STATE OF CONNECTICUT *v.* KENNETH PORTER (SC 19818)

Palmer, McDonald, Robinson, D'Auria and Kahn, Js.*

Syllabus

The defendant, who was convicted of assault of public safety personnel, interfering with an officer, and possession of a narcotic substance, appealed to the Appellate Court, claiming, inter alia, that his conviction on both the assault and interfering counts violated the federal constitutional prohibition against double jeopardy. The defendant's conviction stemmed from his actions during a motor vehicle stop by the police. When police officers B and D approached the defendant and requested that he show his hands, he refused and reached toward the passenger side of the vehicle and inside his pants. As the officers were removing the defendant from his vehicle, he tried to kick D and attempted to stab him with a screwdriver. The defendant swung his hands, kicked his feet, and fought wildly in the struggle that ensued, during which D sustained injuries. At some point during the struggle, the defendant removed a bag of marijuana from his pants, put it in his mouth, and, after he had been subdued, spit it out. The information alleged that the offenses occurred on the same date, at the same time, and at the same location, and no bill of particulars was filed. After determining that it was obligated to review the evidence presented at the defendant's trial in addition to reviewing the charging documents for purposes of its double jeopardy analysis, the Appellate Court concluded that the defendant's double jeopardy claim failed because, on the basis of that evidence, the jury could have concluded that the assault and interfering charges did not arise from the same act or transaction. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court properly reviewed the evidence presented at trial for the purpose of determining, in connection with its double jeopardy analysis, whether the defendant's offenses arose from the same act or transaction, as this court clarified that, under the two step process for evaluating whether the prohibition on double jeopardy has been violated, which requires a determination, first, that the charges arise out of the same act or transaction and, second, that the charged crimes are the same offense, the review of evidence presented at trial is permitted in connection with the first step of the two step process but not in connec-

* This case originally was scheduled to be argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria and Kahn. Although Justice Palmer was not present when the case was argued before the court, he has read the briefs and appendices and listened to a recording of the oral argument prior to participating in this decision.

tion with the second step; furthermore, the defendant could not prevail on his unpreserved claim that allowing a court to review evidence presented at trial to determine if the charges allegedly arose out of the same act or transaction contravened constitutional principles of notice and unduly complicated his legal defense, as the state's information afforded him notice because it separately charged him with the assault and interfering offenses, and, to the extent that the defendant's notice claim was premised on his uncertainty as to what conduct corresponded to each charge, the defendant could have remedied any confusion by filing a motion for a bill of particulars or raising the issue in the trial court; moreover, the Appellate Court correctly determined that the defendant's double jeopardy claimed failed because the offenses of assault of public safety personnel and interfering with an officer arose from different acts or transactions, as the evidence at trial establishing the defendant's conduct of attempting to kick and stab D, and injuring D during the ensuing struggle, supported the defendant's conviction of the offense of assault of public safety personnel, and the evidence establishing the defendant's conduct of attempting to swallow the bag of marijuana supported his conviction of the offense of interfering with an officer.

Argued December 19, 2017—officially released May 1, 2018

Procedural History

Substitute information charging the defendant with three counts of the crime of assault of public safety personnel, and one count each of the crimes of carrying a dangerous weapon, possession of a narcotic substance, possession of a controlled substance, interfering with an officer, and failure to appear in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Mullins*, *J.*; verdict of guilty of two counts of assault of public safety personnel, and one count each of possession of a narcotic substance, possession of a controlled substance and interfering with an officer; thereafter, the court dismissed the charge of possession of a controlled substance and rendered judgment of guilty of two counts of assault of public safety personnel, and one count each of possession of a narcotic substance and interfering with an officer, from which the defendant appealed to the Appellate Court, *Beach*, *Sheldon* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the

defendant, on the granting of certification, appealed to this court. *Affirmed.*

Mark Rademacher, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The sole question presented in this appeal is whether a court may look to the evidence presented at trial when determining if a defendant's conviction violated the constitutional prohibition against double jeopardy. The defendant, Kenneth Porter, appeals[1] from the judgment of the Appellate Court affirming his judgment of conviction, following a jury trial, of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1) and interfering with an officer in violation of General Statutes § 53a-167a.[2] *State* v. *Porter*, 167 Conn. App. 281, 283–84, 142 A.3d 1216 (2016). The defendant claims that the Appellate Court could review only the charging documents when determining whether his conviction of both charges violated the prohibition on double jeopardy and that it improperly looked to the evidence presented at trial to make that

[1] We granted the defendant's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "In determining that the defendant's double jeopardy rights had not been violated, did the Appellate Court properly review the evidence at trial, rather than confining its inquiry to the allegations in the charging document?" *State* v. *Porter*, 323 Conn. 920, 920–21, 150 A.3d 1152 (2016).

[2] The defendant also was convicted of a second count of assault of public safety personnel, which is not at issue in this appeal, and one count of possession of a narcotic substance in violation of General Statutes § 21a-279 (a). Although the jury also found the defendant guilty of possession of a controlled substance in violation of General Statutes § 21a-279 (c), the trial court subsequently dismissed that charge.

determination. The state counters that *State* v. *Schovanec*, 326 Conn. 310, 163 A.3d 581 (2017), permits the review of evidence in double jeopardy analysis for the limited purpose of deciding whether the offenses stem from the same act or transaction, and that it was proper for the Appellate Court to consider evidence in that analysis. We agree with the state that the Appellate Court properly considered the evidence presented at trial and, accordingly, affirm its judgment.

The Appellate Court set forth the following facts. "On May 24, 2010, Brian Donnelly, a patrol officer with the Yale Police Department, heard a police broadcast regarding a domestic dispute involving the defendant. Donnelly responded by proceeding to Winchester Avenue [in New Haven], where he spotted a vehicle matching the broadcast description of the defendant's vehicle. Donnelly followed the vehicle, which in fact belonged to the defendant. After Officer Lester Blazejowski arrived in support, Donnelly stopped in front of the defendant's vehicle at the intersection of Ashmun and Grove Streets. Donnelly and Blazejowski exited their cruisers, approached the defendant's vehicle, and ordered the defendant to put his vehicle in park and to show his hands. The defendant refused to comply and, instead, reached toward the passenger side of the vehicle and then inside his pants. Donnelly thought the defendant was attempting to retrieve a weapon. He ordered the defendant to show his hands, but, instead, the defendant again reached over to the passenger side of the vehicle and then inside his pants.

"Blazejowski opened the driver's side door and attempted to remove the defendant from his vehicle, but he resisted. Donnelly also tried to remove the defendant from his vehicle, but the defendant resisted and continued to reach for the waistband of his pants and elsewhere in the vehicle. Donnelly finally was able to remove the defendant from the vehicle. While the offi-

cers were trying to handcuff the defendant, the defendant tried to kick Donnelly and attempted to stab him with a screwdriver. A struggle ensued during which the officers attempted to handcuff the defendant, who swung his hands, kicked his feet, and fought 'wildly.' Donnelly incurred scrapes and cuts that resulted in pain and 'swelling.' At some point during the struggle, the defendant removed a bag of marijuana from his pants and put it in his mouth. After having been subdued with pepper spray, the defendant spit out the marijuana. Eventually, the defendant was handcuffed and formally arrested." (Footnote omitted.) *State* v. *Porter*, supra, 167 Conn. App. 284–85.

Relevant to this appeal, the amended information charged the defendant in the first count with assault of public safety personnel, and provided that "the defendant . . . with the intent to prevent [Donnelly] from performing his duties . . . and while [Donnelly] was acting in the performance of his duties . . . caused physical injury to [Donnelly] in violation of [§ 53a-167c (a) (1)] . . . ." It charged the defendant in the seventh count with interfering with an officer in violation of § 53a-167a, and provided that "the defendant . . . obstructed, resisted, hindered and endangered [Donnelly], while in the performance of [his] duties . . . ." The information alleged that both offenses occurred "on May 24, 2010, at or around 7:23 p.m., at or near Ashmun Street, in the city of New Haven . . . ." "No bill of particulars was filed . . . ." *State* v. *Porter*, supra, 167 Conn. App. 288.

The Appellate Court additionally set forth the following relevant procedural history. "Following a trial to a jury, the defendant was convicted of two counts of assault of public safety personnel, [one count of] possession of a narcotic substance . . . and [one count of] interfering with an officer. The defendant was sentenced on each of the assault convictions to ten years

incarceration, execution suspended after seven years; the sentences were to run consecutively. The defendant's one year sentence on count seven, interfering with an officer, and five year sentence on count five, possession of a narcotic substance, were ordered to run concurrently with each other and with the assault sentences. The defendant's total effective sentence was, thus, twenty years incarceration, execution suspended after fourteen years and five years of probation." *State* v. *Porter*, supra, 167 Conn. App. 285.

In his appeal to the Appellate Court, the defendant claimed a double jeopardy violation for his conviction of both assault of public safety personnel and interfering with an officer. To resolve his claim, that court surveyed Connecticut's double jeopardy jurisprudence to determine if it was permitted to review evidence presented at trial because "[t]he information allege[d] that the two crimes occurred at the same time and place" and, if confined to "the charging document alone, one conviction must [therefore] be vacated." Id., 289. Although the Appellate Court noted that several of its cases had interpreted *State* v. *Goldson*, 178 Conn. 422, 423 A.2d 114 (1979), to completely bar evidentiary review during double jeopardy analysis, it concluded that subsequent cases implicitly overruled *Goldson*, and, as a result, it was obligated to review the evidence in addition to the charging documents. *State* v. *Porter*, supra, 167 Conn. App. 289, 292. On the basis of the evidence presented at trial, the Appellate Court held that the jury could have concluded "that the two crimes did not stem from the same conduct." Id., 293. As a result, the defendant did not satisfy one of the requirements to establish a double jeopardy violation in the context of a single trial. Id. The Appellate Court therefore affirmed the judgment of conviction. Id., 297. This certified appeal followed.

The issue in this appeal is whether the Appellate Court properly reviewed the evidence presented at trial when determining that the defendant's conviction did not violate double jeopardy.[3] The defendant maintains that *Goldson* proscribes consideration of the evidence in double jeopardy analysis, but the state contends that this court's decision in *Schovanec* permits a court to look beyond the charging documents when determining if the offenses stem from the same act or transaction. Thus, both parties offer precedent in a manner that appears to be in conflict, and the state goes so far as to suggest that we should overrule *Goldson* in light of *Schovanec* if necessary. We conclude that *Goldson* and *Schovanec* are consistent because both cases prohibit the review of evidence only with regard to the second step of a two step process for evaluating whether there has been a violation of the prohibition on double jeopardy.

We begin by setting forth the standard of review. "A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The dou-

[3] The defendant conceded before the Appellate Court that his double jeopardy claim was unpreserved and sought review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). *State* v. *Porter*, supra, 167 Conn. App. 286. "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 . . . exists and . . . 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 omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). We agree with the Appellate Court that the record is adequate and that the double jeopardy claim is of constitutional magnitude. See *State* v. *Devino*, 195 Conn. 70, 73, 485 A.2d 1302 (1985) ("The defendant's claim of double jeopardy is also raised for the first time on appeal. Since this claim involves a question of a fundamental constitutional right, it is reviewable . . . .").

ble 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. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Citation omitted; internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013).

"Double jeopardy analysis in the context of a single trial is a [two step] process," and, to succeed, the defendant must satisfy both steps. (Internal quotation marks omitted.) Id. "First, the charges must arise out of the same act or transaction [step one]. Second, it must be determined whether the charged crimes are the same offense [step two]. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) Id. At step two, we "[t]raditionally . . . have applied the *Blockburger*[4] test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[5] (Internal quotation marks omitted.) Id.

[4] *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[5] This two step process is consistent with federal law. See *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) ("*where the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" [emphasis added]); *State* v. *Goldson*, supra, 178 Conn. 424 (applying *Blockburger* test through two step process); see also *Brown* v.

Our case law has been consistent and unequivocal as to whether a court may consider evidence offered at the trial in the second step of this two step process: the answer is a resounding no. See, e.g., *State* v. *Schovanec*, supra, 326 Conn. 325–26. This court has consistently held that the *Blockburger* test conducted at step two "is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Internal quotation marks omitted.) Id., 326.

With regard to the first step of the inquiry, although this court has in some instances been less than clear, our decision in *Schovanec* clarified any ambiguity in the law. In *Schovanec*, this court held that "it is not uncommon that we look to the evidence at trial and to the state's theory of the case" when assessing whether the offenses stem from the same act or transaction at step one.[6] Id., 327. The case involved Frank Schovanec's

Ohio, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (restating *Blockburger* test). We observe that this two step process is also logical, because a test that looks only to the statutory provisions, and does not consider whether offenses arose from the same act or transaction, would prohibit a defendant from being convicted on multiple counts of the same crime when committed against different individuals. For example, such a test would result in double jeopardy violations where a defendant is convicted on multiple counts of murder after killing seven different victims in an attack—this simply cannot be the case. See, e.g., *Whitfield* v. *Ricks*, Docket No. 01 Civ. 11398 (LAK) (S.D.N.Y. October 24, 2006) (The court rejected an ineffective assistance of counsel claim pertaining to appellate counsel's failure to argue a double jeopardy violation for multiple charges of weapons possession, attempted murder, and assault. Such a claim would have been meritless, because "the evidence indicated that [the] [p]etitioner fired multiple shots at several different people . . . [and] [h]e was therefore not charged with multiple offenses for a single act.").

[6] We observe that this approach is consistent with federal law. See, e.g., *United States* v. *Benoit*, 713 F.3d 1, 17–18 (10th Cir. 2013) (looking beyond charging documents to determine that lower court must vacate one of defendant's convictions for both receipt and possession of child pornography where, "[i]n light of the record as a whole, it is clear that [the defendant] was convicted . . . based on the same conduct"). Indeed, the United States Court of Appeals for the Second Circuit has looked beyond the charging documents to the trial evidence in evaluating whether offenses arose from

claim that his conviction of "identity theft, illegal use of a credit card, and the lesser included offense of larceny in the sixth degree" violated the prohibition against double jeopardy. Id., 312. The charges stemmed from Schovanec's theft of a wallet and its contents, including a credit card that he subsequently used. Id., 329. This court reviewed the information, the prosecutor's arguments, and the evidence presented at trial to determine that the offenses did not stem from the same act or transaction because the charges arose from different acts. Id., 326–29. This court held that a jury could have found that the larceny charge stemmed from the actual theft of the wallet and that the charges of identity theft and illegal use of a credit card "arose out of the specific use of one particular credit card in the stolen wallet." Id., 329. As a result, the court did not go on to step two because when "we conclude that the charges may not have occurred from the same transaction, it is unnecessary for us to proceed to step two of the analysis." Id., 328.

Schovanec did not change the law but, rather, reaffirmed this court's approach to double jeopardy jurisprudence. This court first considered the issue of whether evidence could be reviewed at step one in *Goldson*, holding that "[w]e must refer to the language of the information against the defendant, as amplified by the bill of particulars."[7] *State* v. *Goldson*, supra, 178

the same act or transaction. See, e.g., *United States* v. *Wilke*, 481 Fed. Appx. 647, 649 (2d Cir.) (holding that conviction for both receipt and possession of child pornography was not plain error, because prohibition against double jeopardy was not implicated given that defendant was not "in fact convicted for the same conduct," because "evidence at trial indicated that he had the pornographic video on both a computer and an external hard drive"), cert. denied, 568 U.S. 862, 133 S. Ct. 217, 184 L. Ed. 2d (2012).

[7] Although this court's earlier cases touch on related issues, and *State* v. *Licari*, 132 Conn. 220, 226, 43 A.2d 450 (1945), even appears to consider evidence while determining whether charges were part of a continuous offense or separate transactions, they do not squarely address whether a court may review evidence at step one.

Conn. 424. Utilizing this approach, this court determined that the charges of possession of narcotics and transportation of narcotics "clearly relate[d] to the same act or transaction," because both occurred in the same place at the same time. Id., 424–25. In reaching this conclusion, although the court relied on the information and the bill of particulars, it did not explicitly prohibit looking beyond the charging documents. Id. This court took a similar approach in *State* v. *Devino*, 195 Conn. 70, 74, 485 A.2d 1302 (1985), observing that the analysis at step one is "taken with reference to the information and bill of particulars." Thus, this court again did not explicitly limit the analysis to the charging documents.[8]

This court's post-*Goldson* double jeopardy cases consistently enforce the *Goldson* prohibition against the review of evidence at step two, but do not extend that limitation to step one. See, e.g., *State* v. *Bletsch*, 281 Conn. 5, 27–28, 912 A.2d 992 (2007). The majority of these cases do not reach the issue of whether the offenses stem from the same act or transaction—generally because the issue was not in dispute or because this court chose to dispose of the case at step two. See, e.g., *State* v. *McCall*, 187 Conn. 73, 89–90, 444 A.2d 896 (1982). Nevertheless, these cases still illustrate that evidence is barred only at step two. For example, our decision in *State* v. *McCall*, supra, 89–90, is particularly instructive. In *McCall*, the state conceded that the offenses arose from the same act or transaction, and the court accordingly turned its focus to step two. Id.,

[8] It is logical that the court would allow review of the evidence at step one because courts do not always have the luxury of relying on a bill of particulars to determine whether the offenses stem from a single act or transaction. See, e.g., *State* v. *Schovanec*, supra, 326 Conn. 328 n.7 ("[w]e note that the defendant . . . did not request a bill of particulars regarding count four, which contained the charge of larceny in the sixth degree"). Without a bill of particulars, a court has only two resources to analyze a defendant's double jeopardy claim at step one: the information and the evidence presented at trial.

90. The court observed that, as a result, the "analysis *then becomes* one of deciding whether, restricting our examination to the statutes, the information and the bill of particulars . . . the proof of a violation of one statute necessarily requires proof of a violation of the other." (Citations omitted; emphasis added.) Id. In other words, it is only *after* step one that the analysis is confined to the charging documents.

That approach—allowing review of evidence at step one but not at step two—is especially clear in the post-*Goldson* cases that *do* involve analysis under step one. In such cases, this court has routinely looked beyond the charging documents to determine whether the offenses arose from a single act or transaction. See *State* v. *Schovanec*, supra, 326 Conn. 327 ("[w]hen conducting the first inquiry, however, it is not uncommon that we look to the evidence at trial and to the state's theory of the case").

For example, in *State* v. *Snook*, 210 Conn. 244, 263, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989), this court considered evidence in determining whether charges of sexual assault in the second degree and sexual assault in the third degree arose from the same act or transaction.[9] The court reasoned that, "[a]s the facts recited [in this opinion] make clear, *the state introduced evidence* of a number of episodes in which the defendant engaged in sexual intercourse with the victim. . . . Thus, the defendant has failed to meet his initial burden of demonstrating that his conviction on the second and third degree sexual assault charges arose out of the same act." (Emphasis added.) Id., 265. In other words, "in

[9] This court addressed an additional double jeopardy claim in *Snook*, in which it reviewed the substitute information, rather than the evidence, at step one. *State* v. *Snook*, supra, 210 Conn. 260–61. Given this court's reliance on evidence elsewhere in *Snook*, the opinion cannot be read to prohibit the review of evidence at step one.

Snook, we analyzed the first step using both the charging document and the evidence upon which the jury could have relied." *State* v. *Schovanec*, supra, 326 Conn. 327–28.

Snook is not an anomaly. Indeed, this court has reviewed evidence at step one in other cases as well. For example, in *State* v. *Kulmac*, 230 Conn. 43, 67–69, 644 A.2d 887 (1994), the court relied on evidence in the context of the defendant's conviction on multiple counts of sexual assault to determine that "the counts [did] not arise out of the same act or transaction." Victim testimony and other evidence supported the conclusion that "[e]ach separate act of sexual assault or risk of injury constituted a separate offense." Id., 68. Our decision in *State* v. *Brown*, 299 Conn. 640, 11 A.3d 663 (2011), provides another example. In that case, this court again turned to the evidence at step one. Id., 653–54. Our decision in *Brown* involved the defendant's conviction of robbery and attempted robbery, and the court concluded that the two offenses arose from different conduct even though they occurred in close geographic and temporal proximity. Id., 650, 653–54. This court relied on the facts to align the charges with separate transactions, holding that the attempted robbery occurred when the victim was in a car with the defendant, and that the completed robbery occurred after the victim escaped from the car and was killed. Id., 653–54.

These cases illustrate the compatibility of evidentiary review at step one and, as *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), illustrates, the prohibition of such review at step two. In *Miranda*, this court considered expert medical testimony in its analysis of whether counts of assault in the first degree stemmed from the same act or transaction at step one. Id., 124. However, when analyzing a separate double jeopardy claim by the defendant at step two, this court held

that, in "determining whether one violation is a lesser included offense in another violation . . . we look only to the relevant statutes, the information, and the bill of particulars, not to the evidence presented at trial." (Citation omitted; internal quotation marks omitted.) Id., 125. Thus, *Miranda* exemplifies the consistency of the divergent treatment of evidence at each step of the two step process.[10]

Given this context, *Schovanec* represents a continuation of our double jeopardy jurisprudence. In *Schovanec*, we held, as we did in *Goldson*, that a court may look only to "the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial" at step two. *State* v. *Schovanec*, supra, 326 Conn. 326; see *State* v. *Goldson*, supra, 178 Conn. 424. We did not extend this limitation to step one, however, because *Snook*, *Kulmac*, *Miranda*, and *Brown* indicate that this court need not do so. The holding and analysis of *Schovanec* are consistent with those cases. Indeed, by reviewing evidence at step one, but recognizing that it was barred from doing so at step two, the court in *Schovanec* performs the very analysis exemplified by post-*Goldson* cases like *Miranda*.

Accordingly, *Schovanec* and *Goldson* do not conflict. In light of the admitted lack of clarity in our case law in this area, we now summarize the applicable two step process for "[d]ouble jeopardy analysis in the context

[10] We reject the defendant's contention that *State* v. *Brown*, supra, 299 Conn. 640, *State* v. *Kulmac*, supra, 230 Conn. 43, and *State* v. *Miranda*, supra, 260 Conn. 93, can be distinguished from the present case because the charging documents in each case provided more specificity than the information in the present case. The relevant inquiry is whether *Goldson* bars a court from considering evidence at step one regardless of the parameters of the charging documents. That these cases consider evidence shows that it does not. Furthermore, it is logical that there would be even more reason to review the evidence in a case in which the information is ambiguous and there is no bill of particulars because the evidence would provide clarity where it is otherwise lacking.

of a single trial . . . . First, the charges must arise out of the same act or transaction." (Internal quotation marks omitted.) *State* v. *Bernacki*, supra, 307 Conn. 9. At step one, "it is not uncommon that we look to the evidence at trial and to the state's theory of the case"; *State* v. *Schovanec*, supra, 326 Conn. 327; in addition to "the information against the defendant, as amplified by the bill of particulars." *State* v. *Goldson*, supra, 178 Conn. 424. If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where " 'it must be determined whether the charged crimes are the same offense.' " *State* v. *Bernacki*, supra, 9. At this second step, we "[t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Internal quotation marks omitted.) Id. In applying the *Blockburger* test, "we look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged." (Internal quotation marks omitted.) *State* v. *Goldson*, supra, 426. Because double jeopardy attaches only if both steps are satisfied; *State* v. *Bernacki*, supra, 9; a determination that the offenses did not stem from the same act or transaction renders analysis under the second step unnecessary. *State* v. *Schovanec*, supra, 328.

In the present case, the Appellate Court properly looked to the evidence presented at trial at step one of its double jeopardy analysis, and it correctly determined that the offenses arose from different acts or transactions. As the Appellate Court observed with regard to

the offense of assault of public safety personnel, "there were facts in evidence that . . . the defendant tried to kick Donnelly and to stab him with a screwdriver when Donnelly and other officers tried to handcuff him outside the vehicle." Id., 292. Furthermore, "[t]here was evidence that, during the struggle to handcuff the defendant, the defendant fought 'wildly' and injured Donnelly." Id., 292–93. Similarly, separate conduct supported the offense of interfering with an officer: "The state urged in closing argument that the jury find the defendant guilty of the interfering with an officer charge by virtue of his attempting to swallow the drugs. There was evidence presented at trial that during the struggle to handcuff the defendant, the defendant removed a bag of marijuana from his pants and put it in his mouth." Id., 293. The Appellate Court properly considered this evidence in its analysis of whether the offenses arose from the same act or transaction and correctly concluded that they did not. See id. Therefore, as the Appellate Court held, the defendant's double jeopardy claim fails.[11]

We are not persuaded by the defendant's other arguments. First, the defendant contends that *Brown* v. *Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), bars review of the evidence in the present case. We disagree. That case involved a double jeopardy claim stemming from Nathaniel Brown's theft of a car in East Cleveland, Ohio, which, nine days later, he was "caught driving . . . in Wickliffe, Ohio." Id., 162. "The Wickliffe police charged [Brown] with 'joyriding,' " he pleaded guilty, and was sentenced to thirty days in jail. Id. After his release, "Brown was returned to East

[11] As a result, there is no need to move on to step two and perform a *Blockburger* analysis of the two charges because, when "we conclude that the charges may not have occurred from the same transaction, it is unnecessary for us to proceed to step two of the analysis." *State* v. *Schovanec*, supra, 326 Conn. 328.

Cleveland to face further charges," and was indicted for car theft and joyriding. Id., 162–63. Brown objected, claiming former jeopardy. Id., 163. The United States Supreme Court rejected the holding of the Ohio Court of Appeals that Brown "could be convicted of both crimes because the charges against him focused on different parts of his [nine day] joyride," cautioning that "[t]he [d]ouble [j]eopardy [c]lause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id., 169.

Brown v. *Ohio*, supra, 432 U.S. 161, is inapposite to the present case. First, the holding in that case does not speak to whether evidence may be considered when determining if the offenses stem from a single act or transaction. See id., 168–69 (resolving double jeopardy claim without addressing question of whether evidence may be reviewed when determining if offenses stem from same act or transaction). Second, the issue in *Brown v. Ohio*, supra, 169, focused on whether the defendant could be charged with car theft and joyriding, which constituted the same statutory offense under *Blockburger*, on the theory that Brown's conduct spanned several days. Unlike Brown, the defendant in the present case was not charged with multiple offenses for the same conduct under a theory of temporal severability. Indeed, in the present case, the state alleged "that the two crimes occurred at the same time and place . . . ." *State* v. *Porter*, supra, 167 Conn. App. 289. Thus, unlike in *Brown* v. *Ohio*, supra, 169, the state did not suggest that the offenses are separate because they occurred on different days but, rather, because each resulted from different conduct.[12] Id., 290.

[12] Thus, we reject the defendant's related argument that, even if the charge of interfering with an officer stems from the defendant's attempt to swallow the marijuana, it is part and parcel of the assault charge and arises out of the same act or transaction. Rather, as we have already explained, the attempt to swallow the marijuana and the assault of public safety personnel were separate acts warranting separate charges. Although we recognize

We also disagree with the defendant's argument that allowing a review of the evidence at step one contravenes constitutional principles of notice and unduly complicates his legal defense. The state contends that this argument is unpreserved and subject to *Golding*

that, on some level, the offenses appear closely related, that alone is not a determinative consideration. See, e.g., *State* v. *Schovanec*, supra, 326 Conn. 329 (upholding conviction of separate offenses resulting from theft of wallet and use of credit card that had been in wallet). We are also not persuaded by the defendant's related argument that the Appellate Court improperly concluded that the offenses were premised on different conduct because the state did not prove when Donnelly's injury occurred.

Therefore, we also reject the defendant's argument that, "[b]ecause the information alleged that both offenses were committed at the same time and place, the defendant met his burden of showing the charges arose out of the same act or transaction." This statement cannot be correct, as it would mean step one must be decided entirely in terms of temporal proximity. If true, two completely distinct crimes committed by the same individual at the same location and time would trigger double jeopardy.

The defendant tries to qualify this sweeping assertion by arguing that, "as a corollary of this rule, if the charging documents are ambiguous, the court must construe them in the defendant's favor." The only controlling precedent the defendant offers in support of this argument is *Goldson*, which the defendant misreads. Admittedly, this court stated in *Goldson* that, "[i]f separate charges explicitly addressing different temporal aspects of the same conduct do not avoid the double jeopardy clause, surely an information and bill of particulars stipulating a single date and time cannot do so." *State* v. *Goldson*, supra, 178 Conn. 425. However, the court made that statement in response to the state's "assertion that possession of the heroin may have continued beyond the time charged . . . ." Id. That argument is exactly the sort of temporal severability theory that *Brown* v. *Ohio*, supra, 432 U.S. 161, forecloses. As we have already explained, however, that is not the theory in the present case, as the state conceded that the offenses occurred at the same time and place but argued that they were the result of distinct acts.

The defendant further relies on a handful of Appellate Court decisions, including *State* v. *Mincewicz*, 64 Conn. App. 687, 688, 781 A.2d 455 (2001), that extended *Goldson* to require that ambiguous charging documents stating the same location and time must be construed in favor of the defendant. This court has not adopted that rule, and the Appellate Court has accordingly abandoned it. See *State* v. *Porter*, supra, 167 Conn. App. 292 ("[w]e conclude that [*State* v. *Brown*, supra, 299 Conn. 640] implicitly overruled *Mincewicz*, and that . . . where the information and bill of particulars, if any, do not separate a transaction into separate parts, the reviewing court has the obligation to determine whether the multiple convictions reasonably could have been predicated on different conduct").

review, which it would fail because the defendant cannot establish the existence of a constitutional violation. Even if we assume for the sake of argument that the defendant's claim would survive *Golding* review, it fails for two reasons.

First, the defendant conceded at oral argument before this court that his claim of lack of notice was predicated on the ramifications of overruling *Goldson*, which we have not done.[13] Second, the information afforded notice because it separately charged the defendant with assault of public safety personnel and interfering with an officer. To the extent this notice claim is premised on the defendant's uncertainty as to what conduct corresponded to each charge, the confusion could have been remedied by filing a motion for a bill of particulars or raising the issue in the trial court. See, e.g., *State* v. *Schovanec*, supra, 326 Conn. 328 n.7 ("We note that the defendant . . . did not request a bill of particulars regarding count four, which contained the charge of larceny in the sixth degree. . . . Furthermore . . . [b]y failing to raise the claim of double jeopardy before the trial court, the defendant contributed to the ambiguity that is now present in the record."). Indeed, the defendant conceded that he chose not to request a bill of particulars "because it would likely have made interfering not [a lesser included offense] of the assault, but a separate offense, and thereby increased the defendant's exposure to an additional year of incarceration." This concession undermines the defendant's argument that he lacked notice and suggests, rather, that the defendant was aware that the charges stemmed from distinct conduct and that he chose not to clarify for strategic reasons.

[13] To the extent that this concession was premised on the defendant's incorrect interpretation of the holding of *Goldson*, the defendant's notice argument is still not persuasive for the second reason we outline.

Finally, we address the defendant's argument that the two step process should parallel the test for determining whether a lesser included offense instruction should be given because that test prohibits a review of the evidence. We reject this argument. The defendant asserts, citing to *State* v. *Tomlin*, 266 Conn. 608, 835 A.2d 12 (2003), that Connecticut uses the cognate pleadings approach to determine whether one crime is a lesser included of another, a test he claims relies on the pleadings rather than the evidence presented at trial. This argument is incorrect because the cognate pleadings standard is one prong of a larger four-pronged test that does rely on evidence to determine whether a lesser included offense instruction is warranted. See id., 617–18 (explaining that cognate pleadings approach is second prong of four-pronged test to determine if defendant is entitled to lesser included offense instruction). Indeed, two prongs of that four-pronged test envision review of the evidence. See *State* v. *Jones*, 289 Conn. 742, 764, 961 A.2d 322 (2008) ("With respect to the third prong, we must examine whether there is any possibility that the evidence introduced at trial would justify a conviction of the lesser included offense. . . . With respect to the fourth prong, we must determine whether the evidence that would have supported a conviction on the lesser included offense was disputed by the parties."). Even if it did not involve evidentiary review, the cognate pleadings test applies to a different context than that of the present case. Accordingly, the Appellate Court properly reviewed the evidence to determine that the offenses in question did not arise from the same act or transaction and that, as a result, his conviction did not violate double jeopardy.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

FIRSTLIGHT HYDRO GENERATING COMPANY *v.* ALLAN STEWART ET AL. (SC 19891)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.

Syllabus

The defendants, who owned land abutting a lake owned by the plaintiff, a public utility corporation, appealed from the judgment of the trial court, which found that the defendants had trespassed on the plaintiff's property when they constructed certain improvements along the shore of the lake. The plaintiff's predecessor in interest, C Co., had purchased certain land for the purpose of raising the level of the lake. The boundary of the lake's surface when completely flooded, referred to as the 440 contour, was memorialized as part of a document known as the 1927 Rocky River datum. In 1934, C Co. conveyed a portion of the land surrounding the lake to O Co. The deed to O Co. delineated the land conveyed, in part, by reference to the 1927 Rocky River datum and a monument on the 440 contour. A portion of the land conveyed to O Co. was later subdivided, and two lots along the lake were conveyed to N. The deed to N referenced the 440 contour and 1927 Rocky River datum, and described the lots conveyed by metes and bounds. Subsequently recorded maps pertaining to those lots did not reference the 440 contour but contained the same relevant metes and bounds set forth in the deed to N. The defendants subsequently received title to land comprised, in part, of the lots previously owned by N and an adjacent parcel. A deed previously conveying that adjacent parcel expressly incorporated a map that referred to the southern boundary of the defendants' property as the 440 contour and indicated that certain lands south of that boundary were owned by C Co. In 2000, C Co. quitclaimed its remaining interests to the land comprising the bed and shoreline of the lake to the plaintiff, excepting therefrom all prior conveyances. Contractors representing the defendants subsequently received two permits from the plaintiff allowing for the construction of certain improvements on the plaintiff's land. After the defendants began construction, the plaintiff determined that the defendants were performing work in violation of the permits and commenced the present action. The plaintiff sought, inter alia, an injunction requiring the defendants to remove all structures from the plaintiff's property that were not authorized by the permits. At trial, the plaintiff presented testimony from two experienced, licensed surveyors, P and R, each of whom offered an opinion as to ownership of the land contiguous to the defendants' property and whose testimony the trial court credited. Upon finding that the defendants had trespassed on the plaintiff's property, the trial court issued an injunction requiring removal of certain improvements. The defendants appealed from the trial court's

judgment in favor of the plaintiff, claiming, inter alia, that there was insufficient evidence to support the court's finding that the plaintiff owned the property on which the improvements had been constructed and, therefore, improperly found that they had trespassed. *Held*:

1. The trial court properly found that the defendants were trespassing on the plaintiff's property, there having been sufficient evidence to support the court's factual finding that the plaintiff's owned the land on which the defendants had constructed their improvements; the trial court reasonably relied on the testimony of P and R, as well as certain maps and deeds identifying the boundaries of the defendants' property, to support its findings, and the trial court's use of various deeds in the defendants' chain of title to establish the boundaries of the plaintiff's property was not incorrect, as those deeds incorporated documents referencing the plaintiff's ownership of property immediately contiguous to the defendants' property and as all land not previously conveyed by C Co. had been quitclaimed to the plaintiff.
2. The defendants could not prevail on their claim that the trial court had abused its discretion by ordering injunctive relief that was overly broad and that exceeded the scope of the relief sought by the plaintiff insofar as two of the structures that the trial court ordered the defendants to remove were allowed under the permits, as the injunctive relief ordered by the trial court was proper; consistent with certain representations made by the parties at oral argument, this court concluded that the trial court's order must be read so as to require the defendants to remove the enumerated improvements only to the extent that they did not comply with the permits issued by the plaintiffs and then to allow the defendants to rebuild those structures, if they elect to do so, in a manner complying with the permits.

Argued November 7, 2017—officially released May 1, 2018

Procedural History

Action for, inter alia, a temporary and permanent injunction ordering the defendants to remove certain structures from the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the case was tried to the court, *Truglia*, *J.*; judgment in part for the plaintiff, from which the defendants appealed. *Affirmed*.

Neil R. Marcus, with whom were *Barbara M. Schellenberg* and *Alexander Copp*, for the appellants (defendants).

John L. Cordani, Jr., with whom, on the brief, was *Richard L. Street*, for the appellee (plaintiff).

Opinion

MULLINS, J. This appeal arises from an action in which the plaintiff, FirstLight Hydro Generating Company, alleged that the defendants, Allan Stewart and Donatella Arpaia, were trespassing on property that the plaintiff owned along the shore of Candlewood Lake (lake). The trial court rendered judgment for the plaintiff in part.[1] On appeal, the defendants claim that (1) there was insufficient evidence to prove the plaintiff's ownership of the subject property, and (2) the trial court abused its discretion by ordering injunctive relief that was overly broad and exceeded the scope of the relief sought by the plaintiff. We conclude that there is sufficient evidence to support the trial court's finding that the plaintiff owned the subject property and, thus, that the trial court properly found that the defendants had trespassed on the plaintiff's property. We further conclude that the scope of the trial court's injunctive relief is not overly broad. Accordingly, we affirm the judgment of the trial court.

The following relevant facts and procedural history are set forth in the trial court's memorandum of decision. "The plaintiff is a public utility corporation with a principal office located in New Milford . . . that operates hydroelectric power generation facilities in this state pursuant to licenses from the Federal Energy Regulatory Commission. . . .

"One of the plaintiff's facilities is a pumped storage hydroelectric power facility . . . known as the Rocky River development. [The lake], which covers an area of approximately 5650 acres in New Milford, Danbury,

[1] The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

New Fairfield, Sherman and Brookfield, serves as the reservoir for the Rocky River [development]. . . .

"The plaintiff's predecessor in interest, the Connecticut Light & Power Company (CL&P), began construction on [the lake] in 1920 and completed it in 1927. CL&P acquired title to the lands forming the bed and shoreline of [the lake] through a series of conveyances during the 1920s and thereafter. . . . The natural elevation of the . . . lake is approximately 200 feet above sea level. When the lake was created, CL&P purchased all of the land constituting the shoreline of the lake sufficient to allow it to raise the water level in the lake by an additional 230 feet. The elevation of approximately 440 feet above sea level, i.e., the maximum height of the lake's surface when completely flooded, was memorialized as part of [a document known as the] '1927 Rocky River datum.' This elevation is . . . commonly referred to as the '440 [foot] contour elevation line' or sometimes more simply as the '440 contour.' . . .

"In . . . 2000, CL&P conveyed all of its right, title, and interest in and to the Rocky River [development] to the plaintiff, then known as Northeast Generation Company, by way of a quit claim deed . . . . This quit claim deed conveyed all of the land comprising the bed and shoreline of [the lake] . . . excepting therefrom prior conveyances from CL&P to other grantees . . . .

"In 1934, CL&P conveyed a portion of the land it had acquired to complete [the lake] and its surrounding shoreline to Oenoke Holding Corporation [by deed]. . . . The 1934 deed describes the eastern and western boundaries of the tract conveyed . . . by reference to the '[1927] Rocky River datum more particularly described in an instrument recorded [on page 213 of volume 12] of the New Fairfield land records.' The 1934 deed also delineates the [tract conveyed] by a complete

metes and bounds description with reference to permanent surveyors' marks. The 1934 deed also refers to '[a monument on the] 440 [foot] contour elevation line.' . . .

"The 1934 deed makes clear that the land conveyed to Oenoke Holding Corporation was, and is, immediately contiguous to the land retained by CL&P along the 440 foot contour elevation line. The 1934 deed also grants to Oenoke Holding Corporation and its successors and assigns rights of use and access to the waters of [the lake]. The . . . waters referred to in the 1934 deed cover the adjacent land retained by CL&P at the time of the 1934 conveyance. . . .

"In . . . 1961, the Bogus Hill Development Corporation recorded a subdivision map [relating to] a portion of the land deeded to Oenoke Holding Corporation by CL&P. . . . [L]ots 51 and 52 [of that subdivision] were conveyed to Arthur Namm by warranty deed . . . . The legal description contained in the deed to Namm describes the southerly boundary [those lots] as running along '[the 440 foot contour elevation line of the 1927] Rocky River datum [and] thence along . . . said 440 foot contour elevation line [following a series of specific courses and distances].' The identical metes and bounds description set forth in [this] deed is shown on . . . town of New Fairfield map no. 1026 . . . .

"Lots 50, 51, and 52 on map no. 1026 were later reconfigured to form, in part, lot 52 and parcel C, as shown on . . . town of New Fairfield . . . map no. 1903. . . .

"Neither map [no.] 1026 nor map [no.] 1903 delineates the southerly boundary of [these tracts] by reference to 'the 440 contour' or a similar reference. Each map contains the same metes and bounds description contained in the warranty deed from [the] Bogus Hill Development Corporation to Namm. . . .

"The defendants are the owners of a residential parcel of land commonly known as 24 Sunset Drive, New Fairfield . . . . The defendants' parcel is a waterfront tract that is directly adjacent to the shoreline of [the] lake owned by the plaintiff. The defendants received title to their property by warranty deed from Diana Horowitz . . . .

"The legal description in the defendants' deed describes the land conveyed to them as lot . . . 52 and parcel C, as shown and delineated on . . . map no. 1903. . . .

"The defendants also received title to a second tract of land, [comprised of] 0.03 acres, as shown on [town of New Fairfield map no. 2580] . . . . The second parcel conveyed to the defendants was land [formally] owned by CL&P, the plaintiff's predecessor in interest, [and is] immediately contiguous to the southerly boundary of lots [51 and 52] as shown on map no. 1026. . . .

"The defendants are the owners of the land and improvements located within the lines of record title, as shown on [a map created by Paul Hiro, a licensed surveyor, that was admitted into evidence as plaintiff's exhibit seven].[2] More specifically, the defendants are the owners of the land . . . delineated by the bold lines on said map. . . .

"The plaintiff is the owner of all of the land immediately contiguous to the southerly border of the defendants' land as shown on said map, comprising the shoreline and intertidal zone adjacent to the defendants' property, and the plaintiff is entitled to exclusive possession and control over it. . . .

"In 2013, contractors representing the defendants approached representatives of the plaintiff seeking per-

[2] This map is dated September 10, 2012, and was revised by Hiro to reflect certain changes on March 7, 2013, August 20, 2014, and September 9, 2014.

mission to make improvements to the defendants' property. The defendants required the plaintiff's permission because a portion of the improvements were to be located partially or entirely on the plaintiff's land. The plaintiff granted the defendants permission to install certain improvements, including landscaping, that would be built on the plaintiff's land by way of a permit dated December 6, 2013. . . . The defendants signed the December 6, 2013 permit, thereby agreeing to the scope of the work allowed and all of the other terms, conditions and limitations of the permit. . . .

"Shortly thereafter, the defendants' representatives again approached the plaintiff seeking permission for additional improvements to be built partially or entirely on the plaintiff's land. The plaintiff granted a second permit to the defendants for the additional work, dated [May] 13, 2014. . . . Stewart signed the May 13, 2014 permit in July, 2014, thereby agreeing to the scope of the work allowed and all of the other terms, conditions and limitations of the permit. . . .

"Each permit issued by the plaintiff expressly prohibits 'any excavation, flooding, grading or filling except as described' in the permits, and 'construction of any structures, fixtures or improvements except as described' in the permits. . . .

"[Over the course of a year, the plaintiff determined that the defendants were continuously performing work in violation of the permits, even after being warned by the plaintiff to discontinue the work.] On July 30, 2014, Brian Wood, the plaintiff's land management administrator, on behalf of the plaintiff, held an on-site meeting with the defendants. At this meeting, Wood advised the defendants that they had to immediately cease all work on the property because they were constructing a significant portion of it on the plaintiff's land in violation of the permits. Wood advised the defendants that they had

to have their property surveyed and the lot lines staked or otherwise marked, and that they had to bring their construction into compliance with the permits. The defendants agreed to obtain [an updated] survey from . . . Hiro . . . and to cease all further work on the premises. . . .

"The defendants commissioned an updated survey from Hiro, [but did not provide] Wood or any other person representing the plaintiff with a copy of the updated survey. . . .

"Wood visited the site again on September 23, 2014, to review compliance with the permits. Once again, Wood found the defendants' contractors at work on the plaintiff's property. Wood also found on this occasion that extensive additional work had been done on the plaintiff's property in violation of the permits, including the installation of a water fountain." (Footnotes added and omitted.)

The plaintiff subsequently commenced the present action, alleging, inter alia, trespass. The plaintiff sought injunctive relief requiring the defendants to remove all structures from the plaintiff's property that were not authorized by the permits issued to the defendants. At trial, the defendants claimed that the plaintiff could not establish its ownership or possessory interest in the property on which the defendants were building.

After trial, the court concluded as follows: "The court finds that the plaintiff has proven by a preponderance of the evidence that (1) the . . . line separating the plaintiff's property and the defendants' property is delineated by the 440 . . . contour as originally established by the 1927 Rocky River datum and 1934 deed, and (2) the plaintiff, as successor in interest to [CL&P], is the owner of all of the land immediately contiguous to the southerly boundary of the defendants' property." The trial court further found "that the plaintiff has sus-

tained damages by virtue of the substantial permanent unauthorized improvements constructed by the defendants on the plaintiff's land."

The trial court thereafter issued a permanent mandatory injunction as follows: "1. The defendants are ordered to remove immediately those portions of the following structures that are located partially or entirely on the plaintiff's land shown as being outside the property boundary defined in bold as the '440 contour [elevation] line per . . . map no. 1903' and 'property line per . . . map no. 2580' [as] depicted on plaintiff's [exhibit seven]:

"a. the upper patio;

"b. the masonry fireplace and hearth;

"c. the masonry retaining wall abutting the upper patio area on the . . . lake side of the patio;

"d. the large boulder wall to the southwest of the upper patio and fireplace labeled as 'wall' on plaintiff's [exhibit seven];

"e. the masonry steps to the upper patio area and the masonry steps abutting the retaining wall and upper patio area;

"f. the lower patio;

"g. the masonry retaining wall abutting the lower patio area;

"h. all conduit, utility lines, electric fixtures and lines, high and low voltage lighting, drains and irrigation equipment;

"i. the block wall to the west . . . of the house; and

"j. the hot tub.

"2. The defendants shall immediately restore the upper patio area to the topography grades shown on [a survey map dated September 13, 2012, which was admitted into evidence as defendants' exhibit A].

"3. The defendants shall immediately reduce the masonry retaining wall abutting the lower patio area to [a length of thirty feet].

"4. The defendants shall not take water from or drain water on the plaintiff's land.

"5. The defendants shall not use the planter adjacent to the stone steps and wood deck as a fountain.

"6. The defendants shall not construct any structures on the plaintiff's property as shown on plaintiff's [exhibit seven], the property boundary being defined in bold as the '440 contour [elevation] line per . . . map no. 1903' and 'property line per . . . map no. 2580' . . . on plaintiff's [exhibit seven], except for those allowed by permit from the plaintiff." This appeal followed.

I

The defendants first claim that the trial court incorrectly determined that they were trespassing on the plaintiff's property because there was insufficient evidence to demonstrate that the plaintiff owned the property on which the defendants were building. The plaintiff responds by asserting that the testimony of the experts and the documentary evidence were sufficient to support the trial court's finding that the plaintiff owned the land at issue. We agree with the plaintiff.

We begin by setting forth the standard of review and the relevant principles of law governing the defendants' claim. "[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has

made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, 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.) *Miller* v. *Westport*, 268 Conn. 207, 214, 842 A.2d 558 (2004).

"The essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 87, 931 A.2d 237 (2007). The only prong of this test that the defendants challenge in this appeal is the first prong, i.e., that the plaintiff has failed to provide sufficient evidence to prove its ownership or possessory interest in the property.

Specifically, at trial, the defendants asserted that the boundaries of the plaintiff's property, which are described in the 1934 deed conveying a parcel of property to the defendants' predecessor in interest, were ambiguous and that the expert testimony did not resolve that ambiguity. The defendants further assert that the 1934 deed references "the 440 foot contour elevation line of the [1927] Rocky River datum more particularly described in an instrument recorded [on page 213 of volume 12 of] the New Fairfield [l]and [r]ecords," and that the plaintiff's experts did not verify this mark.

This court has held that "the issue [of whether] land [is] included in one or the other chain of title [is] a question of fact for the court to decide." *Feuer* v. *Henderson*, 181 Conn. 454, 458, 435 A.2d 1011 (1980). Thus, we conclude that the appropriate scope of review is whether the trial court's findings were clearly errone-

ous. See, e.g., *Har* v. *Boreiko*, 118 Conn. App. 787, 794–95, 986 A.2d 1072 (2010) (applying clearly erroneous standard of review to trial court's finding of boundary line in action alleging, inter alia, trespass).

"The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole . . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 301, 685 A.2d 305 (1996).

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 575, 31 A.3d 1 (2011).

In the present case, the trial court had before it a large number of exhibits, including various deeds and maps. The trial court also heard testimony from two expert witnesses, Hiro and Raymond Howard, Jr. On the basis of our review of the trial court's memorandum of decision, we conclude that the key evidence with respect to the plaintiff's ownership of the land was the testimony of these expert witnesses.

"[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 credi-

bility 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. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 65.

The trial court explained in its memorandum of decision as follows: "Hiro testified at length as to his long experience surveying properties in and around [the] lake, which the court found credible. The court also found his testimony technically sound and found a sufficient basis for his opinion as to ownership of the land immediately contiguous to the defendants' southerly boundary through his reference to all intervening deeds and maps." A review of Hiro's testimony supports the trial court's findings.

Hiro testified that he is a licensed land surveyor in Connecticut and that he has worked for over twenty-seven years as a licensed surveyor. Hiro also testified that he was able to determine the plaintiff's boundary line with "a high degree of confidence . . . ." In particular, Hiro testified as follows:

"[The Plaintiff's Counsel]: [W]hen you do your survey work around [the lake], you tie into [the 1927] Rocky River datum—

"[The Witness]: We do. . . .

"[The Plaintiff's Counsel]: All right. So, that you are able . . . to determine, with a high degree of confidence, that you are actually locating the boundary line between an abutter and the [plaintiff's] property?

"[The Witness]: [W]e are, yes. . . . And, we get a lot of field checks . . . when we're doing that, by finding existing . . . rivets or . . . monuments . . . we [go] out there, and we may find a corner or an iron pin . . .

or a copper rivet or something right where it's supposed to be, based on . . . all our . . . computations and our field locations."[3]

Hiro further testified as follows:

"[The Plaintiff's Counsel]: [C]an someone determine where the property boundary is, between their property and [the plaintiff's] property, simply by determining where 440 feet above sea level is?

"[The Witness]: No.

"[The Plaintiff's Counsel]: Why not?

"[The Witness]: [B]ecause . . . it changes, it moves. . . . With construction . . . that contour line moves down, *but the original deed line is where they were deeded to* . . . .

"[The Plaintiff's Counsel]: And that doesn't move?

"[The Witness]: And that doesn't move." (Emphasis added.)

In its memorandum of decision, the trial court explained that it "also found the testimony of the plaintiff's second expert . . . Howard . . . credible and sound regarding title to the land immediately contiguous to the defendants' property. The court found that

[3] The defendants argue that the trial court incorrectly relied on Hiro's testimony because he did not verify the boundary by referring to the 1927 Rocky River datum, which was referred to in the 1934 deed. The trial court explained its reliance on Hiro's testimony as follows: "Hiro . . . testified that verifying the 1927 Rocky River datum by field locating it was unnecessary because it had been fixed by reference to permanent markers, which are still in existence, and identified by metes and bounds at the time it was established. Hiro also testified that in his experience the original permanently marked boundary line has been recognized as such ever since. Hiro then testified that it would not be possible for the actual field contour of 440 feet above sea level to serve as the property line because it would constantly be changing due to weather, construction along the waterfronts, and other causes." On the basis of the foregoing, we conclude that the trial court reasonably relied on Hiro's testimony.

Howard was highly experienced in surveying and cataloguing titles for CL&P, especially those involved in CL&P's hydroelectric projects." Howard testified that he is a licensed land surveyor in Connecticut, Massachusetts, and New York, and has worked as a licensed land surveyor since 1991. He also testified that he had worked as a surveyor for Northeast Utilities, a sister company of CL&P, performing various surveying work until his departure to start his own surveying business in 2007. After he started his own business, he performed various surveying work for the plaintiff.

The trial court summarized Howard's testimony as follows: "Howard testified that he reviewed the same primary sources, i.e., deeds, surveys and permanent monuments, as Hiro, and field verified the 440 foot contour elevation [line] as having the same metes and bounds described by Hiro. The court found Howard well qualified to express an opinion as to (1) the location of the original 440 foot [contour elevation line], and (2) title to the land on both sides of the 440 foot [contour elevation line]. The court accepts Howard's testimony that further verification of the 440 foot contour elevation [line] described in the 1934 deed is unnecessary in that it has been verified many times by other surveyors around [the] lake." (Internal quotation marks omitted.)

A review of the testimony at trial demonstrates that the trial court reasonably relied on Howard's testimony. At trial, Howard testified as follows:

"[The Defendants' Counsel]: But you haven't gone back to certify where the property line is vis-à-vis the original deed . . . even though it's easy to do?

"[The Witness]: No, it's not easy to do, it's a lot of work.

"[The Defendants' Counsel]: [M]aybe that's why people haven't done it, it's a lot of work, okay?

"[The Witness]: Some don't, but the good ones do.

"[The Defendants' Counsel]: Okay. . . . But it can be done?

"[The Witness]: Oh, yeah . . . .

"[The Defendants' Counsel]: [I]f somebody asked you to do it, you would do it?

"[The Witness]: I would do what I've been asked to do, based [on] my license. . . I was asked to do a boundary stake out, I reviewed the records, everybody was consistent where that line was, I'm obligated to follow in the footsteps of a surveyor, [and] there's no reason to doubt where that line was . . . .

"[The Defendants' Counsel]: Even though [C. James Osborne, Jr.][4] never referred to it as [the] 440 contour, on his original map? . . .

"[The Witness]: At some point a contour is going to have a bearing and distance put on it, and he did. He just happened to be the first one that did it, whether he labeled it the 440 [contour] after that or not is not relevant."

The trial court also relied on documentary evidence in reaching its conclusion. For instance, the trial court explained "the legal description in the defendants' deed makes reference to map no. 2580 when describing the property conveyed to the defendants. Map no. 2580 expressly refers to the southerly boundary of the defendants' property as the '440 contour' and indicates that the land south of that border is land owned by [CL&P]." These maps and deeds identifying the boundaries of the defendants' property therefore provide further evidence to support the trial court's finding that the

[4] C. James Osborne, Jr., a licensed surveyor, conducted a survey of the defendants' property in 1978, and was the author map no. 1903, upon which Hiro relied when determining the property lines in the present case.

plaintiff owned the property on which the defendants were building.

The defendants assert, however, that the trial court incorrectly relied on deeds for the defendants' property to establish the boundaries of the plaintiff's property. We disagree. First, as we have explained previously in this opinion, the trial court's finding was based primarily on the testimony of the plaintiff's experts, whom the trial court found to be credible. Second, it is undisputed that CL&P originally owned *all* of the land in this area and quitclaimed to the plaintiff *all* of the land it had not conveyed to others previously; therefore, demonstrating what land previously had been conveyed to others, including the defendants, may be useful in establishing the property currently owned by the plaintiff. Third, reliance on the deeds of one landowner to establish the boundaries of an adjoining landowner's property is not improper as a matter of law. See, e.g., *Barca* v. *Mongillo*, 133 Conn. 374, 376, 51 A.2d 598 (1947) (relying, in part, on language in defendant's deed showing common boundary to establish plaintiff's ownership of abutting land in action for trespass); cf. *Velsmid* v. *Nelson*, 175 Conn. 221, 227–28, 397 A.2d 113 (1978) (relying on fixed monuments of adjoining property owner to establish boundary line). Thus, the trial court's reliance on deeds for the defendants' property was not incorrect, especially when those deeds incorporated documents referencing the plaintiff's ownership of the property immediately contiguous to the defendants' property.

After a careful review of the record, we conclude that the trial court's finding that the plaintiff owned the land on which the defendants had trespassed is supported by sufficient evidence in the record and is, therefore, not clearly erroneous. As previously mentioned in this opinion, the defendants do not challenge the trial court's findings as to any of the other elements

of trespass. Accordingly, we conclude that the trial court properly found that the defendants were trespassing on the plaintiff's property.

II

The defendants also contend that the trial court abused its discretion by ordering injunctive relief that was overly broad and exceeded the scope of the relief sought by the plaintiff. Specifically, the defendants assert that two of the structures that the trial court ordered the defendants to remove—namely, the lower patio and the adjacent retaining wall—were allowed under the permits previously issued by the plaintiff.

For the reasons that follow, consistent with the parties' representations at oral argument before this court, we conclude that the trial court's order must be read so as to require the defendants to remove the lower patio and the adjacent retaining wall only to the extent that they are currently not in compliance with the original permits and then to allow the defendants to rebuild those structures in a manner that complies with those permits.

We begin by setting forth the appropriate standard of review. "The issuance of an injunction and the scope and quantum of injunctive relief rests in the sound discretion of the trier." (Internal quotation marks omitted.) *Cummings* v. *Tripp*, 204 Conn. 67, 90, 527 A.2d 230 (1987). "[T]he court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 165, 612 A.2d 1153 (1992).

At trial, the plaintiff introduced a permit dated May 13, 2014, memorializing an agreement between the plaintiff and the defendants. In particular, this permit

allowed, inter alia, the defendants to construct a "[l]evel [s]itting [a]rea" that is 30 feet in length by 20 feet in width and made of gravel or peastone and a stone retaining wall around that area.

As stated previously in this opinion, after finding that the defendants had trespassed, the trial court issued an injunction requiring, inter alia, the defendants to remove immediately several specifically enumerated structures "that are located partially or entirely on the plaintiff's land shown as being outside the property boundary defined in bold as the '440 contour [elevation] line per . . . map no. 1903' and 'property line per . . . map no. 2580' [as] depicted on plaintiff's [exhibit seven] . . . ." These structures included "the lower patio" and "the masonry retaining wall abutting the lower patio area . . . ."

At oral argument before this court, the following colloquy occurred between the court and counsel for the plaintiff:

"The Court: So you read the order as the court telling the defendants to cut the retaining wall by ten feet, because it's ten feet too long, and take the patio and basically remove it, and you can have it as a gravel sitting area twenty [feet] by thirty [feet] . . . .

"[The Plaintiff's Counsel]: I think essentially that's right. I don't read it as granting the defendants any sort of affirmative relief about what they can do. . . . The court just said remove the patio that wasn't permitted and . . . you should conform to the permit in the future, and any further trespasses are enjoined. . . . So I think the court was entirely consistent with what the permit allowed, [and] whether the defendants can [bring an action] for some sort of affirmative relief under the permit in the future [is] for another day.

"The Court: It sounds like, at least with respect to that issue, there wouldn't be a need to do that if . . .

they agree with you about what the order requires them to do. That is, not take down the entire structure, but just to change it, put it back to what it was, or what's permitted under the permit.

"[The Plaintiff's Counsel]: Yah, I wouldn't say they violated the injunction by keeping a peastone or gravel sitting area there . . . . That would not be a violation of the injunction.

"The Court: As long as it's thirty feet—

"[The Plaintiff's Counsel]: Yah, as long as it's the proper size, correct. And the retaining wall, obviously, just needs to be reduced according to the judge's instructions."

Likewise, at oral argument before this court, the following colloquy occurred between the court and counsel for the defendants:

"The Court: [O]bviously, your view is that there is no trespass at all, at least with respect to the plaintiff. But if we disagree with you and . . . we get to the second issue about the lower patio and [the abutting] retaining wall, in light of what [the plaintiff's counsel] said, is there really an issue anymore?

"[The Defendants' Counsel]: Oh, I think there is, because, quite honestly, if you look at . . . closing arguments, which are . . . part of the record, [the plaintiff] keeps changing . . . what [its] looking for . . . .

"The Court: Well, whatever they were looking for at trial, or before today, if you want to call it a concession, you heard [the plaintiff's counsel], based on what he said, if we were to include that in an opinion, what's left of that aspect of this controversy?

"[The Defendants' Counsel]: Very little . . . I'll agree with you, Your Honor."

After a review of the judgment of the trial court and the record before the trial court, including the May 13, 2014 permit authorizing the defendants to build the lower patio and abutting retaining wall, we agree with counsel for both parties that the injunctive relief must not be read to require complete removal of these structures. Rather, consistent with the representations of the parties at oral argument before this court, we conclude that the injunction requires the defendants (1) to remove the lower level patio, which had been constructed with pavers, and rebuild it, if they elect to do so, as a gravel or peastone sitting area, and (2) to remove the portions of the abutting retaining wall that exceed the size allowed by the permit. Accordingly, we conclude that the injunctive relief ordered by the trial court was proper.[5]

The judgment is affirmed.

In this opinion the other justices concurred.

DISCIPLINARY COUNSEL *v.* THOMAS J. HICKEY (SC 19892)

Palmer, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Syllabus

The defendant attorney appealed from the judgment of the trial court, which granted the motions of the plaintiff, Disciplinary Counsel, and the State-

[5] In its brief on appeal to this court, the plaintiff also asserted the following arguments: (1) the defendants' claim regarding the injunctive relief is unreviewable because they did not plead permitting as a special defense; (2) the defendants' claim regarding the injunctive relief is unreviewable because it is unpreserved; (3) the defendants have no permit because they have not satisfied a condition of the permit; and (4) no permit was issued for the lower patio or retaining wall in their current condition. On the basis of the representations made by the plaintiff's counsel at oral argument before this court, we consider these claims abandoned and understand the plaintiff to agree that the injunctive relief ordered by the trial court must be read so as to allow the defendants to maintain a lower level sitting area and retaining wall in accordance with the permit dated May 13, 2014.

wide Grievance Committee to dismiss his application for reinstatement to the bar. An investigation commenced following an overdraft and random audit of the defendant's IOLTA account. In response to the Statewide Grievance Committee's request to produce certain records, the defendant sought permission from the trial court to resign from the bar and to waive his right to apply for reinstatement. The Statewide Grievance Committee represented to the court that it would resolve all disciplinary matters involving the defendant as a result of his resignation from the bar and waiver of his right to seek reinstatement. Following a canvass, the court accepted the defendant's resignation and waiver. In 2012, the defendant filed an application for reinstatement, claiming that his previous waiver did not preclude a determination that he was presently fit to practice law. The plaintiff and the Statewide Grievance Committee filed motions to dismiss the application, claiming that the trial court lacked jurisdiction as a result of the defendant's previous waiver of his right to seek reinstatement. In response to those motions, the defendant submitted affidavits substantiating his claim that he had resigned from the bar to avoid having a difficult and embarrassing family situation become public. In 2016, the trial court concluded that it had inherent authority to entertain the motions to dismiss. The court also concluded that a 2014 amendment to the rule of practice (§ 2-53 [b]) pertaining to reinstatement applications, which provided that an attorney who has resigned from the bar and has waived the right to seek reinstatement is ineligible to apply for reinstatement, codified existing procedures and practices, and, therefore, retroactively applied to the defendant's 2012 application for reinstatement. The trial court, having accepted as true the factual assertions set forth in the affidavits submitted by the defendant, rejected the defendant's claim that his waiver was invalid because it was not knowing and voluntary. The court concluded that the defendant's knowing and voluntary waiver of the right to seek reinstatement in exchange for the Statewide Grievance Committee's assurance that there would be no further investigation precluded him from seeking reinstatement. On appeal, the defendant claimed that the trial court had incorrectly determined that the 2014 amendment to § 2-53 (b) retroactively applied to his 2012 application for reinstatement and that, because § 2-53 required the court to forward his application for reinstatement to a standing committee on recommendations for admission to the bar, the trial court incorrectly determined that it had inherent authority to entertain the motions to dismiss. *Held*:

1. The defendant could not prevail on his claim that the 2014 amendment to § 2-53 (b) did not retroactively apply to his 2012 reinstatement application on the ground that the provision was neither procedural nor intended to be clarifying; it was unnecessary for this court to determine whether the 2014 amendment was retroactive because, even if the amendment was substantive and, therefore, not retroactive, the trial court correctly concluded that the amendment codified the preexisting

common-law rule that an attorney's knowing and voluntary waiver of the right to seek reinstatement after resignation serves as a permanent bar to reinstatement.

2. The trial court correctly determined that it had inherent authority to entertain the motions to dismiss the defendant's reinstatement application and properly granted those motions on the ground that the defendant's knowing and voluntary waiver of his right to apply for reinstatement rendered him permanently ineligible to submit a reinstatement application: a motion to dismiss was the proper procedural vehicle to raise a colorable claim that the defendant was ineligible to apply for reinstatement on the basis of his prior waiver of the right to do so, as § 2-53 contemplates that the trial court will determine as a threshold issue whether an attorney is eligible to apply for reinstatement after resignation, it is well established that a trial court has the inherent power to craft procedures by which it may entertain threshold issues in order to avoid unnecessary delays and to conserve judicial resources, and it would make little sense to require a court to forward a reinstatement application by an attorney who is ineligible to apply to the standing committee for a full hearing on the merits; moreover, there was no merit to the defendant's claim that it would be an injustice to deny him a hearing before the standing committee on the ground that it was not inevitable that the standing committee would recommend that he was ineligible to apply for reinstatement, as the trial court accepted the truth of the facts set forth in the affidavits submitted by the defendant and determined, as a matter of law, that the circumstances cited therein did not invalidate his waiver of the right to apply for reinstatement, and, accordingly, nothing would have been gained by requiring a standing committee to make the threshold legal determination of whether the defendant was eligible to apply for reinstatement, which ultimately would have been subject to review by the trial court.

Argued January 24—officially released May 1, 2018

Procedural History

Resignation from the state bar by the defendant, brought to the Superior Court in the judicial district of Stamford, where the court, *Adams*, *J.*, accepted the defendant's resignation; thereafter, the defendant filed an application for reinstatement to the state bar; subsequently, the court, *Povodator*, *J.*, granted the motions of the plaintiff and the Statewide Grievance Committee to dismiss the defendant's application, and rendered judgment thereon, from which the defendant appealed. *Affirmed.*

Brendon P. Levesque, with whom was *Scott T. Garosshen*, for the appellant (defendant).

Leanne M. Larson, assistant chief disciplinary counsel, for the appellee (plaintiff).

Elizabeth M. Rowe, assistant bar counsel, for the appellee (Statewide Grievance Committee).

Opinion

D'AURIA, J. After the defendant, Thomas J. Hickey, voluntarily resigned from the bar of this state, he filed an application for reinstatement, and the plaintiffs, Disciplinary Counsel, and the Statewide Grievance Committee (committee), filed motions to dismiss the defendant's application for reinstatement.[1] The issue that we must resolve in this appeal is whether the trial court properly granted the plaintiffs' motions to dismiss the defendant's application for reinstatement to the bar on the ground that the defendant had resigned from the bar and waived his right to apply for reinstatement. The defendant contends that the trial court incorrectly determined that the portion of Practice Book § 2-53 (b) providing that "[n]o attorney who has resigned from the bar and waived the privilege of applying for readmission or reinstatement to the bar at any future time shall be eligible to apply for readmission or reinstatement to the bar," which became effective January 1, 2014, applied retroactively to his application for reinstatement filed in 2012. The defendant also claims that, under

[1] The defendant commenced this action by way of a pleading titled, "Resignation of Attorney," and captioned, "*Disciplinary Counsel* v. *Thomas J. Hickey*," even though Disciplinary Counsel had not previously filed a presentment in the Superior Court. See Practice Book § 2-34A (b) (7). A copy of the defendant's resignation was sent to the committee, which filed an appearance and was required to submit a report to the trial court. See Practice Book (2008) § 2-52 (b). For purposes of this opinion, we refer to Disciplinary Counsel and the committee individually by name and collectively as the plaintiffs, and, for consistency, we use the case caption employed by the defendant and the trial court.

Practice Book (2012) § 2-53 (a), which, according to him, is the rule of practice that the trial court should have applied to his application, the court had no authority to entertain the plaintiffs' motions to dismiss on the ground that he was ineligible to apply for reinstatement but, rather, was required to forward his application to a standing committee on recommendations for admission to the bar (standing committee) for a determination of that issue.

We conclude that the trial court correctly determined that the defendant was ineligible to apply for reinstatement to the bar as the result of his voluntary resignation and waiver of his right to apply for reinstatement, regardless of whether Practice Book § 2-53 (b) is retroactive. We further conclude that the trial court was not required to forward the defendant's application to a standing committee and properly granted the plaintiffs' motions to dismiss. We therefore affirm the judgment of the trial court.

The record reveals the following facts, which were either found by the trial court or are undisputed, and procedural history. After receiving a notice of overdraft relating to the defendant's IOLTA account,[2] in May, 2008, the committee initiated an investigation that ultimately led to an effort by the committee to audit that account. In connection with the audit, the committee directed the defendant to produce certain documentation pursuant to Practice Book § 2-27 (c). Also during this time, the defendant's IOLTA account was selected for a random audit. In response, the defendant initiated a proceeding in the trial court pursuant to Practice

[2] IOLTA stands for "interest on lawyers' trust accounts." Black's Law Dictionary (10th Ed. 2014) pp. 936, 956. Rule 1.15 (a) (5) of the Rules of Professional Conduct provides in relevant part: " 'IOLTA account' means an interest- or dividend-bearing account established by a lawyer or law firm for clients' funds at an eligible institution from which funds may be withdrawn upon request by the depositor without delay. . . ."

Book (2008) § 2-52, seeking permission to resign from the bar and to waive his right to apply for reinstatement. The defendant subsequently filed in the trial court a memorandum of law contending that the compelled production of the documentation sought by the committee would violate his right against self-incrimination guaranteed by the state and federal constitutions. Because of the defendant's refusal to cooperate, the committee forwarded the defendant's overdraft grievance and random audit files to Disciplinary Counsel for presentment to the trial court. The plaintiffs initially objected to the defendant's resignation from the bar but, ultimately, withdrew their objections after the defendant agreed to provide certain documentation to the committee and Disciplinary Counsel.

On November 12, 2008, the trial court, *Adams*, *J.*, conducted a hearing on the resignation proceeding. At the hearing, the committee submitted a report pursuant to Practice Book (2008) § 2-52 (b) in which it represented that, as the result of the defendant's resignation from the bar and waiver of his right to seek reinstatement, it would resolve all disciplinary matters involving the defendant. The court canvassed the defendant as to whether his resignation and waiver of his right to seek reinstatement were knowing and voluntary, and whether he had been advised by counsel of the ramifications of his actions. The defendant responded affirmatively to both inquiries. The court then accepted the defendant's resignation and waiver.

In 2012, notwithstanding his voluntary resignation and prior waiver of his right to seek reinstatement to the bar, the defendant filed an application for reinstatement, contending that the "waiver does not preclude a present determination of his present fitness to be admitted to practice law." Disciplinary Counsel filed a motion to dismiss the application, claiming that the court lacked jurisdiction to entertain it as the result of

the defendant's waiver of his right to seek reinstatement. In response, the defendant contended that his waiver was not knowing or voluntary because he had never been advised of his right to appeal from the judgment of the trial court accepting his resignation.

For reasons that are unclear from the record, no action was taken on Disciplinary Counsel's motion to dismiss for nearly four years. In January, 2016, the defendant filed a supplemental memorandum of law in opposition to the motion. He claimed that, during the years preceding his resignation, his wife had been struggling with a difficult and embarrassing family situation and that she was " 'overwhelmed . . . with fear' " that the situation would become public if the committee's investigation against the defendant continued. Affidavits by the defendant and his wife setting forth the details of the family situation were attached to the defendant's opposition to the motion to dismiss. The defendant also contended that "[f]our independent audits were conducted and [his] client trustee accounts were completely in compliance with the law . . . ."

Thereafter, the committee also filed a motion to dismiss the defendant's application for reinstatement. In its memorandum of law in support of its motion to dismiss, the committee contended that its limited investigation of the defendant in 2008 had showed that there was "a serious question that remains to this day as to whether the [defendant] misappropriated funds from his IOLTA account." The committee also contended that the grievance complaint file, which stemmed from the IOLTA account overdraft, and the random audit file had been closed in exchange for the defendant's resignation and waiver, and that those files had since been destroyed.

After conducting a hearing on the plaintiffs' motions to dismiss, the trial court, *Povodator*, *J.*, granted them

both.[3] In its memorandum of decision, the court observed that, before reaching the merits of the defendant's claim that he was presently fit to serve as an attorney, the court was required to address the threshold question of whether the defendant's waiver precluded consideration of his application for reinstatement. The court concluded that, although there are no formal rules governing motion practice in reinstatement proceedings, the court had the inherent authority to entertain a motion to dismiss that raised this threshold question. The court also concluded that the portion of Practice Book § 2-53 (b) providing that an attorney who has resigned from the bar and waived the right to seek reinstatement is ineligible to apply for reinstatement, which was added to the rule and became effective in 2014,[4] was retroactive because it "restated existing procedures and practices, rather than creating a new prohibition." Addressing the defendant's claim that his waiver was invalid because it was not knowing and voluntary, the court stated that, "accepting the factual contentions set forth in the affidavits . . . relating to the concern about disclosure of family skeletons, the court cannot conclude that is a cognizable basis for finding a lack of knowing and voluntary waiver." The court further stated that, "[w]hile the [defendant's] rationale may well be plausible and emotionally attractive, [his] own characterization of his decision as 'ill-considered' is not the equivalent of a negation of a knowing and voluntary decision. Nor, to the extent the term is invoked, do these facts constitute duress, an alternat[iv]e characterization given by the [defendant]." The court concluded that no evidentiary hearing was necessary because the court assumed the truth of the facts averred in the affidavits that the defendant had

[3] Hereinafter, all references to the trial court are to Judge Povodator.

[4] Practice Book § 2-53 was amended to include this provision on June 14, 2013, to take effect on January 1, 2014.

submitted in support of his application for reinstatement. Finally, the court concluded that the defendant's knowing and voluntary waiver of the right to seek reinstatement in exchange for the committee's assurance that there would be no further investigation of him precluded him from seeking reinstatement. Accordingly, the court granted the motions to dismiss.

Thereafter, the defendant filed a motion for articulation in which he requested that the trial court articulate, among other things, whether and on what ground it had determined that it lacked subject matter jurisdiction over his application for reinstatement. In its response, the court noted that the defendant had not previously raised the issue of whether the court's subject matter jurisdiction was implicated by the plaintiffs' claim that the defendant was ineligible to apply for reinstatement to the bar. The court then observed that "[t]he sui generis nature of the proceeding undercuts the need for clear demarcation of [whether the issue was] jurisdictional [or] nonjurisdictional in a technical sense. The issue was whether there had been a threshold legal or factual presentation that would warrant further proceedings . . . ." The court concluded that a motion to dismiss was the proper vehicle for raising this issue, regardless of whether it fell within one of the traditional categories of claims implicating subject matter jurisdiction.

This appeal followed.[5] The defendant claims that the trial court incorrectly determined that the current version of Practice Book § 2-53 (b), which provides in relevant part that "[n]o attorney who has resigned from the bar and waived the privilege of applying for readmission or reinstatement to the bar at any future time shall

[5] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

be eligible to apply for readmission or reinstatement to the bar under this rule," applies retroactively to his application. He also contends that the trial court incorrectly determined that it had the inherent authority to entertain the plaintiffs' motions to dismiss his application for reinstatement because (1) Practice Book (2012) § 2-53 (a),[6] which the defendant claims governs, requires the trial court to forward all applications for reinstatement to a standing committee for consideration, and (2) a waiver of the right to apply for reinstatement does not implicate the trial court's subject matter jurisdiction over an application for reinstatement.[7] We affirm the judgment of the trial court.

I

We first address the defendant's claim that the portion of Practice Book § 2-53 (b) providing that an attorney who has previously waived the right to seek reinstatement to the bar is ineligible to apply for reinstatement is not retroactive because that provision was neither procedural nor intended to be clarifying. See, e.g., *Narayan* v. *Narayan*, 305 Conn. 394, 403, 46 A.3d 90 (2012) (procedural rules of practice ordinarily apply retroactively whereas statute that changes substantive rights is not subject to retroactive application); id., 410 (new rule of practice is presumed to apply prospectively

[6] Practice Book (2012) § 2-53 (a) provides in relevant part: "No application for reinstatement or readmission shall be considered by the court unless the applicant, inter alia, states under oath in the application that he or she has successfully fulfilled all conditions imposed on him or her as part of the applicant's discipline. . . . The application shall be referred, by the court to which it is brought, to the standing committee on recommendations for admission to the bar that has jurisdiction over the judicial district court location in which the applicant was suspended or disbarred or resigned . . . ."

[7] We have reframed the claims set forth in the defendant's statement of the issues to more accurately reflect the arguments that he makes in his brief. See, e.g., *Arras* v. *Regional School District No. 14*, 319 Conn. 245, 254 n.15, 125 A.3d 172 (2015).

in absence of evidence of clear intent that rule was intended to be clarification of prior rule); see also *D'Eramo* v. *Smith*, 273 Conn. 610, 621, 872 A.2d 408 (2005) ("[w]hile there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress" [internal quotation marks omitted]). This is a question of law subject to plenary review. *State* v. *Nowell*, 262 Conn. 686, 701, 817 A.2d 76 (2003).

We conclude that we need not determine whether the provision added to Practice Book § 2-53 (b) in 2014 prohibiting attorneys from seeking reinstatement to the bar after waiving that right is substantive or procedural because, even if we were to assume that it is substantive, we agree with the trial court that the provision merely codified the preexisting common-law rule in this state that a knowing and voluntary waiver of the right to seek reinstatement after resigning is a permanent bar to reinstatement. See *In re Application of Eberhart*, 48 Conn. Supp. 267, 269, 277, 841 A.2d 749 (2002) (attorney applicant's second application for reinstatement to bar was precluded by res judicata because three judge panel that heard first application for readmission concluded that, "having resigned from the bar and having knowingly and voluntarily waived his privilege to reapply, [the attorney applicant] was estopped [from applying] for readmission to the bar"), aff'd, 267 Conn. 667, 841 A.2d 217 (2004); see also id., 668 (adopting opinion of trial court as "a proper statement of the issues and the applicable law concerning those issues"); *In re Application of Kliger*, Superior Court, judicial district of New Haven (September 26, 1997) (20 Conn. L. Rptr. 435, 437) ("[a] knowing and intelligent waiver of the privilege of applying for readmission to the bar at any future time . . . is binding and final once

accepted by the [c]ourt"); see also *Florida Bar* v. *Mattingly*, 342 So. 2d 508, 510 (Fla. 1977) (attorney who enters into agreement to resign from bar and to never petition for reinstatement in exchange for dismissal of misconduct charges is permanently bound by agreement).

The reason for the rule is obvious: an attorney should not be able to waive permanently his right to apply for reinstatement to the bar to avoid disciplinary proceedings and then, after evidence pertaining to the disciplinary matter has been lost or destroyed, witnesses have disappeared and memories have faded, renege on that waiver. Indeed, although the defendant contends that the portion of Practice Book § 2-53 (b) providing that an attorney who previously has waived his or her right to apply for reinstatement to the bar is ineligible to apply for reinstatement is not retroactive because it is substantive, he does not contend on appeal that an attorney who has knowingly and voluntarily waived his right to apply for reinstatement to the bar should, nevertheless, be eligible to submit such an application.[8] Rather, he contends only that his waiver is not binding because it was not knowing or voluntary.[9] Accordingly, we need not decide whether the amendment to Practice Book (2012) § 2-53 was retroactive because, even if it was not, the trial court in the present case correctly

[8] As we have indicated, the defendant's application for reinstatement states in conclusory fashion that his "waiver does not preclude a present determination of his present fitness to be admitted to practice law." He provided no authority or explanation for that assertion.

[9] The defendant also contends that, under the 2012 revision of Practice Book § 2-53, the trial court must treat a valid waiver as a defense to an application for reinstatement, instead of treating the lack of a waiver as a precondition for reinstatement. This claim is *procedural*, however, and has no bearing on the question of whether the provision of the current revision of Practice Book § 2-53 (b), making an attorney who has waived the right to apply for reinstatement ineligible to apply for reinstatement—which the defendant himself contends is *substantive*—is retroactive. For reasons set forth more fully in this opinion, we reject the defendant's procedural claim.

held that an attorney's knowing and voluntary waiver of the right to seek reinstatement to the bar after resignation renders that attorney permanently ineligible to seek reinstatement under the common law. See *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 149–50, 794 A.2d 535 (2002) (concluding that it was unnecessary to decide whether statute codifying common-law attorney-client privilege was retroactive because same legal standard applied regardless of whether statute was retroactive).

II

We next address the defendant's claim that the trial court incorrectly determined that it had the inherent authority to entertain the plaintiffs' motions to dismiss the defendant's application for reinstatement on the ground that he was ineligible to apply. This is a question of law subject to plenary review. See *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 239–40, 796 A.2d 1164 (2002) ("[w]hether the trial court had the power to issue the order, as distinct from the question of whether the trial court properly exercised that power, is a question involving the scope of the trial court's inherent powers and, as such, is a question of law" subject to plenary review).

We conclude that the trial court properly determined that a motion to dismiss was the proper procedural vehicle to raise the claim that the defendant was ineligible to file his application for reinstatement to the bar. Although Practice Book (2012) § 2-53 (a) directs the trial court to refer any application for reinstatement after resignation to a standing committee, that rule also provides in relevant part that "[n]o application for reinstatement or readmission shall be considered *by the court* unless the applicant, inter alia, states under oath in the application that he or she has successfully fulfilled all conditions imposed on him or her as part of

the applicant's discipline."[10] (Emphasis added.) Thus, the rule expressly recognizes that there are cases in which the *court* cannot entertain an application for reinstatement in the first instance because the applicant is ineligible to apply for reinstatement, regardless of his or her present fitness to practice law. In other words, this rule of practice expressly recognizes that eligibility to apply for reinstatement and fitness for reinstatement are separate and distinct issues, and the *court*, rather than the standing committee, must determine eligibility as a threshold issue.

As we have explained, under the common law of this state, an attorney who has knowingly and voluntarily waived his or her right to seek reinstatement to the bar after resignation is *ineligible* to apply for reinstatement. See part I of this opinion. Although this rule was not expressly codified in Practice Book (2012) § 2-53, we can perceive no reason why an attorney who is ineligible to apply for reinstatement because he has waived the right to do so should be subject to a different procedure than an attorney who is ineligible to apply for the reasons set forth in this rule of practice. Indeed, even if Practice Book (2012) § 2-53 (a) did not expressly contemplate that the eligibility of an attorney to apply

[10] We note that the current version of Practice Book § 2-53 (f) provides in relevant part that "[t]he application shall be referred by the clerk of the superior court where it is filed to the chief justice or designee, who shall refer the matter to a standing committee on recommendations for admission to the bar . . . ." Also, Practice Book § 2-53 (d) currently provides in relevant part that, "[u]nless otherwise ordered by the court, an application for reinstatement shall not be filed until" the applicant has met certain enumerated conditions. We assume for purposes of this opinion that the 2012 revision of § 2-53 applies to the defendant's application for reinstatement. Even if the current revision applied retroactively, however, so long as the trial court correctly determined that a motion to dismiss was the proper procedural vehicle for raising a claim that an attorney is ineligible to apply for reinstatement because that attorney previously had waived his right to apply—which we conclude that it was—the same analysis would apply under the current revision of the rule.

for reinstatement to the bar is a threshold issue to be decided by the trial court, it would make little sense to require the court to forward an application for reinstatement by an attorney who was ineligible to apply to a standing committee for a full hearing on the merits. Such a proceeding would not benefit the attorney in any way, but would only cause delay and a waste of judicial resources.

In addition, it bears emphasizing that attorney disciplinary proceedings are sui generis, that it is the exclusive duty of the Judicial Branch to regulate attorneys, and that entities such as the committee and Disciplinary Counsel act as the agents of the court when carrying out their regulatory and disciplinary functions. See *Burton* v. *Mottolese*, 267 Conn. 1, 26, 835 A.2d 998 (2003) ("[T]he proceeding to disbar . . . an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court. . . . Once the complaint is made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require. . . . [T]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership. Such statutes as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct." [Internal quotation marks omitted.]), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004); see also *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 554, 663 A.2d 317 (1995) ("rules of practice authorize the [committee] to act as an arm of the court in fulfilling this responsibility [to protect the public from unfit practitioners]" [internal quotation marks omitted]); *Grievance Committee* v. *Goldfarb*, 9 Conn.

App. 464, 473, 519 A.2d 624 ("the Superior Court has explicitly granted grievance [panels] the power to inquire into and investigate attorney misconduct"), cert. denied, 203 Conn. 802, 522 A.2d 292 (1987); *Grievance Committee* v. *Goldfarb*, supra, 477 ("Grievance [panels] obviously perform a necessary and valuable function by providing the courts with able and competent experts to investigate and evaluate claims of attorney misconduct. This delegation of power, however, is not a deprivation of power. The Superior Court retains inherent and plenary power to regulate and discipline its officers."). Thus, this case differs from the situation in which a court, by legislative grant, reviews a decision of an agency in a separate branch of government, where the court is required to consider the independent rights, obligations and interests of the parties affected by the decision *and* of the administrative decision maker. When dealing with matters of attorney discipline, the court must consider the rights and interests of only one party, the attorney who is the subject of the proceedings, without ignoring the court's interest in protecting its own integrity. The defendant has cited no authority for the proposition that an attorney has an inherent *right* to have the threshold issue of eligibility determined by a standing committee, rather than by the court, or that the standing committee has an inherent *right* or *obligation* to determine the issue, which the courts must respect.[11] We conclude, therefore, that the

[11] We recognize, of course, that, when a court has delegated a fact-finding function to a separate regulatory entity, the court is required to defer to the factual findings of that entity. See Practice Book § 2-38 (f) ("[u]pon appeal, the court shall not substitute its judgment for that of the [S]tatewide [G]rievance [C]ommittee or reviewing committee as to the weight of the evidence on questions of fact"); *Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 452, 87 A.3d 1078 (2014) ("[t]he standing committee, as fact finder, determines with finality the credibility of witnesses and the weight to be accorded their testimony" [internal quotation marks omitted]); *Doe* v. *Connecticut Bar Examining Committee*, 263 Conn. 39, 58, 818 A.2d 14 (2003) ("[T]he Superior Court's role in reviewing a petition for admission is not that of [fact finder]. We have repeatedly stated that [t]he trier of

trial court, rather than the standing committee, has the authority to entertain a colorable claim that an attorney is ineligible to apply for reinstatement to the bar because of a prior waiver of the right to do so.

Although Practice Book (2012) § 2-53 (a) does not specify the procedural vehicle for raising a claim that an attorney is ineligible to apply for reinstatement, it is well established that the trial court has the inherent power to craft procedures by which it may entertain threshold issues in order to avoid unnecessary delays and to conserve judicial resources. See *Miller* v. *Appellate Court*, 320 Conn. 759, 771, 136 A.3d 1198 (2016) (courts have inherent power "to manage [their] dockets and cases . . . to prevent undue delays in the disposition of pending cases" [internal quotation marks omitted]). This power "is of ancient origin, having its roots in judgments . . . entered at common law . . . and *dismissals* . . . . That power may be expressly recognized by rule or statute but it exists independently of either and arises because of the control that must neces-

the facts [i.e., the Bar Examining Committee] determines with finality the credibility of witnesses and the weight to be accorded their testimony." [Internal quotation marks omitted.]); *Scott* v. *State Bar Examining Committee*, 220 Conn. 812, 825, 601 A.2d 1021 (1992) ("It was improper for the trial court . . . to substitute its own assessment of the petitioner's credibility and candor for that of the [Bar Examining Committee]. Unlike the members of the executive committee, the trial court did not have the benefit of viewing the petitioner's demeanor when he testified at the hearing before the [Bar Examining Committee]."); cf. *Statewide Grievance Committee* v. *Ganim*, supra, 452 (standing committee's ultimate finding of current fitness to practice law is "reviewable by the court to determine whether [it is] reasonable and proper in view of the subordinate facts found and the applicable principles of law" [internal quotation marks omitted]). This deference is required, however, not because such regulatory bodies have any inherent rights or obligations as independent decision makers to which the judiciary is required to defer. Rather, as this court explained in *Scott*, deference is required under these circumstances because, when such bodies have engaged in their fact-finding function, they are in a better position than the trial court to assess the credibility of witnesses. See *Scott* v. *State Bar Examining Committee*, supra, 821–22, 25.

sarily be vested in courts in order for them to be able to manage their own affairs so as to achieve an orderly and expeditious disposition of cases." (Emphasis added; internal quotation marks omitted.) Id., 771–72; see also *Grievance Committee* v. *Goldfarb*, supra, 9 Conn. App. 471 ("the trial court has broad powers over both procedural and substantive aspects of attorney disciplinary proceedings"). Because Practice Book (2012) § 2-53 (a) expressly contemplates that the trial court will determine as a threshold issue whether an attorney is eligible to apply for reinstatement to the bar after resigning, and because the trial court has the inherent power to craft procedures by which to dispose of such threshold issues, we conclude that the trial court here properly determined that it could entertain the plaintiffs' motions to dismiss the defendant's application for reinstatement.

The defendant contends, however, that a motion to dismiss is not the proper procedural vehicle for raising a claim that he was ineligible to apply for reinstatement because such a claim does not implicate the trial court's subject matter jurisdiction. We disagree with the defendant because, although motions to dismiss are used to raise subject matter jurisdictional claims, that is not their *exclusive* purpose. Indeed, "[i]f a court, *for docket management purposes*, chooses to confer absolute finality to the issue of whether a party has lost the right to have [a] motion considered," dismissal is a proper procedure for doing so. (Emphasis added.) *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 821, 142 A.3d 1176 (2016); see id., 825 (trial court had inherent authority to grant motion to dismiss motion for modification of alimony award on ground that movant had not diligently prosecuted motion); see also *Miller* v. *Appellate Court*, supra, 320 Conn. 771 (inherent power of courts to manage dockets and prevent unnecessary delays includes power to render judgment of dismissal). We can perceive no reason

why the trial court should lack this power under the circumstances of the present case. Accordingly, we need not resolve the thornier question of whether a claim that an attorney has waived his right to apply for reinstatement implicates the trial court's subject matter jurisdiction.

The defendant also contends that *In re Application of Eberhart*, supra, 48 Conn. Supp. 267, and *In re Application of Kliger*, supra, 20 Conn. L. Rptr. 435, do not support the conclusion that a motion to dismiss is the proper procedural vehicle to raise a claim that an attorney is ineligible to apply for reinstatement on the ground that the attorney previously waived the right to do so because, in both of those cases, the trial court referred the application to a standing committee, and the initial determination of ineligibility was made by that body. See *In re Application of Eberhart*, supra, 269–70 (applications for reinstatement to bar following resignation and waiver of right to reapply referred to standing committees, both of which recommended that attorney applicant not be reinstated); *In re Application of Kliger*, supra, 435 (matter was first referred to standing committee). We do not rely on these cases, however, for the proposition that the trial court has inherent authority to grant a motion to dismiss an application for reinstatement by an attorney who has waived his right to submit such an application, which is a question of procedure. Rather, we rely on these cases for the proposition that an attorney who has knowingly and voluntarily waived his right to apply for reinstatement is ineligible to submit an application for reinstatement. See part I of this opinion. Although the trial courts in *In re Application of Eberhart* and *In re Application of Kliger* referred those respective applications to standing committees, nothing in those cases suggests that the trial court here was *required* to follow that procedure. Indeed, the procedural issue simply was not raised in those cases.

Finally, the defendant contends that Practice Book § 1-8, which provides in relevant part that the rules of practice "will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice," required the trial court to forward his application for reinstatement to a standing committee because "[i]t would be an injustice" to deny him a hearing on the question of "whether the circumstances of his resignation and equity justify his readmission." The defendant contends that, contrary to the trial court's apparent belief, it was not "inevitable" that the outcome of such a hearing would be a recommendation that he was ineligible to apply for reinstatement because the standing committee could have found that the "immense pressure" created by his family circumstances at the time that he resigned justified allowing him to apply for reinstatement. He further contends that "the trial court had no discretion or fact-finding power on an application for readmission . . . ."

Again, we disagree. As we have indicated, the trial court accepted the truth of the affidavits submitted by the defendant concerning his family circumstances and concluded that, as a matter of *law*, those circumstances did not invalidate his waiver of his right to apply for reinstatement. The defendant does not claim that this conclusion was wrong on the basis of the evidence that was before the court; nor has he pointed to any additional evidence that he would have submitted if his application had been forwarded to a standing committee. The defendant also does not claim—for good reason—that, even if his waiver was knowing and voluntary, he is nevertheless eligible to apply for reinstatement because he is currently fit to practice law. Accordingly, we cannot perceive what would be gained by requiring a standing committee to make the threshold determination as to whether the defendant is eligible to apply for reinstatement, a legal determination that

would, in any event, ultimately be subject to review by the trial court. See *Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 452, 87 A.3d 1078 (2014) ("[t]he ultimate facts [found by a standing committee] are reviewable by the court to determine whether they are reasonable and proper in view of the subordinate facts found and the applicable principles of law" [internal quotation marks omitted]).

We further note that our conclusion that the trial court has the inherent power to entertain a motion to dismiss an application for reinstatement to the bar on the ground that the applicant is ineligible to apply necessarily implies that the court also has the inherent power to find facts necessary to decide the motion to dismiss. Cf. *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009) ("where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts"). Thus, in a case—unlike the present one—in which the facts and circumstances surrounding an attorney's waiver of his right to apply for reinstatement to the bar could support a finding that the waiver was invalid for some reason, the trial court would have the authority to conduct an evidentiary hearing to explore that issue. We need not determine in the context of this appeal whether such a proceeding would be more akin to a proceeding on a motion to open a judgment pursuant to General Statutes § 52-212a, which must be brought within four months of the judgment and at which "the court must inquire into whether the decree itself was obtained by fraud, duress, accident or mistake"; *Jenks* v. *Jenks*, 232 Conn. 750, 753, 657 A.2d 1107 (1995); a proceeding on a claim that a defendant's waiver of his right to a jury trial was invalid, at which the defendant must prove that the waiver of a jury trial was not knowing and voluntary; see, e.g., *State* v.

Ouellette, 271 Conn. 740, 753, 859 A.2d 907 (2004); or, instead, an entirely different proceeding given the sui generis nature of proceedings on an application for reinstatement to the bar. See *Miller* v. *Appellate Court*, supra, 320 Conn. 771–72.

For the foregoing reasons, we conclude that the trial court correctly determined that it had the inherent authority to entertain the plaintiffs' motions to dismiss. We further conclude that the trial court properly granted the motions to dismiss on the ground that the defendant's knowing and voluntary waiver of his right to apply for reinstatement to the bar rendered him permanently ineligible to submit such an application.

The judgment is affirmed.

In this opinion the other justices concurred.