the parties to submit supplemental briefs addressing the unpreserved issue of whether, if the state's evidence was found sufficient to support the jury's guilty verdict of three counts of attempt to commit assault in the first degree, the defendant's conviction of three separate counts of that offense should be upheld, or, instead, should be merged into a conviction of one count of attempt to commit assault in the first degree for which a single sentence should be imposed. In *State* v. *Montgomery*, 22 Conn. App. 340, 578 A.2d 130, cert. denied, 216 Conn. 813, 580 A.2d 64 (1990), this court affirmed a conviction of multiple counts of attempt to commit assault in the first degree against different intended

II

The defendant also claims that the court erred in failing to allow the jury to take the video of the events at issue, which had been introduced as an exhibit, into the deliberating room, requiring them instead to view the video in the courtroom, in the presence of the court, counsel and all others attending the trial. The following additional facts are relevant to this claim.

After commencing its deliberations, the jury sent a note to the court asking to have the video replayed for it, first at full speed and then at one-half speed. In response to this request, the jury was returned to the courtroom, where the recording was first played in its entirety at full speed, then played at half speed to the point when the foreperson interrupted as follows: "Your Honor, we don't need to see any more of the video,

victims based upon a single course of conduct found to have strongly corroborated the defendant's alleged purpose of inflicting serious physical injury upon each such victim by means of a deadly weapon. The court in *Montgomery* explained: "A fundamental purpose of the criminal law is to protect individual citizens from the criminal conduct of another. People are neither fungible nor amorphous. Where crimes against persons are involved, a separate interest of society has been invaded for each violation. Therefore, when two or more persons are the victims of a single episode there are as many offenses as there are victims." (Internal quotation marks omitted.) Id., 350. That is, the defendant can appropriately be convicted of attempt to commit assault in the first degree with respect to any alleged victim as to whom the state proves beyond a reasonable doubt that, while acting with the intent to cause serious physical injury to that victim with a deadly weapon or a dangerous instrument, he engaged in conduct constituting a substantial step in a course of conduct planned to culminate in the commission of that offense against that victim. Here, because the jury reasonably could have found that the defendant, while physically struggling with all three officers at close range throughout their concerted efforts to subdue him, reached quickly into his shorts pocket and dislodged therefrom a cocked and fully loaded five shot revolver, we conclude that the jury reasonably could have found that such conduct strongly corroborated the defendant's alleged intent to use the gun to shoot each of the three officers in an attempt to overcome the officers' efforts to subdue him and to escape from their custody and control. For that reason, we affirm the defendant's conviction of each of the three counts of attempt to commit assault in the first degree.

actually we're going to go back in our room and discuss some of the other areas that we'd like to have replayed on the video." The jury then exited the courtroom and resumed its deliberations. Thereafter, the jury sent the court another note, asking to view the video "in private." Before the jury was brought into the courtroom for the court's response, the court informed counsel that, pursuant to *State* v. *Gould*, 241 Conn. 1, 15, 695 A.2d 1022 (1997), the video must be viewed "in open court under the supervision of the trial judge, in the presence of the parties and their counsel."[5] With no objection by the state or the defense to this procedure, the court summoned the jury and informed them that it could not grant their request. The foreperson responded that the jury would "be asking for [the video] to be replayed multiple times," then specifically stated that the jury would like to see the first twenty seconds of the video, played at regular speed. After the court complied with that request, the foreperson immediately asked to see it again in slow motion. The court told the jury that it could see the video as many times as it would like, then complied with its request. The foreperson next asked the court to see the portion of the video from the fifteen second mark to the thirty-five second mark, at regular speed. Due to technical difficulties, however, the court and the parties discovered that the video could only be replayed from the beginning. So informed, the foreperson next requested a playback from the start of the recording to the thirty-five second mark. The court complied with that request and asked if the jury wanted to see it again. After the foreperson responded in the affirmative, the video was played three more times

[5] We note that *Gould*, the case upon which the court relied in denying the jury's request to view the video in the deliberating room, concerned videotaped deposition testimony, not a trial exhibit like the video in this case. See *State* v. *Gould*, supra, 241 Conn. 9–15. We need not address the propriety of the court's reliance on *Gould* because no objection to that aspect of the court's ruling was preserved for our review.

before the jury returned to the deliberating room. Shortly thereafter, the jury asked for certain parts of the video to be played back and asked if the first sixty seconds could be isolated and "played in a loop." The court then adjourned for the day. The next morning, the court played the requested loop for the jury, first at regular speed, then again at one-quarter speed, then one more time at regular speed. The jury deliberated further and then sent several additional requests to the court, including a request to view the video from the twenty-five second mark to the thirty-five second mark. The video was played for the jury as requested, frame by frame, beginning at the twenty-three second mark until thirty seconds. The foreperson then asked to "go back frames," specifically to the frames at the twenty-seven second to twenty-nine second marks. The frames were played back as requested. The foreperson then asked to "go back one," and that request was again complied with. The video was then played again as requested by the jury and, at one point, the foreperson asked for the replay to stop so that a snapshot of a particular frame could be made, marked as an exhibit and provided to the jury. The court and counsel agreed that the video was the exhibit that had been introduced into evidence at trial, and that the admission of additional evidence at that point in the trial would be improper. The foreperson further asked if the contrast in the video could be adjusted, but the court indicated that it could not be, because that would alter the evidence that had been admitted. The foreperson then asked that the next frame be replayed and the video was played as requested. Thereafter, the jury returned to the deliberating room to resume its deliberations. The jury did not ask to see the video again.

At no time did the defendant ask that the jury be allowed to view the video in the deliberating room, nor did he take issue with the court's denial of the jury's

request to do so. Consequently, the defendant concedes, as he must, that he did not preserve the present claim at trial. He nonetheless maintains that his claim is reviewable under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as constitutional error, and under the plain error doctrine. We disagree.

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." (Emphasis in original.) Id., 239–40. We consistently have held that purely evidentiary claims fail the second prong of *Golding* as they are not of constitutional magnitude. See *State* v. *Wells*, 111 Conn. App. 84, 90, 957 A.2d 557 ("[t]he defendant can not raise a constitutional claim by attaching a constitutional label to a purely evidentiary claim or by asserting merely that a strained connection exists between the evidentiary claim and a fundamental constitutional right" [internal quotation marks omitted]), cert. denied, 289 Conn. 958, 961 A.2d 423 (2008).

Here, although the defendant's claim is not a classic evidentiary claim, in that it does not challenge the admission or exclusion of evidence or limitations upon the uses to which admitted evidence lawfully could be put, it concerns the process by which admitted evidence was made available to the jury for its review and consideration in the course of deliberations. Addressed, as it is, to a practical issue of trial management, it does not concern whether the jury had unrestricted access to

duly admitted evidence or an unencumbered opportunity to deliberate about such evidence in complete privacy, but how the passive viewing of certain trial evidence was facilitated during deliberations. The jurors were not required by the court's challenged ruling to discuss the video evidence in the presence of the court and counsel or otherwise to discuss the case or deliberate in public. They were not limited in their access to the evidence, either by express order or by implicit judicial suggestion. Rather, they were invited to return to the courtroom as often as they wished to view and review the video, shown and reshown, in several different ways. We thus conclude that the claim fails under the second prong of *Golding*.[6]

The defendant also asserts that his unpreserved claim should be reviewed under the plain error doctrine. See Practice Book § 60-5. We disagree. Our Supreme Court has explained: "The plain error doctrine is a rule of reversibility 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. . . . That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear

[6] Even assuming, arguendo, that the defendant's claim in this regard could be construed as one of constitutional magnitude alleging the violation of his fundamental right to due process, we could not conclude that the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial because the jury watched the video repeatedly and the defendant has not proved that he was deprived of a fair trial on the basis that the jury was required to view the video in the courtroom instead of the deliberating room. The defendant's claim thus would also fail under the third prong of *Golding*.

and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; internal quotation marks omitted.) *State* v. *Roger B.*, 297 Conn. 607, 618, 999 A.2d 752 (2010).

On the basis of our review of the record, we cannot conclude that the court's ruling requiring the jury to view the video in the courtroom constituted a manifest injustice. There is nothing in the record to suggest that the jury felt constrained in the manner in which it reviewed the video. Although the defendant contends that the "jury was unable to adequately view and consider a key piece of evidence in the trial," his claim is belied by the fact that the jury viewed the video, or portions of it, no fewer than twelve times throughout its deliberations, often asking that specific portions be played and at various speeds. There is no indication in the record that the jury was exposed to any undue influence as a result of being required to view the video in the courtroom. The defendant has failed to demonstrate that the court's denial of the jury's request to view the video in the deliberating room constituted an obvious error that affected the integrity of the trial. Therefore, the defendant's attempt to invoke the plain error doctrine in this case must fail.[7]

III

The defendant finally claims that the court erred in failing to instruct the jury as to the intent element of the charge of interfering with a peace officer. The defendant acknowledges that he did not preserve this claim of instructional error at trial, and thus he seeks review of the claim under *State* v. *Golding*, supra, 213 Conn. 239–40. Although the defendant's claim is reviewable

[7] The defendant also suggests that the court's error in this regard constituted a structural defect rendering the trial fundamentally unfair. Because we address this issue in our plain error analysis, we decline to analyze it further under a different guise.

under *Golding* because the record is adequate to review the court's instructions and a claim that the court omitted an instruction concerning an essential element of the crime is of constitutional dimension, it is well settled that waived claims cannot satisfy *Golding*'s third prong. See, e.g., *State* v. *Darryl W.*, 303 Conn. 353, 367–68, 33 A.3d 239 (2012). We conclude that this claim has been waived.

The following additional facts are relevant to the defendant's claim of instructional error. On the morning of the last day of evidence, defense counsel informed the court that his next witness would not be available to testify until 2 p.m. that afternoon. The court dismissed the jury until that time and, in the interim, held a charge conference with the attorneys in this case. Although the charge conference was not held on the record, on the following morning, the court gave "an outline of what [was] covered . . . in the charge conference" and told counsel that, "[i]f there's anything you want to add or delete, please let me know." The court then briefly recited the salient points of the conference, stating, inter alia, that "[t]here will be, as part of the charge and on the interfering with an officer, the concept of excessive force . . . ."[8] Following this brief

[8] As to the content of the charge conference, the entirety of the discussion on the record was as follows:

"The Court: We discussed inconsistent statements. One inconsistent statement from Officer Csech and one from Officer Larregui. We—there were no requests for lesser included offenses. There will be, as part of the charge and on the interfering with an officer, the concept of excessive force, there will be—I'm going to allow statements concerning consciousness of guilt, one having to do with a statement and another having to do with flight. Those are to be used only on the crimes charged of pistol without a permit and criminal possession of a firearm. There—I have asked the defense whether they wanted a self-defense charge and that was—the answer I got was no, that they don't wish to have that charge. Does that—does that cover the main points of what we went over?

"[The Prosecutor]: Yes, Your Honor.

"[Defense Counsel]: Yes, Your Honor."

recitation, the court asked counsel if it had "cover[ed] the main points of what we went over," and both parties responded in the affirmative. When the court instructed the jury, it instructed on intent in general, but omitted any instruction as to the requisite intent for interfering with an officer. At the conclusion of the court's instructions to the jury, counsel for both parties indicated that they had no exceptions to the instructions as given.

Shortly after it began its deliberations, the jury asked the court to repeat its instruction on the interfering charge. Neither party expressed any objection to the repeated instruction as given. At the beginning of its second full day of deliberations, the jury again asked the court to repeat its instruction on interfering with an officer. The court repeated its previous instruction to the jury. After the court read the instruction, neither party raised an issue with that instruction. Defense counsel then asked to approach the bench and a brief side bar ensued, after which the court excused the jury to resume its deliberations. After the jury exited the courtroom, the court indicated: "Counsel has suggested that maybe that definition of interfering with an officer be typed up." The court asked if both the state and defense joined in that suggestion. Thereafter, the court monitor transcribed the court's repeated instruction on the interfering charge. The court again asked if both counsel agreed that the transcript could be given to the jury and both responded in the affirmative. The state asked the court to review the transcript of the instruction for accuracy before it was submitted to the jury. Neither party asked to review the transcript. The transcript of the court's reinstruction was provided to the jury.

Our Supreme Court has explained: "[W]hen the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding

changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011).

Here, we conclude that defense counsel had a meaningful opportunity to review and address any deficiencies in the court's instructions, yet failed to do so. Although the record does not reflect whether the court provided counsel with a written copy of its charge before it was given to the jury, the court held a charge conference before instructing the jury and it is discernible from the record that the court's instructions to the jury were consistent with the instructions as discussed during the charge conference. The defendant did not object, nor take exception, to the court's initial instruction, or to either of the court's subsequent reiterations of that instruction; nor did the defendant object to the transcription of its instruction being provided to the jury. Because the court instructed on the interfering charge three times and then submitted a written copy of that instruction to the jury, it is reasonable to infer that defense counsel had knowledge of any potential flaws in the court's instruction, yet he failed to raise any claims regarding those flaws before the trial court. We thus conclude that defense counsel implicitly waived any objection to the instruction as given.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL J. O'BRIEN *v.* KATHLEEN E. O'BRIEN (AC 31990)

Lavine, Sheldon and West, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant and awarding the defendant alimony and child support, and from the court's award of attorney's fees to the defendant to defend this appeal. The plaintiff claimed that the trial court's award of unallocated alimony and child support was improper because the court failed to consider and apply the child support guidelines. *Held* that the trial court abused its discretion by entering its unallocated alimony and child support order without considering and applying the guidelines: a review of the record showed that the court failed to follow or reference the guidelines, and that the court did not, as required by the guidelines, determine the presumptive amount of child support to be awarded thereunder, make a finding as to whether application of the guidelines would be inappropriate or inadequate in this case, or explain its basis for deviating from the guidelines; furthermore, the defendant's claim that the guidelines did not apply in this case because it involved an award of unallocated alimony and child support was unavailing, as a trial court in any marital dissolution action involving minor children must fashion orders providing for support of those children, including unallocated awards of alimony and child support, which necessarily include amounts for both child support and spousal support; accordingly, because the alimony and child support order here was inextricably interwoven with the mosaic of other financial orders that were entered at the time of the final decree, the judgment with respect to all of the court's final financial orders was reversed and the case was remanded for a new trial on all financial issues, including the order requiring the plaintiff to pay the defendant $50,000 in attorney's fees to defend this appeal, which was based on the financial circumstances of the parties that may be materially affected by the new financial orders issued on remand.

(*One judge dissenting*)

Argued January 5—officially released October 16, 2012

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a cross complaint; thereafter, the matter was tried to the court, *Hon.*

Howard T. Owens, Jr., judge trial referee; judgment dissolving the marriage and granting certain other relief; subsequently, the court issued a clarification of the judgment, and the plaintiff appealed to this court; thereafter, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, issued a clarification and correction of the judgment and the plaintiff filed an amended appeal; subsequently, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted the defendant's motion for attorney's fees and the plaintiff filed an amended appeal. *Reversed in part; new trial.*

Steven D. Ecker, with whom, on the brief, was *Ann Walsh Henderson*, for the appellant (plaintiff).

George J. Markley, for the appellee (defendant).

Opinion

SHELDON, J. In this marital dissolution action, the plaintiff, Michael J. O'Brien, appeals from the judgment of the trial court with respect to several of the financial orders entered at the time of its final decree. Among other orders herein challenged is the court's unallocated award of alimony and child support for the defendant, Kathleen E. O'Brien, and the parties' minor children.[1] Central to the plaintiff's challenge to this award is his claim that, in so ordering, the court failed to consider and apply the child support guidelines (guidelines).[2] On this score, the plaintiff complains,

[1] The plaintiff also claims that the court erred in failing to assign to the defendant an earning capacity and thus consider that earning capacity in rendering its financial orders and improperly ordering him to maintain a life insurance policy for the defendant's benefit for as long as his lifetime alimony obligation to the defendant endures. The dissent has opined that the trial court's judgment should be affirmed with respect to these additional claims. Because we reverse the judgment of the trial court on the basis explained herein, and remand the case for a new trial on all financial issues, we offer no view on those claims.

[2] The guidelines are set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies and are promulgated by the commission for child support guidelines established pursuant to General Statutes § 46b-215a.

more particularly, that the court erred by failing to determine the presumptive amount of child support under the guidelines, failing to make a finding that the application of the guidelines would be inequitable or inappropriate in this case, and failing to indicate that it was deviating from the guidelines when it fashioned its unallocated alimony and child support order.[3] Because we agree with the plaintiff that the court erred in entering its unallocated alimony and child support order without considering and applying the guidelines, and we conclude that that order is inextricably interwoven with the mosaic of other financial orders that were entered at the time of the final decree, we reverse the court's judgment with respect to all of its final financial orders and remand this case for a new trial on all financial issues. The plaintiff also claims that the court abused its discretion in ordering him to pay the defendant $50,000 in attorney's fees to defend this appeal. Because such an order must be based upon the financial circumstances of the parties, and those financial circumstances may be materially affected by the new financial orders issued on remand, the award of appellate attorney's fees must also be remanded for further consideration.

The following facts are relevant to our resolution of this appeal. The parties were married in 1985, and three children were born of the marriage—the first child on August 9, 1994, the second child on July 2, 1996, and

[3] With regard to the court's child support order, the plaintiff also claims that the court failed to consider or base its award on the needs of the children; that the court improperly based the support order on his gross income rather than his net income; that the award exceeds the maximum presumptive percentage of income permitted under the child support guidelines; and that the court improperly based the award on a percentage of his fluctuating income. Again, because we are reversing the court's financial orders for the reasons set forth herein, and we thus are remanding the case for a new trial on all financial issues, we need not address these additional claims of error.

the third child on May 19, 2000. The plaintiff filed an action seeking dissolution of the parties' marriage on January 30, 2008. In its memorandum of decision filed on September 18, 2009, the court rendered judgment dissolving the parties' marriage, adopting a parenting plan formulated by the parties, and ordering, inter alia, that "[t]he plaintiff shall pay to the defendant, during his lifetime or until the defendant's death or remarriage, the following percentages of his 'gross annual earned income from employment,' as hereinafter defined, as unallocated alimony and child support: a. [45] percent of the plaintiff's 'gross annual earned income from employment' from October 1, 2009 until January 30, 2015; b. [c]ommencing February 1, 2015, [40] percent of the plaintiff's 'gross annual earned income from employment' through July 2, 2024; c. [f]rom July 2, 2024, until the death of either party or the defendant's remarriage, whichever shall first occur as defined by statute, [20] percent of the plaintiff's 'gross annual earned income from employment' as alimony."[4] This appeal followed.[5] Thereafter, on February 25, 2010, the defendant filed a postjudgment motion for attorney's fees

[4] The plaintiff also claims that when the court later issued a clarification of the judgment, it improperly changed the unallocated award in a substantial and material way. Because we reverse the judgment of the court and the periodic orders will be reconsidered in their entirety, we need not address the court's purported clarification.

[5] In its memorandum of decision dissolving the parties' marriage and issuing associated financial orders, the court did not set forth any findings as to the parties' incomes, careers or earning capacities, other than noting that the "[defendant] has been away from her career for some period" and that "she will take little time in reacquiring her exceptional skills." On December 3, 2010, in a subsequent articulation in response to an order from this court, the court indicated that: "At the time of the dissolution the court found that [the] defendant was a stay-at-home mother and she served in that capacity at the plaintiff's request. Obviously, after the children [are] grown, she would have earning capacity based on her education and prior abilities. It would be premature to assess earning capacity for some future date. Obviously, the defendant is well educated, earned large sums of money, and she has maintained her skills. . . . The court considered the parties' lifestyle during the marriage and the necessity of protecting the wife for the rest of her life. As of April 21, 2009, according to [the] plaintiff's [financial]

to defend this appeal. The court granted that motion, issuing an order that the plaintiff pay the defendant $50,000 in appellate attorney's fees. The court subsequently articulated the basis of this order as follows: "The defendant is defending an appeal that is frivolous. To not award her attorney fees to defend could undermine other awards."

On appeal, although the plaintiff presents several claims of error with respect to the court's unallocated award of alimony and child support, we will focus on the most fundamental of those claims—that in fashioning that award, the court erred in failing to consider and apply the guidelines. On this score, to reiterate, the plaintiff specifically claims that the court erred by failing to determine the presumptive child support amount under the guidelines, failing to make a finding that the application of the guidelines would be inequitable or inappropriate under the circumstances of this case, and failing to indicate that it was deviating from the guidelines when it entered its unallocated, or "total family support," order pursuant to § 46b-215a-3 (b) (5) of the Regulations of Connecticut State Agencies. We agree.

We begin our analysis of the plaintiff's claim by identifying the appropriate standard of review. "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. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a

affidavit, he had gross earnings and gross income of $17,414 per week gross which resulted in a net [of] $10,900 per week."

trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citation omitted; internal quotation marks omitted.) *Williams* v. *Williams*, 276 Conn. 491, 496–97, 886 A.2d 817 (2005).

"The legislature has enacted several statutes to guide courts in fashioning child support orders. General Statutes § 46b-84 provides in relevant part: '(a) Upon or subsequent to the annulment or dissolution of any marriage or the entry of a decree of legal separation or divorce, the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. . . . (d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child. . . .'

"To ensure the appropriateness of child support awards, General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines. General Statutes § 46b-215b requires that '[t]he . . . guidelines . . . be considered in *all* determinations of child support amounts . . . . [T]here shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount of support . . . . A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under criteria established by the Commission for Child Support Guidelines

under section 46b-215a, *shall be required* in order to rebut the presumption in such case.'

"The guidelines incorporate these statutory rules and contain a 'schedule' for calculating 'the basic child support obligation,' which is based on the number of children in the family and the combined net weekly income of the parents. Regs., Conn. State Agencies § 46b-215a-2b (f). Consistent with . . . § 46b-215b (a), the guidelines provide that the support amounts calculated thereunder are the correct amounts to be ordered by the court unless rebutted by a specific finding on the record that the presumptive support amount would be inequitable or inappropriate. Regs., Conn. State Agencies § 46b-215a-3 (a). The finding *must* include a statement of the presumptive support amount and explain how application of the deviation criteria justifies the variance. Id.; see also General Statutes § 46b-215b (a). This court has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to 'facilitate appellate review in those cases in which the trial court finds that a deviation is justified.' . . . In other words, the finding 'will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion.' " (Citation omitted; emphasis altered.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 318–20, 9 A.3d 708 (2010); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367–70, 999 A.2d 721 (2010); *Maturo* v. *Maturo*, 296 Conn. 80, 91, 995 A.2d 1 (2010); *Unkelbach* v. *McNary*, 244 Conn. 350, 367–68, 710 A.2d 717 (1998); *Favrow* v. *Vargas*, 231 Conn. 1, 29, 647 A.2d 731 (1994); *Budrawich* v. *Budrawich*, 132 Conn. App. 291, 299–300, 32 A.3d 328 (2011).

Our Supreme Court has recognized that "the guidelines evolved from an experimental, intentionally nondirective and flexible approach to the imposition of

standards that are *presumptively binding* on the court or magistrate . . . . [I]n general . . . the ensuing work of the commission substantially circumscribes the traditionally broad judicial discretion of the court [to deviate from the guidelines] in matters of child support." (Emphasis added.) *Favrow* v. *Vargas*, 222 Conn. 699, 715, 610 A.2d 1267 (1992). Our Supreme Court recently emphasized the importance of the mandatory application of the guidelines to all cases involving minor children, including those cases involving families with high incomes, in *Maturo* v. *Maturo*, supra, 296 Conn. 80. The court there held: "[T]he applicable statutes, as well as the guidelines, provide that *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote 'equity,' 'uniformity' and 'consistency' for children 'at *all income levels.*' . . . [Child Support and Arrearage Guidelines (2005), preamble], § (c) (1) and (2), p. ii; id., § (e) (6), p. vi. [Section] 46b-84 specifically instructs that courts shall consider various characteristics and needs of the child in determining whether support is required, the amount of support to be awarded and the respective abilities of the parents to provide such support. Although the guidelines grant courts discretion to make awards on a 'case-by-case' basis above the amount prescribed for a family at the upper limit of the schedule when the combined net weekly income of the parents exceeds that limit, which is presently $4000; Regs., Conn. State Agencies § 46b-215a-2b (a) (2); the guidelines also indicate that such awards should follow the principle expressly acknowledged in the preamble and reflected in the schedule that the child support obligation as a percentage of the combined net weekly income should decline as the income level rises. Thus, an award of child support based on a combined net weekly income of $8000 *must* be governed by the same *principles* that govern a child support award based on

a combined net weekly income of $4000, even though the former does not fall within the guidelines' *schedule*. Finally, although courts may, in the exercise of their discretion, determine the correct percentage of the combined net weekly income assigned to child support in light of the circumstances in each particular case, including a consideration of other, additional obligations imposed on the noncustodial parent, any deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child. See also General Statutes § 46b-84 (d)." (Emphasis added.) *Maturo* v. *Maturo*, supra, 94–96.

"Neither this court, nor the trial court, is at liberty, where a particular family enjoys a relatively high income, to disregard the significant progress that has been made in standardizing child support awards since the advent of the guidelines. See 42 U.S.C. § 667 (b) (2) (1988). Removing consideration of the guidelines from child support decisions deprives high income families of the fairness and consistency the guidelines require and leaves the trial and appellate courts adrift, unanchored to the core principles that guide support awards in cases falling within the guidelines' schedule." *Maturo* v. *Maturo*, supra, 296 Conn. 113.[6]

[6] We note that, not only have the guidelines evolved from a guide to a mandate in all cases in which there are minor children, but the treatment of high income situations has also changed. When the guidelines were established in 1991, they explicitly indicated that they did not apply to cases in which the parties' combined net weekly income exceeded $1500. Rather they established that $1500 was the presumptive minimum level for families exceeding that income. In 1994, the guidelines were revised to establish, inter alia, a new presumptive minimum level of $1750, and eliminated the language that stated that the guidelines do not apply to high income situations. The subsequent revisions to the guidelines, in 1999 and 2005, abide by the principle of the 1994 version, but raise the highest levels of income, and thus the minimum presumptive amounts of child support, to $2500 and $4000, respectively.

Here, based upon our review of the record, it is evident that the court failed to follow, or even make reference to, the guidelines. Nor did the court, as required by the guidelines, determine the presumptive amount of child support to be awarded thereunder.[7] Moreover, having failed to determine the presumptive amount of child support under the guidelines, the court was not in a position to, and did not, make a finding as to whether application of the guidelines would be inappropriate or inadequate in this case. We are thus left to speculate both as to the presumptive child support amount and as to whether, and if so why, the circumstances of this case warranted a deviation from that amount.

The defendant argues, and the dissent agrees, that, because the court issued an unallocated award of alimony and child support, the guidelines do not apply. The law supports no such conclusion. In any marital dissolution action involving minor children, it is axiomatic that the court must fashion orders providing for the support of those children. There is no exception to this mandate, and certainly none for unallocated awards of alimony and child support, which necessarily include amounts for both child support and spousal support. Indeed, our Supreme Court recently confirmed in *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012), that an unallocated order "necessarily includes a portion attributable to child support in an amount *sufficient to satisfy the guidelines*." (Emphasis added.) *Tomlinson* also confirmed that, when making an unallocated order, the court must: first, determine the presumptive child support amount; second, explicitly find that an award in the presumptive amount would be inequitable or inappropriate under the circumstances

[7] As noted, in its initial memorandum of decision dissolving the parties' marriage, the court made no finding as to the parties' incomes.

of the case; and third, explicitly find that, in those circumstances, the entry of an unallocated or total family support order is a justifiable deviation from the presumptive amount for one of the reasons set forth in the guidelines themselves. Id., 558–59. Those reasons are explained in the guidelines as follows: "In some cases, child support is considered in conjunction with a determination of total family support, property settlement, and tax implications. When such considerations will not result in a lesser economic benefit to the child, it may be appropriate to deviate from presumptive support amounts for the following reasons only: (A) division of assets and liabilities, (B) provision of alimony, and (C) tax planning considerations."[8] See Regs., Conn. State Agencies § 46b-215a-3 (b) (5). The fact that the guidelines explicitly authorize the making of an unallocated award of alimony and child support as a permissible deviation from the presumptive amount thereunder undermines the defendant's argument and the dissent's suggestion that the guidelines do not apply at all in cases where such unallocated orders are issued.

[8] We recognize that there are federal tax benefits to an unallocated award. When an award is categorized as unallocated, since no part of that award is expressly fixed as child support, the Internal Revenue Code provides that the entire amount may be treated as alimony for taxation purposes, and thus deducted as alimony by the payor. See Internal Revenue Code, 26 U.S.C. §§ 71 and 215. There is, however, no statutory or decisional law suggesting that, if a court decides to make an unallocated award of alimony and child support, it need not, as a preliminary matter, determine the presumptive amount of child support under the guidelines. To the contrary, the court's obligation to fix the presumptive support amount is unchanging, whether or not it ultimately decides to deviate from the guidelines by fashioning such an order. Finally, we do not suggest that, in fashioning an unallocated award, a court must specify how much of that award is earmarked for child support, for such a requirement would frustrate the beneficial tax purposes of an unallocated award. Simply, in fashioning an award of total family support, the court should examine the guidelines, determine the presumptive amount of support thereunder, and then explain its basis for deviating from the guidelines in light of the unfairness or inappropriateness of following them in the case before it. In this regard, the dissent's analysis conflates a court's *finding* of the presumptive amount of child support owed pursuant to the guidelines with the issuance of a child support *order* in that amount.

For the foregoing reasons, we conclude that the court abused its discretion in entering its unallocated award of alimony and child support without considering and applying the guidelines or the principles espoused therein. It erred, more particularly, by failing to determine the presumptive amount of child support under the guidelines, failing to explain that that amount was inequitable or inappropriate, and failing to explain its basis for deviating from the guidelines.

Financial orders in dissolution proceedings often have been described as a mosaic, in which all of the various financial components are carefully interwoven with one another. *Gershman* v. *Gershman*, 286 Conn. 341, 351, 943 A.2d 1091 (2008). Because the court's support orders, particularly its spousal support or alimony order, are informed by and reflective of the parties' incomes and assets, as affected by the court's other financial orders, the entirety of the mosaic must be refashioned whenever there is error in the entering of any such interdependent order. See id., 352. Accordingly, we reverse the judgment of the trial court with respect to all of its financial orders, including, but not limited to those orders challenged on appeal.

As to the court's challenged award of appellate attorney's fees, we recognize that that award was issued postjudgment, not at the time of the entry of the other financial orders which were issued on the date of dissolution. That award is thus not part of the mosaic of final financial orders by which the court initially attempted to chart the parties' financial future. Even so, as the following authorities make clear, the ordering of attorney's fees is itself dependent upon the relative financial circumstances of the parties, as affected by the court's final financial orders. For that reason, the attorney's fees award here at issue must also be reconsidered in light of the new mosaic of financial orders that the court will issue on remand in this case.

"General Statutes § 46b-62 governs the award of attorney's fees in dissolution proceedings and provides that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82. These criteria include the length of the marriage, the causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81 . . . . General Statutes § 46b-82. In making an award of attorney's fees under § 46b-82, [t]he court is not obligated to make express findings on each of [the] statutory criteria. . . . 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. . . . An exception to th[is] rule . . . 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 . . . ." (Citations omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 385–86.

Here, the court did not make a finding as to the defendant's ability to pay her own attorney's fees. Rather, as previously noted, it opined in its articulation that the plaintiff's appeal was frivolous, and thus that the failure to award the defendant attorney's fees to defend the appeal would undermine the court's other financial orders for her maintenance and support. In so doing, the court properly recognized that its award of attorney's fees is a function of the parties' financial circumstances. Those circumstances, however, depend

directly upon the final financial orders issued by the court in its dissolution judgment. Not until the parties' assets are finally divided and their respective rights and obligations to give or receive financial support to or from each other are finally determined can the parties' ability to pay for their own attorney's fees be ascertained; nor, if it is determined that the parties do have the ability to pay their own attorney's fees, can it finally be determined if the failure to award appellate attorney's fees to the defendant would undermine the court's other financial orders for her maintenance and support. Accordingly, because the court's financial orders will be reconsidered in their entirety on remand, its award to the defendant of $50,000 in appellate attorney's fees must also be remanded for reconsideration in light of the new financial orders that will be issued at that time.

The judgment is reversed only as to the court's financial orders, including the award of appellate attorney's fees, and the case is remanded for a new trial on all financial issues.

In this opinion WEST, J., concurred.

LAVINE, J., dissenting. I respectfully disagree with the majority that the court improperly failed to consider and apply the child support guidelines[1] when it ordered the plaintiff, Michael J. O'Brien, to pay unallocated alimony and child support (unallocated support) to the defendant, Kathleen E. O'Brien. Because I would affirm the judgment with respect to the unallocated support, I also consider the plaintiff's other claims on appeal, which are that it was improper for the court to (1) fail to assign an earning capacity to the defendant, (2) order

[1] See Regs., Conn. State Agencies § 46b-215a-1 et seq. The defendant also claims that the court failed to abide by our Supreme Court's decision in *Maturo* v. *Maturo*, 296 Conn. 80, 995 A.2d 1 (2010). I disagree that *Maturo* applies to the factual circumstances here.

him to maintain life insurance for as long as he has a lifetime alimony obligation, (3) award the defendant appellate attorney's fees and (4) modify the judgment. I would affirm the judgment of the trial court.

Because I consider all of the plaintiff's claims on appeal, the following procedural history and facts found by the court are relevant. The parties were married in 1985 and are the parents of three minor children born on August 9, 1994, July 2, 1996, and May 19, 2000.[2] After the plaintiff initiated this dissolution action in January, 2008, he voluntarily left the marital home. In his complaint, he alleged, in part, that the marriage had broken down irretrievably. The defendant admitted the allegations of the complaint and alleged a cross complaint, in which she sought, among other things, temporary and permanent alimony pursuant to General Statutes §§ 46b-82 and 46b-83 and reasonable attorney's fees pursuant to General Statutes § 46b-62.

The court conducted a trial over several days in April and May, 2009, and issued a memorandum of decision dissolving the parties' marriage on September 18, 2009. The court found considerable disagreement as to the reason for the marital breakdown. The defendant claimed that the plaintiff had had a "roving eye" throughout the marriage and that he had had more than collegial relationships with at least twelve women. She retained a private detective service to monitor the plaintiff's infidelity. The plaintiff claimed that the defendant's unwarranted accusations of infidelity and her control of many aspects of his life had led to the breakdown of the marriage. The court found that the plaintiff had had out-of-marriage relationships with two women before he left the marital home. The court, however, found that the adultery itself was not the cause of the

[2] The parties negotiated a parenting plan, which the court approved and incorporated into the judgment of dissolution.

marital breakdown; rather, the plaintiff's dalliances with certain women over the course of the parties' marriage had led to the marital breakdown. The court found substantial evidence that the defendant tried to make the marriage succeed, but that the plaintiff did not have a similar interest. The court found the plaintiff primarily at fault for the breakdown of the marriage.

The court stated that, in formulating its orders, it considered General Statutes §§ 46b-81 and 46b-82, as well as the assets, liabilities, and the gross and net incomes of the parties in entering its orders. It also considered the talent, adeptness and expertise of both parties. The court found that the defendant had been away from her career for some time and will need time to reacquire her exceptional skills.[3] The court awarded the defendant unallocated support[4] to be paid by the plaintiff pursuant to a three stage, step-down plan.[5]

[3] The court found, pursuant to the plaintiff's financial affidavit, that he had gross income of $17,414 per week, which resulted in net income of $10,900 per week. Although the trial court did not make further specific findings of fact as to the parties' employment, for the purposes of context, my review of the record discloses that both of the parties are graduates of Cornell University. The plaintiff attended law school during the first three years of the marriage and continuously practiced law in New York City thereafter. At the time of trial, the plaintiff was general counsel to Omnicom Group, Inc. After graduating from college, the defendant was employed in the financial industry in New York until 2003, and earned a substantial salary. In 2006 and 2007, she was engaged part-time in a recruiting business. She has been unemployed since 2008.

[4] In my view, the term "unallocated child support and alimony" has the potential to be confusing because it creates the impression that an award designated for child support has been made. Therefore, in this opinion, I refer to the court's order simply as "unallocated support." See *Tomlinson* v. *Tomlinson*, 119 Conn. App. 194, 211–12, 986 A.2d 1119 (2010) (award of unallocated support does not designate how support is to be apportioned or applied), rev'd on other grounds, 305 Conn. 539, 46 A.3d 112 (2012).

[5] The court ordered: "The plaintiff shall pay to the defendant, during his lifetime or until the defendant's death or remarriage, the following percentages of his gross annual earned income from employment, as hereinafter defined: a. [45] percent of the plaintiff's gross annual earned income from employment from October 1, 2009 until January 30, 2015, as unallocated alimony and child support; b. Commencing February 1, 2015, [40] percent

The court awarded the defendant exclusive use of the marital home in Greenwich until it is sold on or before April 1, 2014, and ordered that the parties immediately sell their vacation home in Salisbury. With few exceptions, the court ordered that the parties divide their assets, including the proceeds from the sale of the marital home, with 45 percent going to the plaintiff and 55 percent to the defendant. In addition, the court ordered the plaintiff to maintain health insurance for the benefit of each of the parties' children until they reach the age of eighteen and to maintain life insurance for the benefit of the parties' children and the defendant.

The parties filed numerous postjudgment motions. The court sustained the defendant's objection to the plaintiff's October 8, 2009 motion to reargue certain of the court's orders related to the definition of income, income tax disclosure, the marital and vacation homes, health insurance, life insurance and the country club membership.[6] On February 16, 2010, the plaintiff appealed from the judgment of dissolution, and the defendant thereafter filed a motion for appellate attorney's fees. The court granted the defendant's motion and ordered the plaintiff to pay the defendant $50,000 for attorney's fees. In April, 2010, the defendant filed a motion for clarification and correction concerning unallocated support, and several other matters not at issue in this appeal. The court issued a clarification and

of the plaintiff's gross annual earned income from employment through July 2, 2018, as unallocated alimony and child support; c. From July 2, 2018, until the death of either party or the defendant's remarriage, whichever shall first occur as defined by statute, [20] percent of the plaintiff's gross annual earned income from employment as alimony."

The court also ordered the parties to share the cost of their children's private school education. The court retained jurisdiction to enter additional education support orders pursuant to General Statutes § 46b-56c.

[6] In its judgment, the court ordered the plaintiff to transfer his membership in the Stanwich Country Club to the defendant. See *O'Brien* v. *O'Brien*, 138 Conn. App. 591, 592, 53 A.3d 283 (2012).

correction of its judgment on June 23, 2010. In response to an order of this court, the trial court, on December 3, 2010, articulated its decision with respect to the defendant's earning capacity, its award of appellate attorney's fees and the plaintiff's life insurance.

On appeal, the plaintiff claims, at times in caustic language, that he is entitled to a new trial on the basis of the court's financial orders, which he claims are contrary to the evidence, the court's factual findings and the law. Although the plaintiff has asserted numerous claims and arguments, his principal claim appears to be directed at the court's award of lifetime alimony to the defendant.[7] On the basis of my review of the record, the controlling statutes, the court's judgment and its subsequent memoranda of decision, I conclude that the court's financial awards do not constitute an abuse of discretion nor are they contrary to our law.[8]

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts.

[7] The plaintiff offers a litany of arguments and subarguments to support his claim. He contends that (1) there was undisputed evidence of the defendant's significant earning capacity, which the court acknowledged; (2) our law does not permit the court to ignore earning capacity in its alimony determinations; (3) there is no valid reason justifying the court's failure to impute some earning capacity to the defendant for the purposes of alimony determination; (4) the alimony component (a) increases over time, (b) serves no legitimate purpose, (c) provides no incentives to the defendant, (d) reflects outdated gender stereotypes (e) perpetuates the perception that alimony laws are applied differently based on gender, and (f) improperly uses gross earnings as the basis for the order; and (5) the court's broad definition of gross earnings (a) allows for double dipping and (b) is otherwise improper. I am not persuaded by these arguments.

[8] In his brief, the plaintiff acknowledges that the standard of review applied to financial orders in a dissolution action is the abuse of discretion standard. He contends, however, that the plenary standard should be applied in this case as the issues concern matters of statutory interpretation, the court's conclusions of law or mixed questions of law and fact. I do not agree.

. . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . 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. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 87–88, 995 A.2d 1 (2010).

"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." (Internal quotation marks omitted.) *Gianetti* v. *Gerardi*, 122 Conn. App. 126, 129, 998 A.2d 807 (2010). "[*T*]*he question is not whether* [*the reviewing court*], *had* [*it*] *been sitting as the trial judge*, *would have exercised* [*its*] *discretion differently. Our 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.*" (Emphasis added; internal quotation marks omitted.) *Skakel* v. *State*, 295 Conn. 447, 587–88, 991 A.2d 414 (2010) (*Palmer*, *J.*, dissenting).

I

The plaintiff claims that the court's "unallocated child support and alimony award" violates the principles underlying the child support guidelines (guidelines); Regs., Conn. State Agencies § 46b-215a-1 et seq.; and *Maturo* v. *Maturo*, supra, 296 Conn. 80.[9] Specifically,

[9] Child support in a dissolution of marriage action is controlled by General Statutes § 46b-84, which provides in relevant part: "(a) Upon . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in

the plaintiff contends that the court did not comply with the guidelines by failing to state the needs and characteristics of the parties' children, basing its award on his gross rather than net earnings and ordering an award that exceeds the presumptive limit of 17.16 percent of net income.[10] The plaintiff's claim fails for several reasons. First, the guidelines pertain to *child support* awards only and not to awards of unallocated support, which is the situation in this case. Second, not only was *Maturo*[11] decided eight months after the dissolution judgment in this case was rendered, but it also is factually distinguishable.[12] Third, as I conclude in part II of this dissenting opinion, the court did not base its award on the plaintiff's gross earnings.

need of maintenance. . . ." For guidance in the awarding of child support, "[t]he legislature . . . has provided for a commission to oversee the establishment of child support guidelines . . . 'to ensure the appropriateness of child support awards . . . .' General Statutes § 46b-215a." *Maturo* v. *Maturo*, supra, 296 Conn. 90. "The . . . guidelines established pursuant to section 46b-215a and in effect on the date of the support determination shall be considered in all *determinations of child support amounts* . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount of support . . . to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under criteria established by the [commission] under section 46b-215a, shall be required in order to rebut the presumption in such case." (Emphasis added.) General Statutes § 46b-215b (a).

[10] The plaintiff also claims that in fashioning its support award, the court apparently did not give any consideration to the property division; see part II of this dissenting opinion; and custody schedule, based its award on an open-ended, uncapped percentage of his fluctuating income, failed to relate the award to the children's demonstrated need and failed to make the required finding of the amount of support indicated under the guidelines. In his reply brief, the plaintiff states "[t]he trial court here, *as best we can determine*, never consulted the [g]uidelines or [g]uidelines principles . . . ." (Emphasis added.) The plaintiff's statement is based on speculation. In any event, there was no reason for the court to consult the guidelines because its support order was unallocated.

[11] The relevant issue in *Maturo* was whether "the trial court improperly ordered [the husband] to pay 20 percent of his annual net cash bonus award as child support." *Maturo* v. *Maturo*, supra, 296 Conn. 88.

[12] The trial court rendered its judgment in this action on September 18, 2009. Our Supreme Court issued its decision in *Maturo* on May 4, 2010.

The following additional procedural history and facts are relevant to the plaintiff's claim. On April 22, 2009, the defendant filed proposed orders that included, among other things, that she receive unallocated support in accord with a proposed formula.[13] In his trial memorandum dated May 22, 2009, the plaintiff noted the differences between the parties' positions. He strenuously opposed an award of alimony to the defendant[14] and included a section in his brief on national trends regarding alimony. At the conclusion of evidence, counsel presented arguments to the court. The plaintiff stressed his opposition to alimony. Moreover, counsel's argument reflected that he was fully aware that child support

[13] The orders stated in relevant part: "The plaintiff shall pay to the defendant, during his lifetime, until the defendant's death or remarriage, the following percentages of his 'gross annual earned income from employment,' as hereinafter defined, as unallocated alimony and child support . . . .

"The plaintiff shall take no action for the purpose of defeating the defendant's timely right to receive unallocated alimony and child support and/or alimony and, in particular, shall take no action to reduce, divert, delay or defer income for the purpose of reducing, limiting or delaying the plaintiff's unallocated alimony and child support and/or alimony obligation to the defendant.

"In the event of the termination of the alimony payments hereof during the minority of the children, the parties shall determine the amount of child support to be paid by the plaintiff during his lifetime to the defendant for the support of each of the minor children and, in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of alimony."

The defendant subsequently filed amended proposed orders, but the quoted portions of the orders did not change.

[14] In his trial brief, the plaintiff contended that "the amount of alimony requested is extreme and outrageous and should be ignored. . . . [T]he suggested alimony structure presents tax problems that should be avoided. A separate child support order should be entered that is not intertwined with the alimony. If the court orders alimony despite the plaintiff's objection, despite the defendant's ability to support herself, it should be a separate order for a limited time period." He also stated, his "cash flow recommendation . . . is entirely focused on the children. If [the defendant] supports herself, he is offering to pay very high child support so very little will change in the lives of the children. Argument Chart #8 . . . shows the extreme generosity of [the plaintiff's] child support proposal. [The plaintiff] urges the court to accept this proposal that focuses on the children."

is taxable to the payor and that alimony is taxable to the payee and that any portion of a support award that is identifiable as child support is taxable to the payor.[15] In his posttrial argument concerning support, the plaintiff's counsel referred to the child support guidelines and stated that the plaintiff was willing to go beyond the requirements of the guidelines to support the children,[16] if the defendant was not awarded alimony. The court ordered the plaintiff to pay the defendant unallocated child support and alimony from October 1, 2009 until July 2, 2018. See footnote 5 of this dissenting opinion.

"Alimony and child support orders may either be allocated or unallocated. If allocated, some set amount is awarded for each purpose. If unallocated, the award of the amount to be paid periodically is not designated either as child support or alimony. Because it is unallocated, the benefit to the party charged with paying is that it is a deduction in its entirety for federal income tax purposes; see *Commissioner of Internal Revenue* v. *Lester*, 366 U.S. 299, 304, 81 S. Ct. 1343, 6 L. Ed. 2d

[15] The plaintiff's counsel stated, in part, during closing argument: "[W]e hope the court doesn't do anything with alimony, but if the court is going to do anything with alimony, we certainly urge the court, have alimony, have child support, have them separate. We all know what we're doing. We all know what the tax consequences of that. But this structure, with these ages of kids, with this many kids and this close bunched up causes tax problems that the computer programs can't figure out."

[16] Counsel for the plaintiff argued, in part, with respect to the guidelines as follows: "Now, what the guideline instructions say is what you're not supposed to do is what I'm about to do by way of example. You're not supposed to continue extrapolating from that number. But if one did, by way of example, in the next 200—so, if in the first 200, the percentage falls from forty to under twenty, in the next 200 the seventeen has to fall. It's actually a progression that would accelerate. It has to fall by at least 50 percent again. So, by the time you got out to a net of 400, the guideline amount would be something like 8 percent. [*The plaintiff*] *is willing to pay 35 percent.* It's eight times the extrapolation from the guideline, and you're not supposed to extrapolate from the guideline because extrapolating from the guideline produces too high of a number. *It's four times the highest guideline amount.*" (Emphasis added.)

306 (1961); whereas child support, if allocated, is not deductible." *Tomlinson* v. *Tomlinson*, 119 Conn. App. 194, 211–12, 986 A.2d 1119 (2010), rev'd on other grounds, 305 Conn. 539, 46 A.3d 112 (2012). "Even though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012). "[F]or income tax purposes an unallocated award of alimony and support is deductible by the [payor] and taxable to the [payee]." *Powers* v. *Powers*, 186 Conn. 8, 11, 438 A.2d 846 (1982). A trial court properly may consider the tax consequences of its award. Id., 10.

In this case, if the court had articulated findings pursuant to the guidelines, it may well have undercut the tax benefits afforded the parties by an award of unallocated support.[17] Given the argument of the plaintiff's

[17] "Alimony, if in compliance with the provisions of [Internal Revenue Code] § 71, is taxable to the payee and deductible to the payor pursuant to [Internal Revenue Code] § 215 . . . . Child support is not taxable/deductible. To qualify as taxable/deductible alimony, a stream of payments must be cash received by or on behalf of a spouse under a divorce . . . instrument which does not designate such payments as not taxable/deductible." M. Frumkes, "Unallocated Alimony and Child Support Can Be All Taxable/Deductible Alimony," 80 Fla. B.J., no. 6 (June 2006) p. 72. "Generally, whether a payment is alimony depends on [Internal Revenue Code §] 71 (b). Alimony and separate maintenance payments (collectively referred to as alimony) are taxable to the recipient and deductible by the payor. When a taxpayer makes support payments under a court order issued pending a divorce, the parties may specify the amount of alimony in a separation agreement. If neither a divorce decree nor a separation agreement exists, payments made under court orders that don't specifically allocate a portion of the amount as alimony or child support but rather as household maintenance may be deemed alimony if they meet the requirements in section 71 (b) (1)." C. Nash & T. Quinn, "Court Says Unallocated Support Payments Are Alimony," J. of Accountancy (Nov. 2003), available at www.journalofaccountancy.com/Issues/2003/Nov/CourtSaysUnallocatedSupportPaymentsAreAlimony (last visited October 1, 2012).

counsel at the conclusion of trial, he and the plaintiff were well aware of the tax benefits and implications of unallocated support. Pursuant to his final argument, the plaintiff was willing to forego the tax benefits to him and pay child support beyond the limits and percentages established by the child support regulations, if the court did not award the defendant alimony.

In *Tomlinson*, a case recently decided by our Supreme Court, the central issue was whether a nonmodifiable order of unallocated support could be modified if the party having primary custody of the minor children changed; *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 541; which is not the issue here. *Tomlinson*, however, provides guidance with respect to the question raised in this appeal, that is, whether when issuing an unallocated support order at the time of dissolution, the trial court must articulate findings pursuant to the guidelines. *Tomlinson* demonstrates that the answer is "no." See id., 558.

The *Tomlinson* dissolution judgment incorporated the parties' separation agreement. Id., 542. Pursuant to the agreement, primary physical custody of the parties' two minor children would be with the plaintiff wife. Id. The agreement also provided that the defendant husband would pay the plaintiff wife unallocated periodic support that was not modifiable in amount. Id., 542–43. Thereafter, the parties agreed that the defendant husband would have primary physical custody of the parties' children. Id., 543. The defendant husband "filed a motion to modify the [unallocated order], seeking a reduction in the amount of support he paid to the plaintiff [wife] on the ground that custody had changed." Id. The plaintiff wife opposed the motion on the ground that their separation agreement precluded modification. Id. The trial court granted the defendant husband's motion because there had been a change in

physical custody of the children and then determined what portion of the unallocated support was child support and deducted that amount from the amount the defendant husband owed the plaintiff wife as periodic alimony. Id., 544. The plaintiff wife appealed to this court, which reversed the judgment of the trial court on the basis of the nonmodifiable nature of the parties' agreement. *Tomlinson* v. *Tomlinson*, supra, 119 Conn. App. 212. The defendant husband appealed to our Supreme Court.

Our Supreme Court determined that the unallocated support could be altered due to a change in custody, noting "[e]ven though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558. Although our Supreme Court agreed with the trial court that the support order could be modified and that the defendant husband was no longer required to pay the plaintiff wife periodic support that included child support, it remanded the matter to the trial court and provided the formula by which the court should determine the proper amount of child support. Our Supreme Court stated that "[g]iven that [t]he original decree [of dissolution] . . . is an adjudication by the trial court as to what is right and proper *at the time it is entered* . . . the trial court [on remand] must first determine what portion of the unallocated order represented the child support component at the time of the dissolution." (Citation omitted; emphasis in original.) Id., 558. In other words, at the time of the judgment dissolving the Tomlinson marriage, the trial court dissolving the marriage made no findings pursuant to the guidelines. Our Supreme Court determined that no such findings

had to be made until the time it affirmed the court's modification of the support award. I therefore conclude that in cases such as the one before this court now, when the court orders unallocated support, the court need not make the findings required by General Statutes § 46b-215b (a). In this case, no child support was ordered and, therefore, the guidelines do not apply.

With regard to the plaintiff's claim that the court's unallocated award violates *Maturo* v. *Maturo*, supra, 296 Conn. 80, that case is not applicable because the court here made no award of *child support*. In *Maturo*, our Supreme Court held that "the applicable statutes, as well as the guidelines, provide that *all* child support awards must be made in accordance with the principles established therein to ensure that such awards promote 'equity,' 'uniformity' and 'consistency' for children '*at all income levels*.' " (Emphasis in original.) Id., 94–95. Unlike the facts of *Maturo*, the court here made no child support order, *rather*, *it made an unallocated award of child support and alimony*. Moreover at oral argument after trial, the plaintiff's counsel argued that the plaintiff was willing to pay 35 percent of his applicable income for child support, which is more than the guidelines or *Maturo* requires. See footnote 16 of this dissenting opinion. "This court has stated on many occasions that a party may not pursue one course of action at trial for tactical reasons and later on appeal argue that the path he rejected should now be open to him." (Internal quotation marks omitted). *Hall* v. *Bergman*, 106 Conn. App. 660, 672–73, 943 A.2d 515 (2008), aff'd, 296 Conn. 169, 994 A.2d 666 (2010).

Finally, *Maturo* was decided after the judgment of dissolution was rendered in this case, and, therefore, the court could not take its holding into consideration

even if it had awarded child support.[18] I conclude, therefore, that the court did not abuse is discretion in awarding the defendant unallocated support, and the plaintiff's claim regarding the guidelines fails. I now turn to the remainder of the plaintiff's claims on appeal.

II

The plaintiff raises numerous additional claims related to his financial support obligations. He claims that it was improper for the court not to assign an earning capacity to the defendant. I disagree because the court was not required to determine the defendant's earning capacity and, in any event, a party's earning capacity is only one of the many factors to be considered by the court in making its financial awards.[19]

"It is well settled that [i]n dissolution proceedings, the court must fashion its financial orders in accordance with the criteria set forth in General Statutes §§ 46b-81 (division of marital property), 46b-82 (alimony) and

[18] With regard to its award of unallocated support, the court also ordered: "In the event of the termination of the alimony payments hereof during the minority of the children, the parties shall determine the amount of child support to be paid by the plaintiff during his lifetime to the defendant for the support of each of the minor children and, in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of alimony." If the plaintiff's obligation to pay alimony to the defendant ends while there are still minor children and the parties are unable to reach an agreement as to the amount of child support the plaintiff is obligated to pay and they turn to the court, the child support guidelines and *Maturo*, of course, would have to be considered. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558.

[19] The plaintiff also claims that the court's broad definition of gross earnings allows for "double dipping." I understand the claim to be that the court awarded the defendant certain moneys as a property settlement and also ordered the plaintiff to pay the defendant a percentage of those moneys again as unallocated support. I agree with the defendant's position that, although the same *type* of assets are referenced in both sections of the court's judgment of dissolution, the court did not award the defendant the same assets twice.

46b-84 (child support). All three statutory provisions require consideration of the parties' amount and sources of income in determining the appropriate division of property and size of any child support or alimony award. . . . [Section] 46b-82 provides in relevant part: In determining whether alimony should be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81. . . . [Section] 46b-82 describes circumstances under which a court may award alimony. The court is to consider these factors in making an award of alimony, but it need not give each factor equal weight. . . . As long as the trial court considers all of these statutory criteria, it may exercise broad discretion in awarding alimony. . . . We note also that [t]he trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case. . . . There is no additional requirement that the court specifically state how it weighed the statutory criteria or explain in detail the importance assigned to each statutory factor." (Citations omitted; internal quotation marks omitted.) *Kaczynski* v. *Kaczynski*, 124 Conn. App. 204, 210–11, 3 A.3d 1034 (2010).

In this case, the court ordered the plaintiff, during his lifetime or until the defendant's death or remarriage, to pay the defendant a percentage of his gross annual earned income from employment. Generally, from the time of dissolution until July 2, 2018, the payments are for unallocated support, and beginning on July 2, 2018, the payments are for alimony. See footnote 5 of this dissenting opinion. In issuing its financial orders, the court stated that it had considered the criteria set forth

in §§ 46b-81 and 46b-82. The court found, in part, that the defendant "has been away from her career for some period, she will take little time in reacquiring her exceptional skills." "A judge is presumed to have performed [his] duty properly unless the contrary appears." (Internal quotation marks omitted.) *Miller* v. *Miller*, 22 Conn. App. 310, 314, 577 A.2d 297 (1990).

In its articulation, the court stated that "[a]t the time of the dissolution, the court found that the defendant was a stay-at-home mother and she served in that capacity at the plaintiff's request.[20] Obviously, after the children were grown, she would have earning capacity based on her education and prior abilities. It would be premature to assess earning capacity for some future date. Obviously, the defendant is well educated, earned large sums of money, and she has maintained her skills."[21]

[20] The plaintiff is correct when he points out that the court erred when it found that the plaintiff had requested that the defendant become a stay-at-home mother. The plaintiff testified that when the defendant decided to leave her employment at Credit Suisse, he "did not object." The defendant testified that she left Credit Suisse with the plaintiff's knowledge and consent.

The defendant testified in part on direct examination as follows:

"[The Defendant's Counsel]: Now, with regard, again [to] being a full-time mother, is there any significance to the ages of your children and your desire to be a full-time mother?

"[The Defendant]: Yes.

"[The Defendant's Counsel]: What significance?

"[The Defendant]: I have a teenager, a preteen and an eight year old. I think that period of time that spans later lower school to high school is critical. And . . . there's so many things academically, emotionally, physically that are changing, and I think it's critical to be there with the children. That was always our desire.

"[The Defendant's Counsel]: When you say it was—was this a decision—was this a plan that you had worked out with [the plaintiff]?

"[The Defendant]: Yes."

[21] At trial the plaintiff acknowledged that the defendant had been their children's primary caregiver at various times during their marriage, notably from 2003 when she left her employment until the time of trial. Pursuant to the parties' stipulated parenting plan, their minor children shall reside primarily with the defendant.

A

The plaintiff claims that the court's failure to assign an earning capacity to the defendant was error, as the evidence shows that she has a significant earning capacity and that our law does not permit a court to ignore earning capacity in its alimony determination. The court acknowledged the defendant's ability to earn significant sums of money prior to 2003 when she left her employment to assume the role of a stay-at-home mother. The court also recognized the defendant's talents and skills working in the financial markets. But the court concluded that she would need time to reacquire her exceptional skills. The court found that the defendant would have an earning capacity when the children were grown but that it would be premature to assign her an earning capacity at the time of dissolution. The record demonstrates clearly that the court considered the required statutory factors, including the defendant's ability to earn income. The plaintiff takes exception to the fact that, in view of the court's findings, the court did not assign an earning capacity to the defendant, who had been a stay-at-home mother during the last five years of the parties' marriage, a circumstance to which the plaintiff had acquiesced. On the basis of my review of the law, the record and the court's findings, I discern no abuse of the court's discretion.

The plaintiff cites language in Justice Healey's concurrence in *McPhee* v. *McPhee*, 186 Conn. 167, 440 A.2d 274 (1982), to support his claim that the court was required to assign an earning capacity to the defendant. I read Justice Healey's concurrence differently, and note his following statements: "I write separately to state my views on [the majority's] observation that the contrast between the defendant's recently acquired clerical position and the plaintiff's 25-year career as an aluminum siding contractor cannot support the trial court's finding that the employability of the parties is

equal. My view is that to so state, in effect, equates employability with earning capacity or earning potential; see *deCossy* v. *deCossy*, 172 Conn. 202, 205, 374 A.2d 182 (1977); or, more to the point, does not fully consider certain other factors in . . . §§ 46b-81 and 46b-82 that go to the present disparate incomes of the parties. . . .

"In construing a statute, no word should be treated as superfluous or insignificant . . . and words and phrases are to be construed according to the commonly approved usage of the language. . . . Webster defines employability as the quality or state of being employable and employable as capable of being employed, specif: physically and mentally capable of earning a wage at a regular job and available for hiring. . . . In my view, since both parties are in fact employed, the employability of both parties is equal. This is *one* factor to be considered under [§ 46b-82]. [E]arning potential has been said to be *one* of the important factors to be considered; see *deCossy* v. *deCossy*, supra, [172 Conn.] 205; and the statute has other terms going to that factor, i.e., vocational skills, occupation . . . health. Arguably, this list may not be exclusive, but the employability of a person is liminal to any meaningful determination of earning potential or earning capacity as that is explicated by other statutory terms. In any event, the majority opinion attenuates the distinction between employability and the other factors in §§ 46b-81 and 46b-82 referred to above." (Citations omitted; emphasis in original; internal quotation marks omitted.) *McPhee* v. *McPhee*, supra, 186 Conn. 178–79.

In this case, I agree that the defendant will be employable, but due to her responsibilities rearing the parties' children *at the time* of the trial and her time spent away from the financial industry, the court did not assign her an earning capacity, concluding that it was premature to do so. Moreover, one of the factors the court is to

consider under § 46b-82 (a) in the "case of a parent to whom the custody of minor children has been awarded, [is] the desirability of such parent's securing employment." The court's judgment indicates that the court properly considered the statutory requirements in view of the facts of this case. At the time of dissolution, the defendant was a stay-at-home mother, but the court implied in its articulation that she would obtain employment when the youngest of the parties' three children reaches the age of majority. That implication is supported by the level of alimony support the plaintiff is obligated to pay the defendant several months after the youngest child reaches the age of eighteen.

The plaintiff also seeks to bolster his position with language from *deCossy* v. *deCossy*, supra, 172 Conn. 205, a case with facts quite similar to those here.[22] The husband in *deCossy* appealed from the court's financial award. Id., 204. Although the trial court made no determination of the wife's earning capacity, it noted her skills. Our Supreme Court affirmed the judgment of the trial court, stating that "the [wife] was unemployed at the time of the award. She had previously been a teacher, but had not practiced her profession for many years. Though she planned to return to teaching, her earning potential, which was one of the important factors to be considered in awarding alimony under the

[22] Dissolution of the deCossy marriage was granted on the basis of the husband's wilful desertion of the defendant wife. *deCossy* v. *deCossy*, supra, 172 Conn. 203. After a hearing, the court "entered orders requiring the [husband] to pay $15,000 per year alimony, to pay $5000 per year child support for each of his three children, to provide medical insurance for the children, to provide term life insurance on his own life for the benefit of each minor child in the amount of $25,000 and insurance on his life in the amount of $50,000 payable to the [wife] until she dies or remarries, and to assume liability for and pay all obligations arising from the construction of the residence to be occupied by the [wife] and their children except that so long as the [husband] pays the alimony and child support the [wife] is to be responsible for paying the installments on the first mortgage. The [husband] was further ordered to pay $5000 in counsel fees." Id., 203–204.

provisions of General Statutes § 46-52 [now § 46b-82], was significantly lower than that of the [husband]. The court was required to consider the husband's income and his earning capacity. . . . The trial court found that in 1973 the [husband] had an income of $84,000 from his architectural partnership. Further, his firm, in which he was entitled to receive 60 percent of the profits, had contracted for architectural work within the next three years with a construction cost exceeding thirty-six million dollars." (Citations omitted.) Id., 205. Our Supreme Court held that the trial court acted within its discretion. Id., 204, 206. *deCossy* is an example of a trial court's properly considering the earning capacity of the parties, as the trial court did here. I do not read it to stand for the proposition, as the plaintiff asserts, that failure to assign an earning capacity to one of the parties is error.

The plaintiff has not identified a statute or decision that compels the court to determine an earning capacity for both parties when calculating child support or alimony. Compare *Chyung* v. *Chyung*, 86 Conn. App. 665, 675–76, 862 A.2d 374 (2004) (plaintiff failed to provide any statute, case law or rule of practice requiring court to specify exact earning capacity), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005). "Our jurisprudence requires the trial court to consider all the statutory criteria set forth in . . . § 46b-81 in determining how to distribute parties' assets in a dissolution action. . . . We do not, however, require that courts ritualistically recite the criteria they considered, nor are they bound to any specific formula respecting the weight to be accorded each factor." (Citation omitted.) *Casey* v. *Casey*, 82 Conn. App. 378, 384, 844 A.2d 250 (2004).

In addition, the plaintiff claims that the alimony component of its financial award is "riddled with error." He argues that the lifetime alimony award (1) increases over time in direct contradiction to the court's finding

that the defendant will take little time to reacquire her exceptional skills, (2) serves no legitimate purpose and provides the wrong incentive to the defendant, and (3) reflects outdated gender stereotypes and perpetuates the perception that alimony laws are applied differentially based on gender. I disagree with these claims and will address each of them briefly.

As to the claim that the court erred by ordering lifetime alimony that increases over time, the plaintiff ignores the fact that the court's order is for *unallocated* support until July 2, 2018. See footnote 5 of this dissenting opinion. If the award is unallocated, "the award of the amount to be paid periodically is not designated either as child support or alimony." *Tomlinson* v. *Tomlinson*, supra, 119 Conn. App. 211. I therefore reject the plaintiff's claim.

The plaintiff next asserts that lifetime alimony serves no purpose and is a disincentive to the defendant's obtaining employment. He also suggests that he is being punished by having to pay the defendant alimony until his or her death or her remarriage. He also reasserts his claim that the defendant has a demonstrated earning capacity. Regardless of those arguments, there is nothing inappropriate about a lifetime award of alimony, if the court, in the exercise of its discretion, after considering all of the statutory factors, believes that it is warranted. My review of the record discloses that the court considered the factors as required by § 46b-82. A dissolution court may place varying degrees of importance on each of the statutory factors according to the circumstances of each case. See *Ippolito* v. *Ippolito*, 28 Conn. App. 745, 751, 612 A.2d 131, cert. denied, 224 Conn. 905, 615 A.2d 1047 (1992). A court properly may award lifetime alimony even when the recipient has an earning capacity. See *McMellon* v. *McMellon*, 116 Conn. App. 393, 396, 976 A.2d 1, cert. denied, 293 Conn. 926, 980 A.2d 911 (2009). Moreover, "alimony is not designed to

punish, but to ensure that the former spouse receives adequate support." *Cleary* v. *Cleary*, 103 Conn. App. 798, 807, 930 A.2d 811 (2007). When the court here articulated the factual basis for its order making the defendant the beneficiary of $9 million in life insurance for the duration of her life assuming that she does not remarry, the court stated that it had "considered the parties' lifestyle during the marriage and the necessity of protecting the wife for the rest of her life." The court's alimony award therefore is intended to provide the defendant with adequate support as is permitted by law.[23]

In accordance with the discretionary standard of review, the issue is not whether I, as the reviewing court, would have exercised my discretion differently, but whether the trial court chose one of a number of reasonable alternatives. See *Marquand* v. *Administrator, Unemployment Compensation Act*, 124 Conn. App. 75, 79–80, 3 A.3d 172 (2010), cert. denied, 300 Conn. 923, 15 A.3d 630 (2011). Unlike the trial court, I did not have the opportunity to view the parties and make credibility determinations. See *Crotty* v. *Tuccio Development, Inc.*, 119 Conn. App. 775, 779, 990 A.2d 888 (2010). Under the circumstances of this case, while another judge might have approached this issue differently, I can discern no abuse of discretion in the court's failing to assign the defendant an earning capacity at the time of dissolution.

B

The plaintiff further claims in his statement of the issues and in this argument that the court improperly

[23] The plaintiff also claims that the award of lifetime alimony reflects outdated gender stereotypes and the perception that dissolution laws are applied differently on the basis of gender. There is no record that these claims were raised in the trial court. I therefore decline to review them. See *Adamo* v. *Adamo*, 123 Conn. App. 38, 46, 1 A.3d 221, cert. denied, 298 Conn. 916, 4 A.3d 830 (2010).

used his gross earnings as a basis for its award of unallocated support.[24] I disagree with the premise of the plaintiff's claim and therefore reject it.

In its memorandum of decision issued on September 18, 2009, the court stated: "The court has carefully considered all of the criteria set forth in §§ 46b-81 and 46b-82 . . . in entering its orders. It has also considered the assets and liabilities of the parties as well as their gross and *net income*[*s*]." (Emphasis added.) In its articulation, the court stated that as "of April 21, 2009, according to the plaintiff's affidavit, he has gross earnings and gross income of $17,414 per week gross which resulted in a *net* [income] of $10,900 per week." (Emphasis added.) In light of this explicit language, the plaintiff's assertion in his brief that the court's memorandum of decision "reflects no awareness or consideration of net earnings or *net income*" is somewhat confounding. (Emphasis added.)

[24] The court defined gross annual earned income from employment as follows: " '[G]ross annual earned income from employment' shall be broadly defined to include any and all earnings of any nature whatsoever actually received by the plaintiff, or which the plaintiff is entitled to receive, from any and all sources relating to services rendered by the husband by way of his past, current or future employment, including but not limited to salary, bonus, incentive compensation, exercisable stock options, stock grants, restricted stock awards, grants and/or units, warrants, stock awards and option awards granted but not accepted, stock grants and option grants awarded but deferred, dividends on stock awards and option awards, contract payments, stock appreciation rights, performance share awards, performance stock units, dividend equivalents, stock payments, deferred stock, qualified performance based compensation, commission payments, severance payments, profit participations/distributions and voluntary payments made to qualified and nonqualified retirement plans for his benefit both paid and/or deferred. Upon vesting of any stock and/or options, the plaintiff shall immediately notify the defendant. The plaintiff shall, as soon as practical when notified by the defendant in writing, exercise her share of the stock and/or options and sell the resulting stock and deliver to her the proceeds of the sale of the stock within five . . . business days, net of all costs of exercise and sale, including federal and state taxes which he is required to pay as the legal owner of the stock and/or options.

"Deferred income or compensation that the plaintiff has no control over shall not be considered as part of the plaintiff's 'gross annual earned income

"It is well settled that a court must base its child support and alimony orders on the available net income of the parties, not gross income. . . . Whether or not an order falls within this prescription must be analyzed on a case-by-case basis. Thus, while our decisional law in this regard consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific. . . . [T]he fact that the alimony and support order was ultimately a function of gross income does not, alone, stand for the proposition that the order was based on gross income. . . . [W]e differentiate between an order that is a function of gross income and one that is based on gross income." (Citation omitted; internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 338, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

The plaintiff relies on *Morris* v. *Morris*, 262 Conn. 299, 811 A.2d 1283 (2003), to support his claim. In *Morris*, the trial court stated that it "needs to decide what the respective parties have available for support consideration now." (Internal quotation marks omitted.) Id., 306. The trial court then found that the husband has " 'the following *gross* amounts' " and the wife's " '[gross] income is . . . .' " (Emphasis in original.) Id. In the case before us, the trial court found the plaintiff's gross income *and* his net income and stated that it considered both in making its award. "[W]e do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.) *State* v. *Baker*, 50 Conn. App. 268, 275 n.5, 718 A.2d 450, cert. denied, 247 Conn. 937, 722 A.2d 1216

from employment' until said deferred income or compensation is actually received, or capable of being received by the [plaintiff] and is taxed as income."

(1998). In consideration of the full record, I cannot conclude that the court predicated its unallocated support award on the plaintiff's gross income.

For the foregoing reasons, I conclude that the court did not abuse its discretion by failing to assign the defendant an earning capacity or that its financial orders are based on the plaintiff's gross earnings.

III

The plaintiff's third claim is that the court abused its discretion by requiring him to maintain $9 million of life insurance as long as his lifetime alimony obligation exists.[25] I disagree.

The following facts are relevant to this claim. In its memorandum of decision, the court ordered that, as long as the plaintiff is obligated to pay alimony, child support or educational support, "the April 20, 1998 Michael J. O'Brien Family Insurance Trust shall remain in full force and effect and the plaintiff shall be required to provide sufficient funds to the trust on a timely basis for the purpose of paying the premiums for the life insurance policies in which the trust is the beneficiary. For as long as the plaintiff has an obligation to pay alimony, the beneficiary of the [t]rust shall be the defendant. In the event that the plaintiff's obligation to pay alimony to the defendant terminates, the beneficiary of the trust shall be the parties' children. The remaining life insurance policies with death benefits of [$8 million] shall remain unchanged. . . . The defendant shall remain the beneficiary of the existing Omnicom Group Life Insurance Policy with a current face value of [$1

[25] In his brief the plaintiff stated that the court ordered him to maintain $9 million in mostly term life insurance for the remainder of his life. The statement needs amplification. The court ordered him to maintain the life insurance as long as he had an obligation to pay child, educational or alimony support. Significantly, the plaintiff does not challenge the *amount* of life insurance he is required to maintain for the benefit of his children.

million], or any successor policy up to [$1 million] face value for as long as the plaintiff has an alimony and/or child support and/or educational support obligation."

In October, 2010, in response to the plaintiff's motion for review, this court ordered the trial court to articulate several portions of its dissolution judgment, including its order related to life insurance.[26] The court articulated its decision in accordance with the articulation order; see footnote 26 of this dissenting opinion; as follows: "3. The court considered the cost to the plaintiff of life insurance premiums based on his earnings at the time of judgment as well as his assets and future earnings. 4. It was not intended that the cash value of life insurance policies in the O'Brien Family Trust be used to pay premiums thereon. 5. It was intended that its order concerning life insurance policies apply for the life of the term policies. 6. The court was referring to the [$8 million] life insurance in the O'Brien Family Trust. 7. The court considered the parties' lifestyle during the marriage and the necessity of protecting the wife for the rest of her life."

The factual basis of the plaintiff's claim is that the premiums for term life insurance increase after a period

[26] This court ordered the trial court to articulate: "(3) whether it considered the cost to the [plaintiff], going forward, of paying the life insurance premiums as ordered by the court, and, if so, what was the court's evidentiary basis for determining that he could afford those premiums 'for the remainder of [the defendant's] life,' if she did not remarry, (4) whether it intended that the cash value of the life insurance policies in the Michael J. O'Brien Family Trust be available to pay the premiums of those policies, (5) whether it intended that its order concerning the life insurance policies apply only for the life of the term policies, or whether the [plaintiff] is required to purchase new or replacement policies as the term policies end, (6) to what life insurance policies was the court referring when, after discussing the $8 million in life insurance in the Michael J. O'Brien Family Trust, it stated that 'the remaining life insurance policies with death benefits of [$8 million] . . . shall remain unchanged,' and (7) its 'logical and factual basis' for awarding the [defendant] up to [$9 million] in life insurance for the remainder of her life, assuming she does not remarry."

of time. In a footnote in his brief to this court, he points out that the premiums for a John Hancock term policy for $3 million issued in 1998 remain flat for only fifteen years and that the premiums will increase in 2012. While this may be so, the defendant contends that the plaintiff failed to present evidence of an increase to the trial court. The only evidence of the cost of insurance I could find in the record is the then present cost of the plaintiff's insurance in existence at the time of trial. The plaintiff has not brought to the attention of this court an indication that he offered evidence as to the future cost of life insurance.

"An order for life insurance is very often an appropriate and necessary component of a judgment of dissolution of marriage. . . . Indeed, orders requiring the maintenance of life insurance have been approved on numerous occasions by our courts. . . . [Section] 46b-82 (a) and 46b-84 (f) were amended in 2003 to provide: The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. . . . These amendments place the burden regarding the availability and cost of the life insurance on the party upon whom the life insurance obligation is to be imposed." (Citation omitted; internal quotation marks omitted.) *Boyne* v. *Boyne*, 112 Conn. App. 279, 285–86, 962 A.2d 818 (2009).

The plaintiff also argued that there was no basis in fact for the court to order him to maintain $9 million worth of insurance. The court stated in its articulation that it had "considered the parties' lifestyle during the marriage and the necessity of protecting the [defendant] for the rest of her life." The plaintiff acknowledges that ordering security for financial awards falls within the court's discretion, but he argues that that discretion "is

not without limits." *Parley* v. *Parley*, 72 Conn. App. 742, 746, 807 A.2d 982 (2002). In *Parley*, the trial court ordered the husband to obtain additional life insurance to secure his financial obligation without determining whether such insurance was available and its costs. Id. *Parley* is distinguishable from this case, in which the plaintiff already had procured the insurance.

On the basis of a review of the record, the court's memorandum of decision and its articulation, I conclude that the court did not abuse its discretion by ordering the plaintiff to maintain $9 million in life insurance as long as he has an obligation to provide child, education or alimony support. The plaintiff's prior conduct provides an appropriate basis for the amount of the order. In 1998, the plaintiff established a trust funded with more than $4 million of life insurance and, by the time of trial, it had been funded with more than $8 million of life insurance. That amount of security may be construed as, roughly speaking, what the plaintiff thought his family would need if he were to suffer an untimely death. It was not unreasonable for the court to adopt that amount to secure its financial awards. Moreover, at the time of dissolution, all of the parties' children were being educated in independent schools, and the court retained jurisdiction to enter additional educational support orders in accordance with General Statutes § 46b-56c.

The court's award also finds support in our case law. In *Eldridge* v. *Eldridge*, 4 Conn. App. 489, 492, 495 A.2d 283 (1985), the husband claimed that the trial court had "erred in ordering security for payments 'far' in excess of the amount of the maximum future support for which he could be liable." In its articulation, the trial court stated that "the order regarding life insurance was intended to 'protect' the awards of periodic alimony and [child] support." Id., 493. On appeal, this court concluded that when the husband's "maximum possible

obligation to the children *and* the [wife] is considered, the order was not excessive." (Emphasis in original.) Id. The same reasoning is applicable in the present case. The court ordered the plaintiff to maintain life insurance to protect its financial awards. Considering the plaintiff's maximum possible obligation, I conclude that the court did not abuse its discretion, particularly in light of the fact that the plaintiff himself set the disputed amount when he established and funded the Michael J. O'Brien Family Trust. For the foregoing reasons, I reject the plaintiff's claim regarding the court's life insurance order.

IV

The plaintiff's fourth claim is that the court improperly awarded the defendant attorney's fees to defend this appeal. I disagree.

On February 25, 2010, the defendant filed a motion for counsel's fees postjudgment. In her motion, the defendant set forth the postjudgment motions that had been filed by the plaintiff, her objections thereto and the court's rulings. She also stated that the plaintiff had filed an appeal and that he has control over the majority of the parties' assets. The defendant represented that she was without sufficient funds to defend the appeal and to prosecute or defend pending postjudgment motions, and she requested funds for that purpose. The motion was heard by the court in June, 2010, at which time the defendant's counsel presented an affidavit containing a statement of services rendered and disbursements from September 23, 2009 through June 21, 2010. To date the defendant had incurred expenses totaling $39,166.58 and anticipated additional legal expenses of $25,000.[27] On July 2, 2010, the court ordered that the "plaintiff shall pay the defendant $50,000 within thirty

[27] In the trial court and on appeal, the plaintiff does not claim that the amount of the attorney's fees is unreasonable.

days toward her attorney['s] fees and costs." In response to this court's order to articulate the basis of its award, the court stated "[t]he defendant is defending an appeal that is frivolous. To not award her attorney['s] fees to defend could undermine other awards."

"Section 46b-62 vests in the trial court the discretion to award attorney's fees. Our Supreme Court has included within the definition of attorney's fees allowable under § 46b-62 certain costs of litigation . . . . The criteria to be considered in determining whether an award of attorney's fees is appropriate [are set forth in § 46b-82 and] include the age, health, station, occupation, amount and sources of income, vocational skills, employability [and] estate and needs of each of the parties . . . . We review the court's awarding of attorney's fees under the abuse of discretion standard. . . . The ultimate issue in our review, therefore, is whether the court reasonably could have concluded as it did. . . . Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of . . . 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. . . . An exception to th[is] rule . . . 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 [the court's] prior financial orders . . . ." (Citation omitted; internal quotation marks omitted.) *Adamo* v. *Adamo*, 123 Conn. App. 38, 53, 1 A.3d 221, cert. denied, 296 Conn. 916, 4 A.3d 830 (2010). The court "has the discretion to award counsel fees to a party in a dissolution action in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82, including length of the marriage [and] causes for the dissolution of the marriage . . . ." (Internal quotation marks omitted.)

O'Neill v. *O'Neill*, 13 Conn. App. 300, 305, 536 A.2d 978, cert. denied, 207 Conn. 806, 540 A.2d 374 (1988).

In this case, the court awarded the defendant attorney's fees to prosecute and defend postjudgment motions and the plaintiff's appeal, concluding that "[t]o not award her attorney['s] fees to defend could undermine other awards." The court's ruling is in keeping with the exception articulated in *Adamo*. The court's findings "do not have to be explicit as long as the record would support a finding that the party to whom the award of attorney's fees is made lacks sufficient liquid assets with which to pay his or her attorney's fees or that the failure to award such fees would undermine the court's other financial orders." *Bee* v. *Bee*, 79 Conn. App. 783, 791, 831 A.2d 833, cert. denied, 266 Conn. 932, 837 A.2d 805 (2003); see also *Bornemann* v. *Bornemann*, 245 Conn. 508, 542, 752 A.2d 978 (1998).

The record supports the court's award of attorney's fees to preserve its financial orders. At the time of the appeal, the defendant was a stay-at-home mother. The financial affidavits of the parties showed that the plaintiff had an annual net income of approximately $567,000, excluding noncash compensation, and assets of appoximately $4 million, excluding unvested stock options. The defendant had an annual net income from dividends and interest of $11,784 and assets of $2.15 million, including her one-half share of the parties' two houses. I conclude that the court did not abuse its discretion by awarding the defendant attorney's fees to defend this appeal.

V

The plaintiff's fifth claim is that the court improperly modified its judgment in a material way nine months after the judgment was issued when it ruled on the

defendant's motion for clarification and correction.[28] I would dismiss the claim for lack of aggrievement.

In its memorandum of decision dated September 18, 2009, the court ordered the plaintiff to pay the defendant support in the following fashion: (1) 45 percent of his gross annual earned income from employment as unallocated support from October 1, 2009 until January 30, 2015, (2) 40 percent of his gross annual income from employment as unallocated support from February 1, 2015 through July 2, *2024*, (3) 20 percent of his gross annual earned income from employment as alimony from July 2, *2024*, until the death of either party or the defendant's remarriage, whichever occurs first.

On April 15, 2010, the defendant filed a motion for clarification and correction, postjudgment. The defendant asked the court, among other things, to clarify whether "[s]tarting the month after the parties' youngest child turns eighteen, i.e., beginning June 1, 2018, the [40] percent of 'gross annual earned income from employment' paid to the defendant by the plaintiff through July 2, 2024, is paid as alimony, rather than 'unallocated alimony and support.' " The court issued a clarification on June 23, 2010, stating in relevant part: "b. Commencing February 1, 2015, [40] percent of the plaintiff's gross annual earned income from employment through July 2, *2018* as unallocated alimony and child support; c. From July 2, *2018*, until the death of either party or the defendant's remarriage, whichever shall first occur as defined by statute, [20] percent of

[28] "[A] motion for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. . . . Motions for clarification may not, however, be used to modify or to alter the substantive terms of a prior judgment . . . and we look to the substance of the relief sought by the motion rather than the form to determine whether a motion is properly characterized as one seeking a clarification or a modification." (Internal quotation marks omitted.) *Von Kohorn* v. *Von Kohorn*, 132 Conn. App. 709, 714, 33 A.3d 809 (2011).

the plaintiff's gross annual earned income from employment as alimony." (Emphasis added; internal quotation marks omitted.)

On appeal, the plaintiff claims that the court impermissibly modified its judgment by amending the year in which his unallocated support payment of 40 percent of his gross income ends and he is to begin paying 20 percent of his gross income as alimony.[29] "[T]he construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as that which is expressed." (Internal quotation marks omitted.) *de Repentigny* v. *de Repentigny*, 121 Conn. App. 451, 462–63, 995 A.2d 117 (2010).

The plaintiff argues that the motion for clarification was not predicated on the modification criteria of General Statutes § 46b-86[30] and that a court lacks jurisdiction to open a judgment to correct it more than four months after the judgment was rendered. Our Supreme Court has noted that "[m]otions for interpretation or clarification, although not specifically described in the rules of practice, are commonly considered by trial

[29] The plaintiff asserts that his claim is supported by this court's recent decision in *Von Kohorn* v. *Von Kohorn*, supra, 132 Conn. App. 709. That case is factually distinct from this case. In *Von Kohorn*, the trial court's order in response to a motion for clarification went beyond the clarification requested. Id., 711–12, 716. In this case, the court limited its order to the specific request in the motion for clarification, i.e., the year in which the plaintiff was to pay the defendant 20 percent of his gross earned income from employment as alimony.

[30] General Statutes § 46b-86 is entitled "Modification of alimony or support orders and judgments."

courts and are procedurally proper. . . . There is no time restriction imposed on the filing of a motion for clarification. . . . [S]ee . . . *Sablosky* v. *Sablosky*, 258 Conn. 713, 720, 784 A.2d 890 (2001) (where there is an ambiguous term in a judgment, a party must seek a clarification); id., 722 (it is incumbent upon the parties to seek judicial resolution of any ambiguity in the language of judgments)." (Citation omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 244–45, 796 A.2d 1164 (2002). The policy of allowing a party to seek clarification of an ambiguous judgment is "grounded in the trial court's equitable authority to protect the integrity of its judgments." Id., 246. Contrary to the plaintiff's position here, the court's authority to clarify its judgment is not grounded in § 46b-86. Id.

Our Supreme Court has stated that a court has an "interest in preserving the integrity of its judgments. Specifically, this court previously has recognized that it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Rocque* v. *Light Sources, Inc.*, 275 Conn. 420, 433, 881 A.2d 230 (2005). "A court's continuing jurisdiction derives from these equitable powers." Id. I conclude that the court recognized the ambiguity presented by the year 2024, as it was not related to the time the parties' youngest child turned eighteen. It appears that the year 2024 in the court's September 18, 2009 memorandum of decision was an error. A court has the authority to correct an error in its judgment. See *Dougherty* v. *Dougherty*, 109 Conn. App. 33, 38–39, 950 A.2d 592 (2008).

Moreover, by correcting the year in which the plaintiff's obligation to pay 40 percent of his gross annual earned income ended, i.e., from 2024 to 2018, and his obligation to pay 20 percent of his gross annual earned

income began, the court reduced the plaintiff's obligation to pay 40 percent of his income to the defendant by six years. The plaintiff therefore is not aggrieved by the court's correction. See General Statutes § 52-263.[31] A "party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, 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 decision . . . ." (Internal quotation marks omitted.) *Med-Trans of Connecticut, Inc.* v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 158–59, 699 A.2d 142 (1997). The court's clarification benefitted the plaintiff. He therefore is not aggrieved, and I would dismiss the claim.

Respectfully, for the foregoing reasons, I would dismiss the plaintiff's claim concerning modification of the judgment and affirm the judgment in all other respects.

MICHAEL J. O'BRIEN *v.* KATHLEEN E. O'BRIEN (AC 32483)

Lavine, Sheldon and West, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff, which included an order regarding membership in a country club. She claimed that the trial court, in denying her motion to terminate the appellate stay with regard to the order concerning membership in the country club, improperly modified the dissolution judgment. *Held* that the defendant's appeal was moot and dismissed for lack of subject matter jurisdiction, this court, on the

[31] General Statutes § 52-263 provides the right of appeal if "either party is *aggrieved* by the decision of the court or judge upon any question or questions . . . arising in the trial . . . ." (Emphasis added.) See also Practice Book § 61-1.

plaintiff's appeal from the dissolution judgment, having reversed the dissolution judgment and remanded the matter for a new trial.

Argued January 5—officially released October 16, 2012

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant filed a cross complaint; thereafter, the matter was tried to the court, *Hon. Howard T. Owens, Jr.*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted in part the defendant's motion to terminate the stay and did not address the issue of the parties' membership at a certain country club; subsequently, this court granted the defendant's motion for review but denied the relief requested. *Appeal dismissed.*

George J. Markley, for the appellant (defendant).

Steven D. Ecker, with whom was *M. Caitlin S. Anderson*, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, Kathleen E. O'Brien, claims that, in denying her motion to terminate the appellate stay with regard to membership in a certain country club,[1] the trial court improperly modified the

[1] In its judgment of dissolution, the court ordered that "the [plaintiff] shall transfer to the [defendant] the membership in the Stanwich Country Club and she shall be responsible for any and all dues, fees, and expenses from the effective date of the membership."

On April 9, 2010, the defendant filed a motion to terminate the stay as to the country club membership and certain financial matters not at issue in this appeal. As to the country club membership, the court stated in its memorandum of decision on the motion that it "cannot resolve the issue of the parties' membership at the [country club] . . . based on the present state of the record." The defendant filed an appeal from the ruling on the motion to terminate the stay as to the country club membership and thereafter a motion for review. This court granted the defendant's motion for review but denied the relief requested in an order stating that "the motion

judgment of dissolution. In *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 53 A.3d 1039 (2012), an appeal brought by the plaintiff, Michael J. O'Brien, the majority reversed the judgment pertaining to the financial orders and remanded the matter for a new trial.[2] The defendant's appeal is therefore moot. We dismiss the appeal for lack of subject matter jurisdiction.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *Collins* v. *Collins*, 117 Conn. App. 380, 386, 979 A.2d 543 (2009). "[A]n 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.) Id., 387. The judgment of dissolution has been reversed and the case remanded for a new trial; there is no practical relief that we can grant the parties.

The appeal is dismissed.

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is treated as a motion for review of the trial court's effective denial of the defendant's request to terminate stay concerning the transfer of the Stanwich Country Club membership and the motion is granted but the relief requested is denied." The court's failure to rule on the motion to terminate the stay was the functional equivalent of a denial of the motion. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 480, 706 A.2d 960 (1998).

[2] Judge Lavine dissented from the majority opinion. See *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 544, 557 (*Lavine*, *J.*, dissenting).

JORGE SANCHEZ *v.* COMMISSIONER OF CORRECTION (AC 32193)

Gruendel, Sheldon and Schaller, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to call R and S as defense witnesses at his criminal trial. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. He claimed that the habeas court improperly determined that R and S were not credible and that, consequently, the petitioner failed to meet his burden of demonstrating to a reasonable probability that the outcome of his trial could have been different had defense counsel called them as witnesses. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; that court found that it was unlikely that a jury would have found R and S credible, as both were related to the petitioner, were convicted felons and had a motive to be deceptive, and absent evidence demonstrating that that finding was clearly erroneous, this court would not disturb the habeas court's conclusions.

(*One judge dissenting*)

Argued April 26—officially released October 16, 2012

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.*

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

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Gerard Eisenman*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SCHALLER, J. The petitioner, Jorge Sanchez, appeals from the judgment of the habeas court following the denial of his petition for certification to appeal from the judgment denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion by denying his petition for certification to appeal and (2) erred in concluding that he failed to establish that he was denied effective assistance of counsel. We dismiss the appeal.

The following facts and procedural history are relevant to the petitioner's appeal. The petitioner was convicted of murder, conspiracy to commit murder and larceny in the first degree.[1] This court affirmed the petitioner's judgment of conviction on direct appeal. *State* v. *Sanchez*, 50 Conn. App. 145, 146, cert. denied, 247 Conn. 922, 722 A.2d 811 (1998). In doing so, we determined that the jury reasonably could have found the following facts.

"The [petitioner] had been a member of the Latin Kings gang from approximately 1989 until 1993, when he was expelled for breaking gang rules. He sought help from his cousin, Antonio Rigual, in getting back in the gang. Rigual asked his roommate, Edwardo Ortiz, what the [petitioner] could do to regain his membership in the gang. Ortiz asked Emanuel Roman and Richard Morales, the local gang leaders, for their advice. Roman and Morales informed Ortiz that the only way the [petitioner] could regain his membership was to kill either Louis Rodriguez . . . or the victim, Angel Soto . . . . Ortiz did not relay this information to the [petitioner] until the [petitioner] asked Ortiz how he could regain his membership. Because the [petitioner] did not know [Soto], Ortiz pointed him out.

[1] As a result of this conviction, the petitioner received a total effective sentence of sixty years incarceration.

"With the help of others, the [petitioner] stole a red van . . . and painted it with brown primer. On the evening of April 8, 1994, the [petitioner and two other individuals] drove through Bridgeport in the van looking for the victim. They saw the victim leave [a club] and followed his vehicle until it stopped outside a restaurant. When the van stopped next to the victim's vehicle, the [petitioner] and [one of his passengers] shot [Soto] repeatedly and fatally.

"After the shooting, the [petitioner] . . . attended Rigual's birthday party, which was given by Ortiz. The [petitioner] told Ortiz and Rigual that he had just killed the victim. Rigual put his necklace of colored beads on the [petitioner], a sign of gang membership. The day after the murder, Ortiz and the [petitioner's] brother [Lester Simonetty] purchased flares, intending to burn the van, which was recovered before it was burned." Id., 146–47.

In an amended petition for a writ of habeas corpus filed November 9, 2009, the petitioner claimed that his trial counsel, Jonathan J. Demirjian, rendered ineffective assistance by failing to call Rigual and Simonetty as witnesses on his behalf. Specifically, the petitioner testified during the habeas trial that he first became aware of Rigual's and Simonetty's alleged involvement in the shooting when they were implicated by Ortiz' testimony.[2] The petitioner testified that he then informed his defense counsel that he wanted Rigual and Simonetty to testify to see if they would corroborate

[2] During the underlying criminal trial, Ortiz testified that he was a member of the Latin Kings and had spoken with the petitioner and Rigual regarding the petitioner regaining his membership in the gang. In addition, Ortiz testified that he witnessed Rigual reinstate the petitioner to the Latin Kings. Finally, Ortiz testified that the day after the shooting he planned to burn the van with Simonetty, but was unable to do so as the van was gone. Two months later, Ortiz was arrested in New Jersey by the Federal Bureau of Investigation, and he entered into an agreement to cooperate with federal and state authorities regarding activities of the Latin Kings.

Ortiz' statements or if they would deny involvement with or knowledge of Soto's death and, by doing so, undermine the account of events given by Ortiz. Defense counsel did not call either Rigual or Simonetty as a witness at the petitioner's trial and he testified at the habeas trial that he had no independent recollection of Rigual's or Simonetty's specific involvement with the petitioner's case or whether they were investigated.[3] Rigual and Simonetty both testified at the habeas trial that they were not members of the Latin Kings when the shooting occurred and that they had no personal knowledge about the facts and circumstances pertaining to the shooting.

The habeas court denied the petition for a writ of habeas corpus, concluding that the petitioner failed to meet his burden of proving deficient performance and prejudice. In reaching this conclusion, the habeas court specifically determined that the petitioner failed to meet his burden of proving prejudice, reasoning that a jury would be unlikely to find the testimony of either Rigual or Simonetty credible.[4] Subsequently, the habeas court

[3] Defense counsel testified that he was unable to recall specific details of the petitioner's case because he had been unable to review the file prior to his testimony at the habeas trial. He had not been able to locate the file in his archives.

[4] In reaching this conclusion the habeas court noted that "[t]aking the arguments of counsel for [the petitioner] at its face, the best that Simonetty and Rigual could have established in this case is motive for [the petitioner] to have committed the crimes for which he was found guilty by the jury, and as is well known, motive is not an element of the crime." From this language, the dissent posits that the habeas court found that the testimony offered through Simonetty and Rigual "would actually have harmed the petitioner's defense by giving him a motive to kill the victim." As noted previously, Simonetty and Rigual testified before the habeas court that they were not members of the Latin Kings and had no involvement in the murder of Soto. Considered in light of this testimony, it is clear that the habeas court was attempting to convey, albeit using imprecise language, that the testimony of Simonetty and Rigual *went to* the issue of motive. Their testimony, if credited, would have undercut Ortiz' testimony concerning the existence of a motive and, therefore, would not have been dispositive in the underlying criminal trial. Because we conclude that the habeas court's

denied the petition for certification to appeal. This appeal followed.

"We begin by setting forth the applicable standard of review. 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 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. 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." (Internal quotation marks omitted.)

determination regarding the credibility of Simonetty and Rigual is not clearly erroneous; see footnote 6 of this opinion; we need not address whether the habeas court's conclusion regarding motive was incorrect.

Barlow v. *Commissioner of Correction*, 131 Conn. App. 90, 93–94, 26 A.3d 123, cert. denied, 302 Conn. 937, 28 A.3d 989 (2011).

"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 deficient performance prejudiced the defense." (Internal quotation marks omitted.) *McClam* v. *Commissioner of Correction*, 98 Conn. App. 432, 436, 909 A.2d 72 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007). "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Gooden* v. *Commissioner of Correction*, 127 Conn. App. 662, 668, 14 A.3d 1066, cert. denied, 301 Conn. 913, 19 A.3d 1259 (2011). "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland* v. *Washington*, supra, 697; *State* v. *Brown*, 279 Conn. 493, 525–26, 903 A.2d 169 (2006).

In the present case, the petitioner claims that the habeas court abused its discretion in determining that Rigual and Simonetty were not credible and that, consequently, the petitioner failed to meet his burden of demonstrating to a reasonable probability that the outcome

of his trial would have been different had defense counsel called them as witnesses. We are not persuaded.

"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." (Internal quotation marks omitted.) *Joseph* v. *Commissioner of Correction*, 117 Conn. App. 431, 433, 979 A.2d 568, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). In the present case, the habeas court concluded that a jury would be unlikely to find Rigual and Simonetty credible as both are convicted felons and both "would have a motive to be deceptive."[5] Absent evidence demonstrating that this factual finding was clearly erroneous, we will not disturb the habeas court's conclusions in this regard.

The petitioner cites *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009), in support of his argument that defense counsel's failure to call Rigual and Simonetty as rebuttal witnesses likely affected the outcome of his criminal trial. In *Bryant*, our Supreme Court held "that in circumstances that largely involve a credibility contest . . . the testimony of neutral, disinterested witnesses is exceedingly important." (Internal quotation marks omitted.) Id., 518. In that case, the witnesses were "law-abiding citizens . . . none of the witnesses knew or were in any way acquainted or associated with the petitioner. . . . They [were] completely disinterested, observant, qualified and dispassionate witnesses." (Internal quotation marks omitted.) Id., 511

[5] This court has upheld the decisions and factual conclusions of habeas judges stated with similar language. See, e.g., *Barlow* v. *Commissioner of Correction*, supra, 131 Conn. App. 98 (quoting habeas court's conclusion that "the jury could have found that the petitioner conspired and intended to murder" unspecific, unnamed individuals [internal quotation marks omitted]); *Gray* v. *Commissioner of Correction*, 99 Conn. App. 444, 449, 914 A.2d 1046 (affirming habeas court's denial of writ of habeas corpus and noting habeas court's decision "that a reasonable jury could have found the petitioner guilty"), cert. denied, 282 Conn. 925, 926 A.2d 666 (2007).

n.6. The witnesses in the present case, however, are distinguishable from the witnesses in *Bryant*. The undisputed testimony presented to the habeas court establishes that Rigual and Simonetty are both related to the petitioner and have prior criminal convictions. We therefore find the petitioner's reliance on this case to be misplaced. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal.[6]

The appeal is dismissed.

In this opinion GRUENDEL, J., concurred.

SHELDON, J., dissenting. In this case, the majority has determined that the habeas court's denial of the

[6] The dissent's principal contention is that Rigual and Simonetty were, on balance, as credible as Ortiz. In support of that contention, the dissent asserts that their testimony "would probably have been quite helpful to the petitioner had defense counsel called them at trial." The dissent also asserts that "the mere assertion that the witnesses had motives to be deceptive is insufficient to support the court's ruling that the petitioner failed to establish prejudice . . . ." Aside from the fact that both of these assertions indicate a departure from the standard of review that we must apply, set forth in *Barlow* v. *Commissioner of Correction*, supra, 131 Conn. App. 94, we note also that "[t]he 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." (Internal quotation marks omitted.) *Joseph* v. *Commissioner of Correction*, supra, 117 Conn. App. 433. On appeal, this court is bound by precedent to apply the clearly erroneous standard of review to determinations of credibility reached by the habeas court. See *Barlow* v. *Commissioner of Correction*, supra, 94. Although the dissent is correct to note that the habeas court did not fully iterate its reasoning on this point in its oral memorandum of decision, the record contains undisputed evidence that Rigual and Simonetty both had criminal records and are related to the petitioner. These facts provide some support for the habeas court's conclusion that the testimony offered through these witnesses was not credible. In light of this support, the habeas court's failure to credit Rigual and Simonetty was not clearly erroneous.

We note further that the dissent's proposed resolution of this appeal appears to be grounded on its disagreement with the habeas court's reasoning rather than with the judgment that it rendered. In that respect, the proposed resolution of the appeal also represents a departure from the standard of review that governs our review.

petition for certification to appeal filed by the petitioner, Jorge Sanchez, must be upheld because the court did not abuse its discretion in ruling that the petitioner failed to satisfy the prejudice prong of the controlling test for ineffective assistance of counsel set forth in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). I respectfully disagree.

The petitioner's claim of ineffective assistance was based upon his trial lawyer's failure to call two witnesses to testify in his defense at trial. The witnesses, Antonio Rigual and Lester Simonetty, were both claimed by the petitioner to contradict key portions of the state's case against him, which was built centrally upon the testimony of Edwardo Ortiz, an admitted member of the Latin Kings gang with a lengthy criminal record, who testified against the petitioner while in custody as an informant for the Federal Bureau of Investigation (FBI).[1] According to Ortiz, the petitioner murdered the victim, Angel Soto, in order to gain readmission to the Latin Kings, which had previously expelled him. When the petitioner inquired of his cousin, Rigual, how he might gain readmission to the gang, Rigual allegedly told him, after having spoken with Ortiz, that he could gain readmission by killing one of two people with whom local gang leader Richard Morales was angry because one of them had carried on a relationship with the wife of the president of the Latin Kings while the other, Soto, had known of the relationship but did not report it. According to Ortiz, Rigual was also the person to whom the petitioner revealed, again in Ortiz' presence at Rigual's birthday party, that he had done the killing—a revelation that

[1] At the petitioner's trial, Ortiz admitted that after he was arrested by the FBI in New Jersey, he entered into an agreement to cooperate with federal and state authorities concerning the activities of the Latin Kings. When asked by defense counsel whether his sentence in an unrelated case depended on his cooperation and testimony in the petitioner's case, Ortiz responded in the affirmative.

reportedly prompted Rigual to give the petitioner back his beads, betokening his readmission to the gang.

Simonetty, the petitioner's brother, was claimed by Ortiz to have joined him in planning to burn the stolen and repainted motor vehicle that the petitioner had used to approach the victim by surprise in order to commit the murder. The only reason that Simonetty did not follow through with Ortiz on this plan was reportedly that the police located the stolen vehicle before he and Ortiz could torch it. When they testified at the habeas trial, both Rigual and Simonetty denied that they were members of the Latin Kings in the relevant time frame and denied that they had any knowledge of the petitioner's involvement in the killing of Soto. Rigual testified that he did not have conversations with any members of the Latin Kings about the petitioner's alleged effort to be readmitted into the gang, nor was he even aware that Soto was murdered. Simonetty testified that he did not know any members of the Latin Kings who were involved in the murder of Soto, nor did he have conversations about the murder with any such individuals.

In announcing its decision from the bench, the habeas court ruled that the plaintiff had failed to establish either the performance prong or the prejudice prong of *Strickland* for the following reasons. After assuming, arguendo, at the outset, that the performance prong of *Strickland* had been satisfied because defense counsel could not recall or explain why he had failed to call the two witnesses at trial, or even whether he had investigated them, the court then ruled that the petitioner had failed to prove prejudice because calling the witnesses to testify would actually have harmed the petitioner's defense by ascribing to him a motive to kill the victim. The court added that even if the witnesses had been called to the stand at trial, it was unlikely that the jury would have believed them because they both had

criminal records and unspecified "motive[s] to be deceptive." No explanation of these findings was ever offered. At the end of that ruling, the court concluded that, in light of the two witnesses' unhelpfulness to the defense, it was not deficient performance by defense counsel not to have called them at trial.

With due respect to the habeas court, I believe that its conclusion that the two witnesses' testimony would have hurt the petitioner's defense by giving him a motive to murder Soto is unfounded. In fact, they offered critical evidence to contradict the state's key witness in two important respects. As for Rigual, his denial of Latin Kings membership and of knowledge of the murder or of the petitioner's involvement in it directly contradicted a critical element of the state's central theory of the case: that the petitioner was motivated to kill the victim by his desire to regain membership in the Latin Kings. According to Ortiz, Rigual was a key player in the events that unfolded both because Rigual told the petitioner that he could be readmitted to the gang by killing Soto and because he made good on that representation by personally readmitting him when the petitioner informed him that he had killed Soto. If the jury had believed Rigual instead of Ortiz, or had even entertained a reasonable doubt about Ortiz' testimony based upon Rigual's contrary testimony, the petitioner's prospects at his criminal trial would have markedly improved.

As for Simonetty, although his role in the events surrounding the murder was less central than Rigual's, he still was uniquely situated to contradict a key aspect of Ortiz' story, which was that after he and Simonetty learned of the crime, they made plans together to incinerate the car. Because Simonetty was the only other person claimed by Ortiz to have been involved in the postshooting plan to torch the car, his denial of any involvement in it, or of any reason for doing so, could

also have furnished a significant basis for discrediting Ortiz' testimony.

As for the habeas court's conclusion that Rigual and Simonetty would not likely have been believed by a jury because of their criminal records, it is important to note that the essential value of their testimony to the defense in this case would have been to contradict Ortiz, an admitted member of the Latin Kings who had an extensive criminal record and pending criminal charges of his own. The critical question, moreover, is whether their relevant testimony contradicting Ortiz would have been of such significance as to raise reasonable doubt about the state's theory of the case. Here, with no admissions by the petitioner except through Ortiz, no forensic evidence tying the petitioner to the crime and no eyewitnesses against him—in essence, nothing but Ortiz' testimony to establish his guilt—the witnesses' testimony would probably have been quite helpful to the petitioner had defense counsel called them at trial.

The court also observed that both witnesses had unspecified motives to be deceptive. Here, however, where neither the true significance of the witnesses' testimony nor the insignificance, in context, of their criminal records, was properly assessed, I believe that the mere assertion that the witnesses had motives to be deceptive is insufficient to support the court's ruling that the petitioner failed to establish prejudice based upon the trial lawyer's failure to call the two witnesses at trial.[2]

[2] The majority suggests that, in reaching this conclusion, I have failed to pay due deference to the habeas court's determinations of credibility, which must be upheld on appeal unless they are shown to have been clearly erroneous. I respectfully disagree. The findings I object to were not in fact credibility determinations. Instead, they were assessments of the likelihood that the two witnesses' testimony would have been believed and credited by the jury had they been called to testify at trial. These findings were predicated upon the acknowledged existence of bases for impeaching the two witnesses that were identical in character to those affecting the credibil-

Although, as previously noted, the habeas court also ruled that the petitioner failed to establish the performance prong of ineffective assistance of counsel under *Strickland*, that ruling was based solely upon the court's unfounded finding that the witnesses' testimony would have harmed the petitioner by establishing a motive for him to kill the victim. I believe that that ruling fails to furnish an alternative basis for upholding the habeas court's denial of the petitioner's petition for certification to appeal under the performance prong of *Strickland*.

Having determined that the habeas court abused its discretion in ruling that the petitioner failed to satisfy the prejudice prong of *Strickland*, I next turn to a discussion of remedy. On that score, I would note that the mere fact that the court erred in rejecting the petitioner's claim does not, in itself, mean that the petitioner has met his burden of proving that his counsel was ineffective and thus that his habeas petition should be granted. Accordingly, I would reverse the habeas court's decision and remand the case for a new habeas trial on all aspects of the petitioner's ineffective assistance of counsel claim.

IN RE MESSIAH S. ET AL.*
(AC 34324)

Lavine, Espinosa and Peters, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to four of her minor children. *Held*:

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ity of the state's witness, Ortiz, whose testimony they would have contradicted. I find it unsupportable to conclude, on this record, that the two witnesses were not likely to have been believed solely because they, like Ortiz, had criminal records and possible motives to be deceptive.

* 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

1. The respondent mother could not prevail on her claim that the trial court improperly denied her oral motion seeking to have the court recuse itself due to alleged judicial bias:

   a. Contrary to the claim of the petitioner, the commissioner of children and families, the mother's failure to file a motion to disqualify the judge ten days prior to trial as required by the applicable rule of practice (§ 1-23) did not support a finding that her claim of judicial bias was not reviewable; a motion to recuse could not have been filed ten days before trial because the court's rulings and statements to which the mother took exception did not emanate from an extrajudicial source, but were made by the court in response to the manner in which the case was being tried, and, thus, the circumstances giving rise to the motion to recuse had not yet occurred prior to trial, and the mother seasonably asserted her claim of judicial bias during trial on the basis of events that were transpiring in court.

   b. Although the trial court expressed frustration and impatience with some of counsels' conduct in failing to move things along so that the issues could be resolved in an expedient manner for the sake of the children, the court did not harbor a bias against any party or any particular counsel and did not abuse its discretion by failing to recuse itself, as the court did not predetermine the credibility of any witness or issue, and its findings were amply supported by the evidence.

2. The respondent mother could not prevail on her claim that the trial court, in undertaking its analysis of the best interests of the children, improperly copied the analysis it had used in prior unrelated and factually distinct cases: the manner in which the court expressed itself indicated that it was fully aware of the allegations against the mother and engaged in independent analysis based on the facts presented in this case, the court took into consideration the proper elements that it must in any termination of parental rights case, and the court's conclusions were supported by its factual findings that appeared elsewhere in its decision; moreover, the fact that the court may have adopted the language that it had used in previous termination of parental rights cases did not mean that it abdicated its fact finding role, as the court's factual findings were supported by the evidence and were sufficient to support its legal conclusion that it was in the best interests of the children to terminate the mother's parental rights.

3. The trial court did not abuse its discretion in denying the respondent mother's motion to transfer guardianship of the children to L, the sister of the respondent father; that court found that although L had a foster care license, she had not reached the point of how she would parent the children and their specific needs, and that L had told the children that she was interested in gaining guardianship so that she could return them to their mother and father, and in its memorandum of decision,

the court demonstrated that it was aware of the position of the children's foster parents who favored long-term foster care over adoption, but found that the foster parents were willing to adopt the children and to permit them to maintain a relationship with the mother, which was the objective of the mother's motion to transfer guardianship to L, and the court determined that the children needed permanency and stability, which their foster parents were willing and able to provide them.

(*One judge concurring separately*)

Argued May 29—officially released October 1, 2012**

Procedural History

Petitions by the commissioner of children and families to terminate the respondents' parental rights with respect to certain of their minor children, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the respondent father Kirk J. was defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. William L. Wollenberg*, judge trial referee; judgments terminating the respondents' parental rights; subsequently, the court denied the respondent mother's motion to reargue, and the respondent mother appealed to this court. *Affirmed.*

Dana M. Hrelic, with whom were *Brendon P. Levesque*, and, on the brief, *Michael D. Perez*, for the appellant (respondent mother).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon* and *Charlene W. Spencer*, assistant attorneys general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent mother, Stacey S., appeals from the judgments of the trial court terminating her parental rights with respect to four of her minor children pursuant to General Statutes § 17a-112 (j) (3) (B)

** October 1, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

(i)[1] for failure to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in her children's lives. On appeal the respondent claims that the court (1) abused its discretion by failing to recuse itself, (2) failed to undertake an independent analysis of the law and facts of this case and (3) abused its discretion in denying her motion to transfer guardianship of the children.[2] We affirm the judgments of the trial court.[3]

The following procedural history is relevant to this appeal. In April, 2011, the petitioner, the commissioner of children and families, filed four petitions, one each for Messiah S., Aziza B., Jazira B. and Kifayeh B. (collectively children), to terminate the parental rights of the respondent. The petitions alleged that the respondent

[1] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found by the Superior Court . . . to have been neglected or uncared for in a prior proceeding, or (ii) is found to be neglected or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[2] Counsel for the children adopted the position of the respondent.

[3] The termination of parental rights petition concerning Messiah S. also sought to terminate the parental rights of his father, Kirk J., on the ground of abandonment and no ongoing parent-child relationship pursuant to General Statutes § 17a-112 (j) (3) (A) and (D). Kirk J. was defaulted for failure to appear, and the court terminated his parental rights with respect to Messiah S. Kirk J. has not appealed from the termination of his parental rights.

The petitions also sought to terminate the parental rights of Eric B., the father of Aziza B., Jazira B. and Kifayeh B., on the ground of failure to rehabilitate pursuant to General Statutes § 17a-112 (j) (3) (B) (i). The court terminated the parental rights of Eric B. He is not a party to this appeal, as he filed a separate appeal. See *In re Aziza S.-B.*, 138 Conn. App. 639, 53 A.3d 1001 (2012). In this opinion, the term respondent refers to the mother of the children, Stacey S.

is the mother of each of the children, that the department of children and families (department) has made reasonable efforts to reunify the children with the respondent and that the respondent is unable or unwilling to benefit from reunification. On July 28, 2011, Eric B., the father of Aziza, Jazira and Kifayeh, filed a motion to transfer guardianship of Aziza, Jazira and Kifayeh to his sister, Lisa B.-J. On August 22, 2011, the respondent also filed a motion to transfer guardianship of the children to Lisa B.-J. The petitions to terminate the respondent's parental rights were tried on November 4, 7 and 17, 2011. In a memorandum of decision filed January 6, 2012, the court granted the petitions to terminate the respondent's parental rights on the ground of failure to rehabilitate and denied the motions to transfer guardianship of the children to Lisa B.-J. The court denied the respondent's motion to reargue.

In its memorandum of decision, the court made the following findings of fact. The department has been involved with the respondent since December, 2001, due to issues of substance abuse, transience, mental health issues, financial instability and, more recently, domestic violence. The children were committed to the custody of the petitioner on October 29, 2009, after previously having been placed under protective supervision.

The respondent, born in 1972, reported having had a normal childhood and a good relationship with her family. Following high school, she majored in politics and government in college and later earned a master's degree in political theory. She has been employed as a teacher at a group home, as a librarian and as a paralegal. She also was employed by a mortgage company. Despite her education, at the time of trial, the court found that the respondent's employment was menial in nature.

The respondent has never married, but she has had a series of relationships. After college, she met Erroll, whom she dated for five years and with whom she had a daughter, Olivia. Olivia was placed for adoption. The respondent ended her relationship with Erroll in 2001. She then met Kirk J. with whom she had a two month relationship, during which she became pregnant with Messiah. Kirk J. has never offered assistance or been involved in Messiah's life. See footnote 3 of this opinion. The respondent's history with the department, related to mental health issues, substance abuse and unstable housing, began at this time.

The respondent met Eric B. when she was pregnant with Messiah and entered into a serious relationship with him after the child was born. When Messiah was six months old, the respondent and Eric B. moved to Washington, D.C., where Aziza was born. Two years later, they moved to Las Vegas where Jazira was born. The couple returned to Connecticut, and Kifayah was born in Rhode Island in October, 2005.

The respondent gave birth to Eric B., Jr., in October, 2007. A nurse at the hospital informed the department that the respondent had tested positive for cocaine and alcohol at the time of birth. The petitioner took custody of Eric B., Jr., and in July, 2010, the parental rights of the respondent and Eric B. were terminated.

The respondent denies that she has any substance abuse issues, but she tested positive for cocaine use during her last pregnancy in 2007. Prior to trial in November, 2011, the respondent was extremely reluctant to submit her hair for testing. The respondent's Breathalyzer test on April 19, 2011, was positive for alcohol.

Eric B. was born in 1962 and has fathered thirteen children with eight different women; he was fourteen when his first child was born. He was married once,

from 1987 until 2000. Eric B. was arrested seven times between September 16, 1982 and July 2, 2009. On June 13, 2009, he was charged with assault in the third degree, breach of the peace in the second degree and risk of injury to a child arising from his assault of the respondent in front of the children. Eric B. was incarcerated and ordered to have no contact with the respondent. He was placed on probation until July 24, 2009, when he returned to the family home. He admits to using marijuana in high school and denies any history of substance abuse, although he tested positive for cocaine on May 13, 2011. He claims to drink beer socially.

The respondent continues to live with Eric B., and the two are contemplating marriage. At the time of trial, the respondent was employed part-time as a secretary by her church, and Eric B. worked in the delicatessen department of a Stop and Shop supermarket. The two of them continue to avoid therapeutic programs scheduled by the department; they attend sporadically, at best. The court found deep concern over their lack of attention ("no show, no call") to substance abuse tests that are scheduled by the department. Since Eric B. tested positive for cocaine in April and May, 2011, he has avoided further testing and wears his hair too short to be tested. The respondent has had a number of urine tests, but not hair tests, in 2011. She tested negative for substances but her creatinine[4] levels were very low, which rendered the tests results suspicious. She produced a positive Breathalyzer test on April 19, 2011.

The court made factual findings with regard to each of the children as well. Messiah, born in December, 2001, does not know his biological father, Kirk J.[5] See footnote 3 of this opinion. Protective services were

[4] Creatinine is a chemical waste molecule that is generated from muscle metabolism and transported through the bloodstream to the kidneys.

[5] Eric B. is Messiah's psychological father.

provided for Messiah, and he was committed to the petitioner's custody on October 29, 2009. Overall, he is in good health, although he suffers from asthma. His 2009 multidisciplinary evaluation produced some scores that place him in the at-risk range. Messiah would benefit from one-on-one therapy to improve his adaptive and communication skills and frustration tolerance. He is a bright and insightful child. Between December, 2009 and May, 2010, Messiah conveyed to his therapist that he was sad that he did not live with his parents, but happy that he did not have to listen to their screaming any more. He reported that he got along with the respondent, but that she yelled a lot. He understood that Eric B. was in jail because he hit the respondent too much, but according to Messiah, Eric B. hits everybody. When the respondent and Eric B. fight, which scares Messiah, the children hide behind chairs in the living room and under their beds. Messiah is bonded with the respondent and Eric B., whom he sees weekly at Family Connections Visitation Center.

Messiah has adjusted well to his foster care placement where he lives with Aziza. He has bonded with his foster mother, Mary M., who is willing to adopt him. His two youngest half siblings are in a foster placement with Mary M.'s sister, and he sees them regularly. At the time of trial, he was in the fifth grade and doing well, taking on more responsibility and doing his work. His teacher thinks that he is an excellent student and selected him for the gifted and talented program.

Aziza was born in April, 2003, in Washington, D.C. A multidisciplinary study conducted in November, 2009, produced at-risk scores indicating that she has difficulty adapting to changing situations and environments. She sometimes struggles to communicate effectively with others. Aziza attended the Abundant Family Counseling Center weekly from December, 2009 through May, 2010. Individual counseling helped her with her transition

into her foster family. During therapy, Aziza reported being happy to see the respondent during visits, but also was scared and sad. She witnessed domestic violence in June, 2009. When she was interviewed by department personnel, she reported that "Daddy doesn't come home sometimes," and, "sometimes Daddy is mad and angry and fights with mommy." She has witnessed Eric B. kicking and scratching the respondent. She claimed that Eric B. screamed at the respondent and the children, which made her scared. She, too, reported that the children hid "behind chairs, in our rooms, everywhere."

Aziza lives in the same foster home with Messiah. She transitioned to the foster home well and enjoys family outings. She has bonded with her foster mother, but expressed a desire to be at home with her parents. If Aziza becomes legally free for adoption, Mary M. has expressed a willingness to adopt her. At the time of trial, Aziza was in the third grade and doing well.

Jazira was seven years old at the time of trial. She attended the Abundant Life Counseling Center from February through August, 2010, and her foster mother has reported positive changes in her behavior. Jazira has reported seeing violence in her home which scared her: "Daddy picked up a chair and threw it at Mommy." She was in the second grade and continues to make progress in all areas. She and her brother Kifayeh were placed together in the same foster home. She is bonded with Messiah, Aziza and Kifayeh. She visits with Messiah and Aziza during supervised visitation, as well as on weekends.

Kifayeh was six at the time of trial and lives in the same foster home with Jazira. He, too, witnessed the domestic violence episode between his parents in June, 2009. He reported seeing Eric B. choking the respondent. Because his parents' fighting scares him, he cries and hides under the kitchen table when they fight. When

Kifayeh initially was placed with his foster mother, Nancy A., there were concerns because he cried for a long time before falling asleep. He received counseling to address that issue. Kifayeh was in the first grade at the time of trial and doing well. His development presents no concerns. He visits with his parents, half brother and sisters weekly.

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Rafael S.*, 125 Conn. App. 605, 610–11, 9 A.3d 417 (2010).

The petitioner alleged that the respondent's parental rights with respect to the children should be terminated on the ground of failure "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." General Statutes § 17a-112 (j) (3) (B) (i). The petitioner also alleged that in a prior proceeding, the children were found to be neglected.

The court noted that the law requires it "to find, by clear and convincing evidence, that the level of rehabilitation [the respondent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her children's] life." (Internal quotation marks omitted.) *In re Anvahnay S.*, 128 Conn. App.

186, 195, 16 A.3d 1244 (2011). "[I]n assessing rehabilitation, the critical issue is not whether the [respondent 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[ren] at issue." (Internal quotation marks omitted.) *In re Sarah Ann K.*, 57 Conn. App. 441, 448, 749 A.2d 77 (2000). The court is to consider whether the age and needs of the children would support allowance of further time for the respondent to rehabilitate. See *In re Luis C.*, 210 Conn. 157, 167–68, 554 A.2d 722 (1989). In determining whether further allowance of a reasonable period of time would promote rehabilitation, a court may consider efforts made since the date of the filing of the petition to terminate parental rights. See *In re Sarah M.*, 19 Conn. App. 371, 377–78, 562 A.2d 566 (1989).

The court found that the respondent has yet to achieve a sufficient level of rehabilitation which would reasonably encourage a belief that at some future date she can assume a responsible position in the life of her children. The court credited the evidence the department presented in the termination social study and exhibits, which convincingly established that the respondent has not achieved rehabilitation pursuant to the statute. The department became involved with the family in 2005 when the respondent tested positive for cocaine during her pregnancy with Kifayeh. An earlier substantiation of neglect as to Messiah was determined due to her unaddressed mental health issues. By clear and convincing evidence, the court found that the department made reasonable efforts to achieve the permanency plan.

The court made the following findings in the adjudicatory phase of the trial. The department made extraordinary efforts to reunify the children with the respondent. Time after time services and programs have been offered to the respondent only to have her refuse to

cooperate or leave the program before it was completed. In many cases, she was discharged for lack of compliance. She has not shown the ability to gain insight into her failings as a parent and has proven unable to rehabilitate and provide the care that her children require. The respondent is unwilling or unable to benefit from efforts because she has been unable to show progress toward rehabilitation with regard to mental health, substance abuse, parenting, anger management, domestic violence, housing and employment. She remains in a close relationship with Eric B., who offers little or no parenting support or guidance. Eric B. presents himself as a companion for using and abusing substances.

The respondent continuously has provided positive hair and urine tests, although prior to trial she kept her hair too short to permit testing. Her last positive test for cocaine was February 17, 2010. Subsequent to that date, the respondent's urine tests were negative, but they showed very low creatinine levels for which there was no reasonable explanation. Since May 31, 2011, when she produced a negative hair test, the respondent has refused to sign releases for the department, and she failed to attend or canceled eighteen to twenty test appointments. On April 20, 2011, the respondent produced a positive Breathalyzer test, raising concerns about her use of alcohol.

The court found that the respondent failed to make realistic and sustained efforts to conform her conduct to even minimally acceptable parental standards. She has had more than ten years of failure at recovery, during which time she placed a daughter for adoption and her parental rights with respect to a son were terminated. The court also found that her lack of acceptable housing and her refusal to be concerned about domestic violence have left her unfit to parent. The court noted that a parent's failure to appreciate the risks to her

children posed by the other parent's having access to them, or her inability to care for the child on her own can provide a sufficient legal basis to find that a parent has failed to rehabilitate. See *In re Ellis V.*, 120 Conn. App. 523, 532–33, 992 A.2d 362 (2010). A parent involved in an unstable and chaotic relationship can demonstrate a failure to rehabilitate. *In re Samantha C.*, 268 Conn. 614, 624, 847 A.2d 883 (2004). The respondent is still in an intimate relationship with Eric B., who minimizes his own substance abuse issues, as well as those of the respondent.

The court found it "extremely interesting" that counsel for the children, the respondent and Eric B., each during final argument, stated that granting guardianship of the children to Lisa B.-J. was in the best interests of the children rather than reunification.[6] The respondent's counsel acknowledged that the respondent was a " 'functioning addict,' " " 'an addict in recovery' " and that " 'she did the best she could' " in the programs offered. The court stated that it was not persuaded by the argument that the respondent should regain custody of the children.

Given their ages, ten, eight, seven and six, the court found that the children desperately require stability. They have formed bonds with their respective foster parents, sisters with a remarkable relationship that transfers to the children. The foster parents are willing to adopt the children and are agreeable to letting the children maintain a relationship with the respondent. The children need permanency and stability in their lives, which the respondent is not able to provide given her unresolved issues. The uncertainty of their future has a traumatic effect on them, as does the suggestion of Eric B. and Lisa B.-J., that reunification is their intention. The children need a permanent home where they

[6] The court found that counsel also mentioned placing the children in protective supervision.

can flourish, free of substance abuse, domestic violence and other presenting issues. The court made the dispositional findings required by § 17a-112 (k) and concluded that the statutory grounds for termination of parental rights had been proven by clear and convincing evidence.

The court then addressed whether termination of the respondent's parental rights was in the best interests of the children. See General Statutes § 17a-112 (j) (2).[7] The court considered multiple relevant factors, including the children's interest in sustained growth, development, well-being, stability and continuity of their environment; their length of time in foster care, the nature of their relationship with the respondent and the degree of contact the children maintained with the respondent. The court also stated that it had balanced the children's intrinsic need for stability and permanency against the benefits of maintaining a connection with the respondent. The court found by clear and convincing evidence that it was not in the children's best interests to maintain a legal relationship with the respondent.

In its memorandum of decision, the court also ruled on the respondent's motion to transfer guardianship of the children to Lisa B.-J. During final argument, counsel for Eric B. and the children urged the court to grant the motion to transfer guardianship. The court made the following findings. At some earlier time, the department assessed whether Lisa B.-J. could be a resource as the children's guardian. She, however, was not considered a suitable placement because one of her children was involved in the criminal justice system. Lisa B.-J. obtained a foster care license when that child left her

[7] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (2) termination is in the best interest of the child . . . ."

home. The court opined that obtaining a license to become a foster parent is just the beginning and that child placement is contingent on many additional factors that Lisa B.-J. has not addressed.

On the basis of Lisa B.-J.'s testimony, the court found that she knew the children, had visited them on occasion, was employed and maintained a comfortable home. The main reason she wished to be named guardian of the children, however, was to help Eric B., when she learned that he was in trouble. She has not considered how she would parent the children, given their specific needs. Moreover, the court found that Lisa B.-J. did not know that Eric B., Jr., had been removed from his parents' care and adopted. She also did not seem to be aware that Eric B. had other children who have been in the care of their mothers since each of them was born. She was not interested in knowing that Eric B. became a father when he was fourteen years old or that he lived the better part of his forty-nine years without having to support, provide housing for or parent his children in any meaningful way.

Moreover, the court found that, on more than one occasion, the children reported that Lisa B.-J. had told them that she wanted to be their guardian so that they could be returned to their parents. Eric B. also led the children to believe that they would be returned to him and the respondent if Lisa B.-J. was their guardian. The court found that Eric B. had something other than permanency in mind when he admitted making those statements to the children and insisted that he would continue to tell them whatever he desired. The court found, however, that it was "abundantly clear" that Lisa B.-J. has very little knowledge with regard to the children and is only interested in helping her brother, who is in trouble. The court concluded that Lisa B.-J.'s goal was not to provide a meaningful family situation

with permanency, stability and the chance for a productive future for the children. The foster parents, however, could make those opportunities possible. The foster parents care for the children extremely well and are bonded with them.

In her motion to transfer guardianship to Lisa B.-J., the respondent stated that such transfer "will allow [the respondent] to play a perpetual role in her children's lives." The court found that the respondent has "played *only* a peripheral role in the lives of these children for many years" and, in fact, has played less of a role when others have assumed care for the children. The court denied the motion to transfer guardianship to Lisa B.-J., and the respondent's motion to reargue the same. The respondent appealed.

In this appeal, the respondent does not claim that any of the court's factual findings are clearly erroneous. In particular, she does not challenge the court's findings that the department made reasonable efforts to reunify the children with her or that she failed to achieve the required level of rehabilitation. In her brief, the respondent admits that she has battled with cocaine and alcohol use. In recent years, she concedes, she refused on several occasions to participate in hair testing and has a history of cancelling and missing tests and other substance abuse treatment appointments.

The standard for terminating parental rights is well known. "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether

termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Brea B.*, 75 Conn. App. 466, 469–70, 816 A.2d 707 (2003).

I

The respondent claims that the court abused its discretion by denying her oral motion that the court recuse itself.[8] Although the respondent's motion was premised

[8] The transcript reveals the following:

"The Court: You know, all these questions you answer yes or no. Go ahead. You're just giving her some latitude here because the questions you are asking is way beyond what a worker or what a supervisor does. It's done up here. But go ahead. What are you looking at him for?

"[The Respondent's Counsel]: Your Honor, I—

"The Court: No, I would like to know. I just want you to move along. How are you going to ask another question if you wait a minute or so to ask another question? Please move on.

"[The Respondent's Counsel]: If I could just have a second?

"The Court: Let's take a ten minute recess.

* * *

"The Court: The court recessed so [the respondent's counsel] and [counsel for Eric B.] could confer. And now they're back.

"[The Respondent's Counsel]: It's with a heavy heart, Your Honor, that I must respectfully request the court to recuse itself.

"[Assistant Attorney General]: Oh, come on.

"The Court: Denied. I've heard this four or five times, and you take an appeal. That's what you do.

"[The Respondent's Counsel]: If I could state the reasons, my reasons?

"The Court: State your reasons.

* * *

"[The Respondent's Counsel]: I think that there—the court has shown an air of bias. And you know, actual bias does not have to be proven. But I think that there has been a showing, and a—I think that it's—there's been a showing that there may be some bias, that the court has repeatedly asked witnesses questions, I believe in an effort to rebut assertions made by the respondents' attorneys. And so, for those reasons, I believe that there has been an appearance that the court is, in fact, through examination of the witnesses and through its oral argument, giving the appearance that there is a bias for the state's case before the evidence has even concluded.

"The Court: All right, so let me tell you something.

"[The Respondent's Counsel]: And I do this with you [all] due respect, Your Honor.

"The Court: You are absolutely wrong—and I'm going to tell you—in what I feel about this case. You're absolutely wrong. I want to get—

"[Assistant Attorney General]: Your Honor—

on what the respondent characterized as an appearance

"The Court: Please, I want to get the evidence out so that I know all about this. And as far as I'm concerned, there is no feeling of bias, whatsoever. I have no bias in this matter at all. I have read much of the evidence and the facts in the case, without anybody saying one word. And I think you would have to agree with this, this has been a tumultuous time for these people and all these children. Things have been going on for a long time. I have to weigh all that. And in order to weigh it, I have to have the trial, have all the evidence you want to put in. I am concerned when someone like you keeps asking questions and then writes for a minute and then asks a question and is not prepared to ask one—cross-examination, ask one question after the other, be ready for that. That's what's bothering me. I don't mind the questions at all, they ought to be answered. But the time you are taking, I think, is extraordinary. And I'm just asking you—when I ask you what you are trying to prove by this, that there was maybe an error, a scrivener's error, maybe they misread something. That, to me, is not going to turn this case one way or the other, with the extreme amount of evidence. It's going to turn on what the witnesses have to say and what is in the evidence. I have no—at this time, I have no bias, whatsoever. Therefore, I am denying your motion.

"[The Respondent's Counsel]: If I may Your Honor, I'm—just so the court is clear, I'm not asserting that the court is biased. I'm just asserting that there has been an improper appearance of bias.

"The Court: That's your opinion that it's improper. It may be an appearance, but improper is your term.

"[The Respondent's Counsel]: The witness gave an answer that was favorable to my client's case, and Your Honor jumped in and attempted to change her answer.

"The Court: No, I didn't at all. I think—I'll tell you what I am doing here. I think this witness is not the person who wrote this. She is the supervisor. She was pressed into duty for this because the person that wrote this is not available, or whatever, she is not available.

"[The Respondent's Counsel]: She signed the . . . the social study.

"The Court: Well, I understand that. But who was the social worker?

"[Department Social Worker]: Rushnee.

"The Court: Who had been on for a long period of time. And this witness—I think the court also has a duty toward people we call as witnesses. I don't think they need to be badgered, and I don't think they need to be asked questions that someone knows they really can't answer. I don't think that's fair questioning of a witness. And I think the court has an obligation toward witnesses as well as toward attorneys and parties before the court. And I think you're attempting to take advantage of this witness; that's what I think. It has nothing to do with how I feel about the case. It does have something to do with how I feel about the way you are questioning this witness, yes; and that's all. Not the questions, the way you're carrying on; that's what's bothering me, not the case."

of bias, the record demonstrates that the respondent's motion was made in response to the court's sometimes heavy-handed manner and sharp rebukes of all counsel. The court's memorandum of decision and the record, however, demonstrate that the court's decision is amply supported by the evidence. We cannot, therefore, conclude that the court abused its discretion by denying the respondent's motion to recuse or that she was denied a fair trial. As the record demonstrates, this is a case that raises issues relating to judicial temperament, not judicial bias.

A

On appeal, the petitioner contends that the respondent's claim of bias is not reviewable because the motion to recuse was not presented to the court pursuant to Practice Book § 1-23,[9] which requires that a motion to disqualify a judge must be filed ten days before the start of trial. We disagree.

Rule 2.11 of the Code of Judicial Conduct requires a judge to "disqualify himself [or herself] in a proceeding in which his [or her] impartiality might reasonably be questioned . . . ." (Internal quotation marks omitted.) *Weyel* v. *Catania*, 52 Conn. App. 292, 299, 728 A.2d 512, cert. denied, 248 Conn. 922, 733 A.2d 846 (1999). "The alleged bias and prejudice, to be disqualifying, must stem from an *extrajudicial source* and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case. . . . Moreover, to support a claim of disqualification, the judge's comments must express a personal bias against the parties and not merely be directed at

[9] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

the merits of the defense claimed based on information presented to him [or her] during a trial on the merits." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Barca* v. *Barca*, 15 Conn. App. 604, 613, 546 A.2d 887, cert. denied, 209 Conn. 824, 552 A.2d 430 (1988).[10]

As in *Barca*, there is no claim here that the court commenced trial with a preconceived view of the termination proceeding, the parties or their counsel. The court's statements and rulings to which the respondent takes exception did not emanate from an extrajudicial source, but were made by the court in response to the manner in which the case was being tried.[11] No Practice Book § 1-23 motion could have been filed ten days before trial, because the circumstances giving rise to the respondent's motion to recuse had not yet occurred. The respondent's counsel orally asked the court to recuse itself during trial in response to the court's comments and rulings. We conclude on the basis of *Giordano* v. *Giordano*, 9 Conn. App. 641, 643, 520 A.2d 1290 (1987),[12] that the respondent "seasonably asserted" her claim of judicial bias during trial on the basis of events that were transpiring in court.

B

We now address the respondent's claim that the court abused its discretion by denying her motion to recuse.

[10] For a catalogue of cases in which the denial of a motion to recuse was upheld on appeal see *Joyner* v. *Commissioner of Correction*, 55 Conn. App. 602, 610–12, 740 A.2d 424 (1999).

[11] Because there was no evidentiary hearing on the respondent's motion, there are no factual findings for us to review. See *Szypula* v. *Szypula*, 2 Conn. App. 650, 653, 482 A.2d 85 (1984) (claim of judicial bias may require evidentiary hearing before another judge).

[12] In *Giordano*, a dissolution action, "[t]he motion to recuse was precipitated by the statement of the trial court, made during a chambers conference on the third day of a six day trial, that sole custody of the child in the defendant was 'not possible.' The motion was made on the record immediately following the chambers conference." *Giordano* v. *Giordano*, supra, 9 Conn. App. 643–44.

As best we can discern from the record as brought to our attention by the parties; see footnote 11 of this opinion; the court exhibited irritation, frustration and impatience with all counsel and the pace at which the trial was progressing. Although some of the court's statements were clearly intemperate, we conclude they do not reflect judicial bias.

"The standard for appellate review of whether the facts require disqualification is whether the court's discretion has been abused. . . . The question then becomes whether an objective observer reasonably would doubt the judge's impartiality given the circumstances. . . . If an objective observer, in view of all of the facts would reasonably doubt the court's impartiality, the court's discretion would be abused if a motion to recuse were not granted. In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *Joyner* v. *Commissioner of Correction*, 55 Conn. App. 602, 609, 740 A.2d 424 (1999).

The parties have directed us to portions of the transcript from the first day of trial and elsewhere that reveal the court's exasperation with the failure of counsel to have marked exhibits for identification prior to trial, the manner in which objections were made to statements in the case management study, the slow pace of examining and cross-examining witnesses, and the court's impatience with the sometimes less than perfect skills of trial counsel. We do not condone the court's blunt and sometimes sarcastic expressions of frustration, but the record informs us that the court periodically admonished *all* counsel "to move [things]

along,'' so that the issues could be resolved in an expedient manner for the sake of the children.[13] Although the court displayed exasperation with some of counsels' conduct, we cannot conclude that it harbored a bias against any party or any particular counsel. In no

[13] The transcript reveals the following colloquy between the court and counsel when exhibits were being marked, including the social study prepared by the department pursuant to General Statutes § 45a-717 (e) (1).

''The Court: Okay. Let's say this: any of those references that are opinions in any of the documents you have talked about or any of the further documents, the court will not take notice of.

''[Assistant Attorney General]: Your Honor—

''The Court: Unless you put these in and you have given them an opportunity—that's enough. That's enough. We've got a thousand pages here, madam.

''[Assistant Attorney General]: I understand that, Your Honor.

''The Court: That's more than enough. I think by eliminating some of these things, as I'm suggesting, that those matters of opinion that [the respondent's counsel] does not want me to look at or to take into consideration, that I am not going to anyway, but that I am saying I will not take notice of those things that he is objecting to.

''[Assistant Attorney General]: The references to those tests, the reference to the hair tests and the references to the—

''The Court: Madam, you don't need to say it twenty-five times.

''[Assistant Attorney General]: I understand that. But those tests are—we have to report that as part of your statutory obligation.

''The Court: Fine, fine. You don't need to report it two or three times, madam. You can sit here all day and argue about this, I'm not going to do it.

''[Assistant Attorney General]: I understand that, Your Honor. But [the respondent's counsel] is making his record for his appeal.

''The Court: I'm going to tell [the attorney for the minor children, counsel for the respondent], and [counsel for Eric B.], I'm done talking about these, madam. I think we're wasting a lot of time. We should get on with the trial. I want to see some witnesses in here to tell me and the cross-examination and hear that and get both sides, not just someone's—your opinion, [the opinion of the counsel for the minor children], or your opinion, [counsel for the respondent], as to what we should be doing.''

On the first day of trial, the court acknowledge its frustration with how long it took to mark exhibits, a process that should have been handled prior to the start of trial.

''The Court: Call your first witness. . . . Let's see, it's now quarter of eleven, so we just—so I just want to say, yes, to all of you who recognize the frustration that the court has shown this morning with an hour and a quarter gone from trial because of marking exhibits and discussions that could have been had before. So, if you would acknowledge my frustration, perhaps anyone sitting in this position, hearing what I heard the last hour and forty-five minutes would be frustrated.''

We note the standing orders for juvenile matters on the child protection docket, which require under § 5 (B) of the trial management procedures: ''Two weeks prior to any assigned trial date, a trial management conference shall be scheduled to secure the following: (1) agreements and premarking of exhibits.''

instance did the court predetermine the credibility of any witness or issue. Compare *Cameron* v. *Cameron*, 187 Conn. 163, 165–68, 444 A.2d 915 (1982). We conclude that the court did not abuse its discretion by failing to recuse itself. Moreover, we discern nothing in the court's memorandum of decision evidencing bias as the court's findings are amply supported by the evidence.

"A judge is not an umpire in a forensic encounter. . . . He is a minister of justice. . . . He may, of course, take all reasonable steps necessary for the orderly progress of the trial." (Citations omitted.) Id., 169. A trial judge "has a duty to maintain a calm demeanor, the decorum of the courtroom and avoid any action which might suggest partiality. . . . A judge, however, is a human being, and not the type of unfeeling robot some would expect the judge to be. Such a display of exasperation . . . falls far short of a reasonable cause for disqualification for bias or prejudice under [rule 2.3] of the Code of Judicial Conduct." (Citation omitted; internal quotation marks omitted.) *Barca* v. *Barca*, supra, 15 Conn. App. 614. In this case, the court's unfortunate display of frustration did not evidence bias. The respondent, therefore, cannot prevail on her claim.

II

The respondent's second claim is that the court abused its discretion by failing to conduct an analysis that termination is in the best interests of the children as required by § 17a-112 (j) (2). The respondent claims that, when undertaking its analysis of the best interests of the children, the court copied "almost word-for-word" the analysis it used in prior unrelated and factually distinct cases.[14] We disagree that the manner in

[14] In a footnote, the respondent cites sixteen termination of parental rights cases decided by the court between March 7 and December 2, 2011. In other footnotes, the respondent notes that in writing the various opinions, the court changed the singular to the plural and the gender of pronouns where necessary. The court also removed the words domestic violence and added mental health treatment where required. These facts demonstrate that the

which the court set forth its conclusions in this matter affected the outcome. The critical issue "is not how the court reported its findings but whether sufficient evidence [in the record] supported the court's finding that the petitioner proved, by clear and convincing evidence"; *In re Halle T.*, 96 Conn. App. 815, 828, 902 A.2d 670, cert. denied, 280 Conn. 924, 908 A.2d 1987 (2006); that termination was in the best interests of the children.[15]

court did not blindly cut and paste text, but was cognizant of the evidence, the issues and the parties before it and used a prototype as a "skeleton" opinion.

[15] In its memorandum of decision, under the heading "[b]est [i]nterest of the [c]hildren," the court stated that it was "next called upon to determine whether termination of [the respondents'] parental rights to their children would be in their best interest. Applying the appropriate legal standards to the *clear and convincing facts of this case*, the court finds this issue in favor of [the petitioner]." (Emphasis added.) The court then set forth the legal principles applicable to the determination of the best interest of the child in all cases. The respondent takes no issue with the guiding principles on which the court relied.

The court then stated: "Under such scrutiny, the clear and convincing evidence in this matter establishes that it is not in the children's best interest to continue to maintain any legal relationship with their parents." It found that the respondent has failed to gain insight into becoming a safe, nurturing and responsible parent for the children. Her judgment and conduct remains questionable as it has not improved since the children were taken into the petitioner's custody. The court found that the respondent lacks "the attributes and characteristics necessary to fulfill [a] valid parental [role]." Her "recalcitrance concerning referrals clearly and convincingly [show] that, without commitment to consistent substance abuse treatment, as well as individual, domestic violence and parenting counseling, it is likely that [she has] extinguished what little chance [she] ever had to be able to serve as [a] safe, nurturing and responsible [parent] for any child."

The court also considered the children's pressing need for permanence and stability. It found that the respondent requires much time to show that she has forsaken substance abuse, addressed her other issues, undertaken necessary counseling and succeeded in it. The respondent needs to establish herself in the community and demonstrate that she is capable of being a safe, nurturing and responsible parent to her children. The court also found that the children cannot delay their need for permanence and stability in exchange for the respondent's uncertain future.

On the basis of the respondent's behavior and performance to the time of trial, the court could not foresee her having the ability or the opportunity to be able to follow the regimen necessary for the children to maximize their abilities and achievements. It found that the children cannot afford the time the respondent needs to establish herself in the community as a

"Our standard of review on appeal from a termination of parental rights is whether the challenged findings are clearly erroneous. . . . The determinations reached by the trial court that the evidence is clear and convincing will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Sheena I.*, 63 Conn. App. 713, 719, 778 A.2d 997 (2001).

On the basis of our review of the best interests of the children portion of the court's memorandum of decision in this case and with other decisions authored by the court that the respondent included in the appendix to her brief, we note the similarity of the criteria the court considered. Those criteria are mandated by statute and judicial decisions. We also acknowledge the similarity between much of the court's language and some of the court's conclusions. That similarity, however, reflects regrettably the unfortunate consequences that result from the failure to rehabilitate due to addiction. Our review discloses that the manner in which the court expressed itself indicates that it fully was aware of the allegations against the respondent and engaged in independent analysis based on the facts presented in this case. The court considered the elements that it must consider in any termination of parental rights case, which the respondent does not dispute.

safe, nurturing and responsible parent, if at all. The respondent's behavior clearly and convincingly shows that it is unlikely that she will ever be able to conform her behavior to appropriate norms for a parent.

The court noted that "long-term stability is critical to a child's future health and development . . . ." (Internal quotation marks omitted.) *In re Katia M.*, 124 Conn. App. 650, 659, 6 A.3d 86, cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010). Time is of the essence when resolving issues related to the permanent or temporary care of neglected children "because of the psychological effects of prolonged termination proceedings on young children . . . ." (Internal quotation marks omitted.) *In re Alison M.*, 127 Conn. App. 197, 221, 15 A.3d 194 (2011). The court concluded that termination of the respondent's parental rights was in the best interests of the children.

Moreover, we cannot conclude that the court's conclusions are unsupported by its factual findings that appear elsewhere in its decision. The respondent has not challenged those findings as being clearly erroneous nor does she challenge the court's findings that she failed to rehabilitate or its findings made pursuant to § 17a-112 (k).

The respondent claims that the court failed to consider the testimony of the children's foster parents or the attorney for the children in its analysis. We disagree. "The court's decision must be read and construed in its entirety." *Mafcote Industries, Inc.* v. *Gannicott Ltd.*, 60 Conn. App. 393, 396, 759 A.2d 153 (2000); see also *In re G.S.*, 117 Conn. App. 710, 719, 980 A.2d 935 (review court's decision in its entirety), cert. denied, 294 Conn. 919, 984 A.2d 67 (2009).

In its memorandum of decision, under the heading of failure to rehabilitate, the court stated in relevant part: "It is extremely interesting to the court that during final argument by the attorneys for the children and . . . [for the respondent], all felt that the granting of guardianship to . . . Lisa [B.-J.] was in the best interests of the children, rather than reunification with the parents (although protective supervision was also mentioned). [The] [a]ttorney for [the respondent] acknowledged that she was a 'functioning addict,' an 'addict in recovery,' and that 'she did the best she could' in the programs offered. This is not in the least persuasive as to [the respondent's] regaining custody of the children.

"These children have formed bonds with their respective foster parents who happen to be sisters, and have a remarkable relationship with each other which transfers to the children. The foster parents are willing to adopt the children and are agreeable to maintaining a relationship with the children's parents. The children are in need of permanency and stability in their lives and this is not possible with [the respondent's] unresolved

issues." Given this language, we conclude that the court, in fact, did analyze the best interests of the children on the basis of the facts in this case.

The respondent relies on *In re Halle T.*, supra, 96 Conn. App. 815; and *Grayson* v. *Grayson*, 4 Conn. App. 275, 494 A.2d 576 (1985), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987); to support her claim. With regard to the manner in which the various trial courts wrote their decisions, *In re Halle T.* and *Grayson* are factually different. Those cases, however, stand for the rule that this court will not reverse the decision of the trial court if its conclusions are supported by evidence in the whole record, which is the determinative principle here.

In *Grayson*, this court stated its disapproval of the practice of a trial court in copying verbatim the proposed findings of fact submitted to the court by one of the parties after a hearing. *Grayson* v. *Grayson*, supra, 4 Conn. App. 283. This court, however, found that the losing party was not denied a fair trial. Id., 284–85. The court identified the issue as "whether the trial court's findings are supported by the evidence and are in substantial accord with the opinion . . . ." Id., 285.

In *In re Halle T.*, supra, 96 Conn. App. 823, the father claimed that the trial court "violated his federal and state constitutional rights by adopting verbatim significant portions of the social studies in its written memorandum of decision." This court has "made clear that 'parroting' significant portions from an exhibit into a memorandum of decision is a course of action that we neither endorse nor approve"; id. 827; but has concluded that the "verbatim adoption of the findings proposed by a prevailing party is not a per se finding of a denial of a fair trial." Id., 825–26. "[T]he ultimate test as to the adequacy of [the] findings is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for the decision and *whether they are*

supported by evidence." (Emphasis in original; internal quotation marks omitted.) Id., 826.

In this case, the court did not adopt findings of fact proposed by any of the parties. The respondent does not dispute that the court made its factual findings on its own, and she does not dispute that the evidence supports those findings. The court may have taken a shortcut by adopting the language that it had used in previous termination of parental rights cases, but this does not lead us to conclude that it abdicated its fact-finding role. The court's factual findings are supported by the evidence and are sufficient to support its legal conclusion that it was in the best interests of the children to terminate the respondent's parental rights. The court, therefore, did not abuse its discretion. Moreover, in evaluating the propriety of the court's decision, "[w]e remain mindful of the 'suffocating court dockets' and the 'desire to hasten the procurement of justice.' " *In re Halle T.*, supra, 96 Conn. App. 826. The respondent's claim therefore fails.

III

The respondent's third claim is that the court abused its discretion by denying her motion to transfer guardianship of the children to Lisa B.-J. We disagree.

"To determine whether custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp the authority or to substitute ourselves for the

trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [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. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Marcus S.*, 120 Conn. App. 745, 752–53, 994 A.2d 253, cert. denied, 297 Conn. 914, 995 A.2d 955 (2010). The trial court makes a determination regarding placement in the best interest of the child as shown by a fair preponderance of the evidence. *In re Valerie G.*, 132 Conn. App. 652, 662, 34 A.3d 398 (2011), cert. denied, 303 Conn. 937, 36 A.3d 696 (2012). Credibility determinations are made by the finder of fact. *In re Carissa K.*, 55 Conn. App. 768, 781–82, 740 A.2d 896 (1999).

Lisa B.-J. testified at trial. The court found that she was unaware that Eric B., Jr., had been removed from the respondent's care and adopted,[16] did not know that

[16] Lisa B.-J. testified in part as follows:

"The Court: And did you know she was . . . the children were under protective supervision at that time [2005]?

"[The Witness]: No, I did not.

"The Court: Did you know if [the department] was involved?

"[The Witness]: No. No, I did not.

* * *

"The Court: When did you first find out [the department] was involved?

"[The Witness]: I guess 2009 when he was taken from school, I got a call. . . .

"The Court: All right. And let's see . . . that was about October 27 when he was born. He was taken. His mother tested positive for cocaine. The parents' rights were terminated as to [Eric B., Jr.] on July 6, 2010. Did you know all about that, that the [department] was involved then?

"[The Witness]: I know that he was taken. I guess I was assuming that [the department] was in then. But I mean, their business is their business."

Eric B. had substance abuse issues[17] and had little knowledge of the specific needs of the children.[18] In the court's assessment, although Lisa B.-J. had a foster care license, she had not reached the point of how she would parent the children[19] and their specific needs.[20]

[17] Lisa B.-J. testified in part:

"[Assistant Attorney General]: And you are aware of the substance abuse issues in this case, are you?

"[The Witness]: I am not.

"[Assistant Attorney General]: And so—well, you are not. So [Eric B.] has not talked to you about—

"[The Witness]: He is talking to me about children.

"[Assistant Attorney General]: There is no question. He has not talked to you about why the department is involved with him and his family?

"[The Witness]: No."

[18] Lisa B.-J. testified in part:

"The Court: Does [the issue of substance abuse] change your mind at all about how you want to handle this matter?

"[The Witness]: Oh, definitely. I still want to be able to help them in any way I possibly can. But I also want them to help themselves.

"The Court: Well, if they don't help themselves, can they be allowed visits with the kids?

"[The Witness]: If the state was involved and said they had to . . . .

"The Court: No, no, no, just you.

"[The Witness]: I'm just answering, if the state was involved and they had to, then I'm following the guidelines. My brother knows from way back when how I run my house, how I run my life. So if he comes anywhere, anywhere I am, my house, my home, my anywhere, and he is not correct in his demeanor, we don't associate with each other. He knows this."

[19] Lisa B.-J. testified in part:

"[Counsel for Eric B.]: Now, you understand that there was a petition for the court to terminate parental rights?

"[The Witness]: Yes.

"[Counsel for Eric B.]: Did you know that this had been pending for awhile?

"[The Witness]: The one day I came to court in August, that's when I found out about all that.

"[Counsel for Eric B.]: This is all of this year?

"[The Witness]: August of 2011.

"[Counsel for Eric B.]: This was after you found out that you can get guardianship of the children?

"[The Witness]: Yes, yes.

"The Court: Wait a minute. Has that been done?

"[Assistant Attorney General]: Has what been done?

"The Court: She said that's when she found out she could get guardianship of the children. Who said that? . . .

"[Assistant Attorney General]: That's not the department's plan.

"The Court: Who told her that?

"[Counsel for Eric B.]: Your Honor, my client asked if she . . . would accept the transfer of guardianship. And she has indicated by her testimony that she did not know that she could accept guardianship of the children, until she learned that in July."

[20] Lisa B.-J. testified in part:

"The Court: Do you think this use of substances over the last few years had an affect on the children or could it?

"[The Witness]: It always could. When I see his kids, they always seem to be happy, well groomed, well fed, education-wise doing great.

The court found that she was interested in helping her brother, Eric B.[21] Moreover, the court found that on more than one occasion, the children reported to their foster parents that Lisa B.-J. had told them that she was interested in gaining guardianship so that she could return them to the respondent and Eric B.

On the basis of our review of the record, including the testimony of Lisa B.-J., we conclude that the court did not abuse its discretion in denying the motion to transfer guardianship of the children to her. In its memorandum of decision, the court demonstrated that it was aware of the position of the children's foster parents who favored long-term foster care over adoption. The court found, however, that the foster parents were willing to adopt the children and to permit the children to maintain a relationship with the respondent, which was the objective of the respondent's motion to transfer guardianship to Lisa B.-J.[22] Finally, the court determined that the children needed permanency and stability; see *In re Katia M.*, 124 Conn. App. 650, 658, 6 A.3d 86, cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010); which their foster parents were willing and able to provide for them.

The judgments are affirmed.

In this opinion ESPINOSA, J., concurred.

PETERS, J., concurring. Canon 2 of the Code of Judicial Conduct " 'requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality

"The Court: So why do think the state took them?

"[The Witness]: You just told me it was a substance abuse case."

[21] Lisa B.-J. testified in part:

"[Counsel for Eric B.]: Whether [the respondent and Eric B.] decide to get their act together or not, your commitment is to the children?

"[The Witness]: My commitment is to the children, yes. But I would never turn my back on my brother or [the respondent]."

[22] In her motion to transfer guardianship, the respondent stated in part: "A transfer of guardianship to [Lisa B.-J.] will allow [the respondent] to play a perpetual role in her children's lives."

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.' . . . Disqualification is required even when no actual bias has been demonstrated if a judge's impartiality might reasonably be questioned 'because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority.' . . . [P]revention of the appearance of impropriety is of vital importance to the judiciary and to the judicial process." (Citations omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 20–21, 970 A.2d 656 (2009).

I agree with the majority opinion's detailed description of the conduct of the trial court that led counsel for the respondent, Stacey S., the children's mother, to file a motion for disqualification. I recognize that, on appeal, the question is "whether the court's discretion has been abused." *Joyner* v. *Commissioner of Correction*, 55 Conn. App. 602, 609, 740 A.2d 424 (1999). I am, nonetheless, persuaded that the facts described by the majority establish that "an objective observer reasonably would doubt the judge's impartiality given the circumstances [of this case]." (Internal quotation marks omitted.) *Johnson* v. *Board of Education*, 130 Conn. App. 191, 209, 23 A.3d 68 (2011). From the outset of the trial, the judge not only vented his frustration but, at the very least, created an atmosphere that impaired the efforts of the respondent's counsel to present her case.

I also, however, agree with the majority opinion that the petitioner, the commissioner of children and families, provided ample evidence to sustain her burden of proof that the respondent's parental rights should be terminated. I am not persuaded that the improper denial

of the respondent's motion for recusal was a structural error that requires reversal of the court's judgments in favor of the petitioner.

In *Wiseman* v. *Armstrong*, 295 Conn. 94, 104, 109–11, 989 A.2d 1027 (2010), our Supreme Court held that the improper failure of a trial court to honor a litigant's request for a jury poll pursuant to Practice Book § 16-32 was not a structural error, even though, concededly, compliance with the rule of practice was mandatory. In *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 635–37, 904 A.2d 149 (2006), our Supreme Court held that, in civil cases, awards of peremptory challenges not required by law are subject to harmless error review, and not structural error review, even if only one of the parties has received such awards. These cases are persuasive precedent for reviewing the trial court's failure to recuse itself in accordance with the ordinary common-law rules for reversible error, rather than by the special rules that govern claims of structural error.

In the present case, despite the trial court's improper failure to recuse itself, the record establishes a sound factual basis for the court's decision to terminate the respondent's parental rights. The court made the requisite factual findings, and those findings were supported by the facts presented by the petitioner.

I respectfully concur in the judgment of the court.

IN RE AZIZA S.-B. ET AL.*
(AC 34223)

Lavine, Espinosa and Peters, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to three of his children. *Held*:

1. This court declined to review the respondent father's claim that the trial court abused its discretion in denying a motion for recusal, as only counsel for the respondent mother asked the court to recuse itself, and because counsel for the father did not join in the oral motion for the court to recuse itself or file a written motion asking the court to recuse itself, the father failed to preserve his own claim of judicial bias for appeal.

2. The respondent father could not prevail on his claim that the trial court improperly failed to conduct any meaningful independent analysis of the best interests of the children as required by statute (§ 17a-112 [j] [2]), which amounted to a claim that the court did not weigh the evidence according to the father's wishes and failed to consider certain testimony in making its decision; the trial court's conclusion that termination of the father's parental rights was warranted was supported by ample evidence, as that court considered the wishes of the children, the relationship between the children and their parents, the testimony of the foster parents, and the arguments of counsel, the court was not required to accept the father's view of the evidence, and the fact that the father did not challenge the court's findings by clear and convincing evidence that he has a serious substance abuse problem, that he minimizes the respondent mother's numerous issues that she has failed to address and that he cannot provide a safe environment for the children undermined his argument that termination of his parental rights was not in the best interests of the children.

3. The respondent father could not prevail on his unpreserved claim that the trial court prejudged him and, therefore, that the court improperly denied his motion to transfer guardianship of the children to his sister; although the father failed to preserve the claim at trial and did not adequately brief the claim on appeal, the claim nevertheless lacked merit, as the court's written decision denying the motion to transfer

* 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.

guardianship to his sister was devoid of any evidence of bias and was amply supported by the evidence in the record that the father sought the transfer of guardianship to her as a conduit for returning the children to him and their mother.

Argued May 29—officially released October 1, 2012**

Procedural History

Petitions by the commissioner of children and families to terminate the respondents' parental rights with respect to certain of their minor children, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Hon. William L. Wollenberg*, judge trial referee; thereafter, the court denied the respondent father's motion to transfer guardianship of certain of the minor children to his sister and rendered judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Elizabeth Knight Adams, for the appellant (respondent father).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Charlene W. Spencer* and *Benjamin Zivyon*, assistant attorneys general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent father, Eric B., appeals from the judgments of the trial court terminating his parental rights as to three of his minor children,[1] pursuant to General Statutes § 17a-112 (j) (3) (B) (i), for

** October 1, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The parental rights of the children's mother, Stacey S., also were terminated by the court. See *In re Messiah S.*, 138 Conn. App. 606, 53 A.3d 224 (2012). Stacey S. is not a party to this appeal. In this opinion, we refer to Eric B. as the respondent.

failure to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time he could assume a responsible position in his children's lives.[2] The respondent claims that the court violated the Code of Judicial Conduct in that an appearance of impropriety permeated the trial and the court's decision.[3] More specifically, the respondent claims that the court (1) abused its discretion by failing to recuse itself and (2) failed to conduct an independent analysis of the best interests of the children. The respondent also claims that the court prejudged him and, therefore, the court's denial of his motion to transfer guardianship to his sister must be reversed. We affirm the judgments of the trial court.

The following procedural history is relevant to this appeal. In April, 2011, the petitioner, the commissioner of children and families, filed three petitions, one each for Aziza, Jazira and Kifayeh (children), to terminate the parental rights of the respondent for failure to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the children, he could assume a responsible position in their lives. The petitions alleged that the respondent is the father of each of the children, that the department of children and families (department) had made reasonable efforts

[2] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found by the Superior Court . . . to have been neglected or uncared for in a prior proceeding, or (ii) is found to be neglected or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[3] Counsel for the children has adopted the position of the respondent.

to reunify the children with the respondent and that the respondent was unable or unwilling to benefit from reunification.[4] Since they were found to be neglected on July 10, 2006, the children periodically have been under the protective supervision of the department. They were committed to the custody of the petitioner on October 29, 2009, and specific steps were ordered for the respondent on September 28, 2010, to facilitate the return of the children to him. On July 28, 2011, the respondent filed a motion to transfer guardianship of the children to his sister, Lisa B.-J.

Trial was held on November 4, 7 and 17, 2011. In a memorandum of decision filed on January 6, 2012, the court granted the petitions to terminate the respondent's parental rights on the ground of failure to rehabilitate and denied the motion to transfer guardianship to Lisa B.-J.

The court found that the respondent was born in 1962. He completed the twelfth grade and served in the Army from 1980 to 1983. He has been employed in the construction industry and currently works in the delicatessen department of a Stop and Shop supermarket.

The respondent reported that he first had a girlfriend when he was eleven years old. When he was fourteen, he met "Peaches," with whom he had a daughter. His relationship with Peaches lasted for eight months. At the age of fifteen, the respondent met Valerie, and they had two children during a four year relationship. When he was nineteen, the respondent began a two year relationship with Zelda, and they had one child. Although he reportedly was in a relationship with Zelda, the

[4] The court found that the department had made reasonable efforts to reunify the children with the respondent and that the respondent is unable or unwilling to benefit from reunification. On appeal, the respondent does not challenge those two findings of the court.

respondent also was seeing Takibah and her sister, Meta. The respondent and Meta had a child together. The respondent then met Linda, with whom he had a child, and Wendy, with whom he also had a child. The respondent met Lisa and married her in 1987. They had two children, but separated in 2000. In 2001, the respondent met Stacey S. when she was pregnant with the child of another man.[5] The respondent claims that he has regular contact with all of his children and their mothers.

The respondent was arrested seven times between September 16, 1982, and July 2, 2009, including one arrest for each of the following offenses: operating a motor vehicle while his operator's license was under suspension, sexual assault in the fourth degree, harassment in the second degree, criminal trespass, disorderly conduct, assault in the second degree and threatening, as well as violation of probation. In addition, he has two arrests for risk of injury to a child; three arrests for interfering with an officer/resisting arrest; four arrests for assault in the third degree; and five arrests for failure to appear. On June 13, 2009, the respondent was charged with assault in the third degree, breach of the peace in the second degree and risk of injury to a child arising from his assault of Stacey S., which took place in front of the children. He was incarcerated and ordered to have no contact with Stacey S. He was placed on probation on July 24, 2009, when he returned to the family home. He admits to trying marijuana when he was in high school but denies any history of substance abuse, although he tested positive for cocaine on May 13, 2011. He claims to drink beer socially.

The department has been involved with Stacey S. since December, 2001, due to issues of substance abuse,

[5] The respondent claims to be the psychological parent of the child, Messiah.

transience, mental health problems, financial instability and, more recently, domestic violence. She was born in 1972, graduated from the University of Hartford and, in 1996, received a master's degree in political theory from the University of Connecticut. She has been employed as a teacher at a group home, a librarian and a paralegal. She also was employed by a mortgage company. At trial, the court found that her employment was of a more menial nature. Stacey S. has never married. She denies that she has any substance abuse issues. Prior to trial in November, 2011, she was extremely reluctant to submit to hair testing. Her Breathalyzer test on April 19, 2011, was positive for alcohol.

After college, Stacey S. was in a five year relationship and gave birth to a daughter who was adopted by a close friend. In 2001, she gave birth to a son fathered by a different man and entered into a relationship with the respondent. In 2002, the family moved to Washington, D.C., where Aziza was born in 2003. Two years later, they moved to Las Vegas, where Jazira was born. The family returned to Connecticut, and Kifayeh was born in Rhode Island in October, 2005. Eric B., Jr., was born in Connecticut in October, 2007. A nurse at the hospital informed the department that Stacey S. tested positive for cocaine and alcohol at the time Eric B., Jr., was born. The petitioner assumed custody of Eric B., Jr., and in July, 2010, the parental rights of the respondent and Stacey S. as to Eric B., Jr., were terminated.

The court found that from time to time, the respondent and Stacey S. may have separated, but at the time of trial, they were involved in marriage counseling with a view toward marriage. The two of them continue to avoid the therapeutic programs scheduled by the department. They attend such programs sporadically, at best. The court found deep concern over their lack of attention ("no show, no call") to substance abuse

tests that were scheduled by the department. Since the respondent tested positive for cocaine on April 29, 2011, he has avoided further testing and wears his hair too short to be tested.

The court made factual findings with regard to each of the children as well. Aziza was born in Washington, D.C., in 2003. A multidisciplinary study was administered to her in November, 2009, and produced at-risk scores indicating that she has difficulty adapting to changing situations and environments. She sometimes struggles to communicate effectively with others. Aziza attended the Abundant Family Counseling Center weekly from December, 2009, through May, 2010. Individual counseling helped her make the transition into her foster family. During therapy, Aziza reported being happy to see Stacey S. during visits, but also was scared and sad. She witnessed domestic violence in June, 2009. When Aziza was interviewed by department personnel, she reported that "Daddy doesn't come home sometimes," and, "sometimes Daddy is mad and angry and fights with mommy." She has witnessed the respondent kick and scratch Stacey S. Aziza claimed that the respondent screamed at Stacey S. and the children, which scared her. She reported that the children hid "behind chairs, in our rooms, everywhere."

Aziza lives in the same foster home with Messiah. Aziza transitioned to the foster home well. She has bonded with her foster mother, but expressed a desire to be at home with her parents. Mary M., her foster parent, has expressed a willingness to adopt Aziza if she becomes legally free for adoption. At the time of trial, Aziza was in the third grade and doing well.

Jazira was seven years old at the time of trial. She attended the Abundant Life Counseling Center from February through August, 2010, and her foster mother has reported positive changes in her behavior. Jazira

has reported seeing violence in her home: "[D]addy picked up a chair and threw it at [M]ommy," which scared her. She was in the second grade and continues to make progress in all areas. She and her brother, Kifayeh, were placed together in the same foster home. She is bonded with Messiah and Aziza, whom she sees during supervised visitation, as well as on weekends.

Kifayeh was six at the time of trial and lives in the same foster home with Jazira. He, too, witnessed the domestic violence episode between his parents in June, 2009. He reported seeing Stacey S. being choked by the respondent. He is scared when his parents fight, cries because of it and hides under the kitchen table. When Kifayeh initially was placed with his foster mother, Nancy A., there were concerns because he cried for a long time before falling asleep. He received counseling to address that issue. Kifayeh was in the first grade at the time of trial and doing well. He is developmentally on target and presents no concerns. He visits with his parents, half brother and sisters weekly.

The court found by clear and convincing evidence that the department had made reasonable efforts to reunite the respondent with the children; some of the efforts were extraordinary. Time after time services and programs have been offered to the respondent, only to have him refuse to cooperate or leave the program before it was completed. He has not shown the ability to gain insight into his failings as a parent and has proven unable to rehabilitate and provide the care that his children require. The respondent's continued incarceration and the situations in which he finds himself at particular facilities make efforts extraordinarily difficult. The respondent is unwilling or unable to benefit from efforts because he has been unable to show progress in his rehabilitation with regard to mental health, substance abuse, parenting, anger management, domestic violence, housing and employment issues. The

department has been involved with this family since 2005 when Stacey S. tested positive for cocaine while she was pregnant with Kifayeh.

"A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under § 17a-112 (j)] exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Rafael S.*, 125 Conn. App. 605, 610–11, 9 A.3d 417 (2010).

The court cited the law that requires it "to find, by clear and convincing evidence, that the level of rehabilitation [the respondent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his children's] life." (Internal quotation marks omitted.) *In re Anvahnay S.*, 128 Conn. App. 186, 195, 16 A.3d 1244 (2011). "[I]n assessing rehabilitation, the critical issue is not whether the [respondent has] improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the [children] at issue." (Internal quotation marks omitted.) *In re Sarah Ann K.*, 57 Conn. App. 441, 448, 749 A.2d 77 (2000). The court is to consider whether the age and needs of the children would support allowance of further time for the respondent to rehabilitate. See *In re Luis C.*, 210 Conn. 157, 167–68, 554 A.2d 722 (1989). In determining whether further allowance of a reasonable period of time would promote rehabilitation, a court may consider efforts made since the date of the filing of the petition to terminate

parental rights. *In re Sarah M.*, 19 Conn. App. 371, 377, 562 A.2d 566 (1989).

The court found that since 2001, the respondent had a history very similar to that of Stacey S.; see *In re Messiah S.*, 138 Conn. App. 606, 53 A.3d 224 (2012); and that he would not be able to assume a responsible position in the lives of the children within a reasonable period of time. It also found that it is unclear how long the department has been involved with the respondent since his first child was born when he was fourteen years old. The respondent fathered nine children with seven different women before becoming associated with Stacey S. in 2001. With Stacey S., he has fathered the children who are the subject of this appeal and one other child, for whom he consented to the termination of his parental rights. All of the respondent's children who were born prior to 2001 have been parented and supported by their respective mothers. The respondent claims that he has had and continues to have a relationship with all of his children and their families.

With regard to the respondent's history of substance abuse, the court found that he has been extremely resistant, evasive and belligerent in his dealings with program providers and department personnel. He exhibits a secretive, untruthful character, and is distrustful of social workers. He lacks candor and at times displays a combative side. When the respondent was confronted on August 8, 2011, with the fact that he was talking to the children about returning to his home, he insisted that he could "speak anything he wanted with his children." The department confirmed that the respondent had relayed to at least one of the children that the department was coming to take the children to the home of Lisa B.-J., who would return them to the respondent and Stacey S. The court found the respondent's actions disconcerting and disruptive to the well-being of the children.

Throughout his involvement with the department, the respondent has tested positive for cocaine, including on April 29 and May 13, 2011, despite the programs and services offered to him. He attends such programs sporadically, if at all. The respondent refused to authorize a request for hair segmentation testing made by the department. Since May 13, 2011, the department made at least twenty attempts to schedule substance abuse testing for the respondent and Stacey S., but neither of them appeared at the scheduled time or had an excuse for not participating.

The court found that court-ordered specific steps for the respondent were issued on September 28, 2010, to facilitate reunification of the children. The respondent has been noncompliant overall. He has not permitted home visits since March 13, 2010. He has refused to attend most counseling arrangements, recently refused substance abuse testing, has not made progress toward identified goals, has been resistant to signing releases and has been involved in the criminal justice system. On June 16, 2009, the respondent was charged with assault in the third degree, breach of the peace in the second degree and risk of injury to a child when he physically assaulted Stacey S. As a result of the assault, a full protective order was issued against the respondent. When the protective order expired, the respondent was placed on two years of probation. On January 5, 2010, the respondent's probation officer informed the department that the respondent was discharged unsuccessfully from the domestic violence counseling ordered as a condition of probation because he had attended only four out of nine sessions. The respondent later completed the twenty-six week program.

The court found that, although a witness from Community Health Services testified that the respondent had produced negative urine tests for more than two years, during that time, testing of the respondent's hair

was positive for cocaine. The respondent has evaded hair testing and has ongoing issues maintaining sobriety. The children have witnessed domestic violence at home, which causes them to run and hide. The court found that the respondent is unable to safely parent his children, who need a safe, nurturing home environment. The respondent has not successfully rehabilitated from abusing illegal substances and has been physically abusive to Stacey S. The court concluded that the children are in need of a permanent home.

The court found "interesting" that the attorneys for the children, Stacey S. and the respondent, argued that granting guardianship of the children to Lisa B.-J. was in the best interests of the children rather than reunification with the respondent and Stacey S. The court found it abundantly clear that the children "desperately" require stability, especially given their ages: eight, seven and six. The continued uncertainty of their future has a traumatic effect on them, and the respondent's suggestion that reunification is the ultimate intention, is "devastating" to their well-being.

The court noted that a parent's failure to appreciate the risks to children posed by the other parent's having access to them can provide a sufficient legal basis to find that the parent has failed to rehabilitate. See *In re Ellis V.*, 120 Conn. App. 523, 533, 992 A.2d 362 (2010). A parent who remained in an unstable and chaotic relationship has been found to have failed to rehabilitate. *In re Samantha C.*, 268 Conn. 614, 624–25, 847 A.2d 883 (2004). The court found that, although there was some evidence that the respondent and Stacey S. had separated, there was ample evidence that they still are in an intimate relationship. The testimony was undisputed that the respondent not only minimizes his own substance abuse issues, but also Stacey S.'s. Counsel for Stacey S. acknowledged that she is a "functioning

addict," "an addict in recovery" and that "she did the best she could" in the programs offered to her.

The court found by clear and convincing evidence that the petitioner had proved the statutory ground that the respondent had failed to rehabilitate. He did not comply fully with the steps ordered by the court on September 28, 2010. During a hearing on a motion to compel, he was ordered to sign releases permitting the department to obtain information. On April 29, 2011, he tested positive for cocaine use.

The court also made the findings required by § 17a-112 (k), particularly that the respondent, Stacey S. and the children have a bond. The children see their parents on weekends, engage in special visits and participate in telephone conversations. The children also have a bond with their foster parents, who are sisters. The foster parents often visit each other's homes to ensure that the children remain bonded. The children all attend the same school. The court found that it was in the best interests of the children to terminate the respondent's parental rights. The court did so by applying the appropriate legal standards to the clear and convincing facts of this case.

In its memorandum of decision, the court also ruled on the respondent's motion to transfer guardianship of the children to Lisa B.-J., his sister. During final argument, counsel for the respondent and the children urged the court to grant the motion to transfer guardianship. The court made the following findings. At some earlier time, the department assessed whether Lisa B.-J. could be a resource as the children's guardian. At that time, she was not considered to be a suitable placement because one of her own children was involved in the criminal justice system. When Lisa B.-J.'s troubled child left her home, she obtained a foster care license. The court opined that obtaining a license to become a foster

parent, however, is just the beginning and that child placement is contingent on many additional factors that Lisa B.-J. had not addressed.

On the basis of Lisa B.-J.'s testimony, the court found that she knew the children, had visited them on occasion, was employed and maintained a comfortable home. The main reason she wished to be named guardian of the children, however, was to help the respondent, when she learned that he was in trouble. She has not considered how she would parent the children, given their specific needs. Moreover, the court found that Lisa B.-J. did not know that Eric B., Jr., had been removed from his parents' care and adopted. She also did not seem to be aware that the respondent had other children who have been in the care of their mothers since each of them was born. She was not interested in knowing that the respondent became a father when he was fourteen years old or that he lived the better part of his forty-nine years without having to support, provide housing for or parent his other children in any meaningful way.

On more than one occasion, the children reported that Lisa B.-J. had told them that she wanted to be their guardian so that they could be returned to their parents. The respondent also led the children to believe that they would be returned to him and Stacey S. if Lisa B.-J. were their guardian. The court found that the respondent had something other than permanency in mind when he admitted making those statements to the children and insisted that he would continue to tell them whatever he desired. The court found, however, that it was "abundantly clear" that Lisa B.-J. has very little knowledge with regard to the children and was interested only in helping her brother. The court concluded that Lisa B.-J.'s goal was not to provide a meaningful family situation with permanency, stability and the chance for a productive future for the children. The

foster parents, however, could make those opportunities possible. The foster parents care for the children extremely well and are bonded with them. The court denied the motion to transfer guardianship to Lisa B.-J. The respondent appealed.

On appeal, the respondent claims that an appearance of judicial impropriety permeated the trial and the court's decision in violation of rule 2.2 of the Code of Judicial Conduct.[6] The respondent claims that the court (1) abused its discretion by denying the "respondents' " motion for recusal,[7] (2) violated the principles of impartiality and fairness when it copied its best interest analysis from prior unrelated cases and failed to conduct an independent analysis of the best interests of the children as required by § 17a-112 (j) (2), and (3) denied his motion to transfer guardianship of the children to Lisa B.-J. We affirm the judgments of the trial court.

Our review of the record discloses that although the court at times was impatient with all counsel, sarcastic and gruff, a judicial temperament that is inappropriate for the trial court, the court's memorandum of decision reveals that the court's findings and legal conclusions are supported by evidence in the record. Unlike the case of *In re Nathan B.*, 116 Conn. App. 521, 977 A.2d 224 (2009), the record does not disclose that the court had prejudged the respondent's credibility or the matter before it.

I

The respondent first claims that the court abused its discretion "in denying the respondents' motion for

[6] Rule 2.2 of the Code of Judicial Conduct provides: "A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially." The respondent relies specifically on comment (1), which states: "To ensure impartiality and fairness to all parties, a judge must be objective and open-minded."

[7] We have quoted the respondent's claim as articulated in his brief. Although he used the plural possessive "respondents'," the record demonstrates that he did not ask the court to recuse itself.

recusal after asking questions of the [department] witness that demonstrated bias toward'' the petitioner's case.[8] Because the respondent failed to preserve this claim at trial, we decline to afford it review.

The respondent points to several portions of the transcript as the basis of his claim. The portions identified by the respondent reveal that the court interjected questions during the cross-examination of a department supervisor by counsel for Stacey S. and criticized the manner in which counsel was questioning the witness. The transcript of the second day of trial reveals the following:

"The Court: You know, all these questions you answer yes or no. Go ahead. You're just giving her some latitude here because the question you are asking is way beyond what a worker or what a supervisor does. It's done up here. But go ahead. What are you looking at him for?

"[Counsel for Stacey S.]: Your Honor, I—

"The Court: No, I would like to know. I just want you to move along. How are [you] going to ask another question if you wait a minute or so to ask another question? Please move on.

"[Counsel for Stacey S.]: If I could just have a second?

"The Court: Let's take a ten minute recess.

* * *

"The Court: The court recessed so [counsel for Stacey S.] and [the respondent's counsel] could confer. And now they're back.

"[Counsel for Stacey S.]: It's with a heavy heart, Your Honor, that I must respectfully request the court to recuse itself.

"[The Petitioner's Counsel]: Oh, come on.

"The Court: Denied. I've heard this four or five times, and you take an appeal. That's what you do.

[8] See footnote 7 of this opinion.

"[Counsel for Stacey S.]: If I could state the reasons, my reasons?

"The Court: State your reasons."

Only counsel for Stacey S. asked the court to recuse itself. Counsel for the respondent did not join in the oral motion for the court to recuse itself and did not later file a written motion asking the court to recuse itself but continued trying the case to its completion without seeking to have the court recuse itself. By failing to ask the court to recuse itself, the respondent failed to preserve his own claim of judicial bias for appeal. See, e.g., *Doody* v. *Doody*, 99 Conn. App. 512, 522–23 and 522 n.8, 914 A.2d 1058 (2007); Practice Book § 1-23.

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. . . ." "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 in original; internal quotation marks omitted.) *In re Emerald C.*, 108 Conn. App. 839, 852 n.9, 949 A.2d 1266, cert. denied, 289 Conn. 923, 958 A.2d 150 (2008). Because the respondent failed to seek the recusal of the court at trial, we will not review his claim on appeal.[9]

II

The respondent's second claim is that the court "violated the principles of impartiality and fairness when

[9] Stacey S. also appealed from the termination of her parental rights as to the children. In her appeal, she claimed that the court abused its discretion by denying her motion to recuse. Because she raised the claim at trial and the court ruled on it, it was preserved for appellate review. We reviewed her claim, but found that the court did not abuse its discretion by denying the motion to recuse. See *In re Messiah S.*, supra, 138 Conn. App. 622–628.

it copied its best interest analysis from prior unrelated cases and failed to conduct any meaningful independent analysis of the best interests of the children as required by § 17a-112 (j) (2).'' Although the respondent articulated the issue as one of partiality and fairness, claiming that the court failed to conduct any meaningful analysis of the best interests of the children, the substance of the argument in his brief is that the court did not ''[weigh] the children's strong desire to return to their parents, and the significant benefit to the children of the relationship they have with their parents . . . .'' We decline to address the issue as stated,[10] and we disagree with the substance of the argument that was briefed.

The essence of the respondent's argument is that the court did not weigh the evidence according to his wishes. Regardless of how the court stated its findings and conclusions, our review of the entire memorandum of decision demonstrates that the court was aware of the evidence presented. The court's conclusion that termination of the respondent's parental rights was in the best interests of the children is amply supported by the evidence presented by the petitioner. See *In re Halle T.*, 96 Conn. App. 815, 828, 902 A.2d 670 (critical issue is not how court reported findings but whether there is sufficient evidence in record provided by petitioner), cert. denied, 280 Conn. 924, 908 A.2d 1087 (2006).

[10] We decline to review the fairness and impartiality issue because the respondent's brief is devoid of any legal analysis as to that claim. ''We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.'' (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Rapoport*, 119 Conn. App. 269, 280, 987 A.2d 1075, cert. denied, 297 Conn. 907, 995 A.2d 639 (2010).

In her appeal, Stacey S. claimed that ''when undertaking its analysis of the best interests of the children, the court copied 'almost word-for-word' the analysis it used in prior unrelated and factually distinct cases.'' *In re Messiah S.*, supra, 138 Conn. App. 628. We rejected her claim. Id., 633.

"Our standard of review on appeal from a termination of parental rights is whether the challenged findings are clearly erroneous. . . . The determinations reached by the trial court that the evidence is clear and convincing will be disturbed only if [any challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Sheena I.*, 63 Conn. App. 713, 719, 778 A.2d 997 (2001). Importantly, the respondent has not challenged the court's finding that he failed to rehabilitate or its findings made pursuant to § 17a-112 (k). In his brief, he concedes that he continues to deal with substance abuse, but claims that he has made improvements.

The respondent specifically claims that the court in its analysis failed to consider the testimony of the children's foster parents or the attorney for the children. We disagree. "The court's decision must be read and construed in its entirety." *Mafcote Industries, Inc.* v. *Gannicott Ltd.*, 60 Conn. App. 393, 396, 759 A.2d 153 (2000); see also *In re G.S.*, 117 Conn. App. 710, 719, 980 A.2d 935 (review court's decision in its entirety), cert. denied, 294 Conn. 919, 984 A.2d 67 (2009).

In its memorandum of decision, under the heading of "failure to rehabilitate," the court stated in part: "It is extremely interesting to the court that during final argument by the attorneys for the children, and [for the respondent and Stacey S.], all felt that the granting of guardianship to . . . Lisa B.-J. was in the best interests of the children, rather than reunification with the parents (although protective supervision was also mentioned). . . . These children have formed bonds with their respective foster parents, who happen to be sisters, and have a remarkable relationship with each other, which transfers to the children. The foster parents are willing to adopt the children and are agreeable

to maintaining a relationship with the children's parents. The children are in need of permanency and stability in their lives, and this is not possible with [Stacey S.'s] unresolved issues."

As to the respondent, the court found that he continued to test positive for cocaine use up to April 29, 2011, and afterward evaded scheduled hair tests. He continues to have issues maintaining sobriety. The children have disclosed that they witnessed domestic violence in the home that causes them to run and hide. The respondent is unable to parent safely his children and has not rehabilitated from abusing illegal substances and has been abusive physically to Stacey S. The court concluded that the children are in need of a safe, nurturing environment and a permanent home. The respondent does not dispute the court's factual findings, and he does not dispute that the evidence supports those findings.

The court recognized the bond between the respondent and the children when it made the following finding as required by § 17a-112 (k): "Mother, [the respondent] and the children appear to have a bond. The children see their parents weekly, have engaged in special visits and participate in telephonic conversations. The children also appear bonded to their foster parents. The foster parents are sisters, and they often visit in each other's homes to ensure that the children remain bonded. The children all attend the same school." Given the portions of the memorandum of decision cited herein, we conclude that the court did, in fact, consider the wishes of the children and the counsel for all parties. The court considered, in conjunction with the evidence, the criteria that it must consider in any termination of parental rights case.

Contrary to the respondent's argument, the court is not required to accept his view of the evidence. "[I]t is

the exclusive province of 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. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed. . . . The function of the appellate court is to review, and not retry, the proceedings of the trial court." (Internal quotation marks omitted.) *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 700, 1 A.3d 157 (2010).

The fact that the respondent does not challenge the court's having found by clear and convincing evidence that he has a serious substance abuse problem, that he minimizes Stacey S.'s numerous issues that she has failed to address and that he cannot provide a safe environment for the children undercuts his argument that termination of his parental rights is not in the best interests of his children. The respondent also ignores the fact that the court was aware of the children's bond with their parents as well as the fact that the children's foster parents supported that bond and do not want it broken. To that end, the court knew that the foster parents are willing to permit the children to remain in contact with the respondent and Stacey S. For all of these reasons, we conclude that the court did not fail to consider the relationship the children have with their parents, the testimony of the foster parents and the arguments of counsel.

III

In his third claim, the respondent claims that the court prejudged him and, therefore, its denial of his motion to transfer guardianship of the children to Lisa B.-J. must be reversed. Not only did the respondent fail to raise the claim at trial, thus preserving it for review, he also failed to adequately brief his claim.

In his brief, the respondent states, "[a]s set forth more fully above, the appearance of impropriety calls for a reversal of the court's denial of the [respondent's] motion." The respondent states that the court demonstrated bias toward him. As we stated in part I of this opinion, the respondent never asked the court to recuse itself. His briefing of this is one page in length. It contains no specific facts or references to the pages of the transcript; see Practice Book § 67-4 (d); and other than citing General Statutes § 46b-129 (j), which requires that the transfer of guardianship be in the best interest of the child, his brief cites no law that is analyzed with respect to the facts of this case.

Despite the lack of preservation and the inadequacy of the respondent's brief, we nonetheless conclude that the respondent's claim lacks merit. The respondent does not challenge the court's findings, by clear and convincing evidence, that (1) the children were found in a prior proceeding to be neglected, (2) the department made reasonable efforts to reunite him with the children, (3) specific steps were ordered for him, (4) he failed to rehabilitate and (4) termination of his parental rights is in the best interests of the children. See General Statutes § 17a-112 (j). The court's written decision denying the respondent's motion to transfer guardianship to Lisa B.-J. is devoid of any evidence of bias and is amply supported by the evidence in the record that the respondent sought the transfer of guardianship to Lisa B.-J. as a conduit for returning the children to him and Stacey S. "It is an elementary rule of law that the fact that a trial court rules adversely to a litigant, even if some of these rulings were to be determined on appeal to have been erroneous, does not demonstrate personal bias." (Internal quotation marks omitted.) *Wendt* v. *Wendt*, 59 Conn. App. 656, 694, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000). In this case, we find no erroneous rulings or bias and conclude

that the court properly denied the motion to transfer guardianship.

The judgments are affirmed.

In this opinion the other judges concurred.

WILLIAM S. BAILEY *v.* VERNON L. LANOU, JR. (AC 33632)

Gruendel, Sheldon and West, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for negligence, breach of contract and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). The plaintiff and the defendant had entered into a home improvement contract for the construction of a paved driveway and cart path on the plaintiff's property, pursuant to which the defendant represented that he was a licensed home improvement contractor, even though he was not at the time the contract was executed and the work was performed. The trial court rendered judgment for the plaintiff on the complaint and on a counterclaim filed by the defendant, from which the defendant appealed to this court. *Held*:

1. The defendant's claim that the trial court erroneously found that the paved driveway contained material other than the type of asphalt specified in the contract was unavailing, the record having contained ample evidence from which the court could have made that finding.
2. The trial court's finding that substantial portions of the driveway were improperly paved was not clearly erroneous and was supported by the evidence in the record.
3. The trial court did not abuse its discretion in admitting and crediting the expert testimony of A, a licensed home improvement contractor with twenty-five years of experience in the paving industry who gave detailed testimony as to the proper installation of a paved driveway; on the basis of A's testimony, the trial court reasonably could have concluded that he possessed special skills and knowledge directly applicable to the parties' dispute that was beyond the ken of the average fact finder and was helpful to the determination of an ultimate issue, and the trial court, as the sole arbiter of the credibility and the weight to be given specific testimony, was free to accept or to reject, in whole or in part, A's testimony.
4. The trial court's findings that the cost to repair the driveway was $18,000 and that the plaintiff had proven his entitlement to damages in that amount were not clearly erroneous, and the record did not support the

defendant's claim that the court failed to consider less costly alternatives for the repair.

5. The defendant could not prevail on his claim that the trial court improperly awarded the plaintiff damages under CUTPA, it having been undisputed that the defendant was not a licensed home improvement contractor when the contract was executed and the work was performed on the plaintiff's property in violation of the Home Improvement Act (§ 20-418 et seq.), which is a per se violation of CUTPA pursuant to statute (§ 20-427), and the trial court's finding that the plaintiff suffered an ascertainable loss was supported by the record; the plaintiff purchased the new driveway in part as a result of the defendant's false representation that he was a licensed home improvement contractor and the driveway that was constructed was different from that for which the plaintiff had bargained.

6. The defendant's appeal challenging the award of attorney's fees was dismissed for lack of a final judgment, it having been undisputed that, at the time the defendant filed this appeal, the trial court had not yet acted on the plaintiff's request for attorney's fees.

Argued March 12—officially released October 16, 2012

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Wiese*, *J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendant appealed to this court. *Appeal dismissed in part; affirmed.*

Keith Yagaloff, for the appellant (defendant).

Matthew E. Willis, for the appellee (plaintiff).

Opinion

GRUENDEL, J. This case is about a paved driveway. The defendant, Vernon L. Lanou, Jr.,[1] appeals from the

[1] The operative complaint named "Vernon L. Lanou, Jr. d/b/a V. Lanou and Co." as the sole defendant. "[T]he use of a fictitious or assumed business business name does not create a separate legal entity . . . [and] [t]he designation [doing business as] . . . is merely descriptive of the person or corporation who does business under some other name . . . . [I]t signifies that the individual is the owner and operator of the business whose trade name follows his, and makes him personally liable for the torts and contracts of the business . . . ." (Internal quotation marks omitted.) *Monti* v. *Wenkert*, 287 Conn. 101, 135, 947 A.2d 261 (2008).

judgment of the trial court in favor of the plaintiff, William S. Bailey. He claims that the court (1) made erroneous factual findings, (2) improperly admitted and credited the testimony of the plaintiff's expert, (3) rendered an erroneous award of damages, (4) improperly awarded the plaintiff damages pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (5) erroneously awarded the plaintiff attorney's fees. We dismiss for lack of a final judgment that portion of the appeal contesting the award of attorney's fees and otherwise affirm the judgment of the trial court.

In its memorandum of decision, the court found the following relevant facts. The plaintiff owns real property known as 33 Knowles Road in Middle Haddam. The defendant is a paving contractor who employed his son, Keith Lanou, among other individuals. On August 20, 2008, Keith Lanou submitted a written proposal to the plaintiff on behalf of the defendant to construct a paved driveway and cart path on the property. That proposal stated that the defendant was a licensed home improvement contractor. On August 25, 2008, the parties entered into a written contract.[2] Its plain terms provided that the defendant would excavate the existing driveway and then install a six to eight inch base of reprocessed stone for the new driveway and cart path. After permitting that base to settle for a period of one month, the new driveway was to be paved with "class II bituminous" asphalt. The contract further provided that "[a]ll material is guaranteed to be as specified, and the above work to be performed . . . and completed in a substantial workmanlike manner for the sum of . . . $25,000 . . . ." When the parties modified the contract approximately two weeks later to encompass additional work, the contract price was increased to $31,300.

[2] The contract was admitted into evidence as the plaintiff's exhibit number five.

Like the written proposal, the contract represented that the defendant was a licensed home improvement contractor, listing "CT LIC. 545061" under the defendant's address. The court specifically found that "[t]he plaintiff relied upon the representation that the defendant was a licensed home improvement contractor. When the contract was executed and when the work was performed, the defendant was not a licensed home improvement contractor as required by law."

The court found that "[t]he excavation and placement of the driveway base materials was performed in September, 2008. The paving was done in October, 2008. The driveway is approximately 10,000 square feet in size. It took a number of truck loads of asphalt to pave this large area. The paving process involved the placement of hot asphalt into a paving machine. This machine then spreads out the material. The asphalt is then rolled. There are times when hand raking also is required. There were four men performing the paving work—[the defendant], Keith Lanou, and two other employees. The plaintiff was present while the paving was taking place. He observed that some of the asphalt contained much larger stones than specified in the class II [bituminous asphalt] mix. The plaintiff also observed that it contained other contaminates such as pieces of rubber material. The plaintiff requested that the defendant reject truck loads containing the larger stones and contaminates. The defendant refused this request. Most of the substandard asphalt was paved in . . . [an] area [that] is approximately 2500 square feet in size. The defendant's workers attempted to remove the large stones by picking them out of the pavement. This was unsuccessful because of the significant [number] of large stones. The large stones give the driveway a rough and coarse appearance.

"It is extremely important to roll the driveway when the asphalt material is at the optimum temperature. If

asphalt is rolled when it is either too hot or cold, it produces unacceptable results. This requires effective job planning which includes coordination of asphalt deliveries with the pace of the work being performed on the site by the paving machine and roller. A paving machine spreads asphalt in strips of pavement up to thirteen feet in width. It is then rolled and compacted by a roller. If the asphalt is rolled when it has cooled, it produces a cold seam between the adjoining strips of pavement. A cold seam is visible and is more likely to crack over time. Cold rolled pavement also produces what is referred to as 'orange peel flaking.' This is a condition in which you have rough areas with loose paving stones. If asphalt is rolled when it is too hot, it stretches the material and produces a rough and unacceptable surface. Asphalt which is rolled either too hot or cold does not result in proper compaction of the material.

"The plaintiff's driveway was paved over a period of two days. The work was slowed because at times the [defendant's] roller was not working properly and was unable to keep up with the pace of the work. Many areas of the driveway were cold rolled. This resulted in improper compaction, numerous cold seams, loose stones, and a rough and coarse appearance. The driveway was not installed in a workmanlike manner in accordance with standards in the paving industry."

The plaintiff paid the defendant $30,300 for the work performed. Although the parties thereafter had numerous discussions concerning corrective work on the driveway, no agreement was reached.

The plaintiff commenced the present action in March, 2010. His three count complaint alleged negligence, breach of contract and a CUTPA violation on the part of the defendant. In response, the defendant filed an

answer with ten special defenses, as well as a counterclaim alleging breach of an implied covenant of good faith and fair dealing, breach of contract and defamation on the part of the plaintiff. Following a two day bench trial, the court found in favor of the plaintiff on all of his claims, the defendant's special defenses and the defendant's counterclaim. On the issue of damages, the court found that the defendant had failed to fulfill his obligations to construct the driveway "in a substantial workmanlike manner" and with the material "guaranteed to be as specified . . . ." It further found that "[t]he credible evidence proves that the driveway can be satisfactorily repaired by removing defective pavement in the areas adjacent to the garage and barn, then repave the driveway. The cost to perform this work is $18,000. The plaintiff has proven his entitlement to damages in this amount." The court declined to award punitive damages but indicated that "[i]f the plaintiff seeks attorney's fees pursuant to [General Statutes] § 42-110g (d), his counsel shall submit an affidavit of attorney's fees along with contemporaneous records no later than June 1, 2011." The defendant subsequently filed a motion for reconsideration on May 31, 2011. The plaintiff filed an objection to that motion, which the court sustained, and this appeal followed.[3]

I

The defendant first assails numerous factual findings made by the court, which do not merit substantial discussion. We conclude that all of the challenged findings are supported by the record before us and address

[3] The defendant filed this appeal on July 5, 2011, at which time the court had not determined whether to grant the plaintiff's May 17, 2011 request for attorney's fees pursuant to § 42-110g (d). Nevertheless, our Supreme Court has held that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988).

specifically the defendant's claims that the court erroneously found that (1) the paved driveway contained material other than class II bituminous asphalt and (2) the paved driveway was improperly rolled.

It is axiomatic that "[t]his court will not reverse the factual findings of the trial court unless they are clearly erroneous." *Solomon* v. *Connecticut Medical Examining Board*, 85 Conn. App. 854, 865, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005). "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.) *Gordon* v. *Tobias*, 262 Conn. 844, 849, 817 A.2d 683 (2003).

A

The defendant claims that the court erroneously found that the paved driveway contained material other than class II bituminous asphalt. To the contrary, the record contains ample evidence substantiating that finding. The deposition testimony of the plaintiff's expert, Michael Airoldi, was presented at trial. Airoldi testified that, on the basis of his firsthand inspection of the driveway and his examination of numerous photographs thereof, he observed large stones and rocks in the asphalt mix, as well as a piece of rubber. In particular, he opined that a portion of the driveway "was contaminated with stuff in it, bigger stones, rubber glob . . . ." He further testified that the large stones and debris that he observed in the paved driveway were not consistent with a typical class II bituminous asphalt mix. The plaintiff also introduced dozens of photographs—many of which contain a measuring tape for

reference—that depict in graphic detail the condition of the paved driveway, including multiple photographs featuring large stones. In addition, a handwritten letter from Keith Lanou to the plaintiff dated August 12, 2009, was admitted into evidence. In that letter, he acknowledged that a portion of the driveway contained "the occasional large stone in the mix and two pieces of rubber . . . ." The plaintiff also introduced into evidence a piece of rubber, approximately four inches by one inch in size, that was removed from the driveway constructed by the defendant. On that evidence, the court reasonably could have found that the paved driveway contained material other than class II bituminous asphalt.

B

The defendant also claims that the court erroneously found that "substantial portions of the driveway were either cold rolled or rolled too hot. This has resulted in visible seams, rough surfaces and loose stone 'orange peel flaking.' In these areas, the pavement was not properly compacted." Those findings are supported by the testimony of Airoldi, who explained that a cold seam "is where you pick up with a paver and go back and start another pass with a paving machine, that would be a joint between the two areas. Some of the joints I [saw on the plaintiff's driveway] were rolled too late, meaning it was coarser, more texture, rough looking, which will flake, the stones will flake if it is not rolled in properly. A smoother area would be an area that's rolled in at the right time. And if it stretches and it's smooth, it was rolled when it was too hot. . . . [Y]ou don't want cold seams." Airoldi testified that he observed "at least five" cold seams during his inspection of the driveway that contained "loose stones, orange peeling, flaking." Airoldi opined that the foregoing was caused by not being "rolled in properly" and that the flaking in particular was a result of "not getting the right

compaction out of it . . . .'' Asked why the plaintiff's ''driveway looks the way it does,'' Airoldi answered that ''[t]he cold seams and the orange peel flaking is [because it was] rolled too late. Some areas are rolled a little bit too late, some areas in the driveway are rolled a little bit too early due to the fact that I see stretching in the blacktop. When blacktop stretches, it's rolled too hot.'' The plaintiff introduced into evidence multiple photographs that displayed those conditions.

Moreover, in his August 12, 2009 letter to the plaintiff, Keith Lanou stated in relevant part: ''The problem started when the wind came after we paved from the house garage into the large circle area. My roller started to run like crap misfiring and slowing down the rolling process which caused the worst of the problem areas. In order to keep going we had two torches going constantly to try to combat the wind and slow rolling. There is no way for you or I to turn back the clock or we would I can guarantee that. The only choice I had is to move forward, the material was already there and half of the largest span of pavement and largest seam is done. I need[ed] to continue so I can stop with a short seam to be able to heat and join the next day . . . .'' That evidence further substantiates the court's factual finding that portions of the driveway were improperly rolled. The finding, therefore, was not clearly erroneous.

II

The defendant next claims that court improperly admitted and credited the expert testimony of Airoldi. ''It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony

[it] reasonably believes to be credible." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002). "[T]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Concerning expert testimony specifically, the trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court . . . in considering the issues." (Internal quotation marks omitted.) *Russo* v. *Phoenix Internal Medicine Associates, P.C.*, 109 Conn. App. 80, 87, 950 A.2d 559 (2008).

The plaintiff's November 30, 2010 expert disclosure indicated that Airoldi would base his expert opinions and conclusions upon his education, background, training and decades of experience in the field of asphalt paving. That disclosure further stated that Airoldi "will testify regarding defects in the material and workmanship in relation to the driveway which was installed by the defendant, the cause of the defects and damages." In his testimony offered at trial, Airoldi stated that he was a licensed home improvement contractor with twenty-five years of experience in the paving industry. He testified that he was "a master paving specialist." Although he performed both residential and commercial paving projects, he estimated that 75 percent of his business was residential. On that testimony, the court reasonably could have concluded that Airoldi possessed special skills and knowledge directly applicable to the present dispute.

Our thorough review of the one hundred and thirty-four pages of Airoldi's testimony, in which he provided detailed insight into the practice of paving a driveway, reveals that he possessed "knowledge, beyond the ken of the average [fact finder], that, as properly applied, would be helpful to the determination of an ultimate issue." *Siladi* v. *McNamara*, 164 Conn. 510, 513, 325 A.2d 277 (1973). In particular, Airoldi offered testimony as to proper installation of a paved driveway in accordance with the standards and practices in the paving industry by, inter alia, explaining the dangers of rolling pavement either too hot or too cold and the consequences thereof, which included orange peel flaking, loose stones, cold seams and a rough and coarse finish on the driveway. As sole arbiter of credibility and the weight to be given specific testimony, the court was "free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *DiVito* v. *DiVito*, 77 Conn. App. 124, 138, 822 A.2d 294, cert. denied, 264 Conn. 921, 828 A.2d 617 (2003). We cannot say that the court abused its wide discretion in admitting and crediting Airoldi's testimony.[4]

III

The defendant also contests the basis of the court's award of damages. In its memorandum of decision, the

[4] The defendant also alleges that no evidence or expert testimony was provided as to the applicable standard of care, rendering the plaintiff unable to meet his burden of proof. He is mistaken. As the court specifically found, the "standard of care was established through the express terms of the contract," which provides that the defendant's work was to be "completed in a substantial workmanlike manner" and that "[a]ll material is guaranteed to be as specified . . . ." In his expert testimony, Airoldi offered detailed testimony as to the proper installation of a paved driveway. Airoldi opined that, on his examination of "all of the problems" present as to the plaintiff's driveway, the defendant had not installed it in a workmanlike manner in accordance with the standards and practices in the paving industry. He further testified that the driveway contained materials other than class II bituminous asphalt, the material specified in the contract.

court found that "[t]he credible evidence proves that the driveway can be satisfactorily repaired by removing defective pavement in the [affected] areas . . . then repav[ing] the driveway. The cost to perform this work is $18,000. The plaintiff has proven his entitlement to damages in this amount." The defendant suggests that the court failed to consider less costly alternatives, such as seal coating. The record contains no indication that the court failed to do so. To the contrary, the court credited Airoldi's testimony on how best to repair the plaintiff's driveway. Airoldi testified as follows:

"[The Plaintiff's Counsel]: So, in your opinion, how would you repair this problem, these problems?

"[Airoldi]: Well, you could infrared it, seal coat it, but then that's just putting a Band-Aid on it because where the cold seam is, it's going to be more apt to crack than if it was, you know, a hot seam. Or saw cut out areas, for proper run off, take [those] areas out and overlay the whole thing.

"[The Plaintiff's Counsel]: What would be the preferred method to make this driveway what it's supposed to be?

"[Airoldi]: To cut out the areas and overlay it. Cut out the areas so you can get the proper water to run off in the right areas and take out whatever areas you need to take out and overlay the whole thing."

Airoldi further estimated that the cost of the preferred method to repair the plaintiff's driveway was $18,000. In light of that testimony, which the court was free to credit, the court's finding was not clearly erroneous.

IV

The defendant claims that the court improperly awarded the plaintiff damages under CUTPA because he failed to prove an ascertainable loss.[5] We disagree.

[5] The defendant also argues that the plaintiff failed to plead that he suffered an ascertainable loss as a result of the CUTPA violation. We reject that

"A party seeking to recover damages under CUTPA must meet two threshold requirements. First, he or she must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he [or she] must present evidence providing the court with a basis for a reasonable estimate of the damages suffered. . . . The ascertainable loss requirement is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he [or she] has suffered an ascertainable loss due to a CUTPA violation. . . . An ascertainable loss is a loss that is capable of being discovered, observed or established. . . . The term loss necessarily encompasses a broader meaning than the term damage, and has been held synonymous with deprivation, detriment and injury. . . . To establish an ascertainable loss, a plaintiff is not required to prove actual damages of a specific dollar amount. . . . A loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Citations omitted; internal quotation marks omitted.) *Marinos* v. *Poirot*, 132 Conn. App. 693, 707–708, 33 A.3d 282 (2011), cert. granted on other grounds, 303 Conn. 940, 37 A.3d 154 (2012).

The court found, and the defendant does not dispute, that he was not a licensed home improvement contractor "[w]hen the contract was executed and the work was performed" on the plaintiff's property in violation

contention. His CUTPA count alleged that his acceptance of the defendant's written proposal was based in part on the defendant's representation that he was a licensed home improvement contractor. After specifying various manners in which the defendant failed to construct the driveway properly, the count alleged that the plaintiff "now must retain the services of another contractor to finish and/or remediate the services and materials previously rendered by the [d]efendant" and that "[a]s a result of the foregoing, the [d]efendant's negligence has caused monetary damages, delay and loss to the [p]laintiff."

of the Home Improvement Act (act), General Statutes § 20-418 et seq. The failure to comply with the act "is a per se violation of CUTPA by virtue of General Statutes § 20-427 . . . which provides that any violation of the [act] is deemed to be an unfair or deceptive trade practice." *A. Secondino & Son, Inc.* v. *LoRicco*, 215 Conn. 336, 343, 576 A.2d 464 (1990); see also *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 666, 927 A.2d 333 (2007). The only issue before us, therefore, is whether the court correctly concluded that the plaintiff proved that he suffered an ascertainable loss.

Once a violation of the act has been established, "the homeowners still must prove that they have suffered an injury or actual loss in order to recover damages under CUTPA." *Hees* v. *Burke Construction, Inc.*, 290 Conn. 1, 14, 961 A.2d 373 (2009). In the seminal case of *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 612–13, 440 A.2d 810 (1981), our Supreme Court held that a plaintiff is not required "to prove a specific amount of actual damages in order to make out a prima facie case" under CUTPA. The court explained that "[w]henever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known. . . . When the product fails to measure up, the consumer has been injured; he has suffered a loss." Id., 614. Accordingly, the court held that "[t]o satisfy the 'ascertainable loss' requirement, a plaintiff need prove only that he has purchased an item partially as a result of an unfair or deceptive practice or act and that the item is different from that for which he bargained." Id., 614–15.

In its memorandum of decision, the court specifically found that the plaintiff "relied upon the representation that the defendant was a licensed home improvement

contractor" in entering into the contract with the defendant. The court further found that, as a result of the defendant's failure to fulfill his contractual obligations to construct the driveway in a substantial workmanlike manner and to utilize the specified material, the plaintiff was damaged. Stated differently, the plaintiff purchased the new driveway in part as a result of the defendant's false representation that he was a licensed home improvement contractor, which driveway was different from that for which he bargained. On that basis, the court properly concluded that the plaintiff suffered an ascertainable loss. See *Hinchliffe* v. *American Motors Corp.*, supra, 184 Conn. 614–15. As this court has observed, "the loss of a contract is an ascertainable loss." *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 355, 805 A.2d 735, cert. denied, 262 Conn. 922, 812 A.2d 864 (2002).

We further are mindful that, like the complaint in *Larobina* v. *Home Depot, USA, Inc.*, 76 Conn. App. 586, 595, 821 A.2d 283 (2003), the plaintiff's complaint here alleged the same conduct as the basis for both its breach of contract and CUTPA claims. In rejecting the claim that the plaintiff had not demonstrated an ascertainable loss, the court in *Larobina* stated: "We fail to see how the court could have concluded logically that the defendant's conduct was such that it caused the plaintiff to suffer the loss of his contract, thereby entitling him to contract damages, yet the same conduct, while sufficient to establish a CUTPA violation, failed to constitute an 'ascertainable loss' for purposes of CUTPA." Id., 596. We concur with that assessment.

V

As a final matter, we briefly address the defendant's bald contention that the court erroneously awarded attorney's fees to the plaintiff. It is undisputed that, at the time that the defendant filed the present appeal, the court had not acted on the plaintiff's May 17, 2011

request for attorney's fees pursuant to § 42-110g (d). See footnote 3 of this opinion. With respect to the award of attorney's fees, we conclude that the defendant has not appealed from a final judgment.

Although neither of the parties raised a question as to the finality of the judgment, we do so sua sponte because it invokes this court's subject matter jurisdiction.[6] See, e.g., *State* v. *Carey*, 222 Conn. 299, 304–305, 610 A.2d 1147 (1992) (court may raise issue of subject matter jurisdiction sua sponte because it "involves the authority of a court to adjudicate the type of controversy presented by the action before it"). "The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263 . . . ." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 793–94, 967 A.2d 1 (2009).

In *Paranteau* v. *DeVita*, 208 Conn. 515, 524 n.11, 544 A.2d 634 (1988), our Supreme Court stated that "[a] supplemental postjudgment award of attorney's fees becomes final and appealable . . . not when there is a finding of liability for such fees, but when the amount of fees are conclusively determined. A finding as to liability only, prior to a determination on the issue of damages, is not a final judgment from which an appeal lies." Relying on that precedent, this court has held that when "[i]t is undisputed . . . that the plaintiff filed her [appeal] before the amount of attorney's fees had been conclusively determined," the portion of the appeal pertaining to the award of attorney's fees "was not taken from a final judgment." *McKeon* v. *Lennon*, 131 Conn. App. 585, 611, 27 A.3d 436, cert. denied, 303 Conn. 901,

[6] Prior to oral argument before this court, we notified the parties that they should be prepared to address this final judgment issue.

31 A.3d 1178 (2011); see also *Sullivan* v. *Brown*, 116 Conn. App. 660, 662–63, 975 A.2d 1289, cert. denied, 294 Conn. 914, 983 A.2d 852 (2009). In light of the foregoing, we conclude that the defendant has not appealed from a final judgment with respect to the award of attorney's fees. We therefore dismiss that portion of the present appeal challenging, as clearly erroneous, the award of attorney's fees.

The appeal is dismissed for lack of a final judgment with respect to the issue of attorney's fees. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ENRICO MANGIAFICO ET AL. *v.* STATE BOARD OF EDUCATION
(AC 33121)

Gruendel, Espinosa and Borden, Js.

Syllabus

The plaintiff M appealed to the trial court from the decision of an impartial hearing board of the defendant state board of education upholding the determination by the board of education of the town of Farmington that the plaintiff's minor children were not residents of Farmington and were not entitled to free school accommodations in Farmington. M owned a residence in Farmington, at which his family began residing in February, 2006. In April, 2006, when construction commenced on the Farmington residence, M and his family moved to a property owned by M in New Britain, and they continued to reside at the New Britain property after the Farmington residence sustained structural damage due to heavy rain that rendered it uninhabitable. In September, 2007, after M's children began attending school in Farmington, the Farmington board of education received a complaint that the children were not residing in Farmington, and the board subsequently notified M that his children were not permitted to attend school in Farmington. The trial court rendered judgment dismissing the appeal, from which M appealed to this court. *Held*:

1. M could not prevail on his claim that the hearing board improperly determined that his children were not residents of Farmington at the time of the hearing and were not entitled to free school accommodations,

which was based on his claim that his family's intent to return to Farmington, their established nexus to Farmington and the fact that he eventually did return to Farmington all supported a finding of residency in Farmington; given that, at the time of the hearing, M and his family were still living in New Britain, the Farmington property was on a blighted building list and M could not identify a particular date by which he and his family could return to the Farmington property, the hearing board did not abuse its discretion in determining that M's living situation could be characterized as an indefinite absence from Farmington, that such an indefinite absence was inconsistent with actual residence in Farmington, which is required by statute (§ 10-186 [b] [2]) and has been interpreted to mean physical presence in the district, and, thus, that M's children did not actually reside in Farmington and were not entitled to free school accommodations in Farmington.

2. M could not prevail on his claim that, even if his children were not residents of Farmington for the period of time in question, the hearing board improperly determined that there was no exception to the statutory (§§ 10-186 and 10-220) residency requirement for displacement due to natural disaster: pursuant to the plain text of §§ 10-186 and 10-220, the legislature has not provided a statutory exception for the residency requirement for displacement due to natural disaster, if the legislature intended to create a statutory exception for students displaced due to natural disaster it would have done so explicitly, the determination of the hearing board that the defendant has not exercised its discretion to allow for such an exception was supported by substantial evidence and, therefore, the trial court did not abuse its discretion in finding that there was no exception to the residency requirement that applied to M's case; moreover, there was no merit to M's claim that his children were entitled to protections under the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11301 et seq.) because they were "homeless" within the meaning of that act during the period of time in question, as the unchallenged findings of the hearing board reflected that, at all times relevant to this appeal, M's family was living at the New Britain property and was not homeless within the meaning of that act.

3. M's claim that the hearing board improperly failed to conclude that the defendant was estopped from claiming on the basis of residency that his children were not entitled to free school accommodations was not reviewable; although M raised his estoppel claim before the trial court, the court never addressed the claim or made factual determinations related to the claim, and, therefore, the record was inadequate to review the claim.

4. The hearing board did not abuse its discretion in failing to admit certain evidence obtained through Freedom of Information Act requests offered by M, which he claimed demonstrated that Farmington had treated other families differently from the way it had treated his family; it was reasonable for the hearing board to determine, on the basis of the

evidence before it, that M had failed to demonstrate that the documents he received through his first Freedom of Information Act request and those that he anticipated receiving through a second request were not sufficient grounds on which to base a showing of disparate treatment by the defendant, and there was substantial evidence in the record consisting of previous decisions of the defendant that supported the defendant's contention that its refusal to grant M's children free school accommodations was consistent with its internal policies and its prior application of those policies.

Argued February 2—officially released October 23, 2012

Procedural History

Appeal from the decision by the defendant upholding the determination by the board of education of the town of Farmington that the plaintiffs' minor children did not qualify for town educational services, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn*, *J.*, granted the motion to intervene as a party defendant filed by the board of education of the town of Farmington; thereafter, the matter was tried to the court; judgment dismissing the appeal, from which the named plaintiff appealed to this court; subsequently, the court, *Cohn*, *J.*, issued a rectification of its decision. *Affirmed.*

Enrico Mangiafico, pro se, the appellant (named plaintiff).

Jane D. Comerford, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (named defendant).

Peter J. Murphy, for the appellee (defendant board of education of the town of Farmington).

Opinion

ESPINOSA, J. The self-represented plaintiff, Enrico Mangiafico,[1] appeals from the judgment of the Superior

[1] The plaintiff's wife, Concettina Mangiafico, also was a plaintiff in the appeal to the Superior Court but has not appealed to this court from the Superior Court's judgment. We therefore refer in this opinion to Enrico Mangiafico as the plaintiff.

Court dismissing his appeal from the determination of an impartial hearing board, appointed by the defendant, the state board of education,[2] that his children were not residents of Farmington and, therefore, were not entitled to free school accommodations in Farmington. The plaintiff claims that the court's dismissal of his appeal was improper because the impartial hearing board incorrectly determined that (1) his children were not residents of Farmington at the time of the hearing; (2) there was no exception to the residency requirement for displacement due to natural disaster; (3) the defendant was not estopped from claiming on the basis of residency that his children were not entitled to free school accommodations; and (4) certain evidence, which the plaintiff obtained through Freedom of Information Act[3] requests, should not be admitted into evidence.[4] We affirm the judgment of the Superior Court.

[2] The board of education of the town of Farmington (school board) was the named defendant before the impartial hearing board. The school board filed a motion to intervene as a party defendant in the plaintiff's appeal to the Superior Court, which the court granted. The school board, however, did not file a brief in this appeal. Therefore, we refer to the state board of education as the defendant.

[3] See General Statutes § 1-200 et seq.

[4] Additionally, in his statement of issues, the plaintiff claims that the court improperly failed to remand the case to the impartial hearing board for consideration of further evidence related to the issue of when the plaintiff and his family returned to Farmington. He does not, however, analyze this claim within his main brief to this court. "While [w]e are aware that [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 . . . we are also aware that [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." (Internal quotation marks omitted.) *Worth* v. *Korta*, 132 Conn. App. 154, 157, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Cambridge Mutual Fire Ins. Co.* v. *Sakon*, 132 Conn. App. 370, 372 n.2, 31 A.3d 849 (2011), cert. denied, 304 Conn. 904, 38 A.3d 1202 (2012). The only analysis of this claim is within the plaintiff's reply brief to this court. "[C]laims . . . are unreviewable when raised for the first time in a reply brief. . . .

The following facts as found by the impartial hearing board are relevant to our consideration of this appeal. In December, 2005, the plaintiff purchased a residence in Farmington (Farmington property), and he, along with his wife and children, began occupying the Farmington property in February, 2006. The plaintiff's family maintained significant contacts with Farmington and acted in a manner consistent with an intent to remain Farmington residents. They received mail at the Farmington property, paid taxes on the property and listed the property's address on their motor vehicle registrations. The plaintiff worked in Farmington and the family attended church there.

In April, 2006, additional construction commenced on the Farmington property, and the plaintiff and his family moved back to property that the plaintiff owned in New Britain (New Britain property), where they had been residing continuously since at least 1996 until February, 2006. The plaintiff intended to lease this property beginning in July, 2006, and had executed a written lease with a prospective tenant. The plaintiff intended to move back to the Farmington property upon the completion of the construction.

In June, 2006, heavy rain caused structural damage to the Farmington property, rendering it uninhabitable. The plaintiff attempted to obtain insurance proceeds to complete necessary repairs to the property, but the insurance company refused to distribute such proceeds. Because his family could not return to the Farmington property, the plaintiff cancelled the lease with the prospective tenant for the New Britain property, and he

One rationale for that maxim is the fact that [a]rguments first presented in a reply brief impair the opposing party's opportunity to reply in writing." (Citation omitted; internal quotation marks omitted.) *McDonough* v. *Forrest*, 129 Conn. App. 851, 856 n.3, 21 A.3d 546, cert. denied, 302 Conn. 924, 28 A.3d 340 (2011). Accordingly, we decline to review this claim.

and his family continued to reside at the New Britain property.

In September, 2007, the plaintiff's children began attending school in Farmington. After receiving a complaint that the children were not residing in Farmington, the school board conducted an investigation. Through the investigation, the school board learned that the children were residing in New Britain. On January 8, 2009, the school board notified the plaintiff that his children were not residents of Farmington and, therefore, would not be permitted to attend school in Farmington after January 9, 2009.

At the plaintiff's request, the school board held a hearing on this matter on February 24, 2009. At the time of the hearing, the plaintiff was pursuing litigation against his insurance company over its refusal to distribute insurance proceeds, and the Farmington property remained uninhabitable. The Farmington property was placed on the blighted building list on January 14, 2009, and it was still on this list at the time of the hearing. Although the plaintiff intended to return to the property, at the time of the hearing it was not known when that would occur.

On March 3, 2009, the school board issued its decision that, under its policies, the plaintiff's children were not residents of Farmington and were not entitled to free school accommodations. On March 19, 2009, the plaintiff filed a timely appeal of this decision with the defendant. The impartial hearing board (hearing board), established by the defendant,[5] held a hearing on May

[5] General Statutes § 10-186 (b) (2) provides in relevant part: "The State Board of Education shall, on receipt of a written request for a hearing made in accordance with the provisions of this subsection, establish an impartial hearing board of one or more persons to hold a public hearing in the local or regional school district in which the cause of the complaint arises. . . . The hearing board may render a determination of actual residence of any child, emancipated minor or pupil eighteen years of age or older where residency is at issue."

18, 2009, and issued its decision on May 29, 2009. The hearing board determined that the children were not residents of Farmington because they were not actually residing in the district. Rather, the hearing board determined that the children were residents of New Britain. Therefore, the hearing board held that they were not entitled to free school accommodations in Farmington.

On July 20, 2009, the plaintiff appealed from the determination of the hearing board to the Superior Court. Preliminarily, the court noted that the plaintiff was not disputing the facts found by the hearing board; rather, the plaintiff was attempting to distinguish the facts in the present case from those in decisions of the defendant on which the hearing board had relied. Reviewing the hearing board's findings under the substantial evidence rule, the court determined that the hearing board properly had considered the facts in the record, including evidence supporting a finding that the plaintiff and his family had ties to Farmington. The court agreed with the hearing board that an intent to return to the district, upon which the plaintiff relied, was not a proper basis for a finding of residency and that an indefinite absence of the plaintiff's family from Farmington defeated the plaintiff's claim that he and his family were residents of Farmington. Accordingly, the court dismissed the plaintiff's appeal. This appeal followed. Additional facts will be set forth as necessary.

"In accordance with the Uniform Administrative Procedure Act, General Statutes §§ 4-166 through 4-189, we review an administrative agency's decision for abuse of discretion to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, 300 Conn. 617, 621–22, 15 A.3d 1063 (2011). "With regard to questions of

fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Internal quotation marks omitted.) *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 517, 14 A.3d 998 (2011).

"Under this standard, the [c]onclusions reached by [the agency] must be upheld by the [reviewing] 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 [reviewing] court would have reached the same conclusion . . . but whether the record before the [agency] supports the decision reached. . . . If a [reviewing] court finds that there is substantial evidence to support [an agency's] findings, it cannot substitute its judgment for that of the [agency]. . . . If there is conflicting evidence in support of the [agency's] stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the [agency]. . . . 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.) *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 32–33, 19 A.3d 622 (2011).

Although our review of agency determinations generally is deferential, "we do not defer to the [agency's] construction of a statute—a question of law—when . . . the [provisions] at issue previously ha[v]e not been subjected to judicial scrutiny or when the [agency's] interpretation has not been time tested." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 599, 996 A.2d

729 (2010). When a case "presents a question of law and does not involve an agency's time-tested interpretation of its regulations . . . the standard of review is [plenary]." *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 622.

I

First, the plaintiff claims that the hearing board improperly determined that his children were not residents of Farmington at the time of the hearing and were not entitled to free school accommodations. The plaintiff argues that his family's intent to return to Farmington, his family's established nexus to Farmington and the fact that he eventually did return to Farmington all support a finding of residency in Farmington. He asserts that the hearing board improperly determined that the facts of this case supported a finding that his family was indefinitely displaced as opposed to temporarily displaced. We disagree.

Under General Statutes § 10-220 (a), local boards of education must ensure that public school is available to "each child of school age residing in the district . . . ." General Statutes § 10-186 provides in relevant part: "(a) Each local or regional board of education shall furnish, by transportation or otherwise, school accommodations so that each child five years of age and over and under twenty-one years of age who is not a graduate of a high school or vocational school may attend public school . . . . Any board of education which denies school accommodations, including a denial based on an issue of residency, to any such child shall inform the parent or guardian of such child . . . of his right to request a hearing by the board of education in accordance with the provisions of subdivision (1) of subsection (b) of this section. A board of education which has denied school accommodations shall advise the board of education under whose jurisdiction

it claims such child should be attending school of the denial. . . . (b) (1) If any board of education denies such accommodations, the parent or guardian of any child who is denied schooling . . . may, in writing, request a hearing by the board of education. The board of education may . . . establish a local impartial hearing board of one or more persons not members of the board of education to conduct the hearing. . . . [I]n cases of denial of schooling based on residency, the party denied schooling shall have the burden of proving residency by a preponderance of the evidence. (2) . . . The hearing board may render a determination of actual residence of any child, emancipated minor or pupil eighteen years of age or older where residency is at issue."

The hearing board determined that, by using the term "actual residence" in § 10-186 (b) (2), the legislature expressed its intent to mean something narrower than what the term "residence" can connote in other contexts. Specifically, the hearing board determined that trial courts had ruled that § 10-186 required the student's physical presence in the district to support a finding of actual residence. On this point, the hearing board cited *Board of Education* v. *State Board of Education*, Superior Court, judicial district of New Britain, Docket No. CV-01-0510157-S (June 19, 2002) (32 Conn. L. Rptr. 309) (" 'actual resident' means 'physically present and living [at a location] as a householder during significant parts of each day and for important purposes consistent with residence' "), and *Board of Education* v. *State Board of Education*, Superior Court, judicial district of New Haven, Docket No. CV-940364754 (October 4, 1995) (15 Conn. L. Rptr. 304) ("the residence of the child for purposes of public school attendance is in the town where [the child's dwelling] is located").

Additionally, the hearing board found that the defendant's decisions consistently reflected this same approach to the residency requirement of §§ 10-186 and

10-220. In *Student* v. *Board of Education*, Case No. 98-7 (April 16, 1999), the hearing board held that, to prove actual residence, the party denied schooling had to demonstrate physical presence in the district, not just intent to reside there in the future. In *Student* v. *Regional School District #5 Board of Education*, Case No. 98-2 (June 16, 1999), the hearing board held that two students, whose family recently had sold their home in Orange, were still residents of Orange while their family temporarily stayed in East Haven and had a new house built in Orange.

The parties do not dispute the hearing board's reliance on these trial court and hearing board decisions. Rather, the parties disagree regarding the proper characterization of the *facts* of the present case. The plaintiff, without challenging the hearing board's application and interpretation of these decisions, discussed previously, asserts that the facts of this case do not support the hearing board's factual determination that the plaintiff's family did not "actually reside" in Farmington. In so arguing, the plaintiff attempts to distinguish the facts in the present case from those in the decisions relied on by the hearing board. This factual argument properly is reviewed for an abuse of discretion under the substantial evidence test. See *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 621–22. Accordingly, we confine our analysis to this issue, as it is the only issue properly presented by the parties on appeal.

We conclude that the hearing board did not abuse its discretion in finding that the plaintiff's children did not actually reside in Farmington. At the time of the hearing, the plaintiff and his family still were living in New Britain, and the Farmington property was on the blighted building list. The plaintiff asserted before the hearing board that he might be able to obtain a certificate of occupancy for the Farmington property by

November, 2009, but he could not identify a particular date by which he and his family could return to the Farmington property. The hearing board did not abuse its discretion in finding that, at the time of the hearing, the plaintiff's living situation properly could be characterized as an indefinite absence from Farmington. The hearing board properly determined that such an indefinite absence is inconsistent with "actual residence" in Farmington and that, as a result, the plaintiff's children were not entitled to free school accommodations in Farmington.

II

Next, the plaintiff claims that, even if his children were not residents of Farmington for the period of time in question, the hearing board improperly determined that there was no exception to the residency requirement of §§ 10-186 and 10-220 for displacement due to natural disaster. The plaintiff argues that, if a student's displacement was due to an unforeseen catastrophe, the student should be allowed free school accommodations despite not residing in the district. Furthermore, the plaintiff argues that his children were entitled to protections under the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act), 42 U.S.C. § 11301 et seq., because they were "homeless" within the meaning of that act during the period of time in question. We are not persuaded.

The following additional facts are relevant to this claim. On consideration of the plaintiff's appeal from the decision of the hearing board, the court determined that the hearing board had left unresolved certain questions that had to be addressed before the court could review its decision. Accordingly, the court remanded the case to the hearing board to consider two issues: (1) whether there was an exception to the requirement of actual presence in the school district for temporary

removal from the district and (2) assuming that such an exception existed, whether, in the present case, the plaintiff's children were displaced permanently, rather than temporarily.

On remand, the hearing board answered the first question in the negative, maintaining that there was no established exception to the requirement of actual presence in the district. The hearing board noted that, although limited temporary displacement from a district would not defeat a finding of residency, it could not find the plaintiff's children to be Farmington residents because their displacement was of an indefinite duration. The hearing board explained that it could not "find that this indefinite, rather than temporary, arrangement excuses actual presence. Doing so would also impliedly, if not expressly, excuse actual presence for purposes of entitlement to school accommodation ad infinitum. Establishing a standard of entitlement to free school accommodations for an indefinite period of time without actual presence is not supported by the law. This would lead to the same unworkable approach to determining residency that the Connecticut General Assembly specifically addressed when it enacted [Public Acts 1995, No. 95-130] as set forth in the legislative history."

Whether the residency requirement of §§ 10-186 and 10-220 contemplates an exception for displacement due to natural disaster is a question of law. Therefore, our review is plenary. See *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 622. "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." (Internal quotation marks omitted.) *Dept.*

of Public Safety v. *State Board of Labor Relations*, supra, 296 Conn. 599. General Statutes § 1-2z provides: "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."

On the basis of the plain text of §§ 10-186 and 10-220, we conclude that the legislature has not provided a statutory exception from the residency requirement for displacement due to natural disaster. There is no mention of natural disaster in either statute or in related statutes. Furthermore, when the legislature has intended to create exceptions to the residency requirement in recognition of special circumstances, it has done so explicitly. For example, § 10-186 (a) resolved the problem of "border cases" in which a child's house was located on the border of two towns by providing that "a child residing in a dwelling located in more than one town in this state shall be considered a resident of each town in which the dwelling is located and may attend school in any one of such towns. . . ." General Statutes § 10-186 (a). Accordingly, we conclude that if the legislature intended to create a statutory exception for students displaced due to natural disaster, it would have done so explicitly.

Although we conclude that there is no statutorily mandated exception to the residency requirement for displacement due to natural disaster, we recognize that the defendant may, in the exercise of its discretion, make case-by-case residency determinations that take into consideration displacement due to natural disaster. The defendant has the authority to issue regulations interpreting §§ 10-186 and 10-220. See General Statutes

§ 10-3a (b) ("[the defendant] shall adopt regulations pursuant to the provisions of [the Uniform Administrative Procedure Act]"); see also General Statutes § 4-166 (13) (setting forth general power of agencies to issue regulations). Furthermore, the defendant may make residency determinations in contested cases. See General Statutes § 10-186 (b) (2) (giving any individuals denied free school accommodations right to request hearing); see also General Statutes § 4-166 (2) (defining general power of agencies to decide contested cases). It is within the discretion of the defendant to interpret "residents" as that term is used in §§ 10-186 and 10-220 to include individuals who are temporarily displaced due to natural disaster.

To the extent that the hearing board determined that the defendant, in the absence of a statutorily mandated natural disaster exception to the residency requirement, has not exercised its discretion to allow for such an exception, we conclude that the hearing board's determination is supported by substantial evidence. The hearing board was persuaded by evidence that suggested that the plaintiff did not qualify for any exception to the requirement of actual residence in the district. The hearing board noted that the defendant previously had found that temporary displacement was not inconsistent with a finding of actual residence but determined that the plaintiff's displacement could not be characterized properly as temporary. The court did not abuse its discretion in finding that there was no exception to the residency requirement that applied to the plaintiff's case.

The plaintiff's claim that his children were entitled to protections under the McKinney-Vento Act is without merit. "The term 'homeless children and youths' . . . (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of [42 U.S.C. § 11302 (a) (1)]); and (B) . . . includes . . .

(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement . . . .'' 42 U.S.C. § 11434a (2). The unchallenged findings of the hearing board reflect that, at all times relevant to this appeal, the plaintiff's family was living at the New Britain property. The plaintiff was the owner of the property, but he argues that it was not ''adequate'' because it was a rental property. Other cases in which courts have interpreted the meaning of homelessness within the context of the federal act do not support the plaintiff's suggested interpretation of that act. See, e.g., *Lampkin* v. *District of Columbia*, 879 F. Supp. 116, 122–23 (D.D.C. 1995) (holding that families living in shelters and families on the waiting list to enter shelter were homeless for purposes of McKinney-Vento Act). We agree with the court that the plaintiff and his family were not homeless within the meaning of the federal act and, therefore, were not entitled to its protections.

III

Next, the plaintiff claims that the hearing board improperly failed to conclude that the defendant was estopped from claiming on the basis of residency that his children were not entitled to free school accommodations. The plaintiff asserts that he justifiably relied on a proof of residency form, provided by the school for enrollment purposes, that allowed the plaintiff to demonstrate his children's residency by submitting proof of his mortgage on the Farmington property. Furthermore, the plaintiff argues that, in good faith, he relied on certain assurances from the superintendent that he would not be assessed back tuition for time

that his family spent living in New Britain while the Farmington property underwent renovations.

Municipal estoppel claims are "inherently fact bound." *Collins Group, Inc.* v. *Zoning Board of Appeals*, 78 Conn. App. 561, 576, 827 A.2d 764, cert. denied, 266 Conn. 911, 832 A.2d 68 (2003). Although the plaintiff raised this estoppel claim before the trial court, our careful review of the court's decision does not reflect that it addressed the claim or made any factual determinations directly related to the claim. We decline to review the claim on the basis of an inadequate record. See, e.g., *Conservation Commission* v. *Red 11, LLC*, 119 Conn. App. 377, 385–88, 987 A.2d 398 (court declines to review claim of municipal estoppel when appellant failed to furnish Appellate Court with record that included trial court's findings related to such claim), cert. denied, 295 Conn. 924, 991 A.2d 566 (2010).

IV

Finally, the plaintiff claims that the hearing board improperly did not admit certain evidence obtained through Freedom of Information Act[6] requests. The plaintiff asserts that this evidence would have demonstrated that Farmington has treated other families differently from the way it treated his family, namely, by affording free tuition to students who had been displaced from Farmington for longer periods of time than had the plaintiff's children. This evidence, the plaintiff argues, is necessary for the proper resolution of the issues on appeal. We disagree.

The following additional facts are relevant to this claim. At the May 18, 2009 hearing, the plaintiff represented to the hearing board that he had made two separate requests under the Freedom of Information Act[7]

[6] See footnote 3 of this opinion.

[7] See footnote 3 of this opinion.

for materials related to previous decisions of the defendant in residency cases. In response to his first request, he had received documents related to a case heard by the defendant in which, according to the plaintiff, the family received greater leniency than was granted to his family in the present case. The plaintiff maintained that he reviewed these documents and, having decided that they would be relevant to the hearing, made a second request, which was pending at the time of the hearing, for documents relating to other residency cases heard by the defendant. Accordingly, the plaintiff requested a continuance to allow for a response to his second request. The hearing board declined to consider as a full exhibit material from the first request on the ground that it related to only a single case, which did not, on its own, demonstrate the pattern of disparate treatment alleged by the plaintiff. Additionally, the hearing board declined to grant a continuance for the second request, stating that it was mere speculation that the requested documents would support the plaintiff's argument.

We conclude that the hearing board did not abuse its discretion. It was reasonable for the hearing board to determine, on the basis of the evidence before it, that the plaintiff had failed to demonstrate that the documents received through the first Freedom of Information Act[8] request and those that the plaintiff anticipated receiving through the second request were not sufficient grounds on which to base a showing of disparate treatment by the defendant. Furthermore, there was substantial evidence in the record, in the form of previous decisions of the defendant that had been admitted, that supported the defendant's contention that its refusal to grant the plaintiff's children free school accommodations was consistent with its internal policies and its prior application of those policies.

[8] See footnote 3 of this opinion.

The judgment is affirmed.

In this opinion the other judges concurred.

STANLEY KOSIOREK, EXECUTOR (ESTATE OF STANISLAW KOSIOREK) *v.* JACEK I. SMIGELSKI (AC 32919)

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

Syllabus

The plaintiff K, executor of the estate of the decedent, sought to recover damages from the defendants, M Co. and S, for, inter alia, breach of contract. K had hired S to represent the estate in an action against B involving certain real property of the estate, and he signed a fee agreement both in his individual capacity and as executor of the decedent's estate. The fee agreement consisted of two pages, but K was shown only the second page that he had signed. The estate thereafter settled the case with B, who agreed to quitclaim the property to the estate, which then sold the property. From the proceeds of the sale, S paid himself $65,833.33, plus a retainer of $5000, for a total of $70,833.33. The Probate Court disallowed the fee, finding it excessive and unreasonable, determined that S was entitled to a fee of $15,000, plus $1000 for expenses, and ordered that $54,833.33 be returned to the estate, which S failed to do. K thereafter brought this action, alleging claims for, inter alia, breach of contract, breach of the covenant of good faith and fair dealing and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). After the matter was tried to a jury, the trial court granted the motion for a directed verdict filed by M Co., but denied S's motion for a directed verdict. Thereafter, the jury returned a verdict in favor of K as against S, and the trial court rendered judgment for K in accordance with the verdict, from which S appealed and K cross appealed to this court. *Held*:

1. S could not prevail on his claim that the trial court, in denying his motion to implead K individually, improperly determined that K, individually, was not a necessary and indispensable party; S failed to demonstrate why K, individually, was a necessary and indispensable party to this litigation, as K, acting in his capacity as executor of the decedent's estate, brought this action against S to recover the legal fees determined to be excessive by the Probate Court and, thus, properly acted on behalf of the estate and filed the action against the individual responsible to the estate for the missing funds.

2. Contrary to the claim of S, under the circumstances of this case the plaintiff was not required to present expert testimony with respect to the issue of the reasonableness of S's fees for legal services.

3. S's claim that K failed to prove damages was unavailing, as K introduced evidence, via the Probate Court decree, that a reasonable fee in the present case was $15,000, plus $1000 for expenses, that S paid himself a fee of $65,833.33 plus a $5000 retainer, and, thus, that the estate was damaged in the amount of $54,833.33; furthermore, if the fee agreement constituted a valid contract, it would not have relieved S of his obligations to the estate and, therefore, S's claim of estoppel and his claim regarding the validity of the fees based on the existence of a contract failed.

4. The trial court properly submitted the CUTPA claim for the jury's consideration; K presented evidence showing that S failed to provide K with the entire fee agreement or to explain the nature of the contingency agreement at the time it was executed, and that S had not kept accurate time records, paid himself an unreasonable fee and refused to return the disallowed fee to the estate, which related to the entrepreneurial aspects of legal practice and was the required evidence for a CUTPA claim.

5. The trial court properly denied S's motion for a directed verdict as to the statutory theft count, there having been ample evidence supporting the jury's conclusion regarding that count.

6. There was no merit to S's claim that the trial court improperly permitted the probate judge to testify as an expert witness, as the record showed that the probate judge testified as a fact witness, was not asked to provide any expert testimony and did not offer any such testimony; moreover, the trial court's ruling precluding S from questioning the probate judge about whether she had any assistance in writing her decision did not improperly limit S's cross-examination but, rather, properly considered the sanctity of the judicial deliberative process.

7. S could not prevail on his claim that the trial court improperly failed to adapt the jury charge to the issues, pleadings and evidence introduced at trial, S having failed to provide any citation or legal analysis to support his contention; moreover, S's claim that the trial court improperly instructed the jury on the rules of professional conduct governing determination of reasonableness of attorney's fees was unavailing, as the trial court was required to give preclusive effect to the decree of the Probate Court and there was evidence for the jury to compare the work and fees charged by S and K's previous attorney.

8. The trial court did not abuse its discretion in precluding S's expert, E, from offering testimony about a second appraisal done in September, 2006, S having failed to disclose that E would offer expert testimony regarding that appraisal; moreover, S's claim that the trial court improperly questioned E regarding the difference between a comparative market analysis and an appraisal was not reviewable, S having failed to preserve the claim by objecting to the court's questions.

9. Contrary to the claim of K on cross appeal, the trial court properly granted M Co.'s motion for a directed verdict as to K's common-law cause of action for fraudulent transfer, which was based on a claim that S's transfer of two thirds of his interest in M Co. was done with the fraudulent intent to deprive the estate of access to S's assets, there having been no evidence that the conveyance was done for less than fair and reasonable consideration or showing that the transferees actively participated in a fraudulent conveyance; nevertheless, the trial court improperly granted M Co.'s motion for a directed verdict as to K's statutory (§ 52-552e) claim of fraudulent conveyance, as there is no requirement for a fraudulent intent with respect to the transferees in a claim under § 52-552e, and there was evidence from which the jury could have concluded that S transferred his interest with an actual intent to hinder, delay or defraud the estate, which was a creditor of S.

Argued May 16—officially released October 23, 2012

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 court, *Dolan*, *J.*, granted the plaintiff's motion to cite in 122 Main Street Associates, LLC, as a party defendant; thereafter, the court, *Pittman*, *J.*, denied the named defendant's motion to implead Stanley Kosiorek as a party defendant; subsequently, the named defendant filed a counterclaim and the matter was tried to the jury before *Swienton*, *J.*; thereafter, the court, *Swienton*, *J.*, denied the named defendant's motion to preclude certain evidence, and granted the motion for a directed verdict filed by the defendant 122 Main Street Associates, LLC, and rendered judgment thereon; subsequently, the court, *Swienton*, *J.*, denied the named defendant's motion for a directed verdict; verdict for the plaintiff; thereafter, the court, *Swienton*, *J.*, denied the named defendant's motion to set aside the verdict and the plaintiff's motion for punitive damages, and granted the plaintiff's motion for attorney's fees and costs; subsequently, the court, *Swienton*, *J.*, rendered judgment for the plaintiff in accordance with the verdict, from which the named defendant appealed and

the plaintiff cross appealed to this court. *Reversed in part; further proceedings.*

Jacek I. Smigelski, pro se, the appellant-cross appellee (defendant).

William J. Sweeney, Jr., for the appellee-cross appellant (plaintiff).

John A. Barbieri, for the cross appellee (defendant 122 Main Street Associates, LLC).

Opinion

DiPENTIMA, C. J. The self-represented defendant, Jacek I. Smigelski,[1] appeals from the judgment of the trial court rendered in favor of the plaintiff, Stanley Kosiorek, executor of the estate of Stanislaw Kosiorek, following a jury trial.[2] On appeal, the defendant presents a number of overlapping claims of error that stem primarily from the court's denial of his motion to set aside the verdict and for a directed verdict. The plaintiff filed a cross appeal from the judgment of the court directing a verdict in favor of 122 Main Street Associates, LLC, formerly known as 122 Main Street, LLC (122 Main Street), with respect to the counts of the plaintiff's revised complaint alleging common-law and statutory fraudulent conveyance. We are not persuaded by any of the issues raised in the defendant's appeal and affirm the judgment of the trial court. With respect to the cross appeal, we agree in part with the plaintiff and reverse a portion of the judgment of the trial court.

[1] According to the judicial branch website, the defendant was admitted to practice law in Connecticut on November 20, 1986. Effective March 3, 2011, the defendant was suspended from the practice of law for a period of fifteen months. See generally *Disciplinary Counsel* v. *Smigelski*, 124 Conn. App. 81, 4 A.3d 336 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1004, cert. denied, U.S. , 132 S. Ct. 101, 181 L. Ed. 2d 28 (2011).

[2] Prior to trial, the trial court granted a motion by the plaintiff to cite in 122 Main Street Associates, LLC, as a defendant. For clarity, we refer in this opinion to Smigelski as the defendant and to 122 Main Street Associates, LLC, as 122 Main Street.

The jury reasonably could have found the following facts. In May or June, 2004, Stanley Kosiorek spoke with attorney John Matulis regarding a probate matter. His father, Stanislaw Kosiorek, had died[3] and the family home located on Terra Road in Plainville had been transferred to the decedent's second wife, Bronislawa Kosiorek.[4] The transfer of the property was completed approximately six weeks before his death. Stanley Kosiorek was appointed executor of the decedent's estate on July 12, 2004. Matulis obtained an order from the Probate Court granting the children of Stanislaw Kosiorek authority to assume responsibility for the body and to make arrangements for a wake, funeral and interment. Next, Matulis began investigating whether the Terra Road property had been transferred validly to Bronislawa Kosiorek. Matulis commenced an action on behalf of Stanley Kosiorek and his siblings[5] against Bronislawa Kosiorek seeking (1) a judgment declaring the deed transferring ownership of the property invalid and (2) a declaratory judgment that the marriage between Stanislaw Kosiorek and Bronislawa Kosiorek was invalid.

The case went to a judicial pretrial, and a court annexed mediation occurred in late 2005 or early 2006. Stanley Kosiorek and his siblings offered $25,000 in exchange for a return of the house to the estate. This offer was rejected, as Bronislawa Kosiorek sought to receive $45,000. On March 21, 2006, Matulis sent a letter to Stanley Kosiorek and his siblings detailing the options following the unsuccessful mediation. In this letter, Matulis stated that Bronislawa Kosiorek would not accept less than $45,000 in exchange for transferring

[3] Stanislaw Kosiorek died on May 16, 2004.

[4] Stanley Kosiorek testified that no one in his family knew Bronislawa Kosiorek or that his father had been married for a second time.

[5] Stanley Kosiorek was a plaintiff in both his individual capacity and as executor of the decedent's estate. The other plaintiffs were Kazimierz Kosiorek, John Kosiorek, Diane Reynolds, Helen Kosiorek, Teresa Caudillo, Krystyna Jacobson and Stanislaw Wisniewski.

the house to the estate. Ultimately, Matulis made the following recommendation: "It is my belief that if this matter could be settled along the lines recommended by Judge [Richard A.] Robinson and [Bronislawa Kosiorek] be paid no more than $40,000.00 that the settlement would be far and away in the best interests of the family."

A trial was scheduled to begin in early August, 2006. At some point prior to the trial date, Matulis learned that Stanley Kosiorek had filed an application with the Probate Court seeking permission to sell the house to his son. Matulis informed him that the estate could not sell an asset that it did not own. A few days later, Stanley Kosiorek informed Matulis that he and his siblings had decided to hire a different lawyer. Matulis filed a motion to withdraw his appearance and sent a final bill. For the work completed over a two year time period, Matulis' law firm was paid $7732 by the children of the decedent.

In June, 2006, Stanley Kosiorek hired the defendant to represent the estate in the action against Bronislawa Kosiorek. Stanley Kosiorek signed a fee agreement both in his individual capacity and as executor of the decedent's estate. The fee agreement consisted of two pages; however, Stanley Kosiorek was shown only the second page that he had signed. The first page of the agreement set forth the fee arrangement as follows: "It is agreed that the fee for legal services rendered by [the defendant] will be based on an hourly charge of $225.00 per hour or it will be contingent upon recovery of benefits and shall be ONE-THIRD of the gross judgment or settlement, [whichever] amount is greater." Stanley Kosiorek, not having seen the paragraph, believed that the defendant's fee would be calculated on a hourly basis of $250 per hour. The defendant was paid a retainer of $5000.[6]

[6] Kazimierz Kosiorek issued a check for $5000 to pay the defendant's retainer because, at that time, the estate had no money.

Stanley Kosiorek obtained the file from Matulis, provided it to the defendant, and informed the defendant of details regarding the unsuccessful mediation.

Prior to trial, the estate and Bronislawa Kosiorek settled the case. In exchange for $35,000, Bronislawa Kosiorek agreed to quitclaim the deed to the property to the estate.[7] The parties also exchanged mutual general releases.

After the estate became the owner of the property, it entered into a sales agreement with Stanley Kosiorek's son and daughter-in-law. Although they agreed to purchase the property for $170,000, the son and daughter-in-law were unable to obtain a mortgage. To complete this transaction, the estate raised the price of the property to $212,500. Stanley Kosiorek and his siblings agreed to make a gift of equity of $42,500 to facilitate the sale of the property. Following approval of this transaction by the Probate Court, the defendant prepared a deed to transfer the property in exchange for $212,500. At the closing on December 21, 2006, the estate received $155,300.82.

Five days later, Stanley Kosiorek went to the defendant's office and received a disbursement letter. The defendant calculated his fees as follows: the value of the property was $257,000[8] and therefore his fee was one third of that amount, or $85,665.81, plus a probate fee of $1004.99, less a courtesy discount of $14,832.48 and less a retainer of $5000 for a total due to the defendant of $66,838.32. This amount was subtracted from the net proceeds of the closing and paid to the defendant, thus leaving the estate with $88,462.50. Stanley

[7] Kazimierz Kosiorek issued a check for $35,000 to the estate to fund the payment to Bronislawa Kosiorek.

[8] This amount came from a comparative market analysis prepared for Bronislawa Kosiorek.

Kosiorek had expected to receive $155,300 and to pay the defendant at a later date.

Stanley Kosiorek left the defendant's office "[s]peechless and stunned . . . ." He spoke with Kazimierz Kosiorek and then scheduled a meeting with the defendant. The defendant failed to appear at this meeting, and Stanley Kosiorek obtained new counsel. In a letter sent to the defendant, the new attorney, William J. Sweeney, Jr., indicated that he been retained to represent the estate with respect to the lawsuit against Bronislawa Kosiorek as well as any and all matters in the Probate Court. The letter requested the defendant to turn the file over, and advised that there would be claims against the defendant for legal and ethical breaches, namely, settling the lawsuit of the estate without Probate Court approval and charging an unreasonable fee. Finally, the letter requested that the fees retained by the defendant be placed in escrow.

Stanley Kosiorek filed an inventory and accounting in the Probate Court on behalf of the estate. In the administrative expenses, he listed the defendant's fee of $70,833.33. In January, 2007, a hearing was held regarding the defendant's fee. In May, 2007, the Probate Court issued a decree disallowing the defendant's fee, finding it excessive and unreasonable.[9] The Probate Court determined that the defendant was entitled to a fee of $15,000, plus $1000 for expenses. Accordingly, the Probate Court ordered the defendant to restore $54,833.33 to the estate. No appeal was taken from the decree of the Probate Court.

On July 6, 2007, the plaintiff filed an application for a prejudgment remedy to secure $54,833.33 of the defendant's assets to prevent him from fraudulently transferring or disposing of assets. The court granted this

[9] During these proceedings, the defendant provided the estate with an amended disbursement letter stating that he was entitled to one third of the $212,500, rather than the $257,000 he had initially used to calculate

application on December 20, 2007. On December 28, 2007, the plaintiff commenced this action. On September 17, 2008, the plaintiff, pursuant to General Statutes § 52-102, moved to cite in 122 Main Street as a party defendant. The court granted this motion on December 12, 2008.

On October 9, 2009, the plaintiff filed a revised nine count complaint. Specifically, it alleged the following causes of action against the defendant: (1) breach of contract, (2) breach of good faith and fair dealing, (3) unjust enrichment, (4) breach of fiduciary duty, (5) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (6) civil conversion in violation of General Statutes § 52-564. The plaintiff also alleged two counts against 122 Main Street: (1) fraudulent conveyance and (2) violation of the Uniform Fraudulent Transfer Act, General Statutes § 52-552a et seq. The defendant responded with an answer, special defenses and a counterclaim. With respect to the two counts directed against it, 122 Main Street filed an answer.

Both the defendant and 122 Main Street filed motions for a directed verdict. The court concluded that the plaintiff had failed to present proof required to prevail on the two causes of action relating to 122 Main Street and therefore directed the verdict in its favor. The court reserved judgment on the defendant's motion. The jury returned a verdict in favor of the plaintiff with respect to all five counts. Additionally, the jury found that the plaintiff was entitled to punitive damages and attorney's fees under the CUTPA count, and 10 percent interest as to the civil conversion count. The jury awarded damages in the amount of $54,833.33. In accordance with this verdict, the court calculated the interest award to

his fee. The defendant, however, correspondingly reduced his "courtesy discount" to $999.30.

be $20,754.74 for a subtotal of $75,587.74. The court then trebled that amount for a total damages award of $226,762.20.

The plaintiff then filed a motion for punitive damages and attorney's fees pursuant to the CUTPA count. The court declined to award any punitive damages. The court did, however, award attorney's fees in the amount of $68,011.50 and costs in the amount of $3684.59, for a total of $71,696.09. The total amount awarded to the plaintiff was $298,458.29. These appeals followed. Additional facts will be set forth as necessary.

I

DEFENDANT'S APPEAL

The defendant first claims that the court improperly determined that Stanley Kosiorek, individually, was not a necessary and indispensable party. Specifically, he argues that because his fee was earned after the death of Stanislaw Kosiorek, Stanley Kosiorek personally incurred the debt caused by the defendant's disallowed legal fees. In other words, according to the defendant, Stanley Kosiorek "must personally reimburse the estate for the disallowed fee or litigate the issue of the fees with the defendant, which he did not do." We are not persuaded.

On April 29, 2009, the defendant filed a motion to implead Stanley Kosiorek, individually, pursuant to Practice Book § 10-11.[10] The court denied this motion without comment on May 20, 2009. At no point did the defendant file a motion to strike pursuant to Practice

[10] Practice Book § 10-11 (a) provides in relevant part: "A defendant in any civil action may move the court for permission as a third party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to such defendant for all or part of the plaintiff's claim against him or her. . . ."

Book § 10-39.[11] "[T]he failure to join an indispensable party is not a [subject matter] jurisdictional defect. . . . Except as provided in Sections 10-44 and 11-3 no action shall be defeated by the nonjoinder . . . of parties. . . . Practice Book § 9-19. Additionally, [a]s set forth in Section 10-39, the exclusive remedy for nonjoinder of parties is by motion to strike." (Citation omitted; internal quotation marks omitted.) *Bauer* v. *Souto*, 277 Conn. 829, 838–39, 896 A.2d 90 (2006); see also *George* v. *St. Ann's Church*, 182 Conn. 322, 325, 438 A.2d 97 (1980) (filing of motion to strike is exclusive remedy to nonjoinder of indispensable parties).

This court has stated that "when an action cannot be disposed of properly on its merits because of the absence of an indispensable party, the defect is not waivable and can be addressed by this court even if not timely raised by the parties. See *W. G. Glenney Co.* v. *Bianco*, 27 Conn. App. 199, 202–203, 604 A.2d 1345 (1992); *Gaudio* v. *Gaudio*, 23 Conn. App. 287, 305, 580 A.2d 1212, cert. denied, 217 Conn. 803, 584 A.2d 471 (1990). Parties are considered indispensable when they not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final [disposition] may be . . . inconsistent with equity and good conscience. . . . Indispensable parties must be joined

[11] Practice Book § 10-39 provides in relevant part: "(a) Whenever any party wishes to contest . . . (3) the legal sufficiency of any such complaint, counterclaim or cross complaint, or any count thereof, because of the absence of any necessary party or, pursuant to Section 17-56 (b), the failure to join or give notice to any interested person . . . that party may do so by filing a motion to strike the contested pleading or part thereof.

"(b) A motion to strike on the ground of the nonjoinder of a necessary party or noncompliance with Section 17-56 (b) must give the name and residence of the missing party or interested person or such information as the moving party has as to the identity and residence of the missing party or interested person and must state the missing party's or interested person's interest in the cause of action."

because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action]. . . . Necessary parties, in contrast, are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Demarest* v. *Fire Dept.*, 76 Conn. App. 24, 28, 817 A.2d 1285 (2003).

The defendant appears to argue that Stanley Kosiorek, individually, is liable to the estate for the defendant's fee that the Probate Court disallowed. Aside from general citations to a Connecticut probate treatise, the defendant fails to demonstrate why Stanley Kosiorek, individually, is a necessary and indispensable party to this litigation. Stanley Kosiorek, acting in his capacity as executor of the estate, sued the defendant to recover the legal fees determined to be excessive by the Probate Court. It is axiomatic that probate fiduciaries may commence legal action in their representative capacity. See R. Folsom, Connecticut Estates Practice Series: Probate Litigation in Connecticut 2d (2011) § 4:1. In other words, Stanley Kosiorek, acting on behalf of the estate, properly filed suit against the individual responsible to the estate for missing funds. If, hypothetically, Stanley Kosiorek were to breach his duty to the estate and withhold the funds recovered by this lawsuit, then the estate would have a claim against Stanley Kosiorek, individually. On the facts of this record, however, we are not

persuaded by the defendant's claim that Stanley Kosiorek, individually, was a necessary and indispensable party to this action.

II

The defendant next claims that the court improperly denied his motion for a directed verdict. Specifically, he argues that (1) expert testimony was required as to the issue of whether the legal fees charged were reasonable, (2) the plaintiff failed to prove damages, (3) there was no evidence to support the CUTPA count and (4) there was no evidence to support the civil conversion count. We are not persuaded.[12]

"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

[12] As a result of our conclusions regarding these issues, we need not address the defendant's claims regarding the breach of fiduciary duty and breach of good faith and fair dealing counts. Cf. *Green* v. *Yankee Gas Corp.*, 120 Conn. App. 804, 805, 993 A.2d 982 (2010) ("[t]he logic underlying the [general verdict] rule is that [w]here there was an error free path available to the jury to reach its verdict, and no special interrogatories were submitted showing which road the jury went down, any judgment rendered on such a verdict must be affirmed" [internal quotation marks omitted]); *Sturgeon* v. *Sturgeon*, 114 Conn. App. 682, 687, 971 A.2d 691 (same), cert. denied, 293 Conn. 903, 975 A.2d 1278 (2009). In this case, the award of damages contained in the judgment is founded on the jury's conclusions with respect to the CUTPA and civil conversion counts. Because we conclude that there is no error with respect to these counts, we need not consider the defendant's claims with respect to the other causes of action set forth in the operative complaint.

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.) *Sutcliffe* v. *FleetBoston Financial Corp.*, 108 Conn. App. 799, 811, 950 A.2d 544 (2008).

A

The defendant first argues that expert testimony was required on the issue of his legal fees. Specifically, he contends that the issue of the fees charged in this case was outside the common knowledge of the members of the jury, and, therefore, expert testimony was required. The plaintiff counters that the court properly determined that, under the circumstances of this case, expert testimony was not required. We agree with the plaintiff.[13]

Underlying the various causes of actions set forth in the revised complaint was the need for the jury to determine whether the legal fees charged to the estate were reasonable.[14] Because this determination is

[13] We employ the plenary standard of review with respect to this claim. See *St. Onge*, *Stewart*, *Johnson & Reens*, *LLC* v. *Media Group*, *Inc.*, 84 Conn. App. 88, 92, 851 A.2d 1242, cert. denied, 271 Conn. 918, 859 A.2d 570 (2004); see also *Ackerly & Brown*, *LLP* v. *Smithies*, 109 Conn. App. 584, 587–88, 952 A.2d 110 (2008) (issue of whether expert testimony required reviewed under plenary standard).

[14] In order to assess the reasonableness of fees, several factors must be considered, including the time and labor involved, the novelty and difficulty of the questions presented and the customary fee charged in the locality. *St. Onge*, *Stewart*, *Johnson & Reens*, *LLC* v. *Media Group*, *Inc.*, 84 Conn. App. 88, 93, 851 A.2d 1242, cert. denied, 271 Conn. 918, 859 A.2d 570 (2004).

beyond the experience of an ordinary fact finder, expert testimony generally is required. *Celentano* v. *Grudberg*, 76 Conn. App. 119, 126, 818 A.2d 841, cert. denied, 264 Conn. 904, 823 A.2d 1220 (2003). "The general rule does not, however, apply to cases where there is present such an obvious and gross want of care and skill that the neglect is clear even to a layperson." (Internal quotation marks omitted.) *St. Onge, Stewart, Johnson & Reens, LLC* v. *Media Group, Inc.*, 84 Conn. App. 88, 95, 851 A.2d 1242, cert. denied, 271 Conn. 918, 859 A.2d 570 (2004). We expressly have held that "the need to present expert testimony in collection cases is best decided, not by a bright line rule, but by careful examination of the circumstances of each particular case." Id., 96.

We agree with the trial court that expert testimony was not required in this case. The jury heard testimony from Matulis, who had worked on the dispute between the estate and Bronislawa Kosiorek for over two years, had negotiated a settlement that was $10,000 more than the one eventually achieved by the defendant and had charged the estate approximately $7700. The jury also was presented with the decree of the Probate Court, which determined that the defendant's fee was unreasonable.[15] Under the unique circumstances of this case,

[15] In *Disciplinary Counsel* v. *Smigelski*, 124 Conn. App. 81, 97, 4 A.3d 336 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1004, cert. denied, U.S. , 132 S. Ct. 101, 181 L. Ed. 2d 28 (2011), we noted that "in *Gaynor* v. *Payne*, 261 Conn. 585, 598, 804 A.2d 170 (2002), our Supreme Court held that courts of general jurisdiction must give preclusive effect to Probate Court decrees adjudicating the validity of an executor's accounting for his performance of his duties to the estate. Accordingly, in this case, the court was required to take into account the Plainville Probate Court's adjudication of the fee to which the defendant was entitled for his services for Stanley Kosiorek as executor of the Kosiorek estate."

We also noted that "[i]t is axiomatic that, to collect a contingent fee for services rendered, an attorney must establish a nexus between fee and service. In this case, there is no such nexus between the defendant's services and the market value, however calculated, of the Kosiorek estate." *Disciplinary Counsel* v. *Smigelski*, supra, 124 Conn. App. 90.

we conclude that the plaintiff was not required to present expert testimony with respect to the issue of the reasonableness of the defendant's fees for legal services.

B

The defendant next argues that the plaintiff failed to prove damages. Although the defendant's claims are not entirely clear from his brief, he appears to claim that (1) the plaintiff failed to present expert testimony as to the amount of damages and the duty of attorneys to charge only reasonable fees, (2) the plaintiff should have been estopped from claiming damages after having received the benefits of the defendant's legal services and (3) because the plaintiff acknowledged a valid contract, the terms of the contract, including the issue of legal fees, must also be valid. We are not persuaded.

As we have noted, the plaintiff introduced evidence, via the Probate Court decree, that a reasonable fee in the present case was $15,000, plus $1000 for expenses. The defendant had paid himself a fee of $65,833.33. The defendant had been paid a $5000 retainer, and, therefore, the estate was damaged in the amount of $54,833.33. Additionally, we note that "[a] fee agreement is not self-executing. It does not and cannot authorize an attorney to violate his fiduciary obligation to his client." *Disciplinary Counsel* v. *Smigelski*, 124 Conn. App. 81, 89, 4 A.3d 336 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1004, cert. denied, U.S. , 132 S. Ct. 101, 181 L. Ed. 2d 28 (2011). In other words, a valid contract would not relieve the defendant of his obligations to the estate. Therefore, his estoppel argument and his claim regarding the validity of the fees based on the existence of a contract must fail.

C

The defendant next argues that there was no evidence to support the CUTPA count. Specifically, he contends

again that expert testimony was required to establish the unreasonable nature of his fees. We need not revisit this contention. The defendant also maintains that there were no allegations or proof of any misleading or unfair conduct. We are not persuaded.

"CUTPA provides in relevant part 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. General Statutes § 42-110b (a). Connecticut courts, when determining whether a practice violates CUTPA, will consider (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, 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 (or competitors or other businessmen). . . . 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. . . . Whether a practice is unfair and thus violates CUTPA is an issue of fact. . . . The facts found must be viewed within the context of the totality of circumstances which are uniquely available to the trial court. . . . Additionally, our Supreme Court has stated that [a]ll 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." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 714–15, 41 A.3d 1077 (2012).

We now examine the scope of CUTPA in the context of the practice of law. In *Heslin* v. *Connecticut Law*

Clinic of Trantolo & Trantolo, 190 Conn. 510, 520–21, 461 A.2d 938 (1983), our Supreme Court concluded that not all aspects relating to the conduct of the profession of law were excluded from the purview of CUTPA. More recently, we explained: "In general, CUTPA applies to attorney conduct, but only as to the entrepreneurial aspects of legal practice. . . . Professional negligence, or malpractice, does not fall under CUTPA." (Citation omitted.) *Anderson* v. *Schoenhorn*, 89 Conn. App. 666, 674, 874 A.2d 798 (2005); see also *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 34–35, 699 A.2d 964 (1997).

In the present case, the plaintiff presented evidence that the defendant failed to provide Stanley Kosiorek with the entire fee agreement or to explain the nature of the contingency agreement at the time it was executed. Additionally, there was evidence that the defendant had not kept accurate time records, paid himself an unreasonable fee and refused to return the disallowed fee to the estate. "A party seeking to recover damages under CUTPA must meet two threshold requirements. First, he must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he must present evidence providing the court with a basis for a reasonable estimate of the damages suffered." (Internal quotation marks omitted.) *Anderson* v. *Schoenhorn*, supra, 89 Conn. App. 675. The plaintiff presented the required evidence, and this evidence related to the entrepreneurial aspects of legal practice. Accordingly, the court properly submitted the CUTPA claim for the jury's consideration.[16]

[16] The defendant also argues that the court improperly awarded punitive damages under CUTPA. The record does not support this claim. The court stated that "the conduct by the defendant is offensive and would qualify for an award of punitive damages. . . . Absent the jury's finding on the count of civil conversion, which provides for treble damages as well as the plaintiff's entitlement to attorney's fees under CUTPA, the court would surely make a specific award of punitive damages. *However, in light of the reasons set forth, the court will not award any further damages for the*

D

The defendant next argues that there was no evidence to support the statutory theft count.[17] Specifically, he argues that the plaintiff "failed to prove by competent evidence that the fee as retained by the defendant is in fact the property of the [estate] or that the defendant had no right to retain such a fee." We are not persuaded.

"The elements that the plaintiffs must prove to obtain treble damages under the civil theft statute, § 52-564, are the same as the elements required to prove larceny, pursuant to General Statutes § 53a-119. . . . A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . . It must be shown that (1) there was an intent to do the act complained of, (2) the act was done wrongfully, and (3) the act was committed against an owner. . . . The essential cause of action is a wrongful exercise of dominion over personal property of another." (Citations omitted; internal quotation marks omitted.) *Sullivan* v. *Delisa*, 101 Conn. App. 605, 619–20, 923 A.2d 760, cert. denied, 283 Conn. 908, 928 A.2d 540 (2007); see also *Rana* v. *Terdjanian*, 136 Conn. App. 99, 113–14, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012); M. Taylor & D. Krisch, Encyclopedia of Connecticut Causes of Action (2009) p. 106.

In the present case, the plaintiff presented evidence that the defendant wrongfully withheld $54,833.33. The estate is the owner of that money. Moreover, despite the defendant's assertion, the manner in which he assessed

CUTPA claim." (Emphasis added.) Accordingly, we need not review this claim because the court, in fact, did not award punitive damages pursuant to CUTPA.

[17] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

this fee was not valid; it was an unreasonable fee as determined by the Probate Court and later by the office of the disciplinary counsel.[18] There was ample evidence permitting the jury to reasonably and legally reach its conclusion regarding the statutory theft count, and, therefore, the court properly denied the defendant's motion for a directed verdict.

III

The defendant next claims that the court improperly permitted the probate judge to testify as an expert witness. Specifically, he argues that "[a]llowing testimony of the judge here was error because it was clearly a back door attempt to provide an 'expert opinion' despite plaintiff's counsel's disingenuous statements to the contrary." He also contends that he was deprived of his right to cross-examination because he was not permitted to ask questions regarding the process of writing the judge's decision.

The following additional facts are necessary for our discussion. The defendant filed a motion in limine to preclude the testimony of the Honorable Heidi Famiglietti, judge of probate for the district of Plainville. Counsel for the plaintiff countered that Judge Famiglietti was there to testify as a fact witness, with respect to statements made by the defendant, as well as to her recollection of the probate proceedings. The court denied the defendant's motion without prejudice.

During her testimony, Judge Famiglietti stated that she wrote a memorandum of decision in conjunction with her decree as to the final accounting filed by Stanley Kosiorek. In this decree, Judge Famiglietti found that "the attorney fees [for the defendant] are excessive and unreasonable. A fee to [the defendant] of $15,000.00

[18] See *Disciplinary Counsel* v. *Smigelski*, supra, 124 Conn. App. 81.

plus $1,000.00 for reimbursement of costs is reasonable." During cross-examination, the defendant asked whether Judge Famiglietti had any assistance in writing her decision. The court sustained the plaintiff's objection, and permitted the defendant to make an offer of proof outside of the presence of the jury.

The defendant set forth the following: "I was at the Probate Court maybe a year or two ago, inspected the file, the entire file, and found several drafts of the memorandum of decision marked up and with the facts—facts as to [the] Probate Court administrator's office in Hartford." The trial court then determined that the question at issue, stated succinctly, was whether Judge Famiglietti had any assistance in writing her decision. The court sustained the objection and stated that "going behind a judge's decision . . . is just like the A number one thing that people are not allowed to do. I mean, that's going into the thought process of a judge in issuing a decision, and that is not something that is allowed ever, ever."

We have carefully reviewed the testimony of Judge Famiglietti. Her testimony was limited to that of a fact witness. She was not asked to provide expert testimony, nor did she offer any. This claim, therefore, is without merit.

As to the defendant's claim that the court improperly limited his cross-examination, we find it meritless. "The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . Furthermore, [t]o establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial.

. . . In order to establish reversible error on an evidentiary impropriety, however, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 286, 880 A.2d 985 (2005). Here, in its ruling, the trial court properly considered the sanctity of the judicial deliberative process.[19] The defendant has failed to establish that the preclusion of testimony as to Judge Famiglietti's decision-making process was an abuse of discretion.

[19] See, e.g., *In the Matter of Enforcement of a Subpoena*, 463 Mass. 162, 172–73, 972 N.E.2d 1022 (2012) ("[T]he need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the founding. Consequently, we join other courts, State and Federal, that, when faced with attempts by third parties to extract from judges their deliberative thought processes, have uniformly recognized a judicial deliberative privilege. See [*Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Counsel of the Eleventh Circuit*, 783 F.2d 1488, 1517–20 (11th Cir.), cert. denied, 477 U.S. 904, 106 S. Ct. 3272, 91 L. Ed. 2d 562 (1984)]; *Thomas* v. *Page*, 361 Ill. App. 3d 484, 491, [837 N.E.2d 483 (2005)]; *In re Cohen's Estate*, 105 Misc. 724, [726–27, 174 N.Y.S. 427 (Surrogate's Ct. 1919)]; *Leber* v. *Stretton*, [928 A.2d 262, 270 (Pa. Super. 2007), appeal denied, 596 Pa. 733, 945 A.2d 172 (2008)]; *State ex rel. Kaufman* v. *Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727 [2000]. See also *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 [1941] [mental processes of judge cannot be subjected to scrutiny; '[s]uch an examination of a judge would be destructive of judicial responsibility']; *Grant* v. *Shalala*, 989 F.2d 1332, 1344 [3d Cir. 1993] [noting threat to administrative law judges and serious interference with ability to decide cases solely on evidence and law if thought process subject to subsequent inquiry; '[i]t has long been recognized that attempts to probe the thought and decision making processes of judges . . . are generally improper']; *Nixon* v. *Sirica*, 487 F.2d 700, [740–42] [D.C. Cir. 1973] [MacKinnon, J., concurring in part and dissenting in part] [source of judicial privilege 'rooted in history and gains added force from the constitutional separation of powers']. To the extent that '[e]xpress authorities sustaining [a judicial privilege] are minimal,' it is 'undoubtedly because its existence and validity has been so universally recognized.' [Id., 740]. See [C.] Sorenson, Jr., Are Law Clerks Fair Game? Invading Judicial Confidentiality, 43 Val. U. L. Rev. 1, 66–67 [2008] ['[t]he relatively small amount of attention to the privilege in case law and secondary sources should not be attributed to the novelty or tenuousness of the privilege']; [R. Catz & J. Lange], Judicial Privilege, 22 Ga. L. Rev. 89, 115 [1987] ['[i]n two hundred years, few have discussed the [judicial] privilege and none have challenged it']."").

IV

The defendant next claims that the court improperly instructed the jury. Specifically, he argues that the court "improperly failed to adapt the jury charge to the issues, pleadings and evidence introduced at trial. The jury instructions are wrong in toto." Because of the inadequacy of his analysis of this audaciously expansive claim and the evidence before the jury, we are not convinced.

"Our standard of review concerning claims of instructional error is well settled. [J]ury instructions must be read as a whole and . . . are not to be judged in artificial isolation from the overall charge. . . . The whole charge must be considered from the standpoint of its effect on the jurors in guiding them to a proper verdict . . . . The trial court must adapt its instructions to the issues raised in order to give the jury reasonable guidance in reaching a verdict and not mislead them. . . . Claims of error addressed to the [jury] charge are tested by the pleadings and by the evidence . . . . The court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding. . . . The court should, however, submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence." (Citation omitted; internal quotation marks omitted.) *Rua* v. *Kirby*, 125 Conn. App. 514, 516–17, 8 A.3d 1123 (2010).

In his brief, the defendant sets forth certain general principles regarding jury instructions. He then argues that the court's instructions failed to guide the jury because the instructions failed to apply the general rules of law to the particular facts of this case. The defendant, however, has not provided any citation or legal analysis to support this contention. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an

inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Dreambuilders Construction, LLC* v. *Diamond*, 121 Conn. App. 554, 564, 997 A.2d 553 (2010); see also *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 580, 989 A.2d 606 ("mere conclusory assertions regarding a claim with no mention of relevant authority and minimal or no citations from the record will not suffice" [internal quotation marks omitted]), cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).[20]

The defendant also argues that the court improperly "instructed the jury on the rules of professional conduct governing determination of reasonableness of attorney's fees." Specifically, he maintains that there was no evidence for the jury to determine whether his fee was reasonable. As previously stated, this claim must fail. The trial court was required to give preclusive effect to the decree of the Probate Court. See *Disciplinary Counsel* v. *Smigelski*, supra, 124 Conn. App. 97; see also *Gaynor* v. *Payne*, 261 Conn. 585, 598, 804 A.2d 170 (2002). Additionally, there was evidence for the jury to compare the work and fees charged by the defendant and Matulis. For these reasons, we conclude that the defendant's challenge to the instructions given to the jury must fail.

V

The defendant's final claim is that the court improperly precluded certain testimony from his expert witness, Louis Evjen, a licensed real estate appraiser. He appears to argue that the court improperly prevented Evjen from offering testimony about a second appraisal he had performed in September, 2006, and that the court

[20] To the extent that the defendant challenges other aspects of the court's instructions, we decline to review them on the basis of an inadequate brief.

improperly asked Evjen about the difference between a comparative market analysis and an appraisal.

The following facts are necessary for our discussion. On March 15, 2010, the defendant disclosed Evjen as an expert as required by Practice Book § 13-4 (b) (1). The defendant indicated that Evjen would offer his expert opinion that the fair market value of the property was $248,000, as of August 14, 2006. The court permitted Evjen to provide his expert opinion regarding the value of the property.

The defendant then attempted to have Evjen testify about an appraisal completed in September, 2006, that listed the value of the property as $254,000. Counsel for the plaintiff objected on the ground that the appraisal was not disclosed pursuant to Practice Book § 13-4, and, therefore, it should not be admitted into evidence. The court ruled that this area had not been disclosed properly, and determined that Evjen was not permitted to testify about the September, 2006 appraisal.

After the parties had completed their examination of Evjen, the court asked him about the difference between a comparative market analysis and an appraisal. Evjen responded: "A comparative market analysis usually takes into consideration a property on the market. That's typical for a real estate—real estate agent to give you a market analysis, where an appraiser really is only dealing with the history or the sales from that neighborhood unless there's extenuating circumstances." He also explained that banks generally did not rely on comparative market analysis. Neither party had any follow up questions for Evjen following his colloquy with the court.

We begin by setting forth our standard of review. "[T]he trial court has wide discretion in ruling on the

admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . Even if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must not only be an evidentiary [impropriety], there also must be harm." (Internal quotation marks omitted.) *Szczycinska* v. *Acampora*, 125 Conn. App. 474, 478, 10 A.3d 531 (2010).

"Practice Book § 13-4 plainly requires a plaintiff to disclose: (1) the name of the expert witness; (2) the subject matter on which the expert is expected to testify; (3) the substance of the facts and opinions to which the expert is expected to testify; and (4) a summary of the ground for each opinion." (Internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 251, 9 A.3d 364 (2010). The defendant failed to disclose that Evjen would offer expert testimony regarding the September, 2006 appraisal. The court therefore did not abuse its discretion in precluding testimony regarding that subject.

With respect to the defendant's claim that the court improperly questioned Evjen regarding the difference between a comparative market analysis and an appraisal, we decline to review this unpreserved evidentiary claim. The defendant failed to object to the court's questions. "It is well settled that this court will not entertain claims of evidentiary error that were not distinctly raised before the trial court." *Wilderman* v. *Powers*, 110 Conn. App. 819, 828, 956 A.2d 613 (2008).

VI

PLAINTIFF'S CROSS APPEAL

In his cross appeal, the plaintiff claims that the court improperly directed the verdict in favor of 122 Main Street. Specifically, he argues that there was sufficient evidence for the jury to conclude that the transfer of the defendant's interest in 122 Main Street was done with the fraudulent intent to deprive the estate with access to his assets. We agree that the court improperly directed the verdict with respect to the statutory claim of fraudulent conveyance, but disagree with respect to the common-law claim.

The following facts are necessary for the resolution of this issue. The plaintiff's revised complaint set forth two causes of action against 122 Main Street.[21] Specifically, in count seven, the plaintiff claimed that the defendant fraudulently conveyed his interest in 122 Main Street to Julius J. Janusz and John T. Glowka. On December 20, 2007, the court entered a prejudgment remedy in the amount of $54,833.33 against the defendant. At that time, he was the sole owner of 122 Main Street, LLC. A few weeks later, the defendant changed the name of the entity to 122 Main Street Associates, LLC, and diluted his interest by adding Janusz and Glowka as members. The plaintiff alleged that this transfer was done without fair and sufficient consideration, and was done with the intent to hinder, delay and defraud the plaintiff, to protect and preserve the defendant's interest in the property and to prevent and hinder the plaintiff from collecting and receiving the proceeds due to the plaintiff as a result of the defendant's actions. In count eight of the revised complaint,

[21] The defendant described the property owned by 122 Main Street as an "office building with a parking lot attached to it for thirty-five cars. So, actually it consists of two parcels of real property. One is 21 Walnut Street, one is 122 Main Street, which is a corner of Walnut and Main."

the plaintiff asserted these allegations in the context of a violation of § 52-552e.[22] For count seven, the plaintiff sought to impose a constructive trust on $54,833.33, avoidance of the transfer or obligation to the extent necessary to satisfy his claim, an accounting of the money converted, and such other equitable relief as needed. For count eight, the plaintiff sought money damages, avoidance of the transfer or obligation to the extent necessary to satisfy his claim, an attachment or other provisional remedy against the asset transferred and an injunction against further disposition of the asset transferred.

The defendant testified during cross-examination that 122 Main Street, LLC, was a single member limited liability company from July 18, 2001, until January, 2008. The defendant also testified that a prejudgment remedy was entered against him in the amount of $54,833.33 on December 20, 2007. At this time the defendant had lost the fees he had paid himself from the estate in a "bad deal," and 122 Main Street was his major asset. He then transferred two thirds of his interest to Janusz and Glowka. Both were tenants of 122 Main Street, and there was no evidence that they were aware of the prejudgment remedy entered against the defendant. Each paid the defendant $25,000 in cash and gave him a note for $25,000 in exchange of a one-third share.

On October 8, 2010, 122 Main Street filed a motion for a directed verdict, and the court heard from the

[22] 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."

parties on October 12, 2010. It argued that the allegations in the complaint solely were against the defendant. It further claimed that Janusz and Glowka paid reasonable value for their interest. The plaintiff countered that 122 Main Street had failed to satisfy its burden to prove that a reasonable value had been paid. The plaintiff further argued that there existed questions of fact as to whether the transfer was made with a fraudulent intent and that the matter therefore should go to the jury to decide.

On October 13, 2010, the court granted the motion for a directed verdict filed by 122 Main Street. The court "determined that the plaintiff has failed to present the proof that the law requires to prevail on the two claims against [122 Main Street]. There was no evidence presented as to the fair market value of the building, so any determination by the jury that the consideration was deficient would be pure speculation."

We begin with our standard of review. "Whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary. . . . Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although 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. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . This court has emphasized two additional points with respect to motions to set aside a verdict that are equally applicable to motions for a directed verdict: First, the

plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Internal quotation marks omitted.) *Demiraj* v. *Uljaj*, 137 Conn. App. 800, 804–805, 50 A.3d 333 (2012).

"A party alleging a fraudulent transfer or conveyance under the common law bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations or (2) that the conveyance was made with a fraudulent intent in which the grantee participated. . . . The party seeking to set aside a fraudulent conveyance need not satisfy both of these tests. . . . These are also elements of an action brought pursuant to General Statutes §§ 52-552e (a) and 52-552f (a)." (Citations omitted; internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 394–95, 957 A.2d 836 (2008); see also *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 596, 930 A.2d 768, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007); *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 140–41, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002); see generally M. Taylor & D. Krisch, supra, pp. 20, 112–13.

On appeal, the plaintiff argues that the defendant improperly transferred two thirds of 122 Main Street "in an effort to dilute his biggest asset." The plaintiff contends that the court improperly directed the verdict because the jury reasonably and legally could have concluded that this transfer was done with fraudulent intent. We agree with the plaintiff with respect to the statutory claim of a fraudulent transfer.

In this case, the defendant was the transferor, Janusz and Glowka were the transferees, and the interest in

122 Main Street, initially owned 100 percent by the defendant, was the subject of the conveyance.[23] After reviewing the record, we see no evidence that Janusz and Glowka participated in a fraudulent conveyance. While there was evidence for the jury to conclude that the defendant fraudulently conveyed his two-thirds interest to Janusz and Glowka, we have not found, nor has the plaintiff referred to, any evidence that the two grantees participated in the defendant's scheme. See General Statutes § 52-552e (b) (1), (4) and (10).[24] Janusz testified that he and Glowka, after becoming aware of

[23] We disagree with the argument by 122 Main Street that it should not have been named a defendant in this case. On December 12, 2008, the court granted the plaintiff's motion to cite in 122 Main Street as a party defendant. The plaintiff's complaint alleges that 122 Main Street, as controlled by the defendant, was part of a fraudulent conveyance. The plaintiff also directs us to General Statutes § 34-134, which provides: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement." For these reasons, we are not persuaded by 122 Main Street's claim.

[24] General Statutes § 52-552e (b) provides: "In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

There was evidence that the defendant retained possession and control, albeit diminished, of 122 Main Street, he had been sued prior to the transfer of his 100 percent interest and that the transfer occurred shortly after he incurred a substantial debt.

the defendant's financial difficulties in 2006, approached him about becoming co-owners of the building. After reaching a purchase price agreeable to all three, the sale was completed. The evidence showed that Janusz was not aware of any claims against the defendant from the estate, and the defendant did not tell him about the prejudgment remedy entered against him.

At this point, we address the differences between the common-law cause of action for a fraudulent transfer and the statutory action under § 52-552e. In *Robinson* v. *Coughlin*, 266 Conn. 1, 9, 830 A.2d 1114 (2003), our Supreme Court noted that although the statute is largely an adoption and clarification of the standards of the common law of fraudulent conveyances, it is not a wholesale codification. See also *Hamrah* v. *Emerson*, Superior Court, judicial district of Fairfield, Docket No. CV-05-4012872 (August 20, 2009) (noting subtle differences in remedies between statutory and common-law actions).

In *Wieselman* v. *Hoeniger*, supra, 103 Conn. App. 591, this court identified a distinction between the statutory and common-law cause of action for fraudulent conveyance significant to this appeal. "[Section] 52-552e (a) provides in relevant part that [a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . . *Prior to the adoption of the act, the plaintiff had to prove (1) that the transferor had intent to defraud the creditor and (2) that the transferee shared in the transferor's fraudulent intent. . . . The plain language in § 52-552e addresses the fraudulent intent of the debtor and makes no mention of the fraudulent intent of the transferee.*" (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 598–99.

Guided by *Wieselman*, we conclude that the court properly granted the motion for a directed verdict with respect to the common-law cause of action for fraudulent transfer. There was no evidence that the conveyance was done for less than fair and reasonable consideration. Likewise, there was no evidence that either Janusz or Glowka, the transferees, actively participated in a fraudulent conveyance. The jury could not have reasonably or legally reached a verdict in favor of the plaintiff with respect to his claim of common-law fraudulent conveyance. The court, therefore, properly granted the motion for a directed verdict. With respect to the claim under § 52-552e, however, there is no requirement for a fraudulent intent with respect to the transferees. See id., 599. Because there was evidence for the jury to conclude that the defendant transferred his interest with an actual intent to hinder, delay or defraud the estate, a creditor of the defendant, we conclude that the court improperly granted the motion for a directed verdict with respect to the plaintiff's § 52-552e claim.[25]

The judgment is reversed only as to the granting of 122 Main Street's motion for a directed verdict as to the count of the revised complaint alleging a violation of § 52-552e and the case is remanded for further proceedings according to law. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[25] We note that the trial court did not discuss specifically this means of establishing a fraudulent transfer. Nevertheless, because the record reveals evidence that could support a finding that the transfer was done with a fraudulent intent, the motion for a directed verdict was granted improperly. See *Thomas* v. *West Haven*, 249 Conn. 385, 392, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); *Beale* v. *Yale-New Haven Hospital*, 89 Conn. App. 556, 565–66, 874 A.2d 259 (2005).

JACEK I. SMIGELSKI *v.* STANLEY KOSIOREK, EXECUTOR (ESTATE OF STANISLAW KOSIOREK), ET AL.
(AC 34250)

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

Syllabus

The plaintiff brought this action against the defendant K, individually and as executor of the estate of the decedent, for, inter alia, breach of contract and for a declaratory judgment that certain Probate Court decrees should be set aside. The plaintiff had represented K, in his fiduciary capacity, to clear title to certain property that was the estate's only asset, and the plaintiff also represented K in the administration of the estate, which included the sale of the property to a member of K's family. During the administration of the estate, the Probate Court issued two decrees, the first of which approved the sale of the house. Pursuant to the plaintiff's interpretation of the terms of the fee agreement with K, he paid himself $65,833.33, in addition to a retainer of $5000, for a total of $70,833.33 out of the estate funds that he was holding from the sale of the house. In its second decree, the Probate Court found that the plaintiff's fees were excessive, ordered the plaintiff to return $54,833.33 to the estate, and determined that a reasonable fee for the plaintiff's services was $15,000 plus $1000 for expert witness fees. The plaintiff refused to comply with the second decree. The trial court granted in part K's motion to dismiss with respect to the counts seeking a declaratory judgment and, thereafter, granted K's motion for summary judgment as to the plaintiff's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnification, concluding that those claims were barred by res judicata because they were essentially the same claims that were raised and adjudicated in a prior action involving the parties. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly granted K's motion for summary judgment on the ground of res judicata, which was based on his claim that res judicata did not apply because the claims in this case, unlike those in the prior action, were alleged against K in his individual capacity, and that K, in his individual capacity, was a separate party and not in privity with K in his fiduciary capacity; the trial court's finding that there was privity between K in his fiduciary and individual capacities, sufficient to justify preclusion under the doctrine of res judicata, was proper, as the claims in both actions were identical, the fee agreement to be interpreted was the same, K had, in his fiduciary and individual capacities, the same legal rights under the fee agreement that were sufficient to support a finding of privity, and

K's legal rights were sufficiently represented in the first action such that the application of res judicata did not yield an inequitable result.

2. The trial court properly dismissed the counts of the plaintiff's complaint seeking a declaratory judgment to set aside the decrees of the Probate Court that authorized the sale of the property and ordered the plaintiff to return the sum of $54,833.33 to the estate; the plaintiff did not allege a specific personal and legal interest in the decrees of the Probate Court, or that he was specially and injuriously affected by the decrees, and, therefore, he lacked standing to bring those claims.

3. The trial court did not abuse its discretion in denying the plaintiff's motion to disqualify K's counsel, in which the plaintiff claimed that K's attorney had a conflict of interest and could not ethically represent K in both his individual and fiduciary capacities; K's representation by counsel was an entitlement that belonged to K, not the plaintiff, and, thus, the plaintiff lacked standing to assert that issue, the plaintiff did not allege that he was classically aggrieved by counsel's representation of K in both his individual and fiduciary capacities, nor did he cite a statute that afforded him standing to raise the issue, and rule 8.3 (a) of the Rules of Professional Conduct, which requires attorneys of this state to report known misconduct of their colleagues to the appropriate professional authority, does not afford claimants standing to report that misconduct, or to assert the due process rights possessed by another individual.

Argued May 16—officially released October 23, 2012

Procedural History

Action to recover damages for, inter alia, breach of contract and for a declaratory judgment that certain Probate Court decrees should be set aside, brought to the Superior Court in the judicial district of New Britain, where the court, *Young*, *J.*, granted in part the defendants' motion to dismiss; thereafter, the court, *Pittman*, *J.*, denied the plaintiff's motion to disqualify the defendants' counsel; subsequently, the court, *Swienton*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jacek I. Smigelski, pro se, the appellant (plaintiff).

William J. Sweeney, *Jr.*, for the appellees (defendants).

PELLEGRINO, J. The self-represented plaintiff, Jacek I. Smigelski,[1] appeals from the judgment of the trial court, *Swienton*, *J.*, granting the October 21, 2011 motion for summary judgment of the defendant, Stanley Kosiorek, both individually and in his capacity as executor of the estate of Stanislaw Kosiorek (estate),[2] on the plaintiff's revised complaint. On appeal, the plaintiff claims that the trial court improperly (1) granted the defendant's motion for summary judgment on the basis of res judicata, (2) granted the defendant's motion to dismiss certain counts due to the plaintiff's lack of standing and (3) denied his motion to disqualify counsel for the defendant. We affirm the judgment of the trial court.

Many of the relevant facts and the procedural history were set forth by this court in *Disciplinary Counsel* v. *Smigelski*, 124 Conn. App. 81, 4 A.3d 336 (2010), cert denied, 300 Conn. 906, 12 A.3d 1004, cert. denied, U.S. , 132 S. Ct. 101, 181 L. Ed. 2d 28 (2011). The defendant, in both his individual and fiduciary capacities, retained the plaintiff to provide separate but related legal services. The plaintiff represented the defendant, in his fiduciary capacity, to clear title to the estate's only asset, a house at 28 Terra Road in Plainville. Id., 84. The defendant and his family discovered that, within one year of his death at age eighty-three, Stanislaw Kosiorek had married Bronislawa Kosiorek and transferred to her an undivided interest in the house. The discovery prompted the decedent's heirs to

[1] The plaintiff, a member of the Connecticut bar, was suspended from the practice of law at the time of oral argument. See *Disciplinary Counsel* v. *Smigelski*, 124 Conn. App. 81, 4 A.3d 336 (2010), cert denied, 300 Conn. 906, 12 A.3d 1004, cert. denied, U.S. , 132 S. Ct. 101, 181 L. Ed. 2d 28 (2011).

[2] For convenience, we refer to Stanley Kosiorek in both capacities as the defendant.

commence an action against Bronislawa Kosiorek to set aside the transfer. When efforts to settle the dispute failed, the defendant retained the plaintiff who negotiated with Bronislawa Kosiorek to quitclaim the property to the estate in return for a payment of $35,000.[3] Thereafter, the plaintiff represented the defendant in the administration of the estate, which included the sale of the house to a member of the Kosiorek family. Id., 85–86.

During the administration of the estate, the Plainville Probate Court issued two decrees that are relevant here. The first decree, issued on December 12, 2006, approved the sale of the house. The net proceeds of the sale totaled $155,300.82, which the defendant authorized to be given to the plaintiff as trustee. Id., 86. Pursuant to the plaintiff's interpretation of the terms of the fee agreement, the plaintiff paid himself $65,833.33, in addition to a retainer of $5000, for a total of $70,833.33 out of the estate funds that he was holding. Id., 86–87 and n.6. In its second decree, issued on May 21, 2007, the Probate Court ordered the plaintiff to return $54,833.33 to the estate. The Probate Court found that the plaintiff's fees were excessive and that an appropriate and reasonable fee for his services was $15,000 plus $1000 reimbursement for expert witness fees. The plaintiff refused to comply with the second decree. Id., 87–88.

This factual background spawned two separate actions that are relevant to the resolution of the plaintiff's claims on appeal. The defendant, in his fiduciary capacity, commenced and prevailed in an action against the plaintiff. See *Kosiorek*, v. *Smigelski*, 138 Conn. App. 695, 54 A.3d 564 (2012), also released today ("prior action").[4] Before the resolution of the prior action, the

[3] Prior to the plaintiff's involvement, Bronislawa Kosiorek demanded $45,000 to quitclaim her interest in the house to the estate.

[4] In that case, the defendant, in his fiduciary capacity, sought damages against the plaintiff on theories of, inter alia, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and civil conversion, General Statutes § 52-564. The plain-

plaintiff commenced this action against the defendant in his fiduciary and individual capacities. In his amended complaint, dated January 6, 2011, the plaintiff asserted against the defendant, in his individual and/or fiduciary capacities, inter alia, claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnification. The plaintiff also sought in two counts a declaratory judgment to set aside and to declare null and void the two decrees of the Probate Court rendered on December 12, 2006, and May 21, 2007.

The defendant filed a motion to dismiss the plaintiff's amended complaint. The court, *Young*, *J.*, in its memorandum of decision dated April 1, 2011, granted the defendant's motion to dismiss with respect to the plaintiff's claims seeking a declaratory judgment in counts three and four. Judge Young stated: "[The plaintiff] makes no allegation in the third or fourth count that he has any interest, legal or equitable, in the decrees of the Probate Court. . . . [The plaintiff] doesn't seek any personal remedy. Rather, he seeks the setting aside of decrees of a probate court, claiming that the conduct of [the defendant] caused damage to the heirs and the estate. . . . Because [the plaintiff] has failed to allege that he, himself, has an interest in declaratory judgment sought, he has failed to meet the requirements of Practice Book § 17-55. . . . [The plaintiff] has not claimed he has statutory authority to bring such actions, nor

tiff, in turn, brought counterclaims with respect to the fee agreement against the defendant, in his fiduciary capacity, sounding in, inter alia, breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification. The court, *Swienton*, *J.*, directed a verdict on these counterclaims. Thereafter, a jury found in favor of the defendant, in his fiduciary capacity, awarding compensatory damages against the plaintiff in the amount of $54,833.33 and on a count of civil conversion, triple damages. Judge Swienton, in accordance with the jury verdict, awarded $226,762.20 in compensatory damages, plus attorney's fees and costs of $71,696.09 to the defendant, in his fiduciary capacity. See *Kosiorek* v. *Smigelski*, supra, 138 Conn. App. 695.

does he claim he is classically aggrieved. He has alleged no specific personal and legal interest in these decrees. Rather, he claims that the heirs and estate were damaged by the conduct of [the defendant]. Additionally, [the plaintiff] fails to allege the decree[s] of the Probate Court specially and injuriously affected him. . . . [The plaintiff] has alleged no factual basis which would provide him standing as to the causes of action contained in the third and fourth counts. These are dismissed." (Citations omitted.)

Judge Young then considered the defendant's motion to dismiss with respect to the breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnification claims. The defendant argued that these claims should be barred under the doctrine of res judicata because the plaintiff had previously raised these claims in the prior action, which were decided by a motion for a directed verdict in that action. See *Kosiorek* v. *Smigelski*, supra, 138 Conn. App. 695. Judge Young denied the defendant's motion to dismiss in this respect, stating: "[R]es judicata is not included among the permissible grounds on which to base a motion to dismiss. . . . It may not be raised by a motion to dismiss. . . . Of course, there is no reason why, in an appropriate case, once the defense of res judicata has been raised, the issue may not be resolved by way of summary judgment. . . . The validity of [these counts] cannot be addressed at this time." (Citations omitted; internal quotation marks omitted.)

Thereafter, on September 19, 2011, the plaintiff filed a motion to disqualify the defendant's counsel from representing the defendant in both his individual and fiduciary capacities in the present action. On October 4, 2011, the court, *Pittman*, *J.*, denied the plaintiff's motion, stating: "The plaintiff has no standing to raise this issue."

On September 19, 2011, the plaintiff also filed a revised complaint that again alleged claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnification. The defendant filed a motion for summary judgment asserting, once again, that the plaintiff's claims were barred by the doctrine of res judicata because the plaintiff had raised these causes of action against the defendant, in his fiduciary capacity, as counterclaims in the prior action. See *Kosiorek*, v. *Smigelski*, supra, 138 Conn. App. 695. The plaintiff conceded that the doctrine of res judicata barred the claims against the defendant in his fiduciary capacity but maintained that res judicata could not bar his claims in the present matter because here the claims were also brought against the defendant, in his *individual* capacity. In granting the defendant's motion for summary judgment, Judge Swienton stated: "The claims being raised in this action are essentially the same claims that were raised and adjudicated in the prior action. Furthermore, privity exists between the parties as to the claims and issues being raised so that the doctrine of res judicata bars this action." From that judgment, the plaintiff now appeals.

I

The plaintiff's first claim on appeal is that Judge Swienton improperly granted the defendant's motion for summary judgment on the plaintiff's revised complaint on the basis of res judicata as to the breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnity claims. The plaintiff claims that the court improperly applied the doctrine of res judicata to bar these claims in this action, which, unlike the prior action, are alleged against the defendant in his *individual capacity*. The plaintiff argues that because the defendant, in his individual capacity, is a separate party and not in privity with the defendant in his fiduciary capacity, the doctrine of res judicata—

which can only apply to bar same claims when the former action is between the same parties, or those in privity with them—cannot be applied in the present action to bar his claims against the defendant, in his individual capacity. We disagree

"Under the doctrine of res judicata, a final judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the parties or those in privity with them, upon the same claim." *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 812, 695 A.2d 1010 (1997). In this instance, there is no dispute that the court, in the prior action, rendered a final judgment on the same claims that the plaintiff reasserts in this matter. The question, however, for our purposes, is whether there is privity between the defendant, in his fiduciary and individual capacities, such that these same claims should be barred by this court under the doctrine of res judicata.

"In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that [res judicata] *should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion.*" (Emphasis added.) Id., 814. "[T]he crowning consideration . . . [in regard to] the basic requirement of privity . . . [is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Internal quotation marks omitted.) Id., 818.

In granting the defendant's motion for summary judgment, Judge Swienton stated: "The claims being raised

in this action are essentially the same claims that were raised and adjudicated in the prior action. Furthermore, privity exists between the parties as to the claims and issues being raised so that the doctrine of res judicata bars this action." The court's determination that there was privity between the defendant in his fiduciary and individual capacities, sufficient to justify preclusion under the doctrine of res judicata, is a conclusion of law subject to plenary review. See *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 230, 654 A.2d 342 (1995).

The court's findings and determination in granting the motion for a directed verdict in favor of the defendant in his fiduciary capacity, in the prior action, are directly applicable to the plaintiff's claims against the defendant in his individual capacity, in this action, because the claims in both matters are identical and the fee agreement to be interpreted is the same. Because judicial interpretation of the fee agreement would be the same irrespective of those who are party to it, the defendant has, in his fiduciary and individual capacities, the same legal rights under the fee agreement that are sufficient to support a finding of privity between the defendant as an individual and as a fiduciary and justify preclusion of these claims under the doctrine of res judicata. See *Mazziotti* v. *Allstate Ins. Co.*, supra, 240 Conn. 814.

Moreover, because the defendant, in his fiduciary capacity, possesses the same legal rights under the fee agreement in the fairly contested prior action, as he does in his individual capacity in this action, his legal rights were sufficiently represented in the first action, such that our application of res judicata does not yield an inequitable result in this instance. See id., 818. The claims that the plaintiff alleges in this action could only have been properly adjudicated in the prior action. This outcome is consistent with the fundamental purpose of the doctrine of res judicata, to "protect the finality

of judicial determinations, conserve the time of the court and prevent wasteful relitigation." (Internal quotation marks omitted.) *Virgo* v. *Lyons*, 209 Conn. 497, 501, 551 A.2d 1243 (1988). We therefore conclude that Judge Swienton properly granted the defendant's motion for summary judgment on the plaintiff's revised complaint.

II

The plaintiff's second claim on appeal is that Judge Young improperly granted the defendant's motion to dismiss with respect to counts three and four of his amended complaint, which sought a declaratory judgment to set aside the decrees of the Probate Court issued on December 12, 2006, and May 21, 2007. As aforementioned, the Probate Court decrees authorized the sale of the property and ordered the plaintiff to return the sum of $54,833.33 to the estate. The plaintiff claims that he was classically aggrieved by the decrees of the Probate Court and that, as a result, he has standing to bring these claims. We disagree.

"The standard of review for a court's decision on a motion to dismiss is well settled. 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 [is] de novo. . . . When a . . . 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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Citation omitted; internal

quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007).

In granting the defendant's motion to dismiss, the court noted the following: the plaintiff made "no allegation . . . that he has any interest, legal or equitable, in the decrees of the Probate Court. . . . [He] doesn't seek any personal remedy. . . . [He] has failed to allege that he, himself, has an interest in the declaratory judgment sought . . . . [He] has not claimed . . . he is classically aggrieved. . . . He has alleged no specific personal and legal interest in these decrees. . . . [He] fails to allege the decree of the Probate Court specially and injuriously affected him. . . . [He] has alleged no factual basis which would provide him standing as to the causes of action contained in the third and fourth counts." (Citations omitted.)

Consistent with the court's analysis, the plaintiff did not plead a factual basis which provides him standing with respect to counts three and four of his amended complaint. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a *specific personal and legal interest* in the subject matter of the [challenged action], as distinguished from a general interest, such as the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the 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." (Emphasis added; internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 207, 994 A.2d 106 (2010).

As the court correctly stated, the plaintiff did not allege a "specific personal and legal interest" in the decrees of the Probate Court dated December 12, 2006, and May 21, 2007, or that he was "specially and injuriously affected" by the decrees. Accordingly, we conclude that the court did not err by dismissing counts three and four of the plaintiff's amended complaint.

III

The plaintiff's third claim on appeal is that Judge Pittman erred in denying his motion to disqualify the defendant's counsel. The plaintiff argues that the defendant's attorney cannot ethically represent both the defendant in his individual and fiduciary capacities on the basis that there is a conflict of interest between the defendant as a fiduciary and the defendant as an individual. The plaintiff advances the theory that the interest of the defendant, as a fiduciary to the estate, is in direct conflict with the defendant as an individual, who, to the detriment of the heirs of the estate, is bound by law to honor the fee agreement that he entered into with the plaintiff. The plaintiff argues that rule 8.3 (a) of the Rules of Professional Conduct, requires him to inform the appropriate professional authority of this conflict and affords him statutory standing to raise this claim.[5] We disagree.

The standard of review for determining whether the court properly denied a motion to disqualify counsel is

[5] Rule 8.3 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . ."

an abuse of discretion standard. "The Superior Court has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court. . . . In its execution of this duty, the Superior Court has broad discretionary power to determine whether an attorney should be disqualified for an alleged breach of confidentiality or conflict of interest. . . . In determining whether the Superior Court has abused its discretion in denying a motion to disqualify, this court must accord every reasonable presumption in favor of its decision. Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted.) *State* v. *Jones*, 180 Conn. 443, 448, 429 A.2d 936 (1980), overruled in part on other grounds by *State* v. *Powell*, 186 Conn. 547, 442 A.2d 939, cert. denied sub nom. *Moeller* v. *Connecticut*, 459 U.S. 838, 103 S. Ct. 85, 74 L. Ed. 2d 80 (1982).

In her order dated October 4, 2011, Judge Pittman dismissed the plaintiff's motion to disqualify the defendant's counsel because "[t]he plaintiff has no standing to raise this issue." "Our case law is . . . clear that a person cannot gain standing by asserting the due process rights possessed by another individual. It is axiomatic that due process rights are personal, and cannot be asserted vicariously." (Internal quotation marks omitted.) *Taff* v. *Bettcher*, 35 Conn. App. 421, 425, 646 A.2d 875 (1994). The defendant's representation by counsel is, thus, an entitlement that belongs to him and him alone—not the plaintiff. See *Strobel* v. *Strobel*, 64 Conn. App. 614, 620, 781 A.2d 356 (concluding that defendant in dissolution of marriage proceeding did not have standing to disqualify counsel of minor child), cert. denied, 258 Conn. 937, 786 A.2d 426 (2001).

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is

classically aggrieved." (Internal quotation marks omitted.) *Gold* v. *Rowland*, supra, 296 Conn. 207. The plaintiff has not alleged that he was classically aggrieved by counsel's representation of the defendant in both his individual and fiduciary capacities nor has he cited a statute which affords him standing to raise this claim. The plaintiff merely cites a rule of professional conduct, which does not apply in this context. Rule 8.3 (a) indicates, in relevant part, that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional conduct . . . shall inform the appropriate professional authority" which, in most instances, is our statewide grievance committee. See Rules of Professional Conduct 8.3, commentary. It therefore requires the attorneys of this state to report known misconduct of their colleagues to the appropriate professional authority; it does not afford claimants standing to report that misconduct or to assert the due process rights possessed by another individual, in Superior Court.

Accordingly, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to disqualify the defendant's counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

TRENWICK AMERICA REINSURANCE CORPORATION *v.* W. R. BERKLEY CORPORATION ET AL.
(AC 33388)

Espinosa, Sheldon and Bishop, Js.

Syllabus

The plaintiff, a reinsurance company, sought a declaratory judgment that a certain reinsurance agreement of the parties, pursuant to which the plaintiff was obligated to reinsure certain liabilities of the defendant W Co.'s insurance companies, was subject to a commutation agreement

of the parties, which required the plaintiff to make a payment to W Co. in full satisfaction of all past, present and future obligations and liabilities arising out of the parties' various reinsurance agreements. The plaintiff also sought the return of money it had paid W Co. under the subject reinsurance agreement following the execution of the commutation agreement. The trial court rendered judgment in part for the plaintiff, concluding that the commutation agreement did, in fact, commute the reinsurance agreement, but precluding the restitution sought by the plaintiff, from which W Co. appealed and the plaintiff cross appealed to this court. Thereafter, the trial court denied the plaintiff's motion for attorney's fees, and the plaintiff filed an amended cross appeal. *Held*:

1. W Co. could not prevail on its claim that the trial court improperly determined that there was no mutual mistake regarding the inclusion of the subject reinsurance agreement in the commutation agreement and, thus, that the court improperly failed to reform the contract to reflect the parties' true intent that the reinsurance agreement be excluded from the commutation agreement; that court's finding that there was no mutual mistake was not clearly erroneous and was supported by evidence in the record, which showed that the commutation agreement was drafted and signed by an officer of W Co. who was experienced in such matters, that in the agreement itself W Co. affirmatively represented that it had read and understood the commutation agreement and that it was not relying on any representations outside of the contract, that the draft of the agreement was reviewed multiple times by various employees of W Co., including two attorneys, and that the agreement stated in multiple places that it fully and finally terminated all of the parties' reinsurance relationships, and there was nothing in the record that required the trial court to interpret the language of the contract contrary to the common sense meaning of the words used.

2. W Co. could not prevail on its claim that the term "reinsurance agreements" as used in the commutation agreement was ambiguous and that the court, thus, should have considered extrinsic evidence that would have led to the conclusion that the term did not include the specific reinsurance agreement at issue; it was clear from the provisions of the reinsurance agreement at issue that it fell squarely within the ambit of the definition of reinsurance as found by the court and, therefore, the commutation agreement was not ambiguous.

3. The plaintiff's claim on cross appeal that the trial court improperly concluded that it was not entitled to restitution was unavailing; for four years, the plaintiff and W Co. erroneously, but in good faith, believed that the obligations of the reinsurance agreement remained in effect notwithstanding the commutation agreement, and during that time period both parties performed their respective obligations and conferred anticipated benefits on each other, as they believed them to be, and, therefore, there was no evidentiary foundation for the court to have

determined that one party had been unjustly enriched at the expense of the other.

4. The trial court correctly denied the plaintiff's motion for attorney's fees; the relevant contract provision in this case contemplated an order for the payment of counsel fees upon a finding that the contract had been breached, and there having been no such finding made in this case and the plaintiff not having asserted or prevailed on a breach of contract claim, it had no right to attorney's fees under the commutation agreement.

Argued April 17—officially released October 23, 2012

Procedural History

Action for, inter alia, a declaratory judgment that certain reinsurance agreements of the parties were subject to the parties' commutation agreement, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Waterbury, Complex Litigation Docket, where the matter was tried to the court, *Cremins*, *J.*; judgment in part for the plaintiff, from which the defendants appealed and the plaintiff cross appealed to this court; thereafter, the court, *Cremins*, *J.*, denied the plaintiff's motion for attorney's fees, and the plaintiff filed an amended cross appeal. *Affirmed.*

Jonathan M. Freiman, with whom was *Julie Loughran*, for the appellants-cross appellees (defendants).

Augustus R. Southworth III, with whom was *Todd R. Michaelis*, for the appellee-cross appellant (plaintiff).

Opinion

BISHOP, J. In this declaratory judgment action, the defendant W. R. Berkley Corporation[1] appeals from the judgment of the trial court, rendered in favor of the plaintiff, Trenwick America Reinsurance Corporation.

[1] The defendant W. R. Berkley Corporation is a holding company. Berkley Insurance Company, also named as a defendant in this appeal, is a subsidiary of W. R. Berkley Corporation. For convenience, we refer to them collectively as the defendant and individually by name when necessary.

On appeal, the defendant claims that the court improperly (1) concluded that there was no mutual mistake and (2) found that the commutation agreement was not ambiguous. The plaintiff cross appeals, claiming that the court improperly (1) concluded that there was no unjust enrichment and (2) denied its motion for attorney's fees. We affirm the judgment of the trial court.

The plaintiff is a reinsurance company with its principal place of business in Fairfield. The defendant is an insurance holding company with its principal place of business in Greenwich. At various times prior to September 3, 2004, the plaintiff entered into reinsurance agreements with the defendant and its subsidiary insurance companies.[2] The reinsurance agreement at issue in the present case obligated the plaintiff to reinsure certain liabilities of the defendant's insurance companies. More specifically, in exchange for premiums paid by the defendant, the plaintiff agreed to pay a stated percentage of the defendant's insurance companies' losses, claims, and other expenses.

The plaintiff and Signet Star Reinsurance Company (Signet Star),[3] a reinsurance company that is a subsidiary of the defendant, entered into an agreement on June 10, 1999, referred to as Special Casualty and Accident Reinsurance Facility (SCARF II). The trial court noted that SCARF II obligated the plaintiff "to accept a ten percent part of sixty percent of Signet Star's overall

[2] Reinsurance is a business undertaking pursuant to a reinsurance contract, in which an insurer transfers or "cedes" to another insurer, known as the "reinsurer," a portion of the ceding insurer's risks flowing from insurance policies written by the insurer for policyholders. In a reinsurance agreement, the reinsurer agrees to indemnify the ceding insurer in return for payment of a portion of the ceding insurer's premiums. When a valid claim is made, the insurance company pays the claim and the reinsurance company reimburses the insurance company to the extent required by the reinsurance agreement.

[3] Signet Star changed its name to Berkley Insurance Company on or about December 31, 2000.

losses under the program in exchange for a corresponding quota share (ten percent) of the premiums that Signet Star collected." (Internal quotation marks omitted.) As part of SCARF II, the plaintiff also "agreed to accept a 20 [percent] participation of the employer's liability [for the workers' compensation claims] part of the program."

On or about September 3, 2004, the plaintiff and the defendant entered into a commutation and release agreement (commutation agreement).[4] By its terms, the commutation agreement referred to the plaintiff as the "Reinsurer" and the defendant, its subsidiaries and affiliates collectively were referred to as the "Company." The commutation agreement's stated purpose was to "fully and finally terminate, release, determine and fully and finally settle, commute and extinguish all [the parties'] respective past, present, and future obligations and liabilities, known and unknown, fixed and contingent, under, arising out of, and/or pursuant to the [r]einsurance [a]greements . . . ."

The commutation agreement defined "reinsurance agreement" in the following paragraph: "Whereas, the [p]arties have entered various reinsurance agreements pursuant to which the Reinsurer reinsured certain liabilities of the Company and/or the Company reinsured certain liabilities of the Reinsurer (such agreements and all other agreements entered into in connection or relating to such agreements are referred to herein collectively as the [r]einsurance [a]greements) . . . ."

[4] As noted by the trial court regarding commutation agreements generally: "Commutation is an agreement between the parties bringing to an end the liabilities of the reinsurer under the contract, usually a treaty, although possibly a long-term facultative contract. In its simplest form, a lump sum payment by the reinsurer is substituted for the unknown future liabilities on ceded risks and it is done for reasons on both sides having to do with the relative advantages of current and long-term money or the convenience of closing certain yearly accounts. G. Staring, Law of Reinsurance (1993) § 14:6." (Internal quotation marks omitted.)

The commutation agreement required the plaintiff to make a payment of $15,248,338 to the defendant "in full satisfaction of the Reinsurer's past, present and future net liability under the [r]einsurance [a]greements . . . ."

The commutation agreement further stated that "[t]his [a]greement sets forth the entire [a]greement between the [p]arties with respect to the subject matter hereof and supersedes all prior agreements or understandings between them pertaining to the subject matter hereof." In addition, the commutation agreement stated: "This [a]greement may not be amended, altered, supplemented or modified, except by written agreement signed by the [p]arties." Also, the commutation agreement provided that each party "represents to the other as follows: (a) it has had full opportunity to consult with its respective attorneys in connection with the negotiation and drafting of this [a]greement; (b) it has carefully read and understands the scope and effect of each provision contained in this [a]greement; (c) it has conducted all necessary due diligence, investigation and analysis of the transactions contemplated by this [a]greement; and (d) it is not relying upon any representations made by any other party, its attorneys or other representatives."

Following the execution of the commutation agreement, from September 3, 2004 until approximately June, 2008, the plaintiff continued to make payments pursuant to SCARF II.[5] Likewise, during that time, the defendant continued to make premium payments to the plaintiff, totaling approximately $56,000. Between 2006 and 2008, however, the plaintiff began falling behind on its SCARF II payments and the SCARF II administrator began pressing the plaintiff for the past due payments.

[5] The plaintiff contends that it paid the third party administrator of SCARF II a net total of $451,006.72 after entering into the commutation agreement.

At the time, the plaintiff assured the SCARF II administrator that it would be making back payments and advised the administrator that it intended to initiate discussions with the defendant regarding commutation of its obligations under SCARF II.

In January, 2008, Stephen Eisenmann became an executive vice president and officer of the plaintiff. In that capacity, he had the opportunity to review the commutation agreement. On the basis of his review of the commutation agreement, Eisenmann concluded that it commuted SCARF II and therefore the plaintiff had no obligation to make payments to the defendant pursuant to SCARF II after the commutation agreement went into effect on September 3, 2004. Eisenmann determined that, based on the commutation agreement's language, the agreement was global, thereby commuting all reinsurance agreements between the plaintiff and the defendant, including SCARF II, as of the effective date of the commutation agreement. As a result, the plaintiff stopped making further payments under SCARF II and sought a return of the sum of $451,006.72, an amount it believed it had unnecessarily paid to the defendant pursuant to SCARF II. The defendant disagreed with Eisenmann's conclusion that the commutation agreement commuted SCARF II and that the money paid following the execution of the commutation agreement should be returned.

Thereafter, the plaintiff instituted an action seeking a declaration that the commutation agreement commuted SCARF II. In count one, the plaintiff sought a declaratory judgment that the commutation agreement discharged its obligations under SCARF II. The second count, which sounded in unjust enrichment, alleged that the plaintiff was entitled to a return of the money it paid under SCARF II following the execution of the commutation agreement. Following a bench trial, the court held as to count one that the commutation

agreement did, in fact, commute SCARF II. As to count two, the court held that the restitution sought by the plaintiff was barred pursuant to the voluntary payment doctrine.

Having prevailed at trial on its declaratory judgment action, on May 2, 2011, the plaintiff filed a motion for attorney's fees pursuant to Practice Book § 11-21 and article 11, § (h) of the commutation agreement.[6] The court denied that motion, stating that "[t]here has been no judicial determination that the defendant was in breach of the commutation agreement, which alleged breach is the basis for the [plaintiff's] claim for attorney's fees." This appeal and cross appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly determined that there was no mutual mistake regarding the inclusion of SCARF II in the commutation agreement.[7] More specifically, the defendant claims that the court should have determined that a mutual mistake existed and, therefore, the court should have reformed the contract to reflect the true intent of the parties: that

[6] Article 11, § (h) of the commutation agreement provides: "In the event of any breach of the terms or conditions of this [a]greement, the party prevailing at trial shall be entitled to recover from the breaching party, all costs and expenses, including, without limitation, reasonable attorneys fees and disbursements."

[7] Collateral to this argument, the defendant claims that the court improperly refused to consider extrinsic evidence in its determination of the presence of a mutual mistake. Although it is true, as the defendant contends, that our courts have held that extrinsic evidence may be admissible to show mistake; see *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 503 n.14, 746 A.2d 1277 (2000); there is no requirement that the court consider such evidence. Furthermore, the court in this case did in fact acknowledge numerous items of extrinsic evidence in support of its factual finding. At no point in its opinion did the court explicitly state that it refused to consider a particular piece of extrinsic evidence, as the defendant claims.

SCARF II was to be excluded from the commutation agreement. We disagree.

Connecticut law on the subject of reformation of a contract was summarized succinctly by our Supreme Court in *Greenwich Contracting Co.* v. *Bonwit Construction Co.*, 156 Conn. 123, 126–27, 239 A.2d 519 (1968): "A cause of action for reformation of a contract rests on the equitable theory that the instrument sought to be reformed does not conform to the real contract agreed upon and does not express the intention of the parties and that it was executed as the result of mutual mistake, or mistake of one party coupled with actual or constructive fraud, or inequitable conduct on the part of the other. . . . A court in the exercise of its power to reform a contract must act with the utmost caution and can only grant the relief requested if the prayer for reformation is supported by convincing evidence. . . . [In finding mutual mistake] it must be established that both parties agreed to something different from what is expressed in writing, and the proof on this point should be clear so as to leave no room for doubt. . . . If the right to reformation is grounded solely on mistake, it is required that the mistake be mutual, and to prevail in such a case, it must appear that the writing, as reformed, will express what was understood and agreed to by both parties." (Citations omitted.)

"Whether there has been such mistake is a question of fact. . . . 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 and determine credibility, we give great deference to its

findings." (Citations omitted; internal quotation marks omitted.) *McBurney* v. *Cirillo*, 276 Conn. 782, 815–16, 889 A.2d 759 (2006), overruled in part on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284–89, 914 A.2d 996 (2007).

In seeking to reverse the judgment of the court, the defendant concedes the difficulty inherent in demonstrating reversible error as to a trial judge's finding of fact. Despite the highly deferential standard that governs such claims, however, the defendant nevertheless argues that the cumulative effect of the evidence compels the logical conclusion that the parties intended to exclude SCARF II from the commutation agreement. Our review of the record does not support this conclusion. Rather, the record reveals evidence in support of the court's findings of fact, which in turn support the conclusions of the court. Therefore, we are not left with the definite and firm conviction that the court improperly found that there was no mutual mistake.[8]

More specifically, the contract was drafted and signed by an officer of the defendant who was experienced in such matters. In fact, in the commutation agreement itself the defendant affirmatively represented that it had read and understood the commutation agreement and that it was not relying on any representations outside of the contract. The draft of the commutation agreement was also reviewed multiple times by various employees of the defendant, including two attorneys who represented the defendant in the drafting of the commutation agreement. The review process

[8] We acknowledge that there may be evidence to support the defendant's contention that the intention of the parties was to exclude SCARF II from the commutation agreement. When reviewing the findings of the trial court under a clearly erroneous standard, however, we need not determine that its decision was the only possible outcome, but only that there is sufficient evidence to support its conclusion. Weighing conflicting evidence is within the exclusive province of the trial court; it is not an appellate function.

yielded a number of suggestions and ultimately all those who participated deemed the agreement to be acceptable.[9] In addition, the commutation agreement states in multiple places that it fully and finally terminates all of the parties' reinsurance relationships. Indeed, William P. Scott, the defendant's vice president of financial risk management, testified that the proposal did not exclude SCARF II. In an e-mail sent by Scott to other employees following the acceptance of the commutation agreement, the defendant represented that it had agreed to a global settlement amount for the defendant's ceded business. Finally, there is nothing in the record which required the court to interpret the language of the contract contrary to the common sense meaning of the words used, as the terms of the commutation agreement clearly support the court's finding. Accordingly, it cannot be said that the court's finding regarding the intent or understanding of the parties was clearly erroneous.

II

The defendant additionally claims that the term "reinsurance agreements," as used in the commutation agreement, is ambiguous and that the court, therefore, should have considered extrinsic evidence which would have led to the conclusion that the term does not include the plaintiff's obligations under SCARF II. We are not persuaded.

Because a determination as to whether a contract is ambiguous is a question of law, our review is plenary. *Electric Cable Compounds, Inc.* v. *Seymour*, 95 Conn. App. 523, 529, 897 A.2d 146 (2006). "A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . [T]he mere fact that the

[9] Bruce Weiser, one of the attorneys representing the defendant in the drafting of the commutation agreement, testified that he revised and/or removed any language that he felt was "objectionable," "unclear" or "ambiguous."

parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 735, 873 A.2d 898 (2005). Thus, the question before us is whether the language at issue is susceptible to more than one reasonable interpretation, rather than merely a conceivable one. See, e.g., *Isham* v. *Isham*, 292 Conn. 170, 181, 972 A.2d 228 (2009) ("proper inquiry focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation"); *Poole* v. *Waterbury*, 266 Conn. 68, 88, 831 A.2d 211 (2003) (contract ambiguous if language of contract is susceptible to more than one reasonable interpretation).

As with any issue of contract interpretation, we look first to the language of the contract. The commutation agreement defines reinsurance agreements as "agreements pursuant to which the Reinsurer reinsured certain liabilities of the Company and/or the Company reinsured certain liabilities of the Reinsurer (such agreements and all other agreements entered into in connection or relating to such agreements are referred to herein collectively as the 'Reinsurance Agreements')."

The defendant claims that there is evidence to support the contention that SCARF II is a pool or facility

comprised of numerous contracts, including reinsurance agreements, among several participating reinsurers in addition to the plaintiff and the defendant as well as the participation of third party underwriters, managers and administrators. Therefore, the defendant claims, because the commutation agreement referred to reinsurance agreements, and not to pools or facilities such as SCARF II, the language of the contract does not make it clear that the commutation agreement pertained to SCARF II. This lack of clarity, according to the defendant, creates an ambiguity as to purpose and scope of the commutation agreement.

In our view, the defendant's interpretation is not a reasonable one. As the court stated, reinsurance is defined as "[i]nsurance of all or part of one insurer's risk [the defendant] by a second insurer, [the plaintiff] who accepts this risk in exchange for a percentage [10 percent of 60 percent] of the original premium." (Internal quotation marks omitted.) It is clear from the provisions of SCARF II that it falls squarely within the ambit of this definition of reinsurance. Accordingly, we conclude that the commutation agreement is not ambiguous. We turn next to the issues raised by the plaintiff's cross appeal.

III

On cross appeal, the plaintiff claims that the court improperly concluded that the plaintiff was not entitled to restitution. We disagree.

"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. . . . Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Citations omitted; internal quotation marks omitted.) *Hartford Whalers Hockey Club* v. *Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 282–83, 649 A.2d 518 (1994). It is the plaintiff's burden to prove the elements of a claim of unjust enrichment, including that the defendant was benefited. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 451–52, 970 A.2d 592 (2009).

"[T]he determinations of whether . . . particular [facts constitute the elements of unjust enrichment] 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; internal quotation marks omitted.) *Ayotte Bros. Construction Co.* v. *Finney*, 42 Conn. App. 578, 581, 680 A.2d 330 (1996). Finally, unjust enrichment results when "it is contrary to equity and good conscience for the defendant to retain a benefit which has come to him at the expense of the plaintiff." (Internal quotation marks omitted.) *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 597, 489 A.2d 1034 (1985); see also *Pokorny* v. *Getta's Garage*, 219 Conn. 439, 462, 594 A.2d 446 (1991).

We begin our analysis with a discussion of *Northrop* v. *Graves*, 19 Conn. 548 (1849), which anchors the law of restitution in Connecticut. In *Northrop*, the executors of an estate mistakenly believed that they were bound to pay $500 to the daughter of the decedent when in fact the decedent's will required that they pay the daughter's children. The jury awarded restitution to the executors. In affirming, our Supreme Court made clear that "[w]e do not decide that money paid by a mere mistake in point of law, can be recovered back," but instead articulated a theory of restitution grounded in equity and conscience. Id., 554. "[W]e mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered . . . ." Id. The court explained that a restitution claim is essentially an equitable action, and noted cases in which courts had declined to award restitution because, although funds were paid as a result of mistake, the payees received them in good conscience. Id., 555–57. Distinguishing the facts in the case before it, our Supreme Court stressed that the executors "verily supposed they were bound to pay, and the defendant, at the same time, knew they were not . . . ." Id., 555. The court therefore determined that "the money in good conscience as much belongs to the plaintiffs now, as it did when they had it in [their] possession . . . ." Id. The court further stated that "[i]t is therefore a rule, that money paid with full knowledge of facts, but through ignorance of the law, is not recoverable, if there be nothing unconscientious in the retainer of it . . . ." (Internal quotation marks omitted.) Id., 558.

In *Rockwell* v. *New Departure Mfg. Co.*, 102 Conn. 255, 128 A. 302 (1925), our Supreme Court further articulated the circumstances in which restitution may or may not be appropriate based on a mistake of law.

There, the plaintiff entered into a contract with his employer under which he received, among other things, commissions on royalties from the sale of goods using his inventions; the contract entitled the plaintiff to commissions relating to double row bearings. From 1911 to 1917, the employer paid these commissions, however, the employer also paid commissions relating to sales of single row bearings which were not invented by the plaintiff. The company's mistake resulted from its failure to read the contract closely to determine the plaintiff's rights with respect to his commission on the sale of bearings. The trial court presiding over the parties' contract dispute ordered that the plaintiff pay back the royalties on the single row bearings. Our Supreme Court reversed, noting that "the parties stood on an equal footing, each having access to his own copy of the written contract, upon the true interpretation of which the existence of a debatable legal obligation depended." Id., 307. The court further stated that the defendant's mistake did not "make the payments in question any the less voluntary in character, or impose upon the plaintiff, who made his claim in good faith and still pursues it in good faith, any equitable obligation to refund the payments." Id.

The trial court in the present case stated that *Rockwell* carved out an exception where voluntary payments made in error did not have to be repaid. Although we agree with the court that the reasoning of *Rockwell* warrants the conclusion that restitution premised on unjust enrichment is not appropriate in this situation, we do not believe that the court, in *Rockwell*, created an exception to prior law regarding restitution. Rather, we believe that the court in *Rockwell* simply emphasized that circumstantial equities play a significant role in determining whether restitution is proper when it is sought pursuant to a claim of unjust enrichment. The court noted: "[W]e do not question or weaken the

authority of *Northrop* v. *Graves*, [supra, 19 Conn. 548], and our many other decisions holding that money paid under a mistake of fact or of law, which the recipient has no right in good conscience to retain, may be recovered back. We do hold that when the parties to a written contract stand on an equal footing as to means of knowledge of their contract obligations, money paid by one to the other, in part performance of the contract, in response to a claim made in good faith and based upon a permissible but erroneous construction of the contract, cannot be recovered back as money paid under a mistake of law." *Rockwell* v. *New Departure Mfg. Co.*, supra, 102 Conn. 307–308. It is clear from this language that the court in *Rockwell* drew a distinction between the conduct and behavior of the payee in the case before it and the contrasting facts in *Northrop*. *Rockwell* dealt with a payee who had the same good faith, but erroneous understanding of the contract as the payor who paid him whereas *Northrop* dealt with a payee who knew he was not due the money he had received and whose performance did not entitle him to payment even though the payors believed they had an obligation to make payment.

As discussed previously, the court here found that prior to the plaintiff's realization that its obligations under SCARF II were relieved by the commutation agreement, it accepted premium payments from the defendant. In like manner, the plaintiff paid policy claims to the administrator of SCARF II, which were then remitted to the defendant's subsidiary, Signet Star. Thus, both parties were carrying out their obligations pursuant to the agreement as they understood them and the benefits bargained for by one party were in direct proportion to the benefit conferred on the other, as contemplated in SCARF II. For four years, the plaintiff and the defendant erroneously, but in good faith, believed that the obligations of SCARF II remained in

effect notwithstanding the commutation agreement, and, during that time period, both parties performed their respective obligations and conferred anticipated benefits on each other, as they believed them to be. Accordingly, there was no evidentiary foundation for the court to have determined that one party had been unjustly enriched at the expense of the other. On that basis, we agree with the trial court's conclusion that restitution was not appropriate.

IV

Finally, we consider the plaintiff's cross appeal regarding attorney's fees. The plaintiff argues that the court improperly refused to consider whether the defendant breached the commutation agreement and, if so, whether that breach satisfied article 11, § (h) of the commutation agreement, which provided for the payment of attorney's fees. We are not persuaded.

In general, the "rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . ." (Internal quotation marks omitted.) *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d 697 (2007).

The relevant contract provision in the present case contemplated an order for the payment of counsel fees upon a finding that the contract has been breached, a finding not made in this instance. The commutation agreement, article 11, § (h),[10] permits a party to recoup attorney's fees only if it prevails at trial on a breach of

[10] See footnote 6 of this opinion.

contract claim. The plaintiff, however, neither asserted nor prevailed on a breach of contract claim and therefore it had no right to attorney's fees. It is well established that "the right of a plaintiff to recover is limited by the allegations of the complaint . . . and any judgment should conform to the pleadings, the issues and the prayers for relief." (Internal quotation marks omitted.) *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, 304 Conn. 738, 744, 43 A.3d 164 (2012). Put simply, "[a] plaintiff may not allege one cause of action and recover upon another." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 63, 717 A.2d 77 (1998). Accordingly, the court correctly denied the plaintiff's motion for attorney's fees.

The judgment is affirmed.

In this opinion the other judges concurred.

SUSANE O. GRASSO *v.* CONNECTICUT HOSPICE, INC., ET AL.
(AC 33489)

Beach, Alvord and Bear, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, violation of the state whistle-blower statute (§ 31-51m) from the defendant H Co. and the defendant officers and employees of H Co. The plaintiff was an employee of H Co. when she filed two complaints against H Co. with the federal Occupational Safety and Health Administration, and the plaintiff claimed that, in retaliation for filing the complaints, her work environment became hostile, she was subject to relentless pressure to quit her job, and her work duties changed. She thereafter filed a complaint with the administration's whistle-blower protection program, which determined that there existed reasonable cause that a violation of the whistle-blower statute had occurred. H Co. and the plaintiff subsequently entered into a settlement agreement, pursuant to which the plaintiff released H Co. from future claims arising from events preceding the execution of the agreement. The plaintiff subsequently brought this action, claiming that

H Co. breached the agreement. The trial court granted the defendants' motion for summary judgment on the complaint and, in part, on counterclaims filed by the defendants, in which they alleged that the release provision in the settlement agreement released them from liability as to the plaintiff's claims. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff's claim that there was a genuine issue of material fact regarding whether the release provision barred a claim against H Co. for a breach of the employee handbook, as alleged in count four of her complaint, was moot; the trial court rendered summary judgment for the defendants on the plaintiff's claim in count four and on the defendants' counterclaims with regard to the claim in count four concerning the alleged breach of the employee handbook, and although the plaintiff appealed from the summary judgment ruling that the release provision barred the claim of the alleged breach of the employee handbook as stated in count four of the complaint, she did not appeal from the trial court's ruling granting the motion for summary judgment as to the counterclaims on the ground that the release provision in the agreement barred liability, and, therefore, the trial court's ruling rendering summary judgment on the counterclaims was not before this court and there was no practical relief that this court could grant the plaintiff.
2. The plaintiff could not prevail on her claim that the trial court improperly granted the defendants' motion for summary judgment because a genuine issue of material fact existed regarding whether H Co. breached the agreement, as alleged in count three of the complaint, by failing to treat the plaintiff the same as other employees of H Co.; the trial court properly determined that the agreement did not dictate that every H Co. employee was entitled to the exact same treatment with regard to duties, office accommodations or access to the workplace.
3. The plaintiff's claims that the trial court improperly rendered summary judgment on her causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress were inadequately briefed and not reviewable; furthermore, even if the claims had been briefed adequately, the trial court properly rendered summary judgment as to those counts of the complaint, as our Supreme Court previously has determined that negligent infliction of emotional distress in the employment context arises only when it is based on unreasonable conduct of the defendant in the termination process, and the events that occurred here allegedly causing the plaintiff to resign did not satisfy the termination requirement, and the plaintiff's claim of intentional infliction of emotional distress failed to meet the threshold for extreme and outrageous conduct with regard to any of the defendants.

Argued April 23—officially released October 23, 2012

Procedural History

Action to recover damages for, inter alia, violation of the state whistle-blower statute, and for other relief,

brought to the Superior Court in the judicial district of New Haven, where the defendants filed counterclaims; thereafter, the court, *Burke, J.*, granted the defendants' motion for summary judgment on the complaint and on the counterclaims in part and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Burton M. Weinstein, with whom, on the brief, was *Patricia A. Cofrancesco*, for the appellant (plaintiff).

Ian E. Bjorkman, with whom was *William A. Ryan*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Susane O. Grasso, appeals from the summary judgment rendered by the trial court in favor of the defendants, Connecticut Hospice, Inc. (Hospice), and Rosemary J. Hurzeler, Ronny J. Knight, David R. Goldfarb, Sandra J. Klimas, Susan Flannigan, Nancy Baranowski and Michael Sweeney (individual defendants).[1] On appeal, the plaintiff claims that the court improperly concluded that there was no genuine issue of material fact as to her claims (1) in contract, that Hospice breached the employee handbook and the settlement agreement, and (2) in tort, that the individual defendants were liable for both negligent infliction of emotional distress and intentional infliction of emotional distress. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of the plaintiff's appeal. The plaintiff was an employee of Hospice from 1998 until April, 2010. In 2009, she filed two complaints against Hospice with the federal Occupational Safety and Health Administration (administration) relating to defective chairs in the workplace. The administration ordered Hospice to repair any defective chairs. The

[1] The individual defendants are officers and employees of Hospice.

plaintiff claims that, in retaliation for filing the complaints, her work environment became hostile, she was subjected to relentless pressure to quit her job and her work duties changed. The plaintiff filed a complaint with the administration's whistle-blower protection program, claiming retaliation and discrimination. In October, 2009, the administration determined that there existed reasonable cause that a violation of the whistle-blower statute had occurred.

On January 27, 2010, Hospice and the plaintiff entered into a settlement agreement (agreement) with regard to the whistle-blower claim. The agreement stated that the plaintiff would work part-time in Hospice's Branford and Shelton offices, that she would bring what she needed to complete her daily tasks with her to these locations and that she released Hospice from future claims resulting from events preceding the execution of the agreement. Approximately one week after the plaintiff signed the agreement, she sent notice to Hospice that it had breached the agreement. Hospice was unresponsive, so the plaintiff notified the administration of the alleged breach. The administration informed the plaintiff that it was unable to enforce the agreement and advised her to seek a venue for enforcement of the agreement if she thought that Hospice had breached it.

On July 16, 2010, the plaintiff filed a six count complaint in Superior Court alleging (1) violation of the state whistle-blower statute, General Statutes § 31-51m, (2) violation of the first amendment to the United States constitution and article first, §§ 3, 4 and 14, of the Connecticut constitution, (3) breach of the settlement agreement, (4) breach of Hospice's employee handbook, (5) negligent infliction of emotional distress and (6) intentional infliction of emotional distress.[2] The

[2] The plaintiff does not appeal from the judgment rendered on counts one and two of the complaint.

defendants filed counterclaims alleging that the release of claims provision of the agreement (release provision) released the defendants from liability with respect to the claims alleged in all six counts of the plaintiff's complaint. The defendants filed a motion for summary judgment on the six counts of the plaintiff's complaint and on their counterclaims seeking declaratory relief.

The parties argued the summary judgment motion on March 28, 2011. In a memorandum of decision filed April 28, 2011, the court, *Burke*, *J.*, determined that there was no genuine issue of material fact as to any of the six claims and rendered summary judgment in favor of the defendants on the six counts of the complaint. With respect to the counterclaims, the court concluded that the release provision barred the plaintiff's claims in the first, second and fourth counts of the complaint, and therefore rendered summary judgment in favor of the defendants with regard to those counts. This appeal followed.

On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants because a genuine issue of material fact existed with respect to the language of the agreement and the circumstances surrounding the termination of her employment and her treatment in the workplace. She argues that Hospice and the individual defendants violated the clause of the settlement agreement that stated that the agreement would "not provide [the plaintiff] any greater or lesser rights or privileges than other employee[s] of Hospice." She also argues that the release provision does not bar her breach of contract claim with regard to the employee handbook. Finally, the plaintiff argues that the individual defendants' specific acts in the month following the signing of the settlement agreement caused her severe emotional distress, amounting to a constructive termination of employment.

We first set forth the applicable legal principles. "The law governing summary judgment and the accompanying standard of review are well settled. Practice Book § [17-49] requires that 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 the moving party is entitled to judgment as a matter of law. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Rockwell* v. *Quintner*, 96 Conn. App. 221, 227, 899 A.2d 738, cert. denied, 280 Conn. 917, 908 A.2d 538 (2006). "Thus, because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary . . . ." (Citation omitted; internal quotation marks omitted.) *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, 572–73, 893 A.2d 486, cert. denied, 278 Conn. 912, 899 A.2d 38 (2006).

I

The first set of claims asserted by the plaintiff on appeal concerns acts by Hospice that she alleges constituted a breach of the employee handbook and the agreement. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . .

"Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words

to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law." (Citations omitted; internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 7–8, 35 A.3d 177 (2011). We agree with the sound conclusion of the trial court that the agreement is unambiguous. Our review of the agreement is therefore plenary. *Cruz* v. *Visual Perceptions, LLC*, 136 Conn. App. 330, 334, 46 A.3d 209, cert. granted on other grounds, 306 Conn. 903, 52 A.3d 730 (2012).

A

The plaintiff first claims that there is a genuine issue of material fact regarding whether the release provision barred a claim against Hospice for a breach of the employee handbook, as alleged in count four of the complaint. We determine that this claim is moot.

The following procedural history is relevant to our discussion of this claim as to the provisions of the employee handbook. After the plaintiff filed her six count complaint, the defendants filed answers, special defenses and counterclaims, including requests for attorney's fees. The defendants' counterclaims alleged that all six counts of the plaintiff's complaint were barred because the release provision insulated Hospice from any future liability for acts performed prior to the execution of the agreement. The trial court agreed in part and rendered summary judgment in favor of the defendants, inter alia, on the plaintiff's claim of a breach of the employee handbook. Significantly, the court also rendered summary judgment in favor of the defendants on their counterclaims with regard to the alleged breach of the employee handbook.

"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 . . . 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.) *Brown* v. *Brown*, 69 Conn. App. 209, 211–12, 794 A.2d 550 (2002).

Though the plaintiff did appeal from the trial court's rendering of summary judgment that the release provision barred the alleged breach of the employee handbook, the plaintiff did not appeal from the trial court's rendering of summary judgment on the defendants' counterclaims that the release provision in the agreement bars liability. The plaintiff has two different rulings against her with regard to the issue of the breach of the employee handbook because the trial court rendered summary judgment in favor of the defendants on both the claim and the counterclaim, but the plaintiff appealed from only one such ruling. Because the trial court's rendering of summary judgment on the counterclaim is not before us, this court would not be able to grant the plaintiff any practical relief regarding the defendants' alleged breach of the handbook. We therefore do not review this claim.

B

The plaintiff next claims that there is a genuine issue of material fact regarding whether Hospice breached the agreement, as alleged in count three of the complaint. We disagree.

"A settlement agreement is a contract among the parties." (Internal quotation marks omitted.) *Amica Mutual Ins. Co.* v. *Welch Enterprises, Inc.*, 114 Conn. App. 290, 294, 970 A.2d 730 (2009). The relevant section of the agreement provides: "This Agreement shall not and does not constitute an employment contract for a definite term and [the plaintiff's] employment with Hospice shall remain subject to all of Hospice's policies, practices, procedures and rules. Moreover, the settlement agreement will not alter, in any way, [the plaintiff's] status as an at-will employee of Hospice. The settlement agreement will not provide [the plaintiff] any greater or lesser rights or privileges than other employee[s] of Hospice."

The plaintiff focuses on the provision that the agreement does not provide the plaintiff with any *greater or lesser rights or privileges*. She argues that this language indicates an agreement that she would have treatment equivalent to all other employees of Hospice, and that Hospice breached the agreement by failing to provide her with a key to the office when every other worker in the Shelton office had a key. The plaintiff further argues that Hospice's treatment of her was unequal because she was the only employee in the Shelton office who did not have either a computer on her desk or a portable computer, making her the only director or staff member who had to record all work by hand. Under the agreement, however, the plaintiff was assigned only two six hour days per week in the Shelton office, and much of her time on those days was spent traveling, and, thus, out of the office.

The defendants argue that Hospice did not intend to bind itself to providing identical workplace accommodations to every employee, regardless of the time the

employee spent in the office or the duties the employee performed. In support of this argument, they urge this court to consider the "greater or lesser rights or privileges" clause within the agreement and not in isolation. We agree with the defendants that, when examining the clause in context, the parties' intent was that the agreement would neither confer any at-will employment rights that did not exist prior to the agreement, nor would it remove any at-will employment rights that did exist prior to the agreement. The trial court therefore properly determined that the agreement did not dictate that every Hospice employee was entitled to the exact same treatment with regard to duties, office accommodations or access to the workplace.

II

The second set of claims asserted by the plaintiff on appeal concerns acts by the individual defendants, subsequent to the signing of the agreement, which allegedly caused her emotional distress. As a preliminary matter, we determine that the plaintiff's claims that the court improperly rendered summary judgment on her causes of action for negligent infliction of emotional distress and for intentional infliction of emotional distress were inadequately briefed. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Cooke* v. *Cooke*, 99 Conn. App. 347, 353, 913 A.2d 480 (2007). "We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *Krondes* v. *O'Boy*, 37 Conn. App. 430, 436, 656 A.2d 692 (1995).

The section of the plaintiff's brief devoted to the negligent infliction of emotional distress claim is five

sentences long, contains no case citations and does not address the fundamental basis of the trial court's rationale. The section of the plaintiff's brief devoted to intentional infliction of emotional distress is four sentences long, and, while it does contain a case citation, there is no analysis of why the case presented is applicable. Furthermore, the plaintiff's brief contains no application of facts to the elements of intentional infliction of emotional distress. Nevertheless, had the claims been briefed adequately, we still would conclude that the trial court properly rendered summary judgment as to those counts of the complaint.

The following additional facts are relevant to the plaintiff's claims of negligent infliction of emotional distress and intentional infliction of emotional distress. In 2008, the plaintiff was involved in a motor vehicle accident that was not work related and left her hospitalized for one month with fractured ribs, a broken pelvis and a punctured lung. She suffered from post-traumatic stress disorder (stress disorder) that rendered her incapable of driving long distances. The plaintiff was discharged from stress disorder treatment in March, 2009, after her condition improved, but she reported that her symptoms returned in July, 2009. In October, 2009, after filing the three reports with the administration, the plaintiff was reassigned from telemarketing duties in the Shelton office to training duties in various locations throughout the state. The driving occasioned by the reassignment caused her stress. The change in the plaintiff's job description was memorialized in the January 27, 2010 agreement, which stated that the plaintiff would divide the four, six hour days per week she worked between the Branford and Shelton offices.

On February 10, 2010, the plaintiff was scheduled to be in Greenwich at 2:30 p.m. to give a presentation as part of her work duties with Hospice. She was late due to a prior work obligation, and despite calling her

supervisor three times within the next hour to inform her that she was stuck in traffic and that it was pointless to continue driving because she was going to miss the presentation, the supervisor told her to continue to Greenwich. She arrived in Greenwich at 3:15 p.m. and sat in her car shaking and crying from the long commute. When the plaintiff entered the facility, the person in charge of the Greenwich Hospice informed her that the presentation had ended and observed that the plaintiff looked upset. A nurse from Hospice examined the plaintiff in the lobby.

The plaintiff worked for six days after the February 10, 2010 incident. On February 24, 2010, the plaintiff presented Hospice with a letter written by her physician, recommending that the plaintiff refrain from long and stressful drives at work because driving exacerbated her stress disorder. A similar letter, dated March 15, 2010, and written by a different physician, was presented to Hospice along with a request that Hospice allow the plaintiff to receive workers' compensation benefits. On March 2, 2010, Hospice sent the plaintiff a letter explaining that it could not accommodate the plaintiff's driving induced stress by returning her to her previous position, as she had requested, because her previous position no longer existed. Hospice suggested that the plaintiff could qualify for certain benefits under the Family and Medical Leave Act (act), General Statutes § 31-51kk et seq., because she was unable to perform an essential function of her job. Hospice reiterated these suggestions to the plaintiff in letters dated March 10 and 23, and April 2, 2010. In a letter sent by the plaintiff to Hospice dated April 9, 2010, she threatened to file with the state insurance commissioner a complaint against Hospice if it did not comply with her previous demand that she receive subsidized medical

benefits[3] rather than the benefits program provided by the act.[4]

A

The plaintiff first claims that there is a genuine issue of material fact regarding whether the individual defendants could be found liable for negligent infliction of emotional distress. We disagree.

To prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 444, 815 A.2d 119 (2003). "[N]egligent infliction of emotional distress in the employment context arises only when it is based upon unreasonable conduct of the defendant in the termination process . . . ." (Internal quotation marks omitted.) *Perodeau* v. *Hartford*, 259 Conn. 729, 750, 792 A.2d 752 (2002). An individual "may not be found liable for negligent infliction of emotional distress arising out of conduct occurring within a continuing employment context, as distinguished from conduct occurring in the termination of employment." Id., 762–63.

The plaintiff argues that the individual defendants engaged in negligent conduct sufficient to meet the four

[3] The benefits referenced by the plaintiff's letter are available only after the employment relationship is severed.

[4] The plaintiff attempted to recover unemployment benefits, and the administrator of the unemployment compensation act ruled that the plaintiff's separation from her employment was nondisqualifying. Hospice appealed, and the appeals referee found, after a de novo review, that the plaintiff had resigned from her position at Hospice. He further found that the plaintiff was entitled to benefits because she was forced to resign after it was determined that she suffered from a medical condition that prevented her from performing an essential function of her job.

elements of negligent infliction of emotional distress. She further contends that her employment was constructively terminated due to an inhospitable workplace. As support for this claim, the plaintiff relies on the decision of the employment security review appeals referee, who allowed her to collect unemployment benefits. The plaintiff claims that constructive termination is sufficient to meet the termination requirement set forth in *Perodeau*. We are not persuaded.

The trial court held that constructive termination did not satisfy the termination requirement for a negligent infliction of emotional distress claim in an employment context, relying on a Superior Court case, *Michaud* v. *Farmington Community Ins. Agency*, Superior Court, judicial district of Hartford, Docket No. CV-01-0806951 (September 25, 2002) (33 Conn. L. Rptr. 206). While we are not bound by the Superior Court's decision in *Michaud*, we choose to follow its sound rationale in our analysis of this case. "[T]he language of *Perodeau* itself is restrictive. The holding is phrased narrowly: the tort is maintainable only for 'conduct occurring in the termination of employment.' Language such as conduct in the 'discharge process' is not used; such language perhaps would contemplate a more expansive time frame. Conduct justifying the termination, or, on the other hand, compelling the resignation, is not itself the actual termination. Termination means ending, not the conduct which causes the ending." Id.

As the court in *Michaud* noted, the language used in *Perodeau* is supported by policy rationales that buttress the finding that termination must be a condition precedent to a negligent infliction of emotional distress claim in the employment context. Specifically, our Supreme Court in *Perodeau* determined that "individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace."

Perodeau v. *Hartford*, supra, 259 Conn. 757. The court also was aware that ensuring every employee's contentment, so as to ameliorate the threat of lawsuit, potentially could stifle productivity. Id., 758. The court concluded that because of the "inherently competitive and stressful nature of the workplace and the difficulties surrounding proof of emotional distress, extending the tort of negligent infliction of emotional distress to ongoing employment relationships would open the door to spurious claims." Id.

Both the Supreme Court's language and its policy rationales in *Perodeau* regarding the termination requirement indicate that termination is distinct from events that occur over the course of the employment relationship. The plaintiff alleges that her employment was constructively terminated due to a series of events occurring during her employment. The events that occurred, regardless of their impact on her decision to resign from her position at Hospice, do not satisfy the termination requirement set forth in *Perodeau*. The trial court therefore properly held that the plaintiff could not prevail on her claim for negligent infliction of emotional distress.

B

The plaintiff next claims that there is a genuine issue of material fact regarding whether the individual defendants could be liable for intentional infliction of emotional distress. We disagree.

"In order for the plaintiff to prevail in a case for liability under . . . [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3)

that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine." (Citation omitted; internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000).

"Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) Id., 210–11.

The plaintiff alleges that she suffered emotional distress as a result of harassment and humiliation, denial of supplies she required to perform her job and forced excessive commuting. The plaintiff claims that she was forced to drive hundreds of miles unnecessarily, including a commute made to Greenwich on February 10, 2010, that caused her emotional distress.[5] The plaintiff further alleges that the individual defendants conspired

[5] The plaintiff also describes another distressing commute she made from Shelton to Waterbury in whiteout conditions, only to find no record of an appointment made by her supervisor when she arrived. This commute occurred, however, prior to the agreement, and is therefore subject to the release provision.

to engage in a pattern of harassment and infliction of emotional distress that put her under relentless and severe pressure to quit her job. She claims that the individual defendants did this in order to ingratiate themselves with the upper levels of the chain of command at Hospice.

We determine that the court correctly held that there was no genuine issue of material fact that the individual defendants' actions were not extreme and outrageous. A vindictive conspiracy to terminate a plaintiff's employment, even if true, would not necessarily be sufficient to state a claim for intentional infliction of emotional distress. *Gillians* v. *Vivanco-Small*, 128 Conn. App. 207, 213, 15 A.3d 1200 (allegations that defendant coworkers, motivated by personal vendetta, conspired to create hostile work environment that included falsely accusing plaintiff of racial and sexual bias and giving plaintiff negative performance evaluations were insufficient to state claim of intentional infliction of emotional distress), cert. denied, 301 Conn. 933, 23 A.3d 726 (2011). This court has determined that defendants who harassed, intimidated, defamed and then disciplined a plaintiff without proper investigation did not engage in conduct that was extreme and outrageous. *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 569, 922 A.2d 280 (affirming trial court's granting of defendants' motion to strike because allegations, when read in light most favorable to plaintiff, did not rise to level of extreme and outrageous conduct), cert. denied, 284 Conn. 910, 931 A.2d 935 (2007). Furthermore, the agreement indicated that the plaintiff would be driving as part of her job, and that she would have to bring her own materials to work with her in Branford and Shelton. In light of these two provisions of the agreement, the trial court concluded properly that it was not extreme and outrageous behavior to deprive the plaintiff of office equipment or to require her to

drive. Accordingly, the plaintiff's claim of intentional infliction of emotion distress fails to meet the threshold for extreme and outrageous conduct with regard to any of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

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98 LORDS HIGHWAY, LLC *v.* ONE HUNDRED LORDS HIGHWAY, LLC, ET AL.
(AC 33192)

Beach, Sheldon and Flynn, Js.

Syllabus

The plaintiff, L Co., brought this action, pursuant to statute (§ 47-31), against the defendants G, F and D, neighbors who each own a separate lot that abuts L Co.'s property, seeking to quiet title to certain property. Thereafter, G filed a counterclaim seeking to quiet title to a portion of his lot that abuts L Co.'s land and alleging ownership to a certain area of land by adverse possession. F filed an answer and special defenses, and D filed an answer, special defenses, a cross claim and a counterclaim, which included allegations regarding ownership of the portion of her property that was contested and a claim of a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Thereafter, L Co. withdrew its complaint, and F and D filed motions to amend their answers in order to clearly delineate quiet title counterclaims against L Co. G's counterclaim to quiet title survived the withdrawal as a pending counterclaim, and the trial court construed the answers and special defenses of F and D as counterclaims to quiet title as well, and those counterclaims also survived the withdrawal of the complaint. Subsequently, K intervened as a counterclaim defendant and D withdrew her cross claim and CUTPA counterclaim. The matter was tried to the court, which rendered judgment for G, F and D as the counterclaim plaintiffs quieting title to the property and for K as to G's counterclaim for adverse possession. From that judgment, L Co. and K appealed and G cross appealed to this court. *Held*:

1. L Co. and K could not prevail on their claim that the trial court lacked subject matter jurisdiction to quiet title in the land to G, D and F in the absence of a necessary party, M: although M was never joined as a party to the action, it is well established that the nonjoinder of parties or a failure to notify or join indispensable parties generally does not deprive a court of subject matter jurisdiction, and because only the parties to

a quiet title action are bound by the judgment, the failure to include an interested party is not error because the decision to join a party in an action to quiet title is made by the plaintiff; accordingly, because the failure to join M did not implicate the trial court's subject matter jurisdiction or infringe on M's due process rights, as M's circumstances were sufficiently different from those of the parties to this action because he has a chain of title different from that of L Co., it was not necessary to remand the case so that M could be joined as a party or afforded notice.

2. L Co. and K could not prevail on their claim that the trial court improperly allowed F and D to continue as counterclaim plaintiffs based only on their respective answers to L Co.'s withdrawn complaint:

a. The claim of L Co. and K that, once L Co. withdrew its complaint, the trial court lacked subject matter jurisdiction to consider the motions filed by F and D to amend their answers was unavailing: D's filing of a counterclaim prior to L Co.'s withdrawal of the complaint and D's subsequent withdrawal of her counterclaim only with respect to the CUTPA allegations did not affect her allegations regarding the quiet title portion of her counterclaim, which survived the withdrawal of the CUTPA counterclaim, and the trial court retained subject matter jurisdiction over the matter as to D; furthermore, although F's answer did not have a separately delineated counterclaim at the time L Co. withdrew its complaint, the trial court did have subject matter jurisdiction to consider and rule on F's motion, that court's consideration of F's motion effectively having restored the case involving her to the docket, as the court was exercising its inherent powers to provide for the due administration of justice.

b. The trial court properly construed the responsive pleadings of F and D to contain viable counterclaims under § 47-31 (d) that survived L Co.'s withdrawal of its complaint: although D's counterclaim was labeled a CUTPA counterclaim, it contained allegations that satisfied § 47-31 (d) and constituted a proper request for relief under a quiet title counterclaim, and the allegations of F's answer, in which she affirmatively asserted ownership interests in the disputed portion of her property and described the deed through which her interest was claimed to be derived, as well as the relief F sought, properly pleaded the material facts for a counterclaim under § 47-31 (d).

3. Contrary to the claim of L Co. and K, the trial court did not commit plain error in not requiring G, F and D as the counterclaim plaintiffs to amend their pleadings to include K after K was joined as a party defendant, this court having found no manifest injustice or fundamental unfairness: the claim of L Co. and K that K was denied the opportunity to answer and defend his interest in the disputed land was unavailing because despite the fact that L Co. conveyed all of its interest in its property to K the day before trial was scheduled to begin and the day after L Co. withdrew its complaint, K had notice regarding the pendency of the action, as the trial court, upon learning of L Co.'s conveyance of the

disputed parcel, ordered notice both orally and by mail to K regarding the pendency of this action in order to afford him the opportunity to participate in the proceedings and to protect his interest, K took advantage of the notice and appeared before the court, and K's counsel thereafter participated in the trial on his behalf; moreover, although the trial court did not require the counterclaim plaintiffs to amend their pleadings, it was K's prerogative to assert any claim to the disputed property or any defense that he desired, K could have requested the counterclaim plaintiffs to amend their pleadings and, in lieu of such a request, K was not required to wait for an amendment in order to assert a claim in defense of his interest in the disputed land.

4. The trial court improperly used a heightened standard in construing the open and visible requirement in ruling on G's counterclaim alleging adverse possession and determining that because the disputed area consisted of thick forest, it was unlikely that a reasonably prudent owner would have noticed G's activities or the effect they might have on his ownership rights and that G was required to take extraordinary measures to put the owner on notice; the open and visible element requires a fact finder to examine the extent and visibility of the claimant's use of the record owner's property so as to determine whether a reasonable owner would believe that the claimant was using that property as his or her own, and, here, G made permanent and physical improvements to the land, which served as indicia of his claim of possession and were uses that qualified as open and visible; accordingly, the case had to be remanded to the trial court to consider G's adverse possession claim under the proper legal standard.

Argued February 6—officially released October 23, 2012

Procedural History

Action to quiet title to certain real property, brought to the Superior Court in the judicial district of Fairfield, where the defendant Katherine DeSousa et al. filed counterclaims and cross claims; thereafter, the plaintiff withdrew the complaint; subsequently, the defendant Katherine DeSousa et al. withdrew in part the counterclaims and cross claims; thereafter, Alexander Klokus intervened as a counterclaim and cross claim party defendant; subsequently, the matter was tried to the court, *Hon. L. Scott Melville*, judge trial referee; judgment for the defendant Katherine DeSousa et al. quieting title to certain real property and for the counterclaim defendant Alexander Klokus as to the defendant Gary

J. Gubner's counterclaim for adverse possession, from which the plaintiff and the counterclaim defendant Alexander Klokus appealed and the defendant Gary J. Gubner cross appealed to this court. *Reversed in part; further proceedings.*

Thomas L. Kanasky, Jr., for the appellants-cross appellees (plaintiff and counterclaim defendant Alexander Klokus).

Edward T. Krumeich, for the appellee-appellant (defendant Gary J. Gubner).

Mark J. Kovack, for the appellees-appellants (substitute defendant Victoria R. Fash Living Trust et al.).

Opinion

FLYNN, J. The counterclaim defendants, 98 Lords Highway, LLC (the LLC), and Alexander Klokus, appeal from the judgment of the trial court, rendered after a court trial, in favor of the counterclaim plaintiffs, Gary J. Gubner,[1] Victoria R. Fash[2] and Katherine DeSousa,[3] in an action to quiet title under General Statutes § 47-31. On appeal, the counterclaim defendants claim that the trial court erred in (1) quieting title in the absence of a necessary party; (2) allowing Fash and DeSousa to continue as counterclaim plaintiffs based only on their answers to the withdrawn complaint; and (3) not requiring the counterclaim plaintiffs to amend their pleading after Klokus was joined as a counterclaim defendant. Gubner also cross appeals, claiming that the court improperly denied his claim of title by adverse

[1] Beverly Gubner died in 2006, but the real property at issue in these appeals passed to and vested in her husband, Gary J. Gubner, upon her death.

[2] The Victoria R. Fash Living Trust and Victoria Fash Trustee were substituted as defendants for Victoria R. Fash by way of stipulation dated May 4, 2009.

[3] We note that DeSousa filed a motion with this court to adopt the arguments set forth in Fash's brief, which we granted on February 6, 2012, without objection.

possession to land that lies fifteen feet beyond the fence line opening shown on the survey done by Richard Meehan. We affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant on appeal. The counterclaim plaintiffs are neighbors, each owning in fee simple a separate lot that abuts the LLC's property.[4] The LLC, in part, claimed to own a portion of each counterclaim plaintiff's lot, specifically, the portions of the properties that are located in an area along the western side of the LLC's property, each ranging from between twenty and forty feet in width.

On April 7, 2006, the LLC filed the initial action to quiet title under General Statutes § 47-31 (b) against the then defendants, Gubner, Fash, DeSousa, William N. Derraugh, Angelo DeCaro, Mortgage Electronic Registration Systems, Inc., One Hundred Lords Highway, LLC, and 102 Lords Highway, LLC.[5] The LLC claimed ownership in fee simple and possession of 98 Lords Highway, Weston, by virtue of a quitclaim deed recorded on April 15, 2003 at volume 343, page 750, of the Weston land records, absolute title in fee simple to the woodland lot, recorded in volume 29, page 660, and volume 28, page 401, of the Weston land records, and title to and ownership of a parcel of land on a map entitled "Perimeter Survey Prepared for Ranald McNeil, Formerly the Estate of Edith Gifford, Lords Highway, Weston, Connecticut," dated January 7, 2003, record map number 3640 in the Weston land records, which were adverse to the title of the named defendants,

[4] The LLC property is commonly referred to as the "woodland lot" among title searchers.

[5] One Hundred Lords Highway, LLC, and 102 Lords Highway, LLC, were defaulted for failure to appear. The action against Derraugh was withdrawn, and a nonsuit was entered against DeCaro and Mortgage Electronic Registration Systems, Inc.

including the counterclaim plaintiffs. The LLC filed an amended complaint on June 22, 2006, which subsequently was amended further.

Gubner filed his answer, denying the allegations of the plaintiff's complaint and raising eleven special defenses, two counterclaims, and one cross claim. Specifically relevant to his appeal, Gubner filed a counterclaim under § 47-31 seeking to quiet title to the portion of his lot that abutted the LLC's land, and he also claimed ownership by adverse possession of an area of land that lies fifteen feet beyond the opening of the fence line shown on the Meehan survey. The LLC specifically denied all of Gubner's special defenses, as well as the counterclaims set forth in his answer and reply.

Fash filed her answer on November 2, 2006, which contained specific denials of the allegations of the plaintiff's complaint and ten special defenses. She subsequently filed an amended answer on November 28, 2006, to add three additional special defenses. Fash's responsive pleading did not contain any specifically identified counterclaims, but Fash's ad damnum clause "pray[ed] that judgment enter on the Second Amended Complaint in her favor, upholding and/or quieting all of her titles, rights and/or interests to and in the real property identified in paragraph nos. '5' and '6,' above, pursuant to . . . [§] 47-31 . . . ." The LLC replied by generally denying Fash's special defenses on January 5, 2007.

On March 19, 2007, DeSousa filed her answer, along with fourteen special defenses, one counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., against the LLC, as well as one cross claim for a violation of CUTPA against One Hundred Lords Highway, LLC, and 102 Lords Highway, LLC. The LLC filed its reply and answer to DeSousa's answer, denying all allegations

related to her special defenses, as well as specifically denying the allegations of her counterclaim.

On August 31, 2010, the LLC filed a withdrawal of its complaint without prejudice with respect to all of the defendants.[6] The withdrawal was filed only two days before trial was to commence. Robert Walpuck, the sole member of the LLC, filed a release of lis pendens on the counterclaim plaintiffs' properties. Gubner's counterclaim to quiet title survived the withdrawal as a pending counterclaim and, over the LLC's objection, the trial court construed the answers and special defenses filed by Fash and DeSousa as counterclaims as well, and those counterclaims also survived the withdrawal of the complaint.

On September 1, 2010, the LLC conveyed by warranty deed all of its interest in 98 Lords Highway to Klokus.[7] The court learned of this transfer on September 8, 2010, approximately one week after evidence was slated to begin. The court subsequently ordered notice of this case to the new titleholder, Klokus. On approximately September 15, 2010, Klokus was added as a counterclaim defendant, and the trial then proceeded to its conclusion. On September 30, 2010, DeSousa filed a withdrawal of her cross claim and her CUTPA counterclaim, noting, however, that she was not withdrawing her quiet title counterclaim. That same day, Gubner filed a withdrawal of his CUTPA cross claim and counterclaim.

The court specifically found that each of the three counterclaim plaintiffs had satisfied the elements of the Marketable Record Title Act by credible evidence and,

[6] The court described the LLC's decision to withdraw as "strategic," insomuch that it was without prejudice and could be refiled at any time, such that the LLC's withdrawal attempted to avoid the imminent litigation while not foreclosing a future determination of the issues raised in its complaint.

[7] For purposes of these appeals, we continue to refer to both the LLC and Klokus as the counterclaim defendants.

as such, had good and marketable title in fee simple to their respective lots, including the areas originally claimed by the LLC. Furthermore, the court found in favor of the counterclaim defendants on Gubner's claim of adverse possession as to fifteen feet of land beyond the fence line. The counterclaim defendants appeal from the court's judgment quieting title in the counterclaim plaintiffs, and Gubner cross appeals from the judgment denying his claim of adverse possession as to fifteen feet of land beyond the fence line of his deeded property. Additional facts will be set forth as necessary.

I

The counterclaim defendants first claim that the trial court lacked subject matter jurisdiction to quiet title in the land of the three counterclaim plaintiffs in the absence of a necessary party, Robert Muller. We disagree with the counterclaim defendants and conclude that the court had subject matter jurisdiction to adjudicate the matter brought before it.

We begin by setting forth our well established standard of review. "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.) *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 127–28, 836 A.2d 414 (2003). "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.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 485, 815 A.2d 1188 (2003).

A

The counterclaim defendants argue that the court lacked subject matter jurisdiction because the counterclaim plaintiffs never joined Muller, whom the counterclaim defendants describe as a party in interest to this action. We disagree.

The allegation that Muller is a party in interest to this action stems from a deed recorded October 18, 1988, which lists Muller as the recipient of a parcel of land from the Gifford family with the same metes and bounds, excepting one portion of the premises previously separately conveyed, as the parcel that the LLC claims in fee simple. The counterclaim plaintiffs also presented testimony from their expert witness, Marc Shakin, a title searcher, who testified that in his opinion the LLC never received an interest in the woodland lot because it previously was deeded to Muller. Shakin specifically testified that, in his opinion, "98 Lords Highway claimed through a Ranald McNeil, who purchased the property—who got a deed—two deeds, actually—2002 and 2003—from a Deborah Green. It's—I told—I testified that Deborah Green did not own any realty in Weston. . . . I believe that Deborah Green conveyed nothing to this Ranald McNeil, who, in turn, had conveyed nothing to 98 Lords Highway, LLC, because the woodland lot was—was never owned by the parties . . . ."

Although it is clear that Muller was never joined as a party to the action, it is well established that the nonjoinder or misjoinder of parties or a failure to notify or join indispensable parties generally does not deprive a court of subject matter jurisdiction. General Statutes § 52-108 ("[a]n action shall not be defeated by the nonjoinder or misjoinder of parties"); *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 288–89, 914 A.2d 996 (2007); *Yellow Cab Co. of New London &*

Groton, *Inc.* v. *Dept. of Transportation*, 127 Conn. App. 170, 176–77, 13 A.3d 690, cert. denied, 301 Conn. 908, 19 A.3d 178 (2011); *Sullivan* v. *Thorndike*, 104 Conn. App. 297, 301, 934 A.2d 827 (2007). The exclusive remedy for nonjoinder of parties is by motion to strike. *Bauer* v. *Souto*, 277 Conn. 829, 838–39, 896 A.2d 90 (2006); Practice Book §§ 10-39 and 11-3.

In this case, although the counterclaim plaintiffs requested relief under a statute, namely, § 47-31, that requires the joining of persons who may have an adverse interest in the property, our Supreme Court has explained that the failure to join such persons is not error. *Swenson* v. *Dittner*, 183 Conn. 289, 292, 439 A.2d 334 (1981). In *Swenson*, our Supreme Court stated: "An action to quiet title is a statutory action instituted under the provisions of . . . § 47-31. The statute requires the plaintiffs to name the person or persons who may claim such adverse estate or interest. . . . So that the trial court can make a full determination of the rights of the parties to the land, an action to quiet title is brought against persons who claim title to or have an interest in the land. . . . Only the parties to an action to quiet title are bound by the judgment. . . . The failure to include [an interested party therefore] is not error because the decision to join a party in a suit to quiet title is made by the plaintiff." (Citations omitted.) Id.; but see *Gemmell* v. *Lee*, 42 Conn. App. 682, 685, 680 A.2d 346 (1996) (failure to join interested party in action to quiet title deprives court of subject matter jurisdiction). After careful consideration of the *Swenson* precedent, we conclude that the failure to join Muller did not implicate the court's subject matter jurisdiction.

B

After concluding that the court possessed subject matter jurisdiction, in an abundance of caution, we next consider whether the due process interest of Muller

was violated by proceeding with the matter without his inclusion. While failure to join indispensable parties generally does not implicate a court's subject matter jurisdiction, such failure "may implicate due process concerns that would compel a court to require notice or joinder before proceeding with the action." *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 281 Conn. 289. "[A] court may refuse to proceed with litigation if a claim cannot properly be adjudicated without the presence of those indispensable persons whose substantive rights and interests will be necessarily and materially affected by its outcome. . . . Joinder of indispensable parties is mandated because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action]. . . . *Hilton* v. *New Haven*, 233 Conn. 701, 722–23, 661 A.2d 973 (1995)." (Internal quotation marks omitted.) *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 289–90.

We conclude that the failure to join Muller did not infringe on his due process rights. "[A] person who is not a party generally will not be bound by a declaratory ruling. . . . [A]n interested person who is not notified of the action is subject only to the stare decisis impact of the judgment. . . . [When] the interested person's circumstances are sufficiently different from those of the parties, the parties' representation of the nonparty's interests may have been weak, but the case will have less precedential effect on the interested person and any future action to which that person may be a party." (Citation omitted.) Id., 291. Muller, insomuch that he was not made a party to this action, is not bound by the judgment. See *Lake Garda Improvement Assn.* v. *Battistoni*, 155 Conn. 287, 294–95, 231 A.2d 276 (1967); *Sigal* v. *Hartford National Bank & Trust Co.*, 119 Conn. 570, 573, 177 A. 742 (1935). Muller's circumstances are

different from those of the parties to this action because he has a chain of title different from that of the LLC. We therefore decline to remand this case so that Muller may be joined or afforded notice.

II

The counterclaim defendants claim that the trial court erred in allowing Fash and DeSousa to continue as counterclaim plaintiffs based only on their respective answers to the withdrawn complaint. They argue that the court lost subject matter jurisdiction over the case as to Fash and DeSousa after the LLC withdrew its complaint and that the court also improperly construed the answers of Fash and DeSousa as setting forth sufficient allegations to state counterclaims to quiet title under § 47-31 (d). We disagree.

In order to address this claim, the following additional procedural details bear repetition and enhanced detail. On August 31, 2010, the LLC withdrew its action against all of the defendants. At the time of the withdrawal, Fash had filed an amended answer and special defenses. DeSousa also had filed an answer with fourteen special defenses, one cross claim and one counterclaim. The LLC's withdrawal of its complaint was followed by two separate motions by Fash and DeSousa, on September 1 and 2, 2010, respectively, seeking permission of the court to amend each of their answers in order to clearly delineate quiet title counterclaims against the LLC pursuant to § 47-31. On September 7, 2010, the LLC filed an opposition to these motions. On September 8, 2010, after hearing argument on these motions, the court ruled from the bench that "what was plead[ed] was in effect a counterclaim—a proper counterclaim . . . despite the fact that it was labeled something else." Although the counterclaim defendants treat this as a single issue regarding Fash and DeSousa jointly, it is clear that Fash and DeSousa are in distinct

legal positions and, as such, we will address them separately after considering whether the court had subject matter jurisdiction to consider the motions to amend filed by Fash and DeSousa.

A

The counterclaim defendants argue that, once the LLC withdrew its complaint, the case, essentially, was erased from the docket and the court was without subject matter jurisdiction to consider the motions filed by Fash and DeSousa. We disagree.

"We have 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 . . . . 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." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532–33, 911 A.2d 712 (2006).

1

We will address DeSousa first, because she was in a clearer position, having filed a counterclaim in the case prior to the LLC's withdrawal of its complaint. DeSousa's counterclaim also contained multiple paragraphs with additional allegations regarding the ownership of the portion of her property that was contested. Paragraph one of DeSousa's counterclaim states: "The counterclaim plaintiff Katherine DeSousa is the record

owner in fee simple of the premises more particularly described in an executo[r's] deed, dated February 8, 1984 from The Connecticut Bank & Trust Company, N.A., of Hartford, Connecticut, as executor of the Last Will and Testament of Peter M. Fraser, Jr. to Katherine [DeSousa], and recorded in Volume 130 at Page 804 of the Weston Land Records ('DeSousa's Deed'), which deed among other things designates the property owned by Katherine DeSousa as being shown as Lot Number Ten (10) on a certain map titled 'Map of Property Developed for Rogue's Ridge Properties, Inc., Weston, Conn., Sept. 1949, Scale = 1" = 100' " on file in the office of the Town Clerk of the Town of Weston as Map No. 600 ('DeSousa's Property')." Additionally, paragraph fourteen of DeSousa's counterclaim alleges: "In furtherance of their unscrupulous and deceptive campaign of intimidation in furtherance of their scheme in the conduct of their development business, the Lords Highway Developers have, among other things:

"a. unlawfully torn down the Gubners' fence within the Gubners' Property, without seeking or obtaining the Gubners' consent or permission;

"b. improperly and unlawfully placed stakes across the width of the backyard of the Gubners' property, within just a few feet of the Gubners' swimming pool, again without seeking or obtaining the Gubners' consent or permission;

"c. upon information and belief, improperly and unlawfully placed stakes and erected a fence across the middle of the property owned by Katherine DeSousa ('DeSousa'), again without seeking or obtaining DeSousa's consent or permission . . . ."

Finally, in paragraph sixteen, DeSousa claims: "[f.] 98 Lords Highway's alleged claim is barred under the Connecticut Marketable Title Act . . . § 47-33b et seq;

"[g.] 98 Lords Highway's claim is barred because neither it nor its predecessors in title own, owned, possess or possessed the property in which it now allegedly claims an interest . . . ." In this allegation, DeSousa is alleging that she holds good marketable title to the property.

On September 30, 2010, DeSousa filed a form for withdrawal of counterclaims and cross claims, which explicitly stated that the withdrawal was for "CUTPA only; *not* quiet title." (Emphasis in original.) Despite DeSousa's withdrawal of her counterclaim with respect to the CUTPA allegations, this did not affect her allegations regarding quiet title contained, as previously described, in paragraphs one, fourteen, and sixteen of her counterclaim. These paragraphs survive DeSousa's withdrawal of her CUTPA counterclaim because they related to quiet title, not the CUTPA claim, as she specifically stated on her withdrawal form.

Practice Book § 10-55 provides in relevant part: "The withdrawal of an action after a counterclaim, whether for legal or equitable relief, has been filed therein shall not impair the right of the defendant to prosecute such counterclaim as fully as if said action had not been withdrawn . . . ." See also *Boothe* v. *Armstrong*, 76 Conn. 530, 533, 57 A. 173 (1904).

The presence of the counterclaim in DeSousa's pleading therefore provided the court with continuing subject matter jurisdiction over the matter because DeSousa's delineated counterclaim survived the LLC's withdrawal and allowed the court to retain subject matter jurisdiction.

2

Fash, however, was in a more precarious procedural position at the time the LLC filed a withdrawal of its complaint and she filed her subsequent motion because

her answer did not contain a separately delineated counterclaim. Because Fash's answer did not have a separately delineated counterclaim at the time the LLC withdrew its complaint, the LLC argued before the trial court that the court had lost its subject matter jurisdiction over Fash's case because the case involving her no longer existed. The LLC renews this argument on appeal. We, however, are not persuaded and conclude that the court's consideration of Fash's motion effectively restored the case involving her to the docket.

"The question of whether a case should be restored to the docket is one of judicial discretion. See *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 391, 685 A.2d 1108 (1996)." *Sicaras* v. *Hartford*, 44 Conn. App. 771, 779, 692 A.2d 1290, cert. denied, 241 Conn. 916, 696 A.2d 340 (1997); see also *Lusas* v. *St. Patrick's Roman Catholic Church Corp.*, 123 Conn. 166, 170, 193 A. 204 (1937).

In *Lusas*, the court held that "the jurisdiction of the court to proceed further in the matter after an action has been voluntarily withdrawn is strictly analogous to that presented after the rendition of a final judgment or the erasure of a case from the docket. The court unless it is restored to the docket cannot proceed with it further but, the action still being in court, it has not gone entirely beyond the jurisdiction of the court to act in it. . . . [I]f it should be restored on motion of the plaintiff and the defendant should thereafter expressly or by implication waive any claim of lack of jurisdiction, the court could properly proceed with it. . . . There is no reason why the court has [no] jurisdiction upon a proper showing to restore to the active docket a case which has been voluntarily withdrawn, just as it can open a judgment or restore to the docket a case which has been erased." (Citations omitted.) *Lusas* v. *St. Patrick's Roman Catholic Church Corp.*, supra, 123 Conn. 170. In *Lusas*, however, the plaintiff's

motion was denied on the ground that it was filed too long after the withdrawal in a new court term. Id., 171–72.

The issue of restoring a case to the docket after voluntarily withdrawal of the action was again addressed in *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 239 Conn. 375. In that case, the trial judge had issued an order for sanctions for an attorney's bad faith pleading arising out of a breach of franchise agreement case described "as a legal quagmire out of which has grown a tangled thicket of motions, claims and counterclaims." (Internal quotation marks omitted.) Id., 377. Specifically, the underlying action had been withdrawn, but there was still a pending motion before the trial court for contempt regarding the order for sanctions. Id., 389. On appeal, the attorney argued that the court had no jurisdiction because no motion to restore the case to the docket had been filed or granted. Id. Our Supreme Court concluded, however, that "even if we were to assume that, under *Lusas*, [the trial court] was required to grant a motion to restore the case to the docket before considering the motion for contempt, we can only regard [its] actions as the functional equivalent of the granting of such a motion. To conclude otherwise would be to elevate form over substance." Id., 391.

A third notable case to take up this issue is *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 884 A.2d 981 (2005). In *Rosado*, our Supreme Court upheld the granting of an independent third party's motion to intervene, filed by the New York Times Company (Times), in cases that had been settled and withdrawn with prejudice approximately one year prior to the filing of the motion to intervene. Id., 172–73. Relying on *CFM of Connecticut. Inc.*, our Supreme Court reasoned that, "if the trial court had been required to grant a motion to restore the case to the docket before [acting on the motion], we can only regard [the court's] actions

as the functional equivalent of the granting of such a motion. . . .

"[T]he [trial] court exercised direct authority over the [withdrawn] cases, which had the same effect as restoring those cases to the docket. . . . [T]he trial court's exercise of jurisdiction over the documents and orders *necessarily* had the effect of restoring the withdrawn cases to the docket." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 198–99; see also *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 239 Conn. 389–92. "In other words, the [trial] court considered the [Times'] motion on its merits, just as it would have done had the Times filed, and the court granted, a motion to restore the [withdrawn] cases to the docket." (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 199. Our Supreme Court finally concluded that "the actions of the trial court reasonably cannot be treated as anything other than the restoration of the withdrawn cases to the docket." Id., 200–201. We conclude that if the trial court had been required to grant a motion to restore the case to the docket before acting on Fash's motion, the court's subsequent actions are the functional equivalent of the granting of such motion. See id.; *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 391.

In *CFM of Connecticut, Inc.*, our Supreme Court held that the trial court judge "considered it necessary to the due administration of justice that he decide all of these issues. . . . [H]ad he been formally presented with a motion to restore the case to the docket, he would have exercised his discretion to grant that motion as a precursor to his assumption of jurisdiction over the parties and [the attorney] in order to accomplish that necessity. [The trial court] was confronted with a case that had already consumed heroic amounts of resources of the judiciary, the parties and their counsel.

Although now formally withdrawn, the validity of that withdrawal depended on the resolution of . . . a question that [the attorney] in effect promised [the court] would surface again quickly . . . and would, therefore, consume even more such resources. . . .

"[The trial court's] action on the motions that were before [it] must be deemed to be the equivalent of restoring the case to the docket for the purpose of exercising the court's inherent powers to . . . provide for the due administration of justice." *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 239 Conn. 391–92.

Just as in *CFM of Connecticut, Inc.*, the present action before the court has been part of a "legal quagmire out of which has grown a tangled thicket of motions, claims and counterclaims." (Internal quotation marks omitted.) Id., 377. The trial judge in the present action described the situation here, opining: "This is a morass of procedural maneuvering, and I think we need to cut away the brush and get right to the roots . . . ." The current case initially was filed by the LLC in April, 2006, was set for trial and did not finally come to fruition until September 2, 2010.[8] Over that four year period, there were countless motions, memoranda, and replies filed in relation to this action. Furthermore, just as in *CFM of Connecticut, Inc.*, the court in the present case was addressing an issue that would arise again whether it was restored to the docket or brought as a separate action. The difference between restoring the case to the docket and waiting for Fash to refile and relitigate is only a matter of additional time and the expenditure of resources, both on her part and on the part of the

[8] Fash's memorandum of law in support of her motion for permission to amend claims that this action was "scheduled for trial on May 20, 2008, May 27, 2009, August 11, 2009, January 12, 2010, May 24, 2010, April 20, 2010, and June 23, 2010 and continued each time at the request of the [LLC]."

judiciary.[9] Just as our Supreme Court explained in *CFM of Connecticut, Inc.*, here, the trial judge was "exercising the court's inherent powers to . . . provide for the due administration of justice." *CFM of Connecticut, Inc.* v. *Chowdhury*, supra, 239 Conn. 392.

Unlike this action, both *CFM of Connecticut, Inc.*, and *Rosado* involved parties not at interest in the original withdrawn action.[10] In the present action, however, Fash was a named defendant and potential counterclaim plaintiff, who invested time and money into the litigation only to have the LLC withdraw its complaint on the eve of trial. Fash was not a nonparty, like the Times in *Rosado*, that the LLC had no notice of, but, rather, she was present from the filing of the first complaint. In fact, the LLC *named* Fash as a defendant, such that restoring the case to the docket for the purposes of determining whether she could amend her answer to clearly delineate her counterclaim under § 47-31 (d),[11] which would survive the LLC's withdrawal, would not prejudice the LLC. Fash's counsel was prepared to litigate the LLC's complaint as well as what was contained in Fash's pleading, but was notified that the LLC withdrew without an inquiry as to whether she had a surviving counterclaim.

[9] Fash's counsel disclosed to the court on September 2, 2010, days after the withdrawal: "[T]his is the seventh day, I think, that we are expecting to go to trial, and my client's been trying to quiet title for four years of litigation and her property's been on the market almost the entire time that this case has been pending and she can't sell it because of the cloud that the [LLC] is creating. And given that they withdraw in the case but they still have the claim, they could refile tomorrow. My client's still left with this trial." Fash's counsel alluded to the fact that the LLC withdrew the claim *without prejudice*, such that an action could be refiled against the counterclaim plaintiffs at any time.

[10] The party in *CFM of Connecticut, Inc.*, was the original trial attorney against whom sanctions were issued and the party in *Rosado* was the Times.

[11] For an explanation of why Fash's counterclaim will be measured against the requirements found in § 47-31 (d) instead of the pleading requirement found in § 47-31 (b), see part II B of this opinion.

Furthermore, the implicit restoration of Fash's matter to the docket was not temporally prejudicial. For example, the implicit restoration to the docket in *Rosado* was permitted fourteen months after the withdrawal of the underlying action with prejudice. Here, however, Fash moved for permission to amend her answer within days of the LLC's withdrawal. Surely, there is less, if any, prejudice to the parties involved when such an implied restoration to the docket occurs within days rather than more than one year after the withdrawal.

CFM of Connecticut, Inc., and *Rosado* hold that, in appropriate circumstances, the Superior Court has subject matter jurisdiction to restore to the docket actions that have been unilaterally withdrawn. We therefore conclude that the trial court did have subject matter jurisdiction to consider and rule on Fash's motion.

B

We now turn to review the court's ruling that the contents of Fash's and DeSousa's pleadings contained viable counterclaims that would survive the LLC's withdrawal of its complaint.

We begin by setting forth this court's standard of review: "The plaintiff's claim implicates the trial court's construction of the pleadings. [T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 265 Conn. 79, 104, 828 A.2d 31 (2003).

"[T]he general rule is that [a] counterclaim should be pleaded in exactly the same way the claim would be pleaded in the complaint in an independent action." (Internal quotation marks omitted.) *Home Oil Co.* v. *Todd*, 195 Conn. 333, 341, 487 A.2d 1095 (1985).

Although § 47-31 (b) governs the contents of the complaint, § 47-31 (d) commands that "[e]ach defendant shall, in his answer, state," such that a counterclaim under § 47-31 must satisfy subsection (d) and not subsection (b) because subsection (d) governs how a defendant must respond to a complaint, which would include the filing of a counterclaim. Under § 47-31 (d), a defendant is required only to make a claim against the property already brought into issue by the plaintiff under § 47-31 (b), such that it would be duplicitous for the defendant's counterclaim against the plaintiff to be required to satisfy § 47-31 (b), especially since § 47-31 (d) is delineated separately to direct defendants as to how to respond by answer. Furthermore, if a pleading in accordance with § 47-31 (d) is sufficient for a defendant to quiet title as to a disputed parcel, it also should be sufficient for a counterclaim plaintiff to use to quiet title.

Section 47-31 (d) requires: "Each defendant shall, in his answer, state whether or not he claims any estate or interest in, or encumbrance on, the property, or any part of it, and, if so, the nature and extent of the estate, interest or encumbrance which he claims, and he shall set out the manner in which the estate interest or encumbrance is claimed to be derived." This is the standard against which the pleadings of Fash and DeSousa will be measured.

"In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint 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; internal quotation marks omitted.) *ATC Partnership* v. *Windham*, 268 Conn. 463, 466 n.4, 845 A.2d 389 (2004).

"The term [counterclaim] itself is a general and comprehensive one, naturally including within its meaning all manner of permissible counterdemands." *Boothe* v. *Armstrong*, supra, 76 Conn. 532. "[T]he word 'counterclaim' was intended to be the generic term for all cross demands other than setoffs, whether in law or in equity." *Lescoe* v. *Kinstler*, 136 Conn. 253, 255, 70 A.2d 131 (1949). A cross complaint consists of "properly pleaded . . . material facts affecting the status of the parties . . . which afforded the basis of its claim against the plaintiff, and asked for relief by way of judgment in its favor." *American Motorists Ins. Co.* v. *Weir*, 132 Conn. 557, 561, 46 A.2d 7 (1946). We now turn to analyzing each of Fash's and DeSousa's responsive pleadings separately.

1

Paragraph one of DeSousa's counterclaim, although labeled a CUTPA counterclaim, contains allegations that satisfy § 47-31 (d): "The counterclaim plaintiff Katherine DeSousa is the record owner in fee simple of the premises more particularly described in an executo[r's] deed, dated February 8, 1984 from The Connecticut Bank & Trust Company, N.A., of Hartford, Connecticut, as executor of the Last Will and Testament of Peter M. Fraser, Jr. to Katherine [DeSousa], and recorded in Volume 130 at Page 804 of the Weston Land Records ('DeSousa's Deed'), which deed among other things designates the property owned by Katherine DeSousa as being shown as Lot Number Ten (10) on a certain map

titled 'Map of Property Developed for Rogue's Ridge Properties, Inc., Weston, Conn., Sept. 1949, Scale = 1" = 100' " on file in the office of the Town Clerk of the Town of Weston as Map No. 600 ('DeSousa's Property')." In this paragraph, DeSousa claims an interest in fee simple in the disputed portion of her property and describes the deed through which her interest is claimed to be derived in full satisfaction of § 47-31 (d). This paragraph contains the properly pleaded material facts that afford the basis of DeSousa's claim against the counterclaim defendants. See *American Motorists Ins. Co.* v. *Weir*, supra, 132 Conn. 561.

Additionally, DeSousa's ad damnum clause, although delineated as relief "[a]s to plaintiff's alleged claim," requests relief in the form of "quieting title to the Disputed Property in Katherine DeSousa's favor against plaintiff pursuant to . . . § 47-31 . . . ." Furthermore, the relief DeSousa sought under her delineated counterclaim included "such other and further relief as the Court may deem just, equitable . . . ." Taken individually or together, these statements form a proper request for relief under a quiet title counterclaim. See *American Motorists Ins. Co.* v. *Weir*, supra, 132 Conn. 561. Therefore, the court was correct to hold that DeSousa had a viable counterclaim under § 47-31.

2

Despite the fact that Fash does not have a separately delineated counterclaim, the court can read her pleading reasonably to determine if she has a counterclaim that nonetheless is embedded in her responsive pleading. See *ATC Partnership* v. *Windham*, supra, 268 Conn. 466 n.4. At this time, we take note that the implied restoration of the case to the docket, as we discussed in part II A 2 of this opinion, with respect to Fash, does not mean that the parties continue on with a blank slate. To the contrary, the restoration of the case to the

docket activated the LLC's complaint to act as a matrix under which Fash's answer can be examined, read and reviewed. Let us, however, be clear that this restoration does not mean that the LLC could get judgment on its complaint, but only that the complaint is available for us to read together with Fash's answer, which referred to it, in order to determine whether the answer contained a viable counterclaim.

Paragraph five of Fash's answer provides: "As to the allegations stated in paragraph no. '5,' Fash specifically denies the plaintiff's ownership of the 'Premises,' as alleged; as to the remaining allegations contained in said paragraph, Fash admits that she claims ownership to the real property described in a Warranty Deed from Lawrence D. Paulet and Dorothy Paulet dated September 1, 1993 and recorded in Volume 211 at Page 875 of the Weston Land Records and, pursuant to . . . § 47-31 (d), affirmatively avers that her said ownership interest in said real property is absolute title in fee simple."[12]

Paragraph six of Fash's answer states: "As to the allegations stated in paragraph no. '6,' Fash specifically denies the plaintiff's ownership of the 'Premises,' as alleged; as to the remaining allegations contained in said paragraph, Fash admits that she claims ownership to the real property described in a Warranty Deed from Lawrence D. Paulet and Dorothy Paulet dated April 27, 1994 and recorded in Volume 220 at Page 332 of the Weston Land Records and, pursuant to C.G.S. § 47-31

[12] Paragraph five of the LLC's second amended complaint referenced in Fash's answer states: "The Defendant, VICTORIA R. FASH, claims ownership of a certain piece or parcel of land located in the Town of Weston, Connecticut, said Premises being located, generally, westerly of the Premises owned by 98 LORDS HIGHWAY LLC and northerly of the premises owned by Katherine [DeSousa]. Said Premises are more particularly described in a Warranty Deed from Lawrence D. Paulet and Dorothy Paulet to Victoria R. Fash dated September 1, 1993, and recorded in Volume 211 at Page 875 of the Weston Land Records."

(d), affirmatively avers that her said ownership interest in said real property is absolute title in fee simple."[13]

In *Hartford-Connecticut Trust Co.* v. *Cambell*, 95 Conn. 399, 111 A. 864 (1920), "[the defendant] had not particularly set forth his adverse [quiet title] claim. [He] was not required to set forth his claim at length; the complaint had done this, and [his] admission and partial denial satisfies the requirements of pleading under this statute. Where the complaint states truly the plaintiff's ownership and defendant's claim based on admitted facts showing the nature and extent of his title, the defendant's answer should simply admit the allegations of the complaint, and thereupon the question of law determinative of the conflicting claims of title would be in issue. In other cases the defendant must comply with the statute in stating the nature of the interest which he claims." (Internal quotation marks omitted.) Id., 402–403.

Even though both paragraphs five and six of Fash's answer deny part of the LLC's complaint and admit part of the LLC's complaint, such references are acceptable to incorporate such material facts into her counterclaim. See id. In these paragraphs, Fash also affirmatively asserts ownership interests in fee simple in the respective disputed lands under § 47-31 (d). Within each of these paragraphs, Fash claims an interest in fee simple in the disputed portion of her property and describes the deed through which her interest is claimed to be derived in full satisfaction of § 47-31 (d), thus properly

[13] Paragraph six of the LLC's second amended complaint states: "The Defendant, VICTORIA R. FASH, claims ownership of a certain piece or parcel of land located in the Town of Weston, Connecticut, said Premises being located, generally, westerly of the Premises owned by 98 LORDS HIGHWAY LLC and northerly of the premises owned by Victoria R. Fash. Said Premises are more particularly described in a Warranty Deed from Lawrence D. Paulet and Dorothy C. Paulet to Victoria R. Fash dated April 27, 1994, and recorded in Volume 220 at Page 332 of the Weston Land Records."

pleading the material facts affording bases for her counterclaim against the counterclaim defendants. See *American Motorists Ins. Co.* v. *Weir*, supra, 132 Conn. 561.

Additionally, and of critical importance in construing Fash's answer as a counterclaim, Fash included an ad damnum clause in her answer in which she "pray[ed] that judgment enter on the Second Amended Complaint in her favor, upholding and/or quieting all of her titles, rights and/or interests to and in the real property identified in paragraph nos. '5' and '6,' above, pursuant to . . . [§] 47-31 . . . ." The relief Fash sought is a proper request for relief under a quiet title counterclaim. See *American Motorists Ins. Co.* v. *Weir*, supra, 132 Conn. 561. Therefore, the court properly found that Fash had a viable counterclaim under § 47-31 that survived the LLC's withdrawal and under which she could proceed to trial.

We therefore conclude that the court properly construed the responsive pleadings of DeSousa and Fash to contain viable counterclaims under § 47-31.

III

Next, the counterclaim defendants, invoking the doctrine of plain error, claim that the court erred in not requiring amendments to the counterclaim plaintiffs' pleadings after joining Klokus as a party defendant. We disagree and conclude that the court did not commit plain error in not requiring such amendments.

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 counterclaim defendants concede in their brief that this issue was not raised in the trial court

and not preserved for appeal such that they seek review under the plain error doctrine. "Plain error review 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." (Internal quotation marks omitted.) *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 25, 664 A.2d 719 (1995).

In 2009, our Supreme Court "clarified the two step framework under which [an appellate court] review[s] claims of plain error. First, we must determine whether the court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . We made clear . . . that this inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *Crawford* v. *Commissioner*

of Correction, 294 Conn. 165, 204–205, 982 A.2d 620 (2009).

The counterclaim defendants allege that the court should have required the counterclaim plaintiffs to amend their pleadings to include Klokus in order to comply with § 47-31 (b) and allow Klokus to file an answer in accordance with § 47-31 (d). They claim that this failure to amend denied Klokus the opportunity to answer and defend his interest in the disputed land. Even if we were to assume that the failure to require such an amendment was an error in satisfaction of the first prong of the plain error test, we would be unable to conclude that the results of such a claimed error rose to the level of fundamental unfairness in satisfaction of the second prong of the test.

Despite the LLC conveying all of its interest in 98 Lords Highway to Klokus the day *before* a trial was scheduled to begin and the day *after* the LLC withdrew its complaint, and despite Walpuck's allegedly not informing Klokus about the litigation surrounding the disputed land, Klokus still received notice regarding the pendency of the action. When the court learned of the LLC's conveyance of the disputed parcel on September 8, 2010, it ordered notice both orally and by mail to Klokus and his two brothers[14] regarding the pendency of this action before the court in order to afford them the opportunity to participate in the proceedings and protect whatever interest they had at stake. On September 15, 2010, Klokus took advantage of the notice and appeared before the court, where his motion to intervene as a counterclaim defendant was granted. Klokus' counsel, Thomas Bucci, Jr., then filed his appearance with the court on October 12, 2010, and from that point forward participated in the trial on Klokus' behalf. The

[14] Walpuck testified that his three sons, including Klokus, were beneficiaries of a trust owned by the LLC.

counterclaim defendants concede in their brief that Klokus never requested any amendments or opportunity to file pleadings during trial. In fact, the record reveals that he never filed any formal pleadings, including motions, answers, special defenses or cross complaints, during the course of the proceedings. It is difficult, if not impossible, to find manifest injustice or fundamental unfairness when counsel for a client has notice of an action, oversees and participates in the trial, but does not request any amendments or opportunity to file pleadings while the trial is ongoing.

The counterclaim defendants argue that Klokus was not able to defend his interest in the disputed land via an answer in accordance with § 47-31 (d) because the court did not require the counterclaim plaintiffs to amend their pleadings to include Klokus as a party with an adverse interest in the disputed land in compliance with § 47-31 (b). General Statutes § 47-32, which pertains to parties joined as defendants, provides in relevant part that "the plaintiff may join several defendants and all causes of action relating to defects in the title to any property described in the complaint, claims against the property or affecting title to it and encumbrances on the property. In such case, the defendant shall not be required to answer or plead to any allegation of the complaint or other pleadings of the plaintiff except such as affect or pertain to the claims or defenses which he desires to interpose. . . ." It was, therefore, Klokus' prerogative to assert any claim to the disputed property or defense that he desired. Klokus could have requested that the counterclaim plaintiffs amend their pleadings. In lieu of such a request, Klokus was not required to wait for an amendment by the counterclaim plaintiffs in order to assert a claim in defense of his interest in the disputed land. To the contrary, at any time, Klokus could have asserted his own claim under § 47-31 (a).

Section 47-31 (a) provides in relevant part: "An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may . . . have any interest in the property . . . to quiet and settle the title to the property. . . ." Klokus' failure to take advantage of a multitude of methods and opportunities to assert his interest in the disputed property, despite having the assistance of counsel, fails to rise to the level of manifest injustice required for a plain error finding.

IV

Gubner cross appeals, claiming title by adverse possession to an area fifteen feet beyond the fence line opening, as shown on the survey done by Meehan.[15] He claims in relevant part that the court improperly "misread the 'open, visible and notorious' use element as requiring proof of actual notice to the owner where the case law is clear [that] constructive notice will suffice." We agree that the trial court improperly used a heightened standard in construing the open and notorious requirement for Gubner's adverse possession claim.

"[T]o establish title by adverse possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his own and without the consent of the owner. . . . A finding of adverse possession is to be made out by clear and positive proof. . . . The burden of proof is on the party

[15] We note that Gubner's cross appeal is regarding fifteen feet beyond the fence line opening, while the trial court's judgment against Gubner was regarding "approximately [twenty feet] of land east of the boundary lines as shown on exhibit I." Exhibit I is a map commissioned for Gubner that illustrates the eastern deed boundary, as well as a line east of that boundary depicting the area he claims through adverse possession. For purposes of his cross appeal, however, we need not determine if the fence line and the boundary lines are one and the same.

claiming adverse possession. . . . Despite that exacting standard, our scope of review is limited. . . . Because adverse possession is a question of fact for the trier . . . the 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 . . . . A trial court's findings in an adverse possession case, if supported by sufficient evidence, are binding on a reviewing court . . . ." (Citation omitted; internal quotation marks omitted.) *Bowen* v. *Serksnas*, 121 Conn. App. 503, 506–507, 997 A.2d 573 (2010). "Application of the pertinent legal standard to the trial court's factual findings [however] is subject to our plenary review." *O'Connor* v. *Larocque*, 302 Conn. 562, 576, 31 A.3d 1 (2011).

The court made the following factual findings before rendering its decision on Gubner's claim of adverse possession: "In 1980 Mr. Gubner purchased 31 Rogues Ridge Road, also known as Lot # 7 as shown on record map # 600 by warranty deed, which map also depicted the boundaries of Lot 7. . . . [H]e did not review it in detail but did consult it from time to time at the town clerk's office and, as a result, became *generally* aware of the boundaries of his property. On his property at the time of the purchase was a swimming pool, which had been constructed by a previous owner in an undisputed area of his lot and was in a state of disrepair. Gubner subsequently dismantled the pool with the intent of building a new pool somewhere near his easterly boundary and landscaping area so that it could be

used as a play area for his children. He subsequently used the remnants of that old pool from which to calculate his easterly most boundary. Once locating what he thought to be his eastern boundary, Gubner [b]egan making permanent improvements to the land, including clearing the area of underbrush, cutting some trees down, planting a lawn, trees and a garden, constructing a new aboveground swimming pool with an aboveground deck supported by posts driven into the ground. He also installed a fence around part of the perimeter of the area for the sole purpose of keeping his dog from chasing the deer that would come on his 'property.' He and his family continuously used and maintained this area for recreational purposes from approximately 1982 until the present time. However, most of the improvements [Gubner] made to this area turned out to be on the easterly side of his deeded boundary as shown on a survey map, which had been commissioned by his attorneys in preparation for this lawsuit. Until shortly before this suit was instituted, he had no idea that that area he was using was allegedly wrongful. According to Gubner, the entire area to the east of the area he cleared consisted of thick forest land. . . .

"During the entire period [Gubner] occupied the property he saw no person on the neighboring property to the east with one exception of a stranger looking for his dog. . . . In fact, he did not know who his neighbors were to the east. . . . Furthermore, he apparently could not see anyone or any thing beyond the forest. . . . He never asked anyone for permission to use the disputed area because he believed he owned it." (Citations omitted; emphasis in original.)

On the basis of these factual findings, the court then concluded: "There is no doubt that Gubner occupied/

possessed the disputed area set forth in Meehan's partial perimeter survey uninterruptedly for more than fifteen years. Gubner's problem emanates from the 'open and visible' requirement. The test to be applied is whether possession and use was sufficiently apparent to make the reasonably prudent true owner aware that his property was in jeopardy by the claimant's activities."

We conclude that the court improperly held Gubner to a higher standard in fulfilling the "open and visible" prong than that which is required under our law. Specifically, the court reasoned that Gubner's "easterly boundary consisted of thick forest land . . . [and] [t]here is no evidence that there was a road or path on or near the disputed area or any other means by which one might from time to time view the permanent improvements that Gubner was making. Therefore, from an objective perspective, it was unlikely that a reasonably prudent owner would have noticed Gubner's activities or the effect they might have on his ownership rights. . . . Gubner was 'in the boondocks.' Under such circumstances, he was required to take extraordinary measures to put an owner on notice that [that] owner's property rights were in jeopardy. The court has been unable to find a scintilla of evidence in the record to support a finding . . . on that account." (Citations omitted.) We conclude that this legal standard was improper.

"The legal significance of the open and visible element [of adverse possession] is not . . . an inquiry as to whether a record owner subjectively possessed an understanding that a claimant was attempting to claim the owner's property as his own. Rather, the open and visible element requires a fact finder to examine the extent and visibility of the claimant's use of the record owner's property so as to determine whether a reasonable owner would believe that the claimant was using

that property as his or her own. . . . In general, exclusive possession can be established by acts, which at the time, considering the state of the land, comport with ownership; viz., such acts as would ordinarily be exercised by an owner in appropriating the land to his own use and the exclusion of others. . . . Thus, the claimant's possession . . . need only be a type of possession which would characterize an owner's use. . . . It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Poirier*, 121 Conn. App. 748, 753–54, 997 A.2d 604, cert. denied, 298 Conn. 904, 3 A.3d 68 (2010). In satisfaction of the "open and visible" prong of an adverse possession claim, "[t]he location and condition of the land must be taken into consideration and the alleged acts of ownership must be understood as directed to those circumstances and conditions." (Internal quotation marks omitted.) *Lucas* v. *Crofoot*, 95 Conn. 619, 626, 112 A. 165 (1921). For example, in *Lucas*, the disputed land was Great Island, an island that "was never used by anyone to a very great extent." Id. The Supreme Court held that because of this absence of heavy use of the land, "[v]ery much less actual use of this island is necessary to establish [a] claim of ownership than would be the case of a tillable farm . . . ." Id. The land at issue in Gubner's adverse possession claim began as forest land with no road or path, such that the trial court deemed it to be " 'in the boondocks.' "[16] Such land, like Great Island, mostly was undeveloped land, likely requiring less use to satisfy the "open and visible" adverse possession prong than the heightened standard suggested by the court. See *Lucas* v. *Crofoot*, supra, 626.

[16] "Boondocks" is defined as "rough country filled with dense brush . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993).

In this case, the court found that Gubner made permanent improvements on the land, including, but not limited to, clearing the area of underbrush, cutting some trees down, planting a lawn, trees and a garden, and installing a fence. Such permanent improvements are uses that generally qualify as "open and visible." See *Schlichting* v. *Cotter*, 109 Conn. App. 361, 367–69, 952 A.2d 73 ("plaintiff consistently used the full extent of the disputed parcel in a manner consistent with its residential nature," including "spraying, pruning and removal of trees, planting and maintenance of [plants], removal of poison ivy from the trees and the removal of sumac from the foliage in the area, utilization of gypsy moth traps and spraying . . . the dumping, blowing and raking of leaves, the mowing and fertilizing and maintenance of the lawn area, the planting, cultivating and maintenance of the garden, and the paving, plowing, sealing and use of the driveway from 1979 to 2006"), cert. denied, 289 Conn. 944, 959 A.2d 1009 (2008).

In the present case, the trial court relied on our Supreme Court's decision in *Robinson* v. *Myers*, 156 Conn. 510, 518, 244 A.2d 385 (1968), in which the court found "no evidence that during [a] nine-year period anyone, aside from [the defendants' predecessor in title] himself and his grantor, who 'walked the boundaries' with him, knew that he was, or claimed to be, in possession of the property in dispute." We conclude, however, that the facts in *Robinson* readily can be distinguished from *Schlichting* and this case because in *Robinson* "[t]here were no physical indicia of [the defendants' predecessor in title's] claim to possession. It [did] not appear that he fenced in the area, warned off others from trespassing on it, performed any of the common acts of ownership with reference to it, or in any way marked off his claimed boundary." Id.

To the contrary, in the present case, Gubner's permanent and physical improvements to the disputed land

served as indicia of his claim to possession. Accordingly, we conclude that the trial court improperly utilized a heightened legal standard in analyzing Gubner's adverse possession claim. We conclude, therefore, that the case must be remanded to the trial court to consider Gubner's claim of adverse possession under the proper legal standard.[17]

The judgment is reversed only as to Gubner's adverse possession claim and the case is remanded for further proceedings on that claim. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JOSEPH LUBRANO *v.* MOHEGAN SUN CASINO ET AL. (AC 33566)

Gruendel, Bear and Bishop, Js.

Syllabus

The defendants appealed to this court from the decision of the workers' compensation review board affirming the decision of the workers' compensation commissioner denying the defendants' request to determine the reasonableness of the allocation of settlement proceeds that the plaintiff's spouse recovered from third party tortfeasors that could be credited against any future workers' compensation benefits that the defendant M Co. may become obligated to pay to the plaintiff. The plaintiff was employed by M Co., a casino, when he fell from a roof and

[17] The counterclaim defendants also argue on appeal that the court improperly refused to determine whether they were the record owners of the property to which Gubner claims to hold title by adverse possession. They argue that "a judgment in [Gubner's] favor would be against an unknown owner or no one, to the exten[t] that the trial court did not determine a record owner of property being claimed by him to [have] been adversely possessed." We conclude that as part of a claimant's case for adverse possession, in which he or she must prove the essential elements of *ouster of an owner* of possession without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his own, without the consent of *the owner*; see *Bowen* v. *Serksnas*, supra, 121 Conn. App. 707; the court, necessarily, must determine if the claimant has proven ouster of the record owner of the property at issue.

was injured. The plaintiff and his wife had brought an action in tribal court against six defendants, and the action was settled with the plaintiff receiving $2,190,056.37 for his injuries and his wife receiving $2,021,590.46 for her loss of consortium claim. The defendants thereafter sought, before the workers' compensation commission, a moratorium of the plaintiff's future workers' compensation benefits against both the entirety of the plaintiff's settlement and a portion of his wife's settlement with the tortfeasors. The parties agreed that the defendants were entitled to a moratorium in the amount of the plaintiff's net recovery, but the plaintiff asserted that the commission lacked jurisdiction to affect his wife's settlement with the tortfeasors. The workers' compensation commissioner concluded that the commission had no jurisdiction over and could not affect the rights of the plaintiff's wife with respect to the third party defendants and the terms of her settlement, and the board affirmed that decision. *Held*:

1. The board properly affirmed the commissioner's determination that the commission lacked jurisdiction to review the reasonableness of the allocation of third party settlement funds in the present matter: our Supreme Court previously has determined that an employer lacks statutory aggrievement to challenge a third party settlement allocation, regardless of whether the challenge is raised before the commission or before the Superior Court, and that the applicable statute (§ 31-293) does not allow an employer to interfere with a settlement reached between its employee and the tortfeasor, and that statute likewise does not confer authority on the commissioner to make such a determination; moreover, the defendants' decision to withdraw from the tribal court action did not confer standing on them to proceed before the commission, as the defendants lacked the necessary statutory aggrievement to establish their standing to contest the allocation; furthermore, the fact that the defendants' decision to withdraw from the tribal court action resulted from their erroneous assumption that they had standing to seek review of the reasonableness of the settlement allocation before the commission did not render them statutorily aggrieved, nor did it afford them the standing necessary to challenge the reasonableness of the settlement allocation as applied to their moratorium before the commission.

2. The defendants could not prevail on their claim that the commissioner improperly found that they had waived reimbursement of workers' compensation benefits paid, which was based on their claim that a statement of their counsel that repayment was not being sought was not a waiver of any of their rights but, rather, was a reflection that they were not seeking any actual cash from the settlement as was their statutory right under § 31-293; it was apparent from the commissioner's decision that he determined that the defendants were entitled to a moratorium, and to the extent that the defendants claimed that they did not waive their right to a moratorium of the consortium funds, the commissioner made

no finding that the defendants had waived such a claim but, rather, properly concluded that the commission had no jurisdiction over and could not affect the rights of the plaintiff's wife with respect to the third party defendants and had no authority to dictate the appropriate terms of the settlement.

3. The defendants' claim that the commissioner improperly found that their moratorium was only $2,190,056.37 was unavailing; the claim failed to the extent that it was premised on the argument that the commissioner's finding of the moratorium amount was improper due to the commissioner's failure to review the settlement allocation, this court having determined that the commission had no jurisdiction to review the reasonableness of the settlement as to the consortium allocation, and the board properly affirmed the commissioner's determination of the amount of the plaintiff's net recovery and the value of the moratorium.

Argued May 14—officially released October 23, 2012

Procedural History

Appeal from the decision by the workers' compensation commissioner for the second district denying the defendants' request to determine the amount of the net settlement proceeds that the plaintiff's spouse recovered from third party tortfeasors that could be credited against any future workers' compensation benefits that the named defendant may become obligated to pay to the plaintiff, brought to the workers' compensation review board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Edward W. Gasser, with whom, on the brief, was *Maxine L. Matta*, for the appellants (defendants).

Michael J. Quinn, with whom, on the brief, was *Jennifer Antognini-O'Neill*, for the appellee (plaintiff).

Opinion

BEAR, J. The defendants, Mohegan Sun Casino and Safety National Casualty Corporation, appeal from the decision of the workers' compensation review board

(board) affirming the decision of the workers' compensation commissioner for the second district (commissioner) denying the defendants' request to review their claim challenging the allocation of certain third party settlement proceeds between the plaintiff, Joseph Lubrano, and his wife, Jill Lubrano. On appeal, the defendants claim that (1) the board improperly affirmed the commissioner's finding that the workers' compensation commission (commission) lacked jurisdiction to review the amount of a spouse's recovery from a third party claim for loss of consortium when determining the appropriate moratorium due to the defendants,[1] (2) "the commissioner erred in finding, and the board erred in affirming, that the [defendants] had waived reimbursement of workers' compensation benefits paid" and (3) "the commissioner erred in finding, and the board erred in affirming, that the [defendants'] moratorium was only $2,190,056.37." We affirm the decision of the board.

The following facts and procedural history are relevant to our resolution of this appeal. On June 15, 2004, the plaintiff was injured when he fell from a roof at a time when he was an employee of Mohegan Sun Casino. The plaintiff and his wife brought an action against six defendants in the Mohegan Gaming Disputes Court (tribal court), the plaintiff suing for negligence and his wife suing for loss of consortium. The defendants filed an intervening complaint to recover workers' compensation benefits they had paid or would become obligated to pay the plaintiff. In August, 2009, following mediation, the plaintiff and his wife settled their respective claims with the remaining defendants, with the

[1] A moratorium is a credit to an employer against its obligation to pay future workers' compensation benefits to a worker in an amount equal to the net proceeds from the settlement of the worker's third party personal injury action. See *Short* v. *Connecticut Bank & Trust Co.*, 60 Conn. App. 362, 363, 759 A.2d 129 (2000).

plaintiff receiving $2,190,056.37 for his injuries and his wife receiving $2,021,590.46 for her loss of consortium claim. Prior to that settlement being completed, the defendants had objected to the settlement, but eventually they withdrew their intervening complaint.

The defendants chose to proceed before the commission, seeking to assert a moratorium of the plaintiff's future workers' compensation benefits against both the entirety of the plaintiff's settlement and a portion of his wife's settlement with the tortfeasors. The parties agreed that the defendants were entitled to a moratorium in the amount of the plaintiff's net recovery, but the plaintiff asserted that the commission lacked jurisdiction to affect his wife's settlement with the tortfeasors pursuant to the Supreme Court's holding in *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 971 A.2d 1 (2009). On May 10, 2010, the commissioner issued his finding and award, concluding that "[t]he . . . [c]ommission has no jurisdiction over and cannot affect [the] rights [of the plaintiff's wife] with respect to the third party defendants and has no authority to dictate the appropriate terms of settlement." After the commissioner denied the defendants' motion to correct the decision, the defendants petitioned for review to the board. On June 3, 2011, the board affirmed the commissioner's decision. This appeal followed.

On appeal, the defendants first claim that the board erred in affirming the commissioner's finding that the commission lacked jurisdiction "to review the amount of a spouse's recovery from a third party claim for loss of consortium when determining the appropriate moratorium due [the defendants]." The defendants contend that, pursuant to this court's holding in *Schiano* v. *Bliss Exterminating Co.*, 57 Conn. App. 406, 750 A.2d 1098 (2000), the commissioner has not only the authority but also the obligation to review the subject settlement allocation between the plaintiff and his wife

"to determine whether any of the [c]onsortium settlement amount should inure to the benefit of the [defendants] in terms of additional moratorium sums."[2] We are not persuaded.

"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. . . . Neither the review board nor this court has the power to retry facts." *Sellers* v. *Sellers Garage, Inc.*, 92 Conn. App. 650, 650–51, 887 A.2d 382 (2005). "The jurisdiction of the commissioner is confined by the [Workers' Compensation Act (act)] and limited by its provisions. Unless the [a]ct gives the [c]ommissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct. . . . [B]ecause [a] determination regarding . . . subject matter jurisdiction is a question of law, our review is plenary." (Citations omitted; internal quotation marks omitted.) *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 269–70, 44 A.3d 197 (2012).

[2] The defendants argue that the board's decision in *Lesco* v. *Glass Crafters*, No. 3915 CRB-03-98-10 (January 19, 2000), supports their contention that the commissioner has jurisdiction, authority and an obligation to review a settlement allocation. Specifically, they note that *Lesco* provides that "trial commissioners should closely scrutinize settlements which appear to circumvent reimbursement under [General Statutes] § 31-293." The defendants argue that "[i]f there was no [j]urisdiction for the [c]ommissioner to perform the review, the [b]oard [in *Lesco*] would certainly have noted that." We determine that our Supreme Court's decision in *Soracco* controls our disposition of this matter and decline the defendants' invitation to defer to the board's interpretation of the commissioner's authority under § 31-293. See *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 650, 6 A.3d 60 (2010) ("it is manifest to our hierarchical judicial system that [our Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by our [Supreme Court's] precedent" [internal quotation marks omitted]).

The defendants argue that pursuant to our decision in *Schiano* v. *Bliss Exterminating Co.*, supra, 57 Conn. App. 406,[3] it is settled law that the commissioner "has not only jurisdiction but also the obligation to review the allocation . . . ." The defendants further argue that our Supreme Court's holding in *Soracco* v. *Williams Scotsman, Inc.*, supra, 292 Conn. 86, supports their contention that "the [c]omissioner must have jurisdiction to review settlements as they pertain to the consortium allocation as is settled law in *Schiano*. Otherwise the *Schiano* mandated review is eliminated and [c]laimants are free to allocate settlement without oversight to the detriment of employers." Specifically, the defendants contend that the *Soracco* court merely "held that the *Superior Court* lacks jurisdiction to review third party settlements as to a consortium allocation as the employer is not aggrieved by any such decision." (Emphasis added.)

At the outset, we reject the defendants' argument that *Schiano* provides that the commissioner must perform a review of a third party settlement as to a consortium allocation. To the contrary, the *Schiano* court noted that "a commissioner may not dictate the terms or the amount of a loss of consortium claim . . . ." *Schiano* v. *Bliss Exterminating Co.*, supra, 57 Conn. App. 413. Rather, *Schiano* stands for the proposition that, pursuant to General Statutes §§ 31-278, 31-293 and

[3] Additionally, the defendants cite a number of other cases, including *Cruz* v. *Montanez*, 294 Conn. 357, 984 A.2d 705 (2009), *Love* v. *J. P. Stevens & Co.*, 218 Conn. 46, 587 A.2d 1042 (1991) and *Short* v. *Connecticut Bank & Trust Co.*, 60 Conn. App. 362, 759 A.2d 129 (2000), in support of their argument that the commission has jurisdiction to review the reasonableness of a third party settlement with respect to a consortium allocation. We note that those cases are factually inapposite to the present matter as they do not involve review of the reasonableness of a third party settlement that includes a consortium allocation. Moreover, to the extent the defendants rely on those cases as evincing a public policy in favor of the commissioner's review of the reasonableness of a third party settlement allocation, we reject those arguments as inconsistent with *Soracco*.

31-352, the commissioner is entitled to know an employee's portion of a settlement in order to determine what part could be allocated to a moratorium of benefits by the employer. Id., 412–14. Accordingly, the commissioner may, under certain circumstances, conduct a hearing to gather facts necessary to determine the amount of a claimant employee's portion of a settlement and "to know the amount of the settlement paid in satisfaction of [a consortium] claim to determine the amount of the [claimant employee's] recovery." Id., 414. In making that determination, however, the commissioner cannot "assume jurisdiction over or affect [a consortium claimant's] rights with respect to the third party." Id. Nothing in *Schiano* suggests that the commissioner has the authority to approve the reasonableness of an employee's settlement with a third party tortfeasor, and, as noted, our holding in that case prohibited the commissioner from interfering with the amount recovered by a consortium claimant.[4]

Regardless of our interpretation of *Schiano*, we determine that the defendants' claim is foreclosed by our Supreme Court's subsequent holding in *Soracco*. That case presented facts substantially similar to those in the present case. In that case, the plaintiff and his wife brought an action against the named defendant after the plaintiff was injured in the course of his employment. *Soracco* v. *Williams Scotsman, Inc.*, supra, 292 Conn. 87–88. The plaintiff asserted a claim for damages pursuant to § 31-293 and his wife asserted a loss of consortium

[4] To the extent *Schiano* permits the commissioner to review a settlement in order to know the amount paid in satisfaction of a consortium claim so as to determine the amount of a claimant's recovery, that review was performed in the present matter. After reviewing the net settlement recoveries of the plaintiff and his wife, the commissioner determined, and the parties agreed, that the plaintiff's net recovery from the third party settlement was $2,190,056.37. Accordingly, the commissioner concluded that the defendants were entitled to a moratorium against the plaintiff's future workers' compensation benefits in the amount of $2,190,056.37.

claim. Id., 88. The plaintiff's employer intervened in that action, pursuant to § 31-293 (a),[5] seeking to recover the

[5] General Statutes § 31-293 (a) provides: "When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of the injured employee against such person, but the injured employee may proceed at law against such person to recover damages for the injury; and any employer or the custodian of the Second Injury Fund, having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee. If the employee, the employer or the custodian of the Second Injury Fund brings an action against such person, he shall immediately notify the others, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the others may join as parties plaintiff in the action within thirty days after such notification, and, if the others fail to join as parties plaintiff, their right of action against such person shall abate unless the employer, insurance carrier or Second Injury Fund gives written notice of a lien in accordance with this subsection. In any case in which an employee brings an action against a party other than an employer who failed to comply with the requirements of subsection (b) of section 31-284, in accordance with the provisions of this section, and the employer is a party defendant in the action, the employer may join as a party plaintiff in the action. The bringing of any action against an employer shall not constitute notice to the employer within the meaning of this section. If the employer and the employee join as parties plaintiff in the action and any damages are recovered, the damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund. The rendition of a judgment in favor of the employee or the employer against the party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee. If the damages, after deducting the employee's expenses as provided in this subsection, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with the person by either

workers' compensation benefits it had paid and become obligated to pay as a result of the plaintiff's injuries. Id., 88–89.

Following an unsuccessful mediation attempt, the plaintiffs and the named defendant reached a settlement agreement, without the approval of the employer. Id., 89. "The substance of the settlement agreement was that, in exchange for the withdrawal and release, the [named] defendant would pay the plaintiffs a total sum

the employer or the employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit, and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word 'compensation', as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages. Each employee who brings an action against a party in accordance with the provisions of this subsection shall include in his complaint (A) the amount of any compensation paid by the employer or the Second Injury Fund on account of the injury which is the subject of the suit, and (B) the amount equal to the present worth of any probable future payments which the employer or the Second Injury Fund has, by award, become obligated to pay on account of the injury. Notwithstanding the provisions of this subsection, when any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury and the injured employee has received compensation for the injury from such employer, its workers' compensation insurance carrier or the Second Injury Fund pursuant to the provisions of this chapter, the employer, insurance carrier or Second Injury Fund shall have a lien upon any judgment received by the employee against the party or any settlement received by the employee from the party, provided the employer, insurance carrier or Second Injury Fund shall give written notice of the lien to the party prior to such judgment or settlement."

of $750,000. The plaintiffs' attorney indicated that each plaintiff would receive one half of that amount in satisfaction of their individual claims. Unsatisfied with this intended apportionment, [the employer] requested a hearing to allow the court to determine whether the equal division of the settlement proceeds was reasonable. Apparently seeking the court's imprimatur for their settlement, the plaintiffs acquiesced to this procedure." Id., 89–90. After a hearing, the trial court upheld the division of the settlement proceeds. Id., 90. The employer appealed.

On appeal, the court in *Soracco* determined that "the trial court lacked subject matter jurisdiction to determine whether the allocation of the settlement proceeds was reasonable." Id., 88. Specifically, that court reasoned that "§ 31-293 (a) does not confer standing on an employer seeking to challenge the allocation of the proceeds of a settlement reached between its injured employee and the tortfeasor. Indeed, the statute protects employers from unilateral settlement agreements by preserving their rights in the face of such agreements and by providing that they cannot be bound by them absent their assent. Section 31-293 does not, however, allow an employer to interfere with a settlement reached between its employee and the tortfeasor, nor does it provide courts with the authority to dictate the appropriate terms of such a settlement." Id., 96–97.

We are not persuaded by the defendants' attempts to limit or to distinguish *Soracco*. The defendants argue that *Soracco* holds only that the Superior Court does not have the authority to review the reasonableness of a third party settlement allocation, such as that presented in the instant matter. Their contention therefore is that, as implied in *Soracco*, the commissioner has the authority to review such claims. We disagree.

Soracco was resolved on the ground of standing, our Supreme Court determining that the employer in that

matter was not statutorily aggrieved by a third party settlement in the absence of its approval because § 31-293 provided it with a means to protect its rights. In particular, the court in *Soracco* noted that § 31-293 "explicitly contemplates the possibility that . . . a settlement can occur, and declares, in response, that the settlement 'shall [not] be binding upon or affect the rights of the other [party], unless assented to by him.' General Statutes § 31-293 (a)."[6] *Soracco* v. *Williams Scotsman, Inc.*, supra, 292 Conn. 97.

We cannot conclude that the holding in *Soracco* regarding an employer's lack of statutory aggrievement does not extend to an employer's standing before the commission. The court in *Soracco* expressly held that "[§] 31-293 does not . . . allow an employer to interfere with a settlement reached between its employee and the tortfeasor . . . ." Id., 96. Under our reading of *Soracco*, an employer lacks statutory aggrievement to challenge a third party settlement allocation, regardless of whether the challenge is raised before the commission or before the Superior Court. Accordingly, just as § 31-293 does not "provide courts with the authority to dictate the appropriate terms of such a settlement;" id., 97; we likewise determine that the statute does not confer authority on the commissioner to make such determinations.

[6] Moreover, the court noted that "the *only* apparent reason for allowing the employer to intervene in the employee's action is to protect the employer's rights in the event of a settlement. In the absence of a settlement, the employer's rights are completely protected by its judgment lien and its ability to bring an independent cause of action when the employee declines to prosecute his claim. If, for instance, under circumstances similar to those in the present case, the tortfeasor sought to settle the case with the employee and the employee's spouse for considerably less than the employer's potential workers' compensation liability, the employer effectively would be deprived of his right to recover on the lien if it could not pursue a separate cause of action against the tortfeasor." (Emphasis in original.) *Soracco* v. *Williams Scotsman, Inc.*, supra, 292 Conn. 95 n.15.

The defendants further attempt to distinguish *Soracco*, arguing that, by virtue of their withdrawal in the tribal court action, *Schiano* must apply to allow them to "look to the [c]ommissioner for determination as to the reasonableness of the allocation." Specifically, they contend that they are in no different a position than an employer who chose never to intervene in a third party action in the first place.

We already have rejected the defendants' argument that *Schiano* mandates review of the reasonableness of a third party settlement allocation as applied to a moratorium. Furthermore, we cannot conclude that the defendants' decision to withdraw from the tribal court action confers standing on them to proceed before the commission. As our foregoing analysis provides, the defendants lack the necessary statutory aggrievement to establish their standing to contest the allocation. It is apparent from the record that the defendants' decision to withdraw from the tribal court action resulted from their erroneous assumption that they had standing to seek review of the reasonableness of the settlement allocation before the commission. There is no indication in the record that the defendants were required to withdraw their intervention.[7] Thus, we determine that the defendants' misapprehension of the law in this regard does not render them statutorily aggrieved, nor does it afford them the standing necessary to challenge the reasonableness of the settlement allocation as applied to their moratorium before the commission.

On the basis of our foregoing analysis, we determine that the board properly affirmed the commissioner's determination that the commission lacked jurisdiction to review the reasonableness of the allocation of third party settlement funds in the present matter.

[7] There is some dispute, however, whether the defendants felt pressured to withdraw because the plaintiff and his wife had threatened to pursue litigation against them if the settlement negotiations fell through.

The defendants also claim that "the commissioner erred in finding, and the board erred in affirming, that [the defendants] waived reimbursement of workers' compensation benefits paid." The defendants argue that "[their counsel's] statement that repayment is not being sought is not a waiver of any of [their] rights. It is merely a reflection that [they] are not seeking any actual cash from the settlement as was their statutory right under . . . § 31-293 . . . . [They] sought only a [m]oratorium." The defendants address this argument further in their reply brief, stating that their counsel "did not waive the right to a moratorium from the consortium settlement." We disagree.

The commissioner's memorandum states: "Pursuant to [§] 31-293 the [defendants] . . . are entitled to a moratorium against [the plaintiff's] future [w]orkers' [c]ompensation benefits in the amount of $2,190,056.37." Because we construe the defendants' claim as stating that the board erred in affirming the commissioner's determination that they had waived their right to a moratorium, we cannot conclude that the board erred in this regard. It is apparent from the commissioner's decision that he determined that the defendants were entitled to a moratorium. Furthermore, to the extent that the defendants' claim may be construed as arguing that they did not waive their right to a moratorium of the consortium funds, we likewise reject this claim. The commissioner made no finding that the defendants had waived such a claim.[8] Rather,

[8] To the extent that the defendants argue that they have not waived any claim to the workers' compensation benefits paid, we affirm the board's determination that the commissioner did not err in this regard. Specifically, we agree with the board that the following colloquy supports the commissioner's determination that the defendants had "waived reimbursement of workers' compensation benefits paid":

"[The Commissioner]: Since our last session, I had gone [through] all the material that had previously been submitted. I wanted to clarify a few things. And the first thing that I wanted to clarify was just that the claim that's

the commissioner properly concluded that the commission "has no jurisdiction over and cannot affect [the] rights [of the plaintiff's wife] with respect to the third party defendants and has no authority to dictate the appropriate terms of settlement."

The defendants further claim that "the commissioner erred in finding, and the board erred in affirming, that the [defendants'] moratorium was only $2,190,056.37." To the extent that this claim is premised on the argument that the commissioner's finding of the moratorium amount was improper because he failed to review the settlement allocation pursuant to *Schiano*, we disagree. As noted, we determine that the commission had no jurisdiction to review the reasonableness of the settlement as to the consortium allocation and we disagree with the defendants' broad characterization of our holding in *Schiano*. Accordingly, we affirm the board's determination that the commissioner properly determined that the amount of the plaintiff's net recovery was $2,190,056.37 and therefore that the moratorium value was $2,190,056.37.

The decision of the workers' compensation review board is affirmed.

In this opinion the other judges concurred.

THOMAS LAMAR *v.* BOEHRINGER INGELHEIM CORPORATION ET AL.
(AC 33838)

DiPentima, C. J., and Beach and Foti, Js.

Syllabus

The plaintiff appealed to this court from the decision of the workers' compensation review board affirming the denial by the workers' compensation

before me by the [defendants] is just with respect to a moratorium and there's no claim for any kind of repayment of any monies that have been paid out, correct?

"[The Defendants' Counsel]: That's correct."

commissioner of the plaintiff's motion to preclude the defendant employer, B Co., from contesting the payment of workers' compensation benefits to the plaintiff. Although B Co. had sent the plaintiff by certified mail a disclaimer form contesting the plaintiff's claim for benefits, the plaintiff never claimed it. Thereafter, the plaintiff filed a notice of claim indicating, inter alia, the date and type of injury allegedly sustained, and B Co. filed a second disclaimer form contesting liability for the benefits sought, claiming that the plaintiff did not suffer an injury that arose out of or in the course of his employment. *Held*:

1. The plaintiff could not prevail on his claim that because B Co. was aware that the plaintiff had not received the initial disclaimer sent by certified mail, it was required to attempt personal service and, thus, B Co.'s disclaimer was invalid because it was not served in accordance with the applicable statute (§ 31-321); by sending the notice by certified mail, B Co. complied with the requirements of § 31-321 by using one of the three methods for service established in the statute, and the text of § 31-321 did not contemplate any further action in circumstances where, as here, the intended recipient of the disclaimer failed to claim it.
2. The plaintiff could not prevail on his claim that B Co.'s disclaimer notice failed to sufficiently specify the grounds on which it was contesting the plaintiff's right to compensation, the disclaimer, which contested the plaintiff's right to compensation benefits on the ground that the plaintiff did not suffer an injury that arose out of or in the course of his employment, having mirrored notices that our appellate courts previously have found to have met the specificity requirements for a valid notice to contest benefits; furthermore, the plaintiff's claim that the disclaimer failed to allege the correct time period of the plaintiff's repetitive trauma injury was unavailing, the date of injury in the disclaimer having fallen within the period of time that the plaintiff alleged to have suffered the repetitive trauma, and the notice satisfied the statutory (§ 31-294c [b]) requirements that dictate the strict standards of an employer that seeks to contest liability, the disclaimer having alerted the plaintiff to the specific ground on which B Co. contested compensability.

Argued May 30—officially released October 30, 2012

Procedural History

Appeal from the decision by the workers' compensation commissioner for the fifth district denying the plaintiff's motion to preclude the named defendant from contesting liability as to his claim for certain workers' compensation benefits, brought to the workers' compensation review board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Matthew E. Dodd, with whom, on the brief, was *Matthew P. Lascelle*, for the appellant (plaintiff).

James D. Moran, Jr., with whom, on the brief, was *Maribeth M. McGloin*, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Thomas Lamar, appeals from the decision of the workers' compensation review board (board) affirming the decision of the workers' compensation commissioner (commissioner) denying his motion to preclude the defendant employer, Boehringer Ingelheim Corporation,[1] from contesting the payment of benefits pursuant to the Workers' Compensation Act (act), General Statutes § 31-275 et seq. We affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. On December 4, 2007, the defendant mailed a form 43[2] to contest the plaintiff's claim for benefits. As of this date, the plaintiff had not filed a notice of his claim via a form 30C.[3] The defendant's

[1] Liberty Mutual Insurance Group, the workers' compensation liability insurer for Boehringer Ingelheim Corporation, also is a defendant. For convenience, we refer in this opinion to Boehringer Ingelheim Corporation as the defendant.

[2] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 261–62 n.6, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012); see generally 2 A. Sevarino, Connecticut Workers' Compensation After Reforms (4th Ed. 2010) pp. 649–51.

[3] "A form 30C is the document prescribed by the workers' compensation commission to be used when filing a notice of claim pursuant to the [act]." (Internal quotation marks omitted.) *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 261 n.5, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012); see generally 2 A. Sevarino, Connecticut Workers' Compensation After Reforms (4th Ed. 2010) pp. 626–28.

form 43 was sent by certified mail to the plaintiff, who never claimed it. In this form 43, the defendant listed the date of injury as September 6, 2007, the body part injured as lymph nodes, and the nature of the injury as sarcoidosis.[4] The defendant also indicated the reason for the contest as: "[The plaintiff] did not suffer an injury which arose out of or in the course of his employment."

On December 10, 2007, the plaintiff filed a form 30C. The form indicated that the injury was repetitive trauma and the date of injury as January 1, 2005, through the "present." He also listed the body parts injured as "lungs, respiratory complaints." On February 6, 2008, the defendant filed a second form 43, again listing the date of injury as September 6, 2007, the body parts injured as "lungs, respiratory complaints," and the nature of the injury as "repetitive trauma/sarcoidosis." The defendant again listed the reason for the contest as: "[The plaintiff] did not suffer an injury which arose out of [or in] the course of his employment."

The plaintiff argued to the commissioner that both disclaimers filed by the defendant should have been precluded as a matter of law.[5] Specifically, he claimed

[4] Sarcoidosis is defined as "[a] systemic granulomatous disease of unknown cause, especially involving the lungs with resulting interstitial fibrosis, but also involving lymph nodes, skin, liver, spleen, eyes, phalangeal bones and parotid glands; granulomas are composed of epithelioid and multinucleated giant cells with little or no necrosis." Stedman's Medical Dictionary (27th Ed. 2000) p. 1593.

[5] "When an employer fails to comply with the statutory mandate of [General Statutes] § 31-294c and a motion to preclude is granted, the employer is precluded from contesting either the compensability of its employee's claimed injury or the extent of the employee's resulting disability. . . . Once a motion to preclude is granted, the only further role that an employer can play in the proceeding on the merits before the commissioner is to decide whether or not to stipulate to the compensation claimed. If the employer does not so stipulate, the claimant proceeds with his or her case, subject to examination by the commissioner without participation by the employer. . . . Preclusion, therefore, does not relieve a claimant of the obligation to prove his or her claim by competent evidence." (Citations omitted.) *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 333–34, 49 A.3d 211 (2012).

that, as to the first disclaimer, (1) service was improper under General Statutes § 31-321 and (2) the disclaimer failed to specify the date of the alleged injury or place him on notice of any real defense. He also argued that the second disclaimer was untimely and lacked sufficient specificity.[6]

The commissioner determined that the defendant's use of certified mail to send the first disclaimer to the plaintiff satisfied the requirements of § 31-321, despite the plaintiff's failure to claim it. With respect to the issue of the sufficiency of the first disclaimer, the commissioner stated: "I find that the form 43 received by the commission on December 12, 2007, via certified mail lists a specific date of injury as September 6, 2007. The form 30C, which was filed after the form 43, lists a range of dates from January 1, 2005, through the present, which includes the date on the form 43 of September 6, 2007. The nature of the injury is listed as sarcoidosis, and the reason for the contestment states that the [plaintiff] did not suffer an injury which arose out of and in the course of his employment. I find that the [plaintiff], reading this document as a whole, was provided with sufficient information and was placed on notice that the [defendant was] denying his claim due to the condition of sarcoidosis, which developed during the time period alleged in the form 30C." Accordingly, the commissioner denied the motion to preclude filed by the plaintiff pursuant to General Statutes § 31-294c (b).

The plaintiff appealed from this decision to the board. In its decision, the board noted that the plaintiff had not filed a motion to correct the facts found by the commissioner. With respect to the issue of the service

[6] We have examined the decisions of the commissioner and the board and conclude that both considered only the initial form 43. For the purposes of this appeal, we also will consider only the validity of the initial form 43, mailed by the defendant on December 4, 2007.

of the first disclaimer, the board noted that § 31-321, written in the disjunctive, allows for service in three ways: personal service, certified mail *or* registered mail. Turning to the adequacy of the disclaimer, the board first observed that there was no statutory or precedential bar to filing a preemptive disclaimer, that is, one filed before the notice of claim. It then rejected the claim that the first disclaimer was too vague, concluding that it placed the plaintiff on notice that the defendant's position was that the injury was personal in nature, and, thus, outside the scope of the act. See General Statutes § 31-275 (16) (A).[7] It then reasoned: "When a [defendant] files a form 43 contesting liability and acknowledges a date of injury under which this commission retains jurisdiction, the initial inaccuracy as to the precise theory of recovery does not materially prejudice the claimant. . . . In addition . . . the [plaintiff] was properly apprised as to the nature of the injury for which the [defendant] disclaimed responsibility. In the present case, the disclaimer acknowledges [that] an alleged injury occurred within the dates in which the [plaintiff] asserts he has exposure to repetitive trauma. We simply do not find [that] the form 43 in this case violates the terms of the statute governing disclaimers. As noted, it appears to clearly enunciate [that] the [defendant] is challenging the etiology of the [plaintiff's] injury and does not advance another theory of defense." For these reasons, the board affirmed the decision of the commissioner. This appeal followed. Additional facts will be set forth as necessary.

Before addressing the specifics of the plaintiff's appeal, we set forth the principles relevant to our workers' compensation jurisprudence. "The purpose of the

[7] General Statutes § 31-275 (16) (A) provides: " 'Personal injury' or 'injury' includes, in addition to accidental injury that may be definitely located as to the time when and the place where the accident occurred, an injury to an employee that is causally connected with the employee's employment and is the direct result of repetitive trauma or repetitive acts incident to such employment, and occupational disease."

[workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer . . . . The [act] compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation. . . . The act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Further, our Supreme Court has recognized that the state of Connecticut has an interest in compensating injured employees to the fullest extent possible . . . . In order to recover pursuant to this act, a plaintiff must prove that the claimed injury is connected causally to the employment by demonstrating that the injury (1) arose out of the employment and (2) occurred in the course of the employment." (Citations omitted; internal quotation marks omitted.) *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 422–23, 28 A.3d 347 (2011).

I

The plaintiff first claims that the defendant's initial form 43 is invalid because it was not served in accordance with § 31-321. Specifically, he argues that because the defendant was aware that he had not received the notice sent by certified mail,[8] the defendant was required to attempt personal service. We are not persuaded.

The plaintiff's claim is one of statutory interpretation. This issue presents a question of law "over which we exercise plenary review. . . . The process of statutory

[8] The parties stipulated that the December, 2007 form 43 was sent to the plaintiff and that he "did not claim it."

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. . . . When the language of a statute is not plain and unambiguous, we 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 . . . common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Arias* v. *Geisinger*, 126 Conn. App. 860, 865–66, 15 A.3d 641, cert. denied, 300 Conn. 941, 17 A.3d 476 (2011).

To resolve this claim, we must consider the interplay between two statutes. "Section 31-294c (b) dictates the strict standards of an employer that seeks to contest liability. Section 31-294c (b) provides in relevant part: Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the

employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. . . . Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death. The workers' compensation commission created the form 43 for use in complying with § 31-294c (b)." (Internal quotation marks omitted.) *Mehan* v. *Stamford*, 127 Conn. App. 619, 626–27, 15 A.3d 1122, cert. denied, 301 Conn. 911, 19 A.3d 180 (2011).

Section 31-321 provides in relevant part: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. . . ." This statute, therefore, governs the manner in which notice is to be served under the workers' compensation act. *Yelunin* v. *Royal Ride Transportation*, 121 Conn. App. 144, 149, 994 A.2d 305 (2010).

It is undisputed that the form 43 was sent to the plaintiff by certified mail. Under the plain meaning of the statute, written in the disjunctive, the defendant complied with the requirements of § 31-321. The plaintiff would have us read a duty or obligation into the statute that simply is not there. There is no further requirement for the defendant in this case; it properly

used one of the three methods established in § 31-321. "We are constrained to read a statute as written . . . and we may not read into clearly expressed legislation provisions which do not find expression in its words." (Internal quotation marks omitted.) *Curley* v. *Kaiser*, 112 Conn. App. 213, 224, 962 A.2d 167 (2009). The text of the statute does not contemplate any further action required if the intended recipient of the notice, in this case, the plaintiff, fails to claim it. Additionally, the plaintiff's interpretation would lead to the bizarre result of allowing the recipients of such notices to eviscerate two methods of service endorsed by the legislature by refusing to claim either the certified or registered mail. "We have often recognized that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results." (Internal quotation marks omitted.) *Shortell* v. *Cavanagh*, 300 Conn. 383, 388–89, 15 A.3d 1042 (2011). Last, we note that the plaintiff has failed to cite to authority in support of his reading of § 31-321. For all these reasons, the plaintiff's claim must fail.

II

The plaintiff next claims that the defendant's form 43 failed to sufficiently specify the grounds on which the defendant was contesting his right to compensation. Specifically, the plaintiff argues that the form amounts to a general denial because it failed to provide any notice of any specific or substantive defense and incorrectly alleged the date of his injury. We are not persuaded by either argument.

We first consider the plaintiff's argument that the defendant's notice was essentially a general denial. In *Menzies* v. *Fisher*, 165 Conn. 338, 341, 334 A.2d 452 (1973), our Supreme Court considered whether an employer's notice that stated, " '[w]e deny a compensable accident or injury,' was fatally deficient in failing

to specify the grounds on which compensation was denied." It noted that, contrary to the purpose of the statute, "[a] general denial that a claimant has a compensable injury reveals no specific defense or reason why the claim is contested. Such a conclusory statement would leave open numerous possible defenses . . . . As far as notifying the claimant of the specific grounds on which her claim was contested, the stated disclaimer apprised her of nothing except the fact that liability was contested. From this claimant's vantage point, if the defendants proceed on the stated defense . . . she, the claimant, must be prepared to meet any number of undisclosed objections to recovery . . . . Neither the statute nor the [act] contemplates such an impediment to bona fide claims." Id., 344.

The court in *Menzies* further instructed that "the sufficiency of the notice under the statute must be judged not by the technical meaning which a court might attach to it, nor by a meaning the defendant subsequently discloses at the hearing, but rather by the criterion of whether it reveals to the claimant specific substantive grounds for the contest." Id., 345. Ultimately, the court held that the employer must provide a notice setting forth the specific grounds on which compensation under the act is contested as a condition precedent to the defense of the action. Id., 347. "The notice by the employer need not be expressed with the technical precision of a pleading, but it must, as required by the statute, reveal to the claimant the specific grounds on which the right to compensation is contested. . . . The rule contemplates and requires only the simplest procedure and compliance with it enables the principal issues to be framed before a hearing is commenced." (Citation omitted; internal quotation marks omitted.) Id., 347–48. We followed the controlling precedent of *Menzies* in *Wilcox* v. *Naugatuck*, 16 Conn. App. 676, 677–78, 548 A.2d 469 (1988), and concluded

that the following employer's disclaimer failed to meet the statutory requirements: "Employee did not sustain accidental injury as defined by the Workers' Compensation Act. We deny the injury, any disability and casual relation." (Internal quotation marks omitted.) Id., 677.

In *Tovish* v. *Gerber Electronics*, 19 Conn. App. 273, 562 A.2d 76, cert. denied, 212 Conn. 814, 565 A.2d 538 (1989), this court again was presented with the issue of the sufficiency of an employer's notice contesting the right to compensation under the act. We stated that "[t]he essence of the disclaimer was as follows: [I]njury (heart attack) did not arise out of or in the course and scope of employment." (Internal quotation marks omitted.) Id., 274. We then set forth the requirements necessary for a workers' compensation claim. "A claimant for workers' compensation benefits must prove five distinct elements in order to establish a prima facie claim: (1) the workers' compensation commission has jurisdiction over the claim; (2) the claim has been timely brought by filing a notice of claim within the requisite time period or by coming within one of the exceptions thereto; (3) the claimant is a qualified claimant under the act; (4) the respondent is a covered employer under the act; and (5) the claimant has suffered a personal injury as defined by the act, arising out of and in the course of employment. J. Asselin, Connecticut Workers' Compensation Practice Manual (1985) § 1." *Tovish* v. *Gerber Electronics*, supra, 275–76. We concluded that the employer's disclaimer "clearly contest[ed] the fifth element." Id., 276. Five years later, in a case with a similar disclaimer, our Supreme Court reached the same conclusion in *Pereira* v. *State*, 228 Conn. 535, 541–42, 637 A.2d 392 (1994).[9]

[9] In *Pereira*, the employer's disclaimer stated: "Respondents do contend [*the*] *plaintiff's stress did not arise out of or in the course of her employment*." (Emphasis in original; internal quotation marks omitted.) *Pereira* v. *State*, supra, 228 Conn. 542. Our Supreme Court further explained that "[a]lthough the disclaimer was not artfully drafted, it clearly apprises the plaintiff of the defendant's intention to challenge an element of her claim,

In the present case, the defendant's December, 2007 form 43 set forth the following reason for contesting the plaintiff's right to compensation benefits: "[The plaintiff] did not suffer an injury which arose out of or in the course of his employment." The language essentially mirrors that of the notices used in *Tovish* and *Pereira*. In those cases, our appellate courts concluded that the notices met the specificity requirements for a valid notice to contest benefits under the act. We reach the same conclusion here.

We now turn to the plaintiff's argument that the notice of disclaimer filed by the defendant failed to allege the correct time period of his repetitive trauma injury.[10] The defendant counters that because the date of injury set forth on its notice fell within the period of time that the plaintiff alleged to have suffered the repetitive trauma, the plaintiff's argument must fail. It further contends that its notice accomplished the objectives set by § 31-294c (b). We agree with the defendant.

As we have noted, the defendant filed its form 43 *before* the plaintiff filed his form 30C.[11] The defendant's

namely, whether the injury arose out of and in the course of employment. Therefore, the defendant's disclaimer complied with the specificity requirement of [the statute] . . . ." Id.

[10] General Statutes § 31-275 (16) (A) provides: " 'Personal injury' or 'injury' includes, in addition to accidental injury that may be definitely located as to the time when and the place where the accident occurred, an injury to an employee that is causally connected with the employee's employment and *is the direct result of repetitive trauma or repetitive acts incident to such employment*, and occupational disease." (Emphasis added.) See also *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 332, 49 A.3d 211 (2012) (legislature intended to include repetitive trauma injuries among those compensable under act).

[11] Although this issue is not before us, we note that one treatise has opined that "[a] proper Form 43 filed before a proper Form 30C does not in and of itself . . . render the disclaimer deficient." 2 A. Sevarino, Connecticut Workers' Compensation After Reforms (4th Ed. 2010) p. 651; see also *Gelinas* v. *St. Mary's Hospital*, 7 Conn. Workers' Comp. Rev. Op. 65 (August 16, 1989) (same); *Lopez* v. *Peerless Aluminum Foundry*, 6 Conn. Workers' Comp. Rev. Op. 46 (October 18, 1988) (same).

notice to contest compensation listed the date of injury as September 6, 2007, the affected body part as "LYMPH NODES" and the nature of the injury as "SARCOIDOSIS."[12] The defendant did not check the box to indicate either an occupational disease or a repetitive trauma. The plaintiff's form 30C listed his date of injury as January 1, 2005, through the present and the body parts injured as "lungs, respiratory complaints." The plaintiff checked the box to indicate that the injury was an occupational disease or a repetitive trauma.

We first address the plaintiff's argument that the defendant's notice was insufficient because it listed the date of injury as September 6, 2007, and not as having occurred over a period of time. The plaintiff relies on *Russell* v. *Mystic Seaport Museum, Inc.*, 252 Conn. 596, 748 A.2d 278 (2000). In that case, the employee filed a notice of claim alleging a repetitive trauma injury that had occurred prior to September 23, 1994. Id., 605. The court observed that "the process of injury from a repetitive trauma is ongoing until [the last date of exposure] . . . and, in many cases . . . the very nature of the injury will make it impossible to demarcate a specific date of injury." (Citation omitted; internal quotation marks omitted.) Id., 613. The defendant filed three form 43s, all indicating the date of the plaintiff's injury as May 2, 1991. Id., 619. Our Supreme Court concluded that these disclaimers were insufficient because they treated the plaintiff's claim as an accidental injury occurring on May 2, 1991, rather than a repetitive injury that occurred prior to September 23, 1994. Id., 621.

We conclude that the present case is distinguishable from *Russell*. The date listed by the defendant's form 43, September 6, 2007, fell within the time period established by the plaintiff's form 30C, January 1, 2005

[12] In its decision, the board stated that it found "that the reference to 'sarcoidosis' in the [defendant's] form 43 was a result of the [plaintiff's] treating physician identifying the [plaintiff's] aliment as such."

through December, 2007. The plaintiff's reliance on *Russell*, therefore, is misplaced.

We also agree with the defendant that its form 43 satisfies the statutory requirements of § 31-294c (b). "Our Supreme Court, in discerning the legislative intent behind the notice requirement of General Statutes (Rev. to 1968) § 31-297 (b), now § 31-294c (b), explained that the statute is meant to ensure (1) that employers would bear the burden of investigating a claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim. . . . The court noted that the portion of the statute providing for a conclusive presumption of liability in the event of the employer's failure to provide timely notice was intended to correct some of the glaring inequities of the workers' compensation system, specifically, to remedy the disadvantaged position of the injured employee . . . ." (Citation omitted; internal quotation marks omitted.) *DiBello* v. *Barnes Page Wire Products, Inc.*, 67 Conn. App. 361, 372, 786 A.2d 1234 (2001), cert. granted on other grounds, 260 Conn. 915, 796 A.2d 560 (2002) (appeal withdrawn June 26, 2002); see also *Chase* v. *State*, 45 Conn. App. 499, 503, 696 A.2d 1299 (1997).

The defendant indisputably investigated the plaintiff's claim in a prompt manner, as its form 43 was filed before the form 30C. Additionally, the defendant made clear to the plaintiff the reason it was contesting the claim under the act; that is, the plaintiff's injury did not arise out of or in the course of his employment. Because this form 43 alerted the plaintiff to the specific substantive ground on which the defendant contested compensability, we conclude that the form 43 was sufficient.[13] See *Pereira* v. *State*, supra, 228 Conn. 541.

[13] We conclude, therefore, that the plaintiff's argument that the defendant's notice was ineffective because it failed to address his repetitive trauma claim is without merit. We agree with the reasoning of the board that such a "technical deficiency" did not prejudice the plaintiff and that the "harsh remedy" of preclusion is not warranted.

The decision of the workers' compensation review board is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JULIO MORQUECHO (AC 33830)

Beach, Bear and Espinosa, Js.

Syllabus

Convicted, after a jury trial, of the crime of murder in connection with the death of his former girlfriend, the defendant appealed. After the victim had ended their relationship, the defendant became angry and repeatedly engaged in violent and threatening conduct toward the victim, which caused the victim to fear him and to move to a domestic violence crisis center. Shortly after the defendant was released from prison for a conviction of violating a restraining order pertaining to the victim, the victim was found dead in front of her apartment building. On appeal, the defendant challenged certain evidentiary rulings by the trial court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly admitted the testimony of S, an expert in the field of domestic violence: it was undisputed that S, who testified about domestic violence and the general behavioral traits and characteristics of persons in a relationship characterized by domestic violence, was qualified as an expert and that his testimony was based on specialized knowledge, and the trial court did not abuse its discretion in concluding that S's testimony would be helpful to the jury in its assessment of the evidence, specifically, the nature of the victim's behavior in relation to the defendant, which was relevant to evaluating whether the defendant caused her death; S's testimony was not inadmissible as irrelevant because it did not pertain to battered woman's syndrome, but to the broader topic of the behavior of persons in a relationship characterized by domestic violence; certain of the defendant's challenges to the admission of S's testimony on relevance grounds and on the ground that it improperly implicated the defendant in the crime were not reviewable, the defendant having failed to object to S's testimony or otherwise raise the evidentiary claims at trial; and because it was reasonable to find that the defendant's violent and threatening conduct caused the victim to fear him, to alter her living arrangements and to obtain a protective order against him, S's testimony was likely to assist the jury in evaluating the nature of the defendant's relationship with the victim, and any prejudicial effect of the evidence did not outweigh its probative value.

2. The defendant could not prevail on his claim that the trial court improperly permitted the state to present the prior testimony of Q from a probable cause hearing on the ground that he was living in Ecuador at the time of the trial and was, therefore, unavailable; in light of the ample evidence in the record of the state's timely and significant efforts to secure Q's live testimony, the trial court's determination that the state made reasonable efforts to secure Q's presence at trial was not an abuse of discretion.

Argued April 26—officially released October 30, 2012

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Danbury, where the court, *Marano*, *J.*, denied the defendant's motions to preclude certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed*.

Mary Beattie Schairer, special public defender, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Warren Murray*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The defendant, Julio Morquecho, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a).[1] The defendant claims that the court improperly (1) admitted expert testimony related to domestic violence and (2) admitted a witness' prior testimony after determining that the witness was unavailable. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts in support of its verdict. The defendant, the victim, Maria Chulca, and their two children originally lived in

[1] The court imposed a sentence of fifty-five years incarceration.

Ecuador before moving to Danbury. The defendant and the victim never were married. Once living in Danbury, the victim worked at two different restaurants. In January, 2005, the victim's two brothers, Jose Chulca and Luis Chulca, moved to Danbury from Ecuador, and, in February, 2005, they moved into an apartment with the defendant, the victim and the two children.

In the spring of 2005, the victim became involved romantically with a coworker, Abel Quinde. Upon learning of this, the defendant became angry and stated that he wanted to kill Quinde. The victim was afraid of the defendant and sought advice from staff at a women's center in Danbury. Specifically, the victim received advice about how safely to move out of the apartment she shared with the defendant and how to care for her children during such a transition. In May, 2005, the victim moved out of her apartment with the help of law enforcement officers and without notifying her family of her whereabouts. She was admitted to a domestic violence crisis center in Norwalk on May 19, 2005.

When the defendant learned that the victim left their residence, he stated that if the victim and Quinde were together, he would kill Quinde. The defendant, relying on military training, stated to the victim's brothers that the most efficient way to kill someone was to slit the person's throat from behind, so that the person did not have time to react. As he said this, he made hand movements to demonstrate how he could kill someone in this manner.

On June 20, 2005, the victim applied for a restraining order against the defendant, alleging an immediate threat to her physical well-being. Four days later, the victim and Quinde were present at a scheduled appointment at the women's center. The defendant confronted them inside the women's center, upsetting the victim.

Staff members of the women's center escorted the victim to a secured area and called the police. When the police officers arrived, the defendant lied to the police concerning his presence and was arrested for violating a restraining order. In a hearing that followed, the defendant pleaded guilty to violating a restraining order. The court sentenced the defendant to 364 days incarceration, execution suspended, and two years of probation.

Sometime in July, 2005, the defendant, having learned of the victim's whereabouts, drove to a violence crisis center in Norwalk, where he approached the victim. The defendant asked the victim to reunite with him. The defendant's presence upset the victim, and she refused to reunite with the defendant.

The victim left the crisis center in July, 2005, and lived in Danbury, but she was compelled to relocate again because the defendant learned where she was living. In September, 2005, the victim moved into a new apartment in Danbury with her children and her brothers. The defendant learned where she was living, and he attempted to visit her at the apartment several times when her brothers were at work. In the fall of 2005, the defendant told an acquaintance of the victim that if the victim did not forgive him and return to him, she might not be with anybody else.

On September 12, 2005, the defendant and Quinde had a physical altercation on a public street in Danbury. When the police arrived, the victim was visibly upset, crying and shaking. During the altercation, Quinde appeared to be protecting the victim. Police officers arrested the defendant, who behaved in a highly agitated manner even after their arrival. The defendant pleaded guilty to violation of a restraining order and admitted to having violated his probation. For the finding of violation of probation, the court sentenced the defendant to a ninety day period of incarceration. For

the conviction of violation of a restraining order, the court imposed a 364 day suspended sentence, followed by three years of probation, with the special condition that the defendant was to have no contact with the victim.

The defendant was released from prison on April 13, 2006. Shortly thereafter, the defendant went to the victim's apartment. He spoke to the victim's brothers, stating that he wanted to reunite with the victim but, if she was with someone else, "it would be better just to kill [her]." The defendant had a history of harassing the victim on her commute to work, on her commute home from work and at her workplace. This conduct upset the victim. On April 18, 2006, the defendant visited the victim at her workplace. He told the victim that, if she did not stop seeing Quinde, he would kill her or Quinde, or take away her children. Although the defendant's angry words upset the victim, there was no evidence that she called the police.

On April 19, 2006, the victim was scheduled to work at 5 p.m. Sometime after 6 p.m., the defendant asked an acquaintance of the victim whether she had seen the victim. The acquaintance had seen the victim, but she lied and said she had not because the defendant appeared to be angry. At the time, the defendant was carrying something, shaped like a ruler that was about twelve inches long, in a plastic bag under his arm. The acquaintance observed the defendant again later that evening around 11 p.m., not far from the victim's apartment.

The victim left work at 1 a.m. on April 20, 2006, and drove one of her coworkers home. The coworker noticed that the victim appeared to be upset and asked her what was wrong. The victim stated that she was fearful of the defendant. She explained that sometimes the defendant would wait for her outside her apartment

when she returned from work and that, on one such occasion, he grabbed her. The victim dropped off her coworker at the coworker's Danbury residence at 1:40 a.m., before proceeding home.

Shortly after 6 a.m., Danbury police responded to a 911 call concerning the victim. When emergency personnel arrived on the scene, they discovered the victim dead on the ground in front of her apartment building. She exhibited two major wounds to her neck, wounds that were consistent with the use of a sharp instrument, as well as several other cuts and abrasions. Also, the victim exhibited defensive type wounds on her hands.

The police interviewed the defendant, who denied any involvement in the victim's death. This appeal followed the defendant's conviction for murder of the victim. Additional facts will be set forth as necessary.

I

First, the defendant claims that the court improperly admitted expert testimony concerning domestic violence. We disagree.

At trial, the state presented testimony from Evan Stark, who holds a master's degree in social work and is an expert in the field of domestic violence. Stark testified concerning his credentials and experience in the field of domestic violence. He defined the term "domestic violence"[2] and discussed different types of domestic violence. Additionally, Stark testified with regard to the traits exhibited by victims of domestic violence generally, such as their gender, reporting habits and behavior. Stark testified about characteristics

[2] Stark testified: "I would define domestic violence as any situation where a partner or a former partner of somebody who's involved in a relationship uses forms of coercion, not limited to, but typically including, violence and threats, to hurt or to frighten or to subjugate, in some cases, or to make dependent, the victim in that instance."

common to relationships characterized by domestic violence, such as jealousy, stalking, threats and fear. At the conclusion of his testimony, Stark testified that he "[knew] nothing about this case, except . . . the very basics." Stark did not testify with regard to any specific facts of the present case and did not opine that the victim was a victim of domestic abuse.

The court permitted Stark's testimony over the defendant's objection. On appeal, the defendant raises a multifaceted challenge to the court's admission of the testimony. Before turning to the specific arguments of the defendant, we set forth our standard of review. "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. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 670–71, 31 A.3d 1012 (2011).

A

First, the defendant argues that the court should have excluded Stark's testimony on the ground that, in light of the factual findings to be made by the jury, "[t]he jury did not need the assistance of an expert to make its decision."[3] Stated otherwise, the defendant argues that Stark's testimony was unlikely to have assisted the jury because the jury could have resolved the issues

[3] At trial, the defendant, arguing that the court should preclude Stark's testimony, raised a materially similar argument. Specifically, the defendant's attorney argued that, because the evidence presented at trial did not reflect that the victim was physically abused by the defendant, Stark's testimony concerning domestic violence was not "relevant" or "probative" to any issue in the present case.

before it by applying its common knowledge and everyday experience in the affairs of life.

"A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." Conn. Code Evid. § 7-2.

Stark provided testimony about domestic violence and the general behavioral traits of persons in a relationship characterized by domestic violence. There is no dispute that Stark was qualified as an expert and that his testimony was based on specialized knowledge. The defendant characterizes his claim as whether Stark's testimony was "necessary" to resolve an ultimate issue of fact, yet our standard for the admission of expert testimony permits the admission of such testimony when such testimony "will assist the trier of fact in understanding the evidence . . . ." Conn. Code Evid. § 7-2. There was ample evidence in this case that the defendant, by the use of violent and threatening conduct, attempted to control the victim.[4] There was evidence that the victim and the defendant were in a relationship characterized by domestic violence. The

[4] There was evidence that the defendant slapped the victim twice, that on one occasion the defendant waited near the victim's driveway for her to return home and grabbed the victim by the arm when he encountered her and that the victim had obtained a protective order after alleging "an immediate and present physical danger to [her] and/or [her] minor children" posed by the defendant. A coworker of the victim described an incident in which the defendant followed the victim and her in his automobile as they drove home from work. During the incident, the defendant repeatedly turned the headlamps of his automobile on and off and nearly caused an automobile accident. Apart from the defendant's threats against the victim's well-being, he behaved violently in the victim's presence by engaging in a physical altercation with Quinde in public. There was evidence that the defendant, on several occasions, threatened the victim, harassed the victim and greatly upset the victim.

defendant has failed to demonstrate that Stark's testimony would not assist the trier of fact in understanding the evidence, specifically, the nature of the victim's behavior in relation to the defendant, which, certainly, was relevant to evaluating whether the defendant caused her death.

Specifically, we note the evidence that the victim exhibited defensive wounds and that her assault likely began in a dark secluded area near her residence after 1:40 a.m. The evidence did not suggest that the victim initially was assaulted near her automobile or near the entry to her residence. There was no evidence that the victim called for help or used her cellular telephone to summon assistance. On these facts, it could be inferred that the victim interacted, albeit briefly, with her assailant. Insofar as the state attempted to prove beyond a reasonable doubt that the defendant was the assailant, it was advantageous to the state's case for the state to demonstrate that the victim afforded *the defendant* an opportunity to commit the crime at that time and place. To this end, it was helpful for the jury to understand why the victim might have interacted with the defendant at all, rather than immediately taking flight from him.

Stark testified that, generally, domestic violence relationships do not end neatly but persist in some form despite the physical separation of the parties. Stark testified that, despite taking steps to end abusive relationships, victims of domestic violence typically continue to interact with their abusers for a variety of reasons, such as reducing the level of violence in the ongoing relationship or merely achieving immediate protection. Insofar as this observation conveyed "scientific, technical or other specialized knowledge"; Conn. Code Evid. § 7-2; we conclude that the court did not abuse its discretion in concluding that it would be helpful to the jury in its assessment of the evidence. There was ample evidence that the victim feared the defendant

and that she attempted to end her contact with the defendant. She sought counseling, moved out of the residence that she shared with the defendant and obtained a protective order. To the extent that this evidence might have appeared to contradict a finding that the victim interacted with the defendant, even briefly, at the time of the murder, Stark's testimony concerning the conduct of victims of domestic violence was useful to the jury in its appraisal of the victim's conduct and whether, as the state argued, the defendant was the perpetrator of the victim's murder. Thus, we conclude that the court's admission of the testimony was not an abuse of discretion.

B

Next, as he did at trial, the defendant argues that Stark's testimony was inadmissible because it concerned battered woman's syndrome and, thus, was irrelevant. As the defendant correctly points out, the state conceded at trial that the victim was not a battered woman in that it did not rely on evidence that, prior to the events at issue, the defendant physically assaulted the victim such that she could be considered a battered woman.

Our review of Stark's testimony leads us to conclude that his testimony did not pertain to battered woman's syndrome, but to the broader topic of the behavior of persons in a relationship characterized by domestic violence. Stark's testimony was in no way limited to relationships marked by physical abuse, but those marked by violent and threatening conduct aimed at coercing a victim to behave in a certain way. Because this aspect of the claim is not based on the evidence presented at trial, it is without merit.

C

Next, the defendant claims that Stark's testimony was inadmissible on relevance grounds "[b]ecause the

relationship at issue did not fall within the parameters of Stark's definition of domestic violence . . . ." As set forth earlier in this opinion, Stark defined domestic violence as a situation in which one person uses forms of coercion, typically including violence and threats, to hurt, to frighten or to subjugate a victim. Stark testified that there are at least two patterns of domestic violence. One involves physical violence accompanied by psychological abuse. The other involves "a much more complex pattern . . . called coercive control." Stark stated: "[W]hat's going on in that situation is, in addition to violence and forms of emotional abuse, usually, patterns designed to isolate a victim, degrade or shame them sexually, intimidate them, frighten them . . . and, perhaps, most importantly, to control them . . . ."

Our review of the record reflects that, at trial, the defendant argued that Stark's testimony was inadmissible because there was no evidence that the victim was a battered woman or that the defendant had engaged in physical violence against the victim. The defendant did not argue that Stark's testimony was irrelevant because the evidence did not fit into either of the types of domestic violence described by Stark; the defendant's relevancy objection preceded this testimony. Because this aspect of the defendant's evidentiary claim was not distinctly raised at trial, we do not reach its merits.[5] See, e.g., *State* v. *Alvarez*, 216 Conn. 301, 306, 579 A.2d 515 (1990) ("[o]nce counsel states the authority and ground of his objection, any appeal will be limited to the ground asserted" [internal quotation marks omitted]).

[5] "[A]s a precautionary measure," the defendant urges us to review any unpreserved aspects of his claim under the doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); under the plain error doctrine codified in Practice Book § 60-5 or by the exercise of this court's inherent supervisory authority over the administration of justice. The defendant, however, has not provided this court with a sufficient analysis of his claims under any of these doctrines. Nonetheless, even were we to determine that the defendant's blanket invocation of these doctrines relating to extraor-

D

Next, the defendant argues that Stark's testimony concerning nonphysical " 'coercive control' " in relationships characterized by domestic violence "was irrelevant because Stark had not reviewed the evidence regarding [the] defendant's specific domestic situation prior to trial and had never made a diagnosis [concerning his relationship with the victim]." Relying on *State* v. *Carpenter*, 275 Conn. 785, 794–813, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006), the defendant asserts that Stark's testimony, insofar as it pertained to codependency in a relationship characterized by domestic violence, was irrelevant absent a psychological evaluation of the defendant and the victim, followed by a diagnosis that the parties were in a codependent relationship.

The record reflects that, at trial, the defendant objected on relevancy grounds to the admission of Stark's testimony. The record, however, does not reflect that the defendant raised an objection that was grounded, even tangentially, in terms related to the present argument. Accordingly, we decline to review this aspect of the defendant's claim. See, e.g., *State* v. *Alvarez*, supra, 216 Conn. 306.

E

Next, the defendant argues that the court should have excluded Stark's testimony because "it improperly implicated [him] in the crime." The defendant takes issue with four questions asked of Stark during the state's direct examination. Specifically, the prosecutor, following Stark's testimony about domestic violence relationships in general, asked Stark to opine about whether women are safer when they leave domestic

dinary review was sufficient, we readily would conclude that none of them apply to the present evidentiary claim.

violence relationships, what role jealousy plays in domestic violence relationships, what significance stalking plays in domestic violence relationships and what significance threats to harm others plays in domestic violence relationships. On appeal, the defendant argues that these questions "[were] designed to explicitly elicit answers implicating [the] defendant in the crime. . . . [Their] goal was to convince the jury that [the] defendant was responsible for the crime based upon a sociologist's testimony that other people's behavior led to homicide." The defendant argues that the questions, while "triggered by evidence the jury had heard," elicited inadmissible propensity evidence.

The record does not reveal that, at trial, the defendant objected to these inquiries during the state's examination of Stark or that the defendant raised an objection of this nature. For this reason, we decline to review this aspect of the defendant's evidentiary claim. See, e.g., *State* v. *Alvarez*, supra, 216 Conn. 306.

F

Next, as he did at trial, the defendant argues that the court should have excluded Stark's testimony on the ground that it was not merely adverse to the defense but unfairly prejudicial. Essentially, the defendant argues that the evidence lacked any probative value and that it was highly prejudicial in that it "unfairly created sympathy for [the victim], and anger toward [the] defendant." We disagree.

"Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4-3. "Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only whe[n] abuse of discretion

is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 582, 10 A.3d 1005, cert. denied, U.S. , 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

The defendant's analysis inaccurately presumes that Stark's testimony lacked any connection to the evidence in this case. Because it was reasonable to find that the defendant's violent and threatening conduct caused the victim to fear him, to alter her living arrangements and to obtain a protective order against him, we conclude that Stark's testimony was likely to assist the jury in evaluating the nature of the defendant's relationship with the victim. Furthermore, the defendant argues that "[b]ecause [Stark's] conclusory testimony led the jurors to believe that it was the natural result that murders occur when certain factors are present, it gave the jury no choice but to conclude that [the] defendant had also murdered." The flaw in this argument, however, is that Stark did not testify that murder is the natural or customary result of a relationship characterized by domestic violence. Moreover, the defendant argues that Stark's testimony likely misled the jury into believing that its deliberations were easy, made its job seem "cut and dry" when, in fact, Stark knew almost nothing about the facts of this case. Insofar as Stark provided information about domestic violence relationships in general and testified clearly that his testimony was not based on his knowledge of the parties or the facts of this case, we disagree with this assessment of the testimony.

We disagree that the prejudicial effect of the evidence outweighed its probative value. Affording the court's determination every reasonable presumption of correctness, we conclude that the court's ruling was not an abuse of its discretion.

II

Next, the defendant claims that the court improperly permitted the state to present the prior testimony of Quinde on the ground that he was unavailable. We disagree.

The following additional facts underlie this claim. Prior to the presentation of evidence, the defendant's attorney alerted the court to the fact that, at a prior criminal trial of the defendant that took place approximately five months earlier,[6] the state presented the prior testimony, elicited during a probable cause hearing, of certain unavailable witnesses. The defendant's attorney stated that although, at the prior trial, the court determined that the witnesses' prior testimony was admissible on the ground that the witnesses were unavailable, the defense argued it was not proper to treat the issue as settled for purposes of the defendant's present trial. The prosecutor addressed the issue, noting that the witnesses at issue were living outside of the United States and that, despite the state's efforts, they declined to return to Connecticut for the prior trial. The prosecutor stated that the court, at the prior trial, determined that the witnesses were unavailable and that, by means of their cross-examination by the defendant at the probable cause hearing, there was no violation of the defendant's right to confront the witnesses. The prosecutor stated that he intended to demonstrate that the witnesses still were unavailable for the present trial. Quinde was one of these unavailable witnesses.

During the present trial, in November, 2009, the state presented the testimony of Marylou Comstock, an investigator in the office of the state's attorney. Comstock testified that one of her duties in assisting in the

[6] At the prior trial, which was based on the events at issue in this case, the defendant was convicted of stalking in the first degree. The jury in that trial, however, was unable to reach a verdict as to the murder count.

preparation of cases for trial is to search for witnesses. Comstock testified that in January, 2009, as part of her work in this case, she was asked to locate Quinde. She testified that Quinde was living in Ecuador. Comstock testified that she searched for Quinde with the use of various databases and contacts. She testified that, in September, 2009, she searched once again for Quinde and that her research encompassed hospital data, motor vehicle data, tax data, department of correction data and department of labor data.

Additionally, the state presented testimony from Daniel Trompetta, a detective with the Danbury police department. Trompetta testified that, in connection with a probable cause hearing in this case, in 2007, he served a subpoena on Quinde at the Danbury residence of Quinde's mother. Trompetta testified that, to his knowledge, sometime after Quinde testified at the probable cause hearing, he returned to Ecuador and remained in that country. Trompetta testified that, approximately six months earlier, in connection with the earlier trial, he obtained Quinde's telephone number in Ecuador from Quinde's mother and that he spoke with Quinde. Trompetta testified that he told Quinde that his testimony at trial was crucial and asked Quinde to return to Connecticut but that Quinde indicated that "[h]e was not going to come back" and that "he had no interest in coming back . . . ." Nonetheless, Quinde asked Trompetta to advise him as to the outcome of the trial. Trompetta testified that he did not speak to Quinde after that conversation and did not speak to him in connection with the present trial. Trompetta testified that the state provided transportation and immigration assistance to two other witnesses who were living abroad, Georgina Diaz and Augusta Suarez, to ensure their presence at the trial.

Thereafter, the state offered Quinde's testimony from the probable cause hearing on the ground that he was

an unavailable witness. The defendant objected, arguing that the state had not demonstrated that it had exercised due diligence to present Quinde. Specifically, the defendant's attorney argued that, unlike its efforts with regard to other witnesses that were not in Connecticut, the state did not demonstrate that it had offered either to finance Quinde's travel to Connecticut from Ecuador or to handle immigration issues related to Quinde's travel. The defendant's attorney argued that because the state knew of Quinde's whereabouts for several months, which was not the case at the time of the first trial, efforts of such nature were likely feasible and the fact that they were not made should be considered by the court when evaluating the state's due diligence at the present trial. The court agreed with the defendant that the state had failed to demonstrate that Quinde was unavailable.

Later, the state presented the testimony of Maria Tigre, Quinde's mother. Tigre testified that Quinde was in Ecuador, she spoke with Quinde two weeks earlier and Quinde did not want to return to Connecticut. Tigre testified that Quinde did not want to return to Connecticut because of concerns about what the defendant would do to him if he was released from prison. Also, the state presented testimony from Craig Martin, a detective with the Danbury police department. Martin testified that, two weeks earlier, with the assistance of a Spanish speaking police officer, he contacted Quinde in Ecuador and tried to convince him to return to Connecticut. Quinde refused. Martin testified that in the weeks prior to trial, the police left several messages for Quinde, but he did not respond to these messages.

Once more, the prosecutor asked the court to admit into evidence the probable cause hearing testimony of Quinde. The prosecutor asserted that it had made a sufficient showing that Quinde was unavailable. In his objection, the defendant's attorney reiterated his earlier

argument that the state had not demonstrated that it offered to assist Quinde in returning to Connecticut for trial. Although the defendant's attorney argued that such offers of assistance were not necessary in all cases to demonstrate the unavailability of a witness, he argued that such efforts were necessary with regard to Quinde because the state had made such efforts to procure the live testimony of other witnesses in this case. The prosecutor represented that, although the state had provided travel assistance to two other witnesses after they had expressed a willingness to return to Connecticut for the trial, Quinde had not expressed such willingness. The prosecutor represented: "I don't think there's any reason to presume that, had . . . Quinde wanted to come back, that the state would not have [arranged for his transportation to and accommodations in Connecticut]."

The court ruled that the state met its burden of demonstrating that Quinde was unavailable. The court rejected the defendant's position that, on the facts of this case, the state bore the burden of demonstrating that it had offered to provide for travel and accommodations. Accordingly, the court admitted a transcript of Quinde's testimony at the probable cause hearing.[7]

On appeal, the defendant takes issue with the court's admission of the probable cause hearing testimony on the ground of Quinde's unavailability. The defendant characterizes the state's efforts to procure Quinde's presence at the trial as less than diligent. The defendant asserts that the state merely located Quinde and took at "face value" his representation that he would not

[7] In light of our determination that the court properly admitted Quinde's testimony on the ground that he was an unavailable witness, we need not discuss the substance of his testimony. Accordingly, we do not address the state's alternate argument that Quinde's testimony was cumulative of other evidence and that it was unlikely to have affected the jury's verdict.

return to testify. The defendant argues that the admission of Quinde's testimony deprived him of an opportunity to cast doubt on the testimony and an opportunity to demonstrate reasonable doubt of his guilt.[8]

It is well established that, in certain circumstances, a party may present the prior testimony of a declarant who is unavailable to testify. See Conn. Code Evid. § 8-6 (1). "In *State* v. *Frye*, 182 Conn. 476, 481, 438 A.2d 735 (1980), our Supreme Court recognized five of the most common situations in which a declarant will be deemed unavailable to testify. The situation most relevant to the present case is one in which the declarant is absent from the hearing and the proponent of his

[8] Although the defendant argues in part that the court's admission of the evidence violated his right to confrontation under the federal and state constitutions, we view the claim as being evidentiary, rather than constitutional, in nature. As a preliminary matter, we do not address the claim under the state constitution because the defendant did not provide this court with an independent analysis under the state constitution. See, e.g., *State* v. *Vakilzaden*, 272 Conn. 762, 768 n.11, 865 A.2d 1155 (2005) (declining to review state constitutional claim where claim not accompanied by independent analysis under state constitution). Furthermore, the defendant's analysis merely focuses on the propriety of the court's determination that Quinde was unavailable and, more specifically, whether the state exercised due diligence and made reasonable efforts to secure Quinde's live testimony at trial.

Beyond stating that the court violated his sixth amendment right to confrontation, the defendant does not undertake an analysis to demonstrate that, because he lacked an opportunity to cross-examine Quinde at the probable cause hearing, the admission of the testimony violated his rights under the confrontation clause of the sixth amendment to the United States Constitution. The defendant does not raise a *Crawford* claim and did not advance arguments of that nature before the trial court. See *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Under *Crawford* v. *Washington*, supra, [68], 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. Hearsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence." *State* v. *Slater*, 285 Conn. 162, 169–70, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008).

statement has been unable to procure his attendance . . . *by process or other reasonable means*. . . . In interpreting reasonable means, [our Supreme Court has] held that the proponent must exercise due diligence and, at a minimum, make a good faith effort to procure the declarant's attendance. . . . The trial court has broad discretion in determining whether the proponent has shown a declarant to be unavailable. Only upon a showing of a clear abuse of discretion will this court set aside on appeal rulings on evidentiary matters. . . . [I]t is within the discretion of the trial court to accept or to reject the proponent's representations regarding the unavailability of a declarant and the trial court's ruling will generally not be disturbed unless the court has abused its discretion. . . .

"[D]ue diligence to procure the attendance of the absent witness [is] . . . an essential . . . predicate of unavailability. . . . To take advantage of the hearsay exceptions requiring unavailability, the proponent must show a good faith, genuine effort to procure the declarant's attendance by process or other reasonable means. . . . This showing necessarily requires substantial diligence. In determining whether the proponent of the declaration has satisfied this burden of making reasonable efforts, the court must consider what steps were taken to secure the presence of the witness and the timing of efforts to procure the declarant's attendance. . . . A proponent's burden is to demonstrate a diligent and reasonable effort, not to do everything conceivable, to secure the witness' presence." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Wright*, 107 Conn. App. 85, 89–90, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008).

We observe that the defendant does not argue that the court abused its discretion in accepting as true the evidence presented by the state with regard to its efforts to secure Quinde's attendance at the trial. Nor does the

defendant explicitly argue that the state had the ability to, but failed to, compel the attendance of Quinde, a foreign national, through its own process.

The record contains adequate evidence of the state's efforts, which may be summarized as follows. With the use of various databases, Comstock was able to determine that Quinde was in Ecuador and that, as late as September, 2009, there was no record of his presence in the United States. In March, 2009, Trompetta obtained Quinde's telephone number from his mother, Tigre, and spoke with Quinde via telephone, stressing the importance of his presence at trial. Quinde unambiguously stated that he was not returning to Connecticut to testify in the defendant's prosecution. This sentiment plainly was echoed by his mother who spoke with Quinde just two weeks prior to her testimony. Lastly, Martin contacted Quinde through a Spanish speaking officer just two weeks prior to his testimony, but Quinde again stated that he would not return to Connecticut to testify. In the weeks following this conversation, Quinde did not respond to additional messages left for him by the police.

Thus, the record reflects that persons, on behalf of the state, determined Quinde's whereabouts, conducted research to ensure that he was not in the United States, spoke with him about the importance of his presence at trial and directly inquired if he would return to testify. These efforts were made until the eve of trial. The gist of the defendant's arguments is that the state conceivably could have done more to secure Quinde's attendance by providing travel and immigration assistance to Quinde, taking steps to ensure that Quinde did not leave the country prior to trial and providing protection to Quinde during his stay in Connecticut. Again, the defendant argues that the state undertook greater efforts to secure the presence of other state witnesses who were living abroad.

There is no bright line test for gauging the diligence and reasonableness of the state's efforts to secure the attendance of a witness living abroad. As stated previously in this opinion, the issue becomes a "judgment call" for the trial court, one that we review for an abuse of discretion. (Internal quotation marks omitted.) *State* v. *Wright*, supra, 107 Conn. App. 89. In light of the ample evidence in the record of the state's timely and significant efforts to secure Quinde's live testimony, we conclude that the court's determination that the state made reasonable efforts was not an abuse of discretion. The defendant's arguments that the state could have taken *additional* steps in an attempt to secure Quinde's presence, or that perhaps it treated other witnesses differently, do not detract from the reasonableness of the state's efforts. It bears emphasizing that a showing of due diligence does not require that the state "do everything conceivable," but that it demonstrate that diligent and reasonable efforts were made. (Internal quotation marks omitted.) Id., 90. Accordingly, the defendant has not demonstrated that the admission of Quinde's probable cause hearing testimony was improper.

The judgment is affirmed.

In this opinion the other judges concurred.

Note

Appellate Court Memorandum Decisions begin at page 901. Page numbers 863 to 900 are intentionally omitted.

Reporter of Judicial Decisions

MEMORANDUM DECISIONS

DAVID O'SUCH *v.* COMMISSIONER OF CORRECTION (AC 33098)

Alvord, Espinosa and Bishop, Js.

Argued September 7—officially released October 2, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Suarez*, *J.*

Per Curiam. The appeal is dismissed.

ERVIN JAMES ET AL. *v.* JOHN STEINEGGER (AC 33091)

Beach, Alvord and Schaller, Js.

Argued September 6—officially released October 2, 2012

Plaintiffs' appeal from the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, *Hon. Jack L. Grogins*, judge trial referee.

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* EVERETT O. SMITH (AC 33359)

Bear, Sheldon and West, Js.

Argued September 11—officially released October 2, 2012

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, *Comerford*, *J.*

Per Curiam. The judgment is affirmed.

TOWN OF LEBANON *v.* ALLAN RYCHLING ET AL.
(AC 32716)

Gruendel, Lavine and Flynn, Js.

Argued September 10—officially released October 2, 2012

Defendants' appeal from the Superior Court in the judicial district of New London, *Hon. Robert C. Leuba*, judge trial referee.

Per Curiam. The judgment is affirmed.

ROGER EMERICK *v.* COMMISSIONER OF PUBLIC HEALTH ET AL.
(AC 34162)

Alvord, Bear and Flynn, Js.

Argued September 24—officially released October 9, 2012

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Domnarski*, *J.*

Per Curiam. The judgment is affirmed.

CAESAR O'NEIL *v.* COMMISSIONER OF CORRECTION
(AC 32764)

Gruendel, Beach and Sheldon, Js.

Argued September 21—officially released October 9, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Schuman*, *J.*

Per Curiam. The appeal is dismissed.

JOHN KEARNEY *v.* COMMISSIONER
OF CORRECTION
(AC 33595)

DiPentima, C. J., and Sheldon and Lavery, Js.

Argued September 19—officially released October 9, 2012

Petitioner's appeal from the Superior Court in the judicial district of New Haven, *Burke*, *J.*

Per Curiam. The judgment is affirmed.

TIBER HOLDING CORPORATION ET AL.
v. ANDREW P. DILORETO
(AC 33715)

Beach, Alvord and Bear, Js.

Submitted on briefs September 17—officially released October 9, 2012

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Taggart D. Adams*, judge trial referee.

Per Curiam. The judgment is affirmed.

ANTHONY FURS *v.* COMMISSIONER
OF CORRECTION
(AC 33260)

DiPentima, C. J., and Gruendel and Espinosa, Js.

Submitted on briefs September 17—officially released October 9, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bright*, *J.*

Per Curiam. The appeal is dismissed.

MICHAEL MCCOY *v.* COMMISSIONER
OF CORRECTION
(AC 33351)

DiPentima, C. J., and Gruendel and Bishop, Js.

Submitted on briefs September 17—officially released October 9, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bright*, *J.*

Per Curiam. The appeal is dismissed.

EDWARD WRIGHT *v.* COMMISSIONER
OF CORRECTION
(AC 33331)

DiPentima, C. J., and Gruendel and Espinosa, Js.

Submitted on briefs September 17—officially released October 9, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Schuman*, *J.*

Per Curiam. The appeal is dismissed.

MATTHEW J. KWONG *v.* COMMISSIONER
OF MOTOR VEHICLES
(AC 34127)

Alvord, Bear and Flynn, Js.

Argued September 24—officially released October 9, 2012

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Cohn*, *J.*

Per Curiam. The judgment is affirmed.

JERRY RODRIGUEZ *v.* COMMISSIONER OF CORRECTION
(AC 32517)

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

Argued September 13—officially released October 16, 2012

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Nazzaro*, *J.*

Per Curiam. The appeal is dismissed.

MICHAEL DARCY *v.* PETURA R. BILLIE
(AC 33750)
(AC 34180)

Lavine, Sheldon and Mihalakos, Js.

Argued September 25—officially released October 16, 2012

Defendant's appeal and plaintiff's appeal from the Superior Court in the judicial district of Hartford; *Aurigemma*, *J.*; *Hon. Robert Satter*, *judge trial referee*; *Scholl*, *J.*

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