SYLVESTER TRAYLOR *v.* STATE OF CONNECTICUT ET AL. (SC 19977)

Robinson, C. J., and Palmer, Kahn, Ecker and Stevens, Js.

Syllabus

The plaintiff sought, inter alia, a judgment declaring unconstitutional the statute (§ 52-190a [a]) that requires a complaint sounding in medical malpractice to be accompanied by a good faith certificate and a letter authored by a similar health care provider opining that there appeared to be evidence of medical negligence. In 2006, following the suicide of his wife, the plaintiff had brought a medical malpractice action against his wife's treating psychiatrist, A, and his employer, C Co., but failed to append to the complaint the good faith certificate and opinion letter required by § 52-190a (a). Although the plaintiff subsequently obtained an opinion letter and amended his complaint, the trial court dismissed the counts of the amended complaint sounding in medical negligence on the ground that the original complaint failed to comply with § 52-190a (a). The trial court subsequently rendered judgment for A and C Co. on the remaining counts. Thereafter, in 2011, the plaintiff commenced two additional actions against A and C Co., their telephone answering service, T Co., and its owners, and other governmental officials, employees and entities, among others, in which he challenged the dismissal of his medical malpractice action. Those actions, both of which included the claim that § 52-190a is unconstitutional, ultimately were resolved against the plaintiff. In 2016, the plaintiff, representing himself, commenced the present action against A, C Co., T Co. and its owners, the state, the Appellate Court, and five Superior Court judges. Thereafter, the trial court granted A and C Co.'s motion for summary judgment on the ground that the claims directed against them were barred by the doctrine of res judicata, as the plaintiff previously had or could have raised and litigated those claims in one of the 2011 actions. The trial court granted the motion to dismiss filed by T Co. and its owners, concluding that the plaintiff's claims against them were barred by the prior pending action doctrine, the plaintiff previously having raised those claims in one of the 2011 actions. The trial court also granted the motion to dismiss filed by the state, the Appellate Court and the Superior Court judges, concluding, inter alia, that the plaintiff's claims for declaratory relief were barred by sovereign immunity and collateral estoppel, and that the claims against the judges were barred by absolute judicial immunity. Accordingly, the trial court rendered judgment for the defendants, and the plaintiff appealed, claiming that § 52-190a is unconstitutional because it imposes a financial burden and other obstacles on plaintiffs seeking to bring medical malpractice claims and, therefore, violated his rights to due process, equal protection, and access to the courts. *Held* that this court could not review the plaintiff's claim that

§ 52-190a is unconstitutional, as the plaintiff failed to address in his brief to this court any of the issues that provided the basis for the trial court's resolution of the plaintiff's action in favor of the defendants: the plaintiff's failure to challenge in his appellate brief the trial court's independent, alternative conclusions that the claims against the defendants were barred by, inter alia, res judicata, collateral estoppel, and the prior pending action doctrine operated as an abandonment of any challenge to the trial court's conclusions and thus effectively rendered the appeal moot because, even if this court were to agree that § 52-190a is unconstitutional, the trial court's conclusions would stand; moreover, the policy of this state's courts to be solicitous of self-represented litigants could not excuse the plaintiff's complete failure to challenge in his brief to this court the trial court's threshold conclusions.

Argued December 13, 2018—officially released August 27, 2019

Procedural History

Action seeking a judgment declaring, inter alia, that a certain medical malpractice statute is unconstitutional, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the case was transferred to the judicial district of Danbury and then to the judicial district of Hartford, Complex Litigation Docket; thereafter, the court, *Moll, J.*, granted the motions to dismiss filed by the named defendant et al. and the motion for summary judgment filed by defendant Bassam Awwa et al., and rendered judgment thereon for the defendants, from which the plaintiff appealed. *Affirmed.*

Sylvester Traylor, self-represented, the appellant (plaintiff).

Jane R. Rosenberg, former solicitor general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellees (named defendant et al.).

William L. Stevens, for the appellees (defendant Advanced Telemessaging, LLC, et al.)

Donald E. Leone, Jr., with whom, on the brief, was *Anthony D. Sutton*, for the appellees (defendant Bassam Awwa et al.)

Opinion

STEVENS, J. This appeal arises from the most recent in a series of civil actions that the plaintiff, Sylvester Traylor, has brought in state and federal court relating to the suicide of his wife, Roberta Mae Traylor (Roberta). The plaintiff, who is self-represented, brought the present case against the defendants, who are (1) the state of Connecticut, numerous current and former Superior Court judges,[1] and the Appellate Court (state defendants); (2) Roberta's treating psychiatrist, Bassam Awwa, and his employer, Connecticut Behavioral Health Associates, P.C. (Awwa defendants); and (3) Robert Knowles and Neil Knowles, and their business, Advanced Telemessaging (Knowles defendants). The plaintiff now appeals[2] from the judgment of the trial court, *Moll*, *J.*,[3] rendered in accordance with its granting of the defendants' motions to dismiss and for summary judgment. On appeal, the plaintiff claims that General Statutes § 52-190a,[4] which requires a plaintiff to

[1] The plaintiff named the following current and former Superior Court judges as defendants: James W. Abrams, Emmet L. Cosgrove, Kari A. Dooley, Thomas F. Parker, and Terence A. Zemetis.

[2] The plaintiff 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.

[3] Given the multiplicity of Superior Court judges involved in this case in both adjudicative and party capacities, for the sake of simplicity, all references herein to the trial court are to Judge Moll unless otherwise noted.

[4] General Statutes § 52-190a provides in relevant part: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's

append a good faith certificate and supporting opinion letter to the complaint in cases of medical negligence, is unconstitutional. Although the plaintiff fully briefed his attack on the constitutionality of § 52-190a, we cannot reach the merits of that claim because of his failure to challenge the trial court's threshold conclusions that his claims against all of the defendants are barred by, inter alia, the doctrines of res judicata and collateral estoppel. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts relevant to the plaintiff's claim on appeal,[5] as pleaded in his complaint,[6]

attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

* * *

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

[5] We note that the vast majority of the allegations in the plaintiff's 105 page complaint consists of facts supporting his various due process claims arising from the handling of his first medical malpractice action, with particular attention to the actions of Judge Thomas F. Parker, judge trial referee, both on and off the bench, along with the fact that Judge Parker ultimately was not renominated to his position as a judge trial referee. Because the plaintiff's sole claim on appeal concerns the constitutionality of § 52-190a, which the trial court did not reach, we need not discuss those other allegations in any detail.

[6] "The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-30] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable

and the complex procedural history of this case. Beginning in 2002, Awwa and his employer, Connecticut Behavioral Health Associates, P.C., provided psychiatric treatment to Roberta. In 2002, the plaintiff attended a treatment session with Roberta, at which time Awwa became aware of her suicidal thoughts. In early 2004, Awwa prescribed medication for Roberta to treat her major depressive disorder, despite the existence of manufacturers' warnings that (1) the medications should not be prescribed to anyone with suicidal thoughts, (2) "the possibility of a suicide attempt is inherent in depression and may persist until [a] significant remission occurs," and (3) "[c]lose supervision of high risk patients should accompany initial drug therapy." Awwa changed Roberta's medication on several occasions during the period of time leading up to March 1, 2004. The plaintiff contacted the Awwa defendants on nine different occasions to inform them that Roberta was having adverse reactions to the medications that Awwa had prescribed. Roberta also sent Awwa a letter dated December 23, 2003, to that effect. Awwa did not return the plaintiff's telephone calls or otherwise indicate that he appreciated the danger of the situation. On March 1, 2004, Roberta tragically committed suicide.

On June 2, 2006, the plaintiff, acting as a self-represented party, filed a medical malpractice action in New

light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Footnote omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015); see also *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 789 n.5, 873 A.2d 965 (2005) (noting that motion for summary judgment, which was treated as "equivalent of a common-law motion for judgment on the pleadings," requires court to "accept as undisputed the facts pleaded in the complaint").

London Superior Court against the Awwa defendants in his own name and as administrator of Roberta's estate, claiming wrongful death, medical malpractice, loss of chance, and loss of consortium. See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S (2006 action). At the time the plaintiff filed the complaint, he had not attached the certificate of good faith and written opinion of a similar health care provider, which are required by § 52-190a. On July 27, 2006, the Awwa defendants moved to dismiss the 2006 action for lack of personal jurisdiction; the trial court, *Hon. D. Michael Hurley*, judge trial referee, denied that motion on December 14, 2006. Subsequently, on October 19, 2006, the plaintiff filed a certificate of good faith and supporting written opinion letter authored by Howard Zonana, a professor of psychiatry at Yale University School of Medicine, opining that there was a good faith basis for the action.

On December 26, 2006, the plaintiff, now represented by counsel, filed a request to amend the complaint pursuant to Practice Book § 10-60. On December 29, 2006, the Awwa defendants objected to the request, and Judge Hurley sustained their objection on January 16, 2007. On January 8, 2007, the Awwa defendants moved to dismiss the 2006 action, claiming that the complaint as originally filed lacked the certificate of merit and written opinion of a similar health care provider required by § 52-190a. Subsequently, on June 1, 2007, Judge Hurley denied that motion to dismiss and thereafter issued numerous discovery orders.

The Awwa defendants did not comply with Judge Hurley's discovery orders. Eventually, counsel for the Awwa defendants stated in court that his clients had destroyed all relevant medical and telephone records that were within their exclusive possession and control, despite their knowledge of their obligation to preserve those records given a pending or impending civil action

dating back to Roberta's death in March, 2004. Similarly, the Knowles defendants, acting at the direction of the Awwa defendants, destroyed relevant records in their possession. The plaintiff and his expert witnesses never had an opportunity to examine those records. Subsequently, the case was reassigned to Judge Thomas F. Parker, judge trial referee, who the plaintiff later named as a defendant in the present case. See footnote 5 of this opinion.

On July 12, 2010, the plaintiff, represented by counsel, filed an amended complaint that became the operative complaint in the 2006 action, adding claims of spoliation and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., arising from the destruction of the records.[7] On July 16, 2010, the Awwa defendants moved to dismiss the amended complaint on the ground that the plaintiff's original June 1, 2006 complaint initiating the action failed to comply with § 52-190a because the required certificate of good faith and opinion letter had not been

[7] We note that, in 2009, the plaintiff also brought a separate mandamus action in the New London judicial district under docket number CV-09-4009523-S, challenging an earlier decision of the trial court, *Abrams J.*, to open a judgment of default that had been rendered against the Awwa defendants in the 2006 action on the ground that they had violated discovery orders previously rendered by Judge Hurley. See *Traylor* v. *State*, 128 Conn. App. 182, 183, 15 A.3d 1173, cert. denied, 301 Conn. 927, 22 A.3d 1276 (2011). Judge Abrams granted the Awwa defendants' motion to open because he had rendered the default judgment without reviewing their properly filed objection and subsequently determined that they had not violated any discovery orders. Id., 184. Judge Parker subsequently granted the motion to dismiss the mandamus action "because the plaintiff did not claim that any of the discovery orders could not be subject to an appeal once the malpractice action had concluded." Id., 184–85. The Appellate Court affirmed that judgment denying the writ of mandamus "because the plaintiff has failed to demonstrate that there is no other specific adequate remedy available to review the court's actions. Moreover, because the actions of the court that are complained of here may be made an issue in the plaintiff's appeal from the final judgment of the medical malpractice action, mandamus is not warranted." Id., 186.

attached. Judge Parker granted the Awwa defendants' motion, concluding that, although Judge Hurley had denied an earlier motion to dismiss filed by these defendants, that denial preceded the Appellate Court's decisions in *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 943 A.2d 544 (2008), and *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).[8] See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S, 2010 WL 3584285, *3–4 (August 11, 2010). Relying on *Rios* and *Votre*, Judge Parker concluded that the plaintiff's failure to obtain and file the written opinion letter required by § 52-190a (a) at the initiation of the 2006 action was not remedied by the eventual filing of Zonana's letter, and that Judge Hurley's ruling to the contrary was inconsistent with this appellate precedent. Id., *5.

Judge Parker next determined that Judge Hurley's earlier decision was not entitled to preclusive effect under the doctrines of law of the case or collateral estoppel. Id., *5–6. Judge Parker then concluded that other specifications in the complaint against Connecticut Behavioral Health Associates, P.C., were barred by the statute of limitations in General Statutes § 52-555 (a). Id., *9–10. Accordingly, on August 11, 2010, Judge Parker rendered judgment dismissing counts one through six of the complaint in the 2006 action. Id., *10.

On August 27, 2010, the plaintiff appealed from the judgment of dismissal to the Appellate Court under docket number AC 32641; the Appellate Court subse-

[8] In *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 30–31 n.17, 12 A.3d 865 (2011), this court discussed, but took no position regarding, the continued viability of the holding in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585–86, that the opinion letter requirement of § 52-190a (a) cannot be satisfied through an opinion of a similar health care provider filed with an amended pleading that was not filed at the commencement of the action.

quently granted the Awwa defendants' motion to dismiss the appeal for lack of jurisdiction on January 5, 2011.[9]

In a subsequent memorandum of decision, Judge Parker rendered judgment dismissing the two remaining counts in the 2006 action, namely, spoliation and CUTPA violations, concluding that the earlier dismissal of the underlying medical malpractice claims for failure to file a good faith certificate and opinion letter meant that the defendants had rebutted the presumption that the plaintiff could have prevailed on those claims in the absence of the acts of spoliation. See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S, 2011 WL 1025029, *9–10 (February 15, 2011). Accordingly, Judge Parker rendered judgment for the defendants in the 2006 action. Id., *10.

On February 23, 2011, the plaintiff, as a self-represented party, appealed from that judgment to this court under docket number SC 18754; that appeal later was transferred to the Appellate Court pursuant to Practice Book § 65-4. The Appellate Court docketed the plaintiff's appeal under docket number AC 33038, along with another appeal, docket number AC 33039, which had been filed by the plaintiff's then attorney in this case on behalf of the estate. The appeal in docket number AC 33039 subsequently was withdrawn as derivative. After the plaintiff's counsel was granted leave to withdraw from the case on June 30, 2011, the Awwa defendants subsequently moved to dismiss the appeal for lack of a justiciable controversy between the parties, on the ground that the plaintiff's claims were deriva-

[9] In their motion to dismiss, the Awwa defendants claimed that the Appellate Court lacked jurisdiction because there was (1) no appealable final judgment and (2) no justiciable controversy between the parties to the appeal. The Appellate Court granted the Awwa defendants' motion in an order without an opinion.

tive of those of the estate, with the estate's appeal having previously been dismissed.[10] The Appellate Court granted that motion to dismiss on December 16, 2011. On December 29, 2011, the plaintiff filed a petition for certification to appeal from that judgment of dismissal, which this court denied on January 25, 2012. *Traylor* v. *Awwa*, 303 Conn. 931, 36 A.3d 242 (2012).

In 2011, the plaintiff filed a new action in New London Superior Court against the Awwa and Knowles defendants, their attorneys and insurers, then Attorney General Richard Blumenthal, court officials, and several New London prosecutors. *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-11-5014139-S (first 2011 action). The first 2011 action, which was later removed to federal court, included in its fifteen count complaint a claim that § 52-190a violated the state and federal constitutions. See *Traylor* v. *Awwa*, Docket No. 3:11CV00132 (AWT), 2014 WL 555358, *1 (D. Conn. February 10, 2014). In a series of rulings, the plaintiff's claims in the first 2011 action, including his claim challenging the constitutionality of § 52-190a, were resolved against him.[11]

[10] The Appellate Court granted the attorney's motion to withdraw, which was filed in accordance with the plaintiff's wishes as stated during the preargument conference, and sua sponte ordered that his appeal as administrator of the estate would be dismissed unless he obtained new counsel within thirty days. The plaintiff did not obtain new counsel. The Appellate Court subsequently dismissed that portion of the appeal on August 2, 2011. On August 4, 2011, the plaintiff filed a petition for certification from that portion of the order, which this court dismissed for lack of a final appellate judgment; see General Statutes § 51-197f; on September 28, 2011. See *Traylor* v. *Awwa*, 302 Conn. 937, 28 A.3d 989 (2011).

[11] More specifically, the claims against the state defendants in the first 2011 action were dismissed by the District Court on the ground that the plaintiff's complaint failed to state a claim under each count or each count was barred by sovereign immunity. *Traylor* v. *Awwa*, supra, 2014 WL 555358, *12. The plaintiff appealed from this judgment to the United States Court of Appeals for the Second Circuit but withdrew that appeal on April 15, 2014.

The District Court also dismissed the plaintiff's claims in the first 2011 action against the Awwa defendants. The plaintiff also appealed from this judgment to the Second Circuit, but withdrew that appeal on April 15, 2014. The District Court denied the motion to dismiss with respect to CUTPA and spoliation allegations against the Awwa defendants' insurer and attorney; see *Traylor* v. *Awwa*, 899 F. Supp. 2d 216, 224–27 (D. Conn. 2012); but

While the first 2011 action was pending, the plaintiff instituted a second action in 2011, this time in the Hartford judicial district under docket number CV-11-5035895-S (second 2011 action). The complaint in the second 2011 action also included the claim that § 52-190a is unconstitutional, and all of the claims raised in this complaint were resolved against the plaintiff.[12] See

subsequently granted a motion for summary judgment filed by these defendants. See *Traylor* v. *Awwa*, 88 F. Supp. 3d 102, 109–10 (D. Conn. 2015). The plaintiff appealed from the granting of that motion for summary judgment to the Second Circuit; the Second Circuit dismissed that appeal on November 19, 2015.

The District Court remanded the remaining claims against the Knowles defendants in the first 2011 action to New London Superior Court, where they were transferred to the Complex Litigation Docket in the judicial district of Waterbury. The first 2011 action was then transferred again to the Stamford-Norwalk judicial district, where Judge Genuario granted the Knowles defendants' motion for summary judgment on October 26, 2016. On June 21, 2017, this court dismissed the plaintiff's writ of error challenging the granting of summary judgment in the first 2011 action, and the Appellate Court subsequently denied the plaintiff's motion for permission to file a late appeal from that granting of summary judgment.

[12] Specifically, the second 2011 action was instituted against numerous judges, legislators, and court employees, and the Awwa defendants' insurer, challenging rulings in the plaintiff's other cases as violations of the state and federal constitutions, along with the constitutionality of § 52-190a. See generally *Traylor* v. *Gerratana*, 148 Conn. App. 605, 88 A.3d 552, cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied, 312 Conn. 902, 112 A.3d 778, cert. denied, U.S. , 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014). The Appellate Court upheld the dismissal of the second 2011 action on the ground that it was barred by the doctrines of qualified and absolute judicial and legislative immunity. Id., 612–15; see id., 615 (concluding that claims against insurer were abandoned because of inadequate briefing). Particularly pertinent to the present case, the Appellate Court held that the plaintiff's claims in the second 2011 action seeking declaratory and injunctive relief against the legislative defendants on the ground that § 52-190a is unconstitutional were barred by sovereign immunity because "[n]one of the claims raised by the plaintiff allege[s] a substantial claim that clearly demonstrate[s] an incursion upon [his] constitutionally protected interests." (Internal quotation marks omitted.) Id., 611.

While litigation continued in the first and second 2011 actions, the plaintiff continued to apply for fee waivers in the New London judicial district to allow him to reopen the original 2006 action and to file new actions. The trial court, *Cosgrove*, *J.*, denied two of these applications pursuant to General Statutes § 52-259b (c) after a hearing, on the ground that the plaintiff "has repeatedly filed actions with respect to the same or similar matters; that these filings demonstrate an extended pattern of frivolous filings that have been without merit; that this filing is consistent with the [plaintiff's] previous pattern of frivolous filings; and that the granting of the fee waiver would constitute a flagrant misuse of [J]udicial [B]ranch resources." *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-

generally *Traylor* v. *Gerratana*, 148 Conn. App. 605, 88 A.3d 552, cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied, 312 Conn. 902, 112 A.3d 778, cert. denied, U.S. , 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014).

The plaintiff filed the present action in April, 2016, in the Stamford-Norwalk judicial district, seeking declaratory and injunctive relief, as well as damages in excess of $15 million. The plaintiff's lengthy complaint pleaded claims for relief under six separate counts, namely (1) violations of his constitutional rights to due process and equal protection of the laws by the state defendants in connection with their handling of his previous actions, (2) fraudulent concealment by the Awwa and Knowles defendants, (3) spoliation by the Awwa and Knowles defendants, (4) violation of CUTPA by Advanced Telemessaging and Connecticut Behavioral Health Associates, P.C., (5) intentional infliction of emotional distress by the Awwa and Knowles defendants and Judge Parker, and (6) loss of consortium as to the Awwa and Knowles defendants. The case subsequently was transferred to the Danbury judicial district, and later to the Complex Litigation Docket in the judicial district of Hartford.

After the case was transferred to the Hartford Complex Litigation Docket, the Awwa defendants moved for summary judgment, and the Knowles defendants and the state defendants each moved to dismiss the amended complaint. The plaintiff did not oppose these motions or appear at the February 6, 2017 hearing on them.[13]

5001159-S, 2016 WL 823033, *4 (February 5, 2016). Ultimately, however, Judge Povadator, sitting in the Stamford-Norwalk judicial district where this case originally was filed, granted the fee waiver on March 14, 2016, which allowed the plaintiff to pursue the present action.

[13] We note that the plaintiff's conduct in responding to the motions and appearing in court was at issue before the trial court. After giving the plaintiff an additional month of time to file responsive briefs, in addition to a previous ninety day extension before its assignment to the case, the trial court then granted the plaintiff an extension of an additional sixty days, ultimately

With respect to the Awwa defendants' motion for summary judgment, the trial court agreed with their argument that they are entitled to judgment as a matter of law under the doctrine of res judicata. After comparing the complaints, the trial court concluded that res judicata barred the plaintiff's claims of fraudulent concealment, CUTPA violations, and intentional infliction of emotional distress because they previously had been raised and litigated to conclusion in the first 2011 action. The trial court concluded similarly with respect to the plaintiff's claim of loss of consortium because he had

setting January 23, 2017, as a due date for briefs and February 6, 2017, as the hearing date. On February 1, 2017, the plaintiff moved for continuance of a " 'February 23' status conference" on the ground that he needed more time to prepare and represented therein that he had contacted the defendants' attorneys regarding his request but they had not responded to him. The plaintiff also indicated in a separate filing that he required a continuance because he had vision problems resulting from medication.

Because there was no status conference scheduled for February 23, 2017, the trial court presumed that the plaintiff sought a continuance of the only scheduled event, namely, the February 6 hearing. On February 2, 2017, the trial court issued an order denying a continuance of the February 6 hearing, but directed the plaintiff to appear at that hearing to argue in support of his request for more time to respond, and to submit for in camera review medical documentation supporting his arguments that he "was physically unable" to participate. On February 3, 2017, the plaintiff obtained his medical records from a Veterans Affairs (VA) office and then had them sent from the New London courthouse to a court officer in Hartford via e-mail. The plaintiff then filed a "notice of compliance" stating that he would not attend the February 6 hearing, "claiming for the first time that he was unable to drive as a result of prescribed medication."

At the February 6 hearing before the trial court, the court officer confirmed on the record that, on the afternoon of February 3, the plaintiff had "called him and said that he had *driven to a VA office* that day to obtain his medical records and that he had *driven to the New London courthouse* that day to have those records e-mailed to [Judge Moll's] chambers." (Emphasis in original.) Given that the plaintiff had driven a car that day and his medical records did not support any claims of vision problems, the trial court found that the plaintiff was "flagrantly disregarding the court's deadlines and the court's February 3, 2017 order denying his request to continue the February 6, 2017 hearing. Accordingly, the [trial] court proceeded with the February 6, 2017 hearing, which [the plaintiff] failed to attend." The plaintiff has not challenged that finding or the denial of additional extensions in this appeal. See footnote 18 of this opinion.

an adequate opportunity to raise that claim in the first 2011 action. The trial court further determined that the plaintiff could have challenged the lower courts' conclusions on these issues by way of appealing the first 2011 action. Accordingly, the trial court granted the Awwa defendants' motion for summary judgment.

The trial court addressed the state defendants' motion to dismiss as follows. The trial court first observed that the plaintiff's complaint sought no monetary damages against either the state, the Appellate Court, or any individual state defendant in his or her official capacity. The court further concluded that any claim against any state defendant in his or her individual capacity was, in effect, against the state and, therefore, barred by sovereign immunity. See, e.g., *Spring* v. *Constantino*, 168 Conn. 563, 568–69, 362 A.2d 871 (2012).

As to the plaintiff's claims for declaratory and injunctive relief against the state defendants, the trial court concluded that these claims were barred by sovereign immunity because the plaintiff failed to allege sufficient facts showing that he had suffered a substantial violation of his constitutional rights or that the defendants had acted in excess of their statutory authority.[14] Specifically, the trial court observed that these claims were identical to those raised by the plaintiff in the second 2011 action, and the trial court relied on the Appellate Court's holding in that case that the plaintiff had not sufficiently pleaded "a substantial claim that the state or one of its officers [had] violated [his] constitutional

[14] As explained in *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009), this court has recognized three exceptions to sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.)

rights." (Internal quotation marks omitted.) The trial court reasoned that, in this context, the plaintiff's claim for declaratory relief was "barred on the independent grounds of sovereign immunity and collateral estoppel." The trial court also concluded that "the plaintiff [lacked] standing to challenge the constitutionality of § 52-190a because he, in fact, obtained the opinion letter required by the statute." The trial court next determined that the plaintiff's claims against the individual judges were barred by absolute judicial immunity, and that his claims were nonjusticiable to the extent that they sought an order to overturn or reverse the decisions of the Appellate Court or the Superior Court. Accordingly, the trial court granted the state defendants' motion to dismiss.

Finally, the trial court granted the Knowles defendants' motion to dismiss. The trial court agreed with their argument that the plaintiff's spoliation and CUTPA claims against them were barred by the prior pending action doctrine because they also were raised in the first 2011 action. The trial court determined that dismissal was warranted given that the actions are "virtually alike" and that the first 2011 action could have provided the plaintiff with the same remedy, given that "the claims in the two actions so obviously overlap that the plaintiff moved to consolidate the matters."

The trial court rendered judgment for all of the defendants in accordance with its decisions on their motions for summary judgment and dismissal. This appeal followed.[15]

On appeal, the plaintiff has filed a brief claiming that § 52-190a is unconstitutional because the "certificate of merit requirement burdens access to the courts by

[15] On January 7, 2019, the plaintiff filed a motion asking us to take judicial notice of certain misrepresentations that he claimed counsel for the state and the Awwa defendants had made during oral argument in this appeal on December 13, 2018. By order dated February 27, 2019, we denied this motion.

imposing an expensive and unnecessary prerequisite to having one's day in court." Arguing that access to the courts is a fundamental right under both the state and federal constitutions, the plaintiff contends that the certificate requirement "creates an improper and often impossible obstacle to access to the courts," citing internal pressure from within the medical community not to support plaintiffs in general, as well as the expense of obtaining the relevant medical records and hiring an appropriate expert to review them. In particular, the plaintiff relies heavily on a line of decisions from the Oklahoma Supreme Court invalidating various iterations of that state's certificate of merit statute. See, e.g., *John* v. *Saint Francis Hospital, Inc.*, 405 P.3d 681, 691 (Okla. 2017); *Wall* v. *Marouk*, 302 P.3d 775, 778 (Okla. 2013); *Zeier* v. *Zimmer, Inc.*, 152 P.3d 861, 874 (Okla. 2006). The plaintiff further argues that § 52-190a violates his right to equal protection under the state and federal constitutions.

In response, the defendants contend that review of the merits of the plaintiff's constitutional claims is precluded by his failure to brief challenges to the trial court's threshold conclusions that his claims in the present case are barred by the doctrines of res judicata, collateral estoppel, and sovereign and judicial immunity, as well as the prior pending action doctrine. The state defendants further argue that, other than his challenge to the constitutionality of § 52-190a, the defendant has abandoned his other constitutional claims against the state defendants challenging various actions taken by the courts, and particularly Judge Parker, during the handling of his cases, both on and off the bench. We agree with the defendants and conclude that the plaintiff's failure to brief a challenge to the trial court's conclusions in its memoranda of decision abandons any such challenge to those conclusions, in essence mooting his constitutional attack on § 52-190a.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented

to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008); see id., 124–25 (claim abandoned when party "devotes little more than a page of her original and reply briefs combined to the discussion of her claim, limiting her argument to the bare assertion that she should not be held legally liable for offer of judgment interest because she was not specifically named in the offer and no unified offer was made to all four defendants," and cites one case "entirely unrelated to the issue on appeal").

In the present case, the plaintiff's complete failure to challenge what the trial court actually decided in its memoranda of decision operates as an abandonment of his claims. "An unmentioned claim is, by definition, inadequately briefed, and one that is generally . . . considered abandoned." (Internal quotation marks omitted.) *State* v. *Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007). Indeed, when an appellant entirely fails to challenge the trial court's conclusions with respect to the merits of the case, thus leaving them intact despite the briefing of other issues, the appeal is, in essence, rendered moot. See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("[u]ndoubtedly, if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal"); *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 53, 161 A.3d 537 (2017) (declining to review claim that trial court

improperly determined that claims were abandoned by inadequate briefing because "the plaintiffs have failed to challenge the trial court's alternative conclusions rejecting the claims on the merits"); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 379 n.23, 119 A.3d 462 (2015) ("where alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant" [internal quotation marks omitted]).

We acknowledge that the plaintiff is a self-represented party and that it "is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . .

"This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A . . . court does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Citations omitted; internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569–70, 877 A.2d 761 (2005); see also *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 257–58, 137 A.3d 748 (2016) ("[t]his court has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall

have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party" [internal quotation marks omitted]).

The solicitous treatment we afford a self-represented party does not allow us to address a claim on his behalf when he has failed to brief that claim. See, e.g., *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487, 189 A.3d 1232 (2018) ("Other than a broad and conclusory claim that the court too narrowly construed the transaction test, the defendant has provided this court with no argument specific to any count of his counterclaim; nor has he set forth any reasoning in support of the notion that his pleadings fall within the parameters of the transaction test. Although we recognize and adhere to the well-founded policy to accord leeway to self-represented parties in the appeal process, our deference is not unlimited; nor is a litigant on appeal relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court." [Footnote omitted.]); *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 239–40, 98 A.3d 93 (2014) ("declin[ing] to enter into the statutory thicket of the family support magistrate laws without any meaningful assistance from the parties" and observing that "the fact that the defendant is self-represented cannot excuse or cure . . . obvious inadequacies in the record"); *In re Nicholas B.*, 135 Conn. App. 381, 384, 41 A.3d 1054 (2012) (declining to review self-represented respondent's claim that his trial counsel rendered ineffective assistance because his "argument is devoid of any legal analysis, let alone citation to any authority," and determining solicitude to self-represented parties was unwarranted because "[t]he major deficiencies in the presentation of this claim, which undeniably interfere with the petitioners' right to respond adequately to the claim, fall well outside of that degree of latitude afforded self-represented parties"); but cf. *State* v.

Brown, 310 Conn. 693, 698 n.4, 80 A.3d 878 (2013) (noting policy of solicitous treatment of self-represented parties and treating defendant's motion to correct illegal sentence filed pursuant to nonexistent " 'Practice Book Rule § 93-22' " as properly filed "pursuant to Practice Book § 43-22").

In the present case, the plaintiff has not addressed any of the issues, including res judicata, collateral estoppel, standing,[16] and the prior pending action doctrine,

[16] Although the plaintiff does not address the issue of standing, we note—sua sponte, because it implicates our subject matter jurisdiction; see, e.g., *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 548, 133 A.3d 140 (2016)—that the trial court concluded that the plaintiff lacked standing because he had failed to allege a substantial claim that the opinion letter requirement of § 52-190a was an incursion on his constitutionally protected interests. In so concluding, the trial court relied upon the Appellate Court's decision in *Traylor* v. *Gerratana*, supra, 148 Conn. App. 605, in which the Appellate Court simply concluded that the plaintiff's amended complaint in that action had made "only conclusory allegations that § 52-190a violated his constitutional rights to equal access to court, separation of powers, equal protection, due process, and a trial by jury. None of the claims raised by the plaintiff alleges a substantial claim that clearly demonstrate[s] an incursion upon [his] constitutionally protected interests." (Internal quotation marks omitted.) Id., 611. We disagree with the trial court's reliance on this reasoning as applied to the present case. Having reviewed the operative complaint in this case, we conclude that the allegations in the plaintiff's complaint, taken as true—and particularly the allegation that § 52-190a creates an "economic barrier" to access to the courts, given that "[t]he average burden of cost for the prelitigation certificate of merit is $10,000 to $20,000," with a disproportionate effect on African American litigants like the plaintiff—are sufficiently specific allegations of economic injury to demonstrate an incursion upon constitutionally protected interests. See, e.g., *Allco Finance Ltd.* v. *Klee*, 861 F.3d 82, 95 (2d Cir. 2017) (allegation that state's request for proposal charged unlawful fees was injury "sufficiently 'concrete' and 'particularized' to qualify as injur[y]-in-fact"), cert. denied, U.S. , 138 S. Ct. 926, 200 L. Ed. 2d 203 (2018); *E.M.* v. *Dept. of Education*, 758 F.3d 442, 459 (2d Cir. 2014) (parent had standing to bring claim under Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., when she became "subject to a contractual obligation to pay [private school] tuition . . . and . . . incurred that obligation as a direct result of the [d]epartment's alleged failure to provide her child a [free and adequate public education]"). Given the significant expense allegedly incurred by the plaintiff, and the fact that his failure to obtain the letter at the outset of the 2006 action led to its dismissal, we also disagree with the trial court's conclusion that "the plaintiff lacks standing to challenge the constitutionality of § 52-190a because he, in fact, obtained the opinion letter required by the

which provided the dispositive bases for the trial court's memoranda of decision.[17] The plaintiff's status as a self-represented party does not permit us to overlook that complete omission. Because this omission operates as an abandonment of any challenge to what the trial court

statute." Nevertheless, the plaintiff's failure to challenge the state defendants' other grounds for dismissal renders this standing conclusion harmless error not requiring reversal.

We further note that, because the plaintiff's standing to challenge the constitutionality of § 52-190a emanates from his interests in the claims relating to the 2006 action, his opportunity to assert this constitutional challenge was in the lengthy proceedings before the trial court in the 2006 action and during the subsequent appeals. "[I]t is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Citation omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016).

Put differently, under the circumstances presented in this case, any claims by the plaintiff that § 52-190a should not be applied to him because of its unconstitutionality were matters required to be asserted in the action in which the decision to apply the statute to him was made, and any challenges to the decision applying the statute to him were matters subject to direct appeal. "[I]t is now well settled that, [u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal *entirely invalid*, he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Emphasis in original; internal quotation marks omitted.) Id., 771–72; see also, e.g., *In re Shamika F.*, 256 Conn. 383, 406–407, 773 A.2d 347 (2001).

[17] We acknowledge that the plaintiff touched on issues of standing, collateral estoppel, and res judicata briefly during the principal and rebuttal portions of his oral argument before this court. Raising a claim at oral argument is not, however, a substitute for adequately briefing that claim. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 493 n.11, 131 A.3d 240 (2016) ("[i]t is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court" [internal quotation marks omitted]).

actually decided in this case,[18] we cannot address the single substantive issue that the plaintiff has raised, namely, his challenge to the constitutionality of § 52-190a.[19] Accordingly, we are required to affirm the judgment of the trial court.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* TONY M.*
(SC 19934)

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

Syllabus

Convicted, after a jury trial, of the crimes of murder and risk of injury to a child in connection with the death of his seven month old baby, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain evidence arising from statements that he had made to the police and improperly excluded a letter to the state in which he offered to plead guilty to the charge of manslaughter. The defendant's conviction stemmed from an incident in which he threw the baby off a bridge and into a river. On his way to the bridge, the defendant had a text message exchange with the baby's mother, with

[18] We note that the plaintiff's appeal form specifies both "[f]inal judgment" and "the decision regarding [the plaintiff's] motion for an extension of time due to illness"; see footnote 13 of this opinion; as the challenged actions of the trial court. The plaintiff has not, however, addressed the denial of his requested extensions of time in his brief. Accordingly, we deem any challenges to that discretionary decision similarly abandoned.

[19] We note that the Appellate Court has previously rejected a similar constitutional challenge to the good faith certificate requirement of § 52-190a under the open courts provision of the state constitution; see Conn. Const. art. I, § 10; and the due process clauses of the federal and state constitutions. See *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 81–84, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e; *State* v. *Jose G.*, 290 Conn. 331, 963 A.2d 42 (2009).

whom he had a troubled relationship and shared custody of the baby, stating, inter alia, "[y]ou won't talk to me tomorrow or any other day," "[t]here [are] no more days," "[e]njoy your new life without us," and that he would not be delivering the baby to her on her next scheduled day of custody. After the defendant arrived at the bridge, he called his own mother and told her to "tell everyone I'm sorry." A few minutes later, the defendant wrote and deleted a message on his phone stating "[t]o everyone, I'm sorry." The defendant then sent additional text messages to the baby's mother stating, inter alia, "[e]njoy your life without us now," "[you're] not a parent anymore," and "[the baby is] dead . . . ." The police arrived at the bridge and discovered the defendant there alone. When the police approached the defendant, he jumped from the bridge into the river. After the defendant was rescued, he was transported to a hospital, where the police subsequently interviewed him for approximately thirty-five minutes. Seven minutes of that interview were video recorded, and, during that time, the defendant responded to questions with only silence, brief verbal answers, shrugs, nods, or shakes of his head. A police officer, using a basketball analogy, asked the defendant whether the baby's trajectory off the bridge was more like a half-court shot, a three pointer, or a free throw. The defendant responded by saying "free throw." Before trial, defense counsel sent a letter to the state indicating that the defendant was willing to plead guilty to manslaughter in exchange for a sentence of twenty-five years imprisonment. The state rejected that offer, and defense counsel subsequently made an oral motion seeking to introduce that letter into evidence, claiming that the defendant's offer was a conclusive admission that he accepted criminal responsibility for the death of the baby but with the mental state associated with manslaughter. The trial court ultimately excluded that letter from evidence, concluding that it was irrelevant and would raise unnecessary collateral issues. The defendant also filed a motion to suppress evidence relating to the hospital interview, including the defendant's "free throw" statement and testimony by the police officers conducting the interview that the defendant had not asked about the baby's welfare during the interview. The defendant claimed, inter alia, that any waiver of his rights under *Miranda* v. *Arizona* (384 U.S. 436) was involuntary and that any statements made during the interview were inadmissible pursuant to the statute (§ 54-1o) governing the admissibility of statements made in the course of an unrecorded custodial interrogation by the police at a place of detention. The court denied the defendant's motion to suppress, concluding that he had voluntarily waived his *Miranda* rights and that his statements to the police had been voluntary. On appeal from the judgment of conviction, *held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress because, even if the challenged evidence had been improperly admitted, any such error was harmless: the state satisfied its burden of proving that any error in admitting the challenged

evidence was harmless beyond a reasonable doubt, as that evidence, which was cumulative of other evidence and was not highlighted by the state, was inconsequential in light of overwhelming, independent evidence of the defendant's intent to kill the baby, including, inter alia, the text messages he sent to the baby's mother and statements he made to his own mother, the deleted message, testimony by a psychiatry resident that the defendant had told him in an interview conducted shortly after the hospital interview that the defendant told her that he had intended to take the baby's life, and the defendant's own testimony that he brought the baby to the bridge with the intention of committing suicide; moreover, even if the police had violated § 54-1o by failing to record portions of the hospital interview, the defendant failed to meet his burden of proving that the admission of the challenged evidence substantially affected the verdict in light of the same overwhelming, independent evidence of his intent to kill the baby.

2. The trial court did not abuse its discretion in excluding from evidence the letter containing the defendant's plea offer: the trial court correctly concluded that the defendant's offer to plead guilty to the lesser offense of manslaughter, a tactical decision made before trial, was irrelevant to the issue of whether the defendant intended to kill the baby when he committed the charged crimes, the only contested issue at trial for the jury to consider; moreover, in light of the infinitely variable and complex considerations involved in plea bargaining, such evidence could inject collateral issues that could have confused the jury.

Argued January 17—officially released August 27, 2019

Procedural History

Amended information charging the defendant with the crimes of murder and risk of injury to a child, brought to the Superior Court in the judicial district of Middlesex, where the court, *Vitale*, *J.*, denied the defendant's motions to preclude and to admit certain evidence; thereafter, the case was tried to the jury before *Vitale*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Norman A. Pattis, with whom, on the brief, was *Brittany Paz*, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, *Peter A. McShane*, former state's attorney, and *Eugene R. Calistro, Jr.*, former senior assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Tony M., appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a and risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant makes three claims. First, he claims that the trial court improperly denied his motion to suppress certain evidence arising from statements that he had made to the police while in the hospital on the ground that any waiver of his *Miranda*[1] rights prior to making those statements was involuntary. In connection with that claim, he argues that his statements were made involuntarily due to his weakened physical condition at the time he made them. Second, he claims that evidence regarding his statements was also inadmissible because the interview was not recorded, as required by General Statutes § 54-1o. Third, he claims that the trial court improperly precluded him from introducing into evidence a letter in which he offered to plead guilty to manslaughter in exchange for twenty-five years incarceration. We disagree with the defendant's claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On July 5, 2015, the defendant threw the victim, his seven month old baby, from the Arrigoni Bridge into the Connecticut River in Middletown. The defendant then jumped off the bridge himself. The defendant survived the fall; the baby did not. In the weeks leading up to the murder, the defendant's relationship with the baby's mother became increasingly troubled, and they separated. As a result, the baby's mother decided to move out of the house where they had been living

[1] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

together for almost two years. At the same time, the baby's mother applied for, and was granted, a temporary restraining order against the defendant. In her application, she explained that the defendant had told her that he could make her and the baby disappear at any time. This caused her to fear for the safety of herself and the baby. At a subsequent hearing, on June 29, 2015, the court dissolved the temporary restraining order, and the defendant and the mother reached an agreement to share joint legal custody of their baby.

Within days of this agreement, on July 5, 2015, the defendant had custody of the baby at his mother's house, where he lived. At around 11 p.m., the defendant woke the baby from his sleep, put him in the stroller along with some blankets, a pacifier, his phone, an iPod, and a knife, and went for a walk. He soon began walking toward the Arrigoni Bridge with the intention of killing his baby and committing suicide. En route to the bridge, the defendant initiated the following exchange of text messages with the baby's mother:

"[The Defendant]: I hope you had fun bullshitting, I really needed to talk to you . . . .

"[The Baby's Mother]: I was trying to talk to my friend. She just broke up with her boyfriend and wanted to talk to me. Sorry I'm trying to be a good friend . . . .

"[The Defendant]: Well, I'm sorry there was a problem regarding our son . . . .

"[The Baby's Mother]: What's going on . . . . Why didn't you say that instead of saying I need to talk to you.

"[The Defendant]: Clearly nothing that matters to you. And why would I say I NEED to talk to you if it wasn't important . . . .

"[The Baby's Mother]: What was the matter?

"[The Defendant]: Don't worry, you'll see later. Just remember I tried [to] contact you first . . . .

"[The Baby's Mother]: Just tell me! Are you in the hospital?

"[The Defendant]: No, and again it doesn't matter now. Just remember you wanted to play games and lie and be childish when I tried to reach out . . . .

"[The Baby's Mother]: Okay Tony. Good night I'll talk to you tomorrow or Tuesday . . . .

"[The Defendant]: No you won't . . . .

"[The Baby's Mother]: What do you mean no?!

"[The Defendant]: You won't talk to me tomorrow or any other day . . . .

"[The Baby's Mother]: Tuesday is my day. So yes I'll text you in the morning to see when you'll be dropping off [the baby].

"[The Defendant]: I won't be . . . .

"[The Baby's Mother]: Tuesday is my day.

"[The Defendant]: There is no more days . . . .

"[The Baby's Mother]: Wtf you mean?!

"[The Defendant]: Enjoy your new life without us . . . .

"[The Baby's Mother]: You can't just decide not to bring him back . . . . It says in the agreement that Tuesday is my day. You can't just not bring him! Tony!!!! Seriously. Don't play around like that. Please don't try and take him from me!!!!"

During the course of this exchange, the defendant arrived at the bridge with the baby. Shortly thereafter, he called his own mother, told her where he was, and began crying. While on the phone with the defendant, his mother could hear the baby cooing and then briefly crying in the background. Assuming the defendant was

going to jump from the bridge, his mother pleaded with him to walk away. He responded that he couldn't and told her to "tell everyone I'm sorry." He then asked her to come to the bridge to get the stroller, iPhone, and iPod so that she would have pictures of the baby. He did not ask her to come get the baby. His mother and brother immediately drove to the bridge, calling the police on the way. Around this same time, a witness drove over the bridge on the way home from work. That witness saw the defendant holding the baby out in front of him and walking toward the railing. A few minutes later, the defendant wrote and deleted a message in his phone that stated: "To everyone, I'm sorry."

The defendant resumed exchanging text messages with the baby's mother:

"[The Defendant]: You tried to take him away from me. You failed. I didn't . . . . Enjoy your life without us now . . . .

"[The Baby's Mother]: Where are you . . . I'm trying to make this co-parent thing work!

"[The Defendant]: Your not a parent anymore . . . .

"[The Baby's Mother]: I'm trying to get along with you for [the baby] and [you] do this?! You can't just up and leave with [the baby]. Where are you! Where's [the baby]?

"[The Defendant]: He's dead . . . [a]nd soon I will be too . . . .

"[The Baby's Mother]: Don't [say] that!!!! Your playing right now! Please tell me you're kidding!!!!!!!!! You're fucking kidding me!!!!!! Don't fucking talk like that . . . . You couldn't kill your own son! [P]lease don't hurt [the baby]!!! Please!!!!!!!!!"

At that point, police officers and the defendant's mother arrived at the bridge where they saw the defen-

dant but not the baby. As officers approached the defendant, he threw himself over the railing and into the Connecticut River. The fall did not kill the defendant. He proceeded to wade in the water for approximately twenty minutes before being rescued. Shortly thereafter, he was airlifted to Hartford Hospital where he was placed in the intensive care unit. Two days later, the baby's body was found in the river by a kayaker.

The defendant was arrested and charged with murder and risk of injury to a child. At trial, the defendant testified that he was responsible for his baby's death but claimed that he had accidentally dropped him from the bridge. Thus, the only question before the jury was whether the defendant intended to kill the baby. Following a weeklong trial, the jury returned a verdict, finding the defendant guilty on both charges. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of seventy years of incarceration. This appeal followed.[2] Additional relevant facts will be set forth as necessary.

I

The defendant claims that the trial court improperly denied his motion to suppress evidence regarding certain statements that he made to the police while in the hospital. In particular, he claims that any statements made while he was in the hospital were obtained in violation of his *Miranda* rights and that those statements also were not voluntarily given as a result of his weakened physical condition. In response, the state contends that the defendant voluntarily waived his *Miranda* rights and that his statements to officers were made voluntarily.

[2] The defendant appealed to the Appellate Court, and that appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (b) (3) and Practice Book § 65-4.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant filed a motion to suppress "any and all statements made by the defendant" while at the hospital on the basis that the statements were obtained in violation of the fifth amendment to the United States constitution, the due process clauses of the United States and Connecticut constitutions, § 54-1o, and the psychiatrist-patient privilege.[3] The parties submitted briefs and made oral arguments. The trial court held a three day evidentiary hearing on the motion.

At that hearing, two officers from the Middletown Police Department, Detective Dane Semper and Officer Lee Buller, testified regarding the interrogation of the defendant that Semper conducted at the hospital on July 6, 2015. Around noon that day, Buller, who had been stationed inside of the defendant's hospital room, saw that the defendant was awake. Semper was notified and then went to the hospital in order to speak with the defendant about the events of the preceding night. Before speaking with the defendant, Semper gave Buller a video camera and instructed him to record the interrogation. The parties disagree as to whether Semper read the defendant his *Miranda* warnings prior to questioning him. See footnote 6 of this opinion. Semper then proceeded to question the defendant regarding the manner in which he threw his baby from the bridge.[4] This topic was of paramount importance because the baby had not yet been found at the time the interview took place.

[3] The defendant does not pursue his claim regarding the psychiatrist-patient privilege on appeal.

[4] We note that a nurse who attended to the defendant in the intensive care unit testified that the defendant wore "mitts," or medical restraints, which tethered his hands to the hospital bed, so that he would not pull at the various medical apparatuses that were connected his body. She clarified that these restraints were not requested by the police officers and that they solely served a medical purpose.

During this initial conversation, Buller was having trouble getting the video camera to record, and Semper briefly stopped speaking with the defendant to help get the camera working. Eventually, Buller got the video camera working but was only able to record about seven minutes of the thirty-five minute interview. The recording began with Semper's asking the defendant about the manner in which he threw the baby off of the bridge. Throughout the seven minute video, the defendant either made no response to Semper's questions or responded with brief verbal answers, shrugs, nods, or shakes of his head.

At one point, Semper made a basketball analogy to further his efforts to determine the baby's trajectory when he was thrown from the bridge. He asked the defendant whether he threw the baby off the bridge in a manner more like a half-court shot, three pointer, or free throw. In response, the defendant asked Semper to turn off the camera. Semper then moved the camera to the hallway but continued to record the conversation. Semper returned to the defendant's room and asked him again how the baby was thrown from the bridge. This time, the defendant responded by saying "free throw." Buller also testified that the defendant never asked about his baby while he was at the hospital.

The trial court also heard evidence regarding the defendant's medical condition at the time of the police interview. A nurse who attended the defendant in the intensive care unit on the day of the interview testified that the defendant had last been given short acting pain medicine at least two hours prior to the interview. She further testified that he was lucid, able to communicate, speak, and follow commands appropriately. A physician who did not personally examine the defendant, but reviewed his chart several hours prior to the interview, initially testified that he did not think a patient who was given the same medications as the defendant could

make complex judgments. He later testified, however, that he did not know if a patient in that situation could make complex judgments and that a psychiatric consultation would be needed to know for sure. A physician's assistant, who performed a brief assessment of the defendant about ninety minutes prior to the interview, testified that he could follow commands well at that point and that he had not had any medication administered to him at least thirty minutes prior to her examination. Finally, just after Semper's interview, the defendant spoke clearly and coherently with Samira Solomon, a psychiatry resident who interviewed him.

The trial court denied the defendant's motion to suppress. In making its ruling, the court determined that the defendant voluntarily, intelligently, and knowingly waived his *Miranda* rights. It also concluded that, on the basis of testimonial evidence of medical personnel regarding the defendant's physical and mental condition, the defendant's statements to Semper were made voluntarily.[5] Accordingly, at trial, the video recording was introduced into evidence. The state also introduced testimony from Semper regarding the interrogation, including the "free throw" statement made by the defendant and the testimony from Buller that the defendant never asked about his baby's welfare while he was in the hospital. These pieces of evidence—the defendant's response to Semper's question about the manner in which he threw his baby off the bridge and Buller's testimony that the defendant never asked about his baby while he was in the hospital—are the focus of the defendant's challenge in this appeal.

On appeal, the defendant first claims that the trial court improperly denied his motion to suppress because any waiver of his *Miranda* rights while speaking with

[5] The trial court was free to discredit the defendant's claim of a weakened physical condition.

the officers at the hospital was involuntary.[6] As a result, the defendant asserts that the trial court improperly admitted the officers' testimony regarding the interrogation. He also claims that any statements made to officers also were involuntary as a result of his weakened physical condition.[7] He further argues that the error was harmful because the challenged evidence was used to impeach his trial testimony that his baby had slipped from his hands.

The state counters that the trial court correctly concluded that the defendant had waived his *Miranda* rights and agreed to speak with Semper. In particular, it claims that the trial court properly credited the testimony from Semper and Buller that the defendant waived his *Miranda* rights, that the defendant was familiar with his rights from a prior arrest unrelated to the present case, and that the defendant was not under

[6] The defendant states in his brief that "the only warnings [he] received were the following . . . Semper asked (1) if [the defendant] would like to have a lawyer present . . . and (2) whether it is okay to talk to him without a lawyer . . . ." To the extent the defendant intends to challenge the trial court's finding that *Miranda* warnings were, in fact, given to him, we defer to the trial court's determination that Semper and Buller credibly testified that they gave the warnings. See *State* v. *Whitaker*, 215 Conn. 739, 757, 578 A.2d 1031 (1990) (whether police officer truthfully testified that *Miranda* warnings were given is "question of credibility, and as such, is for the trier of fact to determine"); *State* v. *Madera*, 210 Conn. 22, 36–37, 554 A.2d 263 (1989) (whether police advised defendant of *Miranda* rights is question of credibility of witness for trier of fact).

[7] The defendant also claims that, upon receiving a letter from the public defender's office notifying him of the availability of its legal assistance, an attorney-client relationship was established so that further interrogation by officers with no action on behalf of the defendant was precluded. See *State* v. *Stoddard*, 206 Conn. 157, 169–70, 537 A.2d 446 (1988). In response, the state asserts that the defendant abandoned this claim at oral argument before the trial court. In its memorandum of decision on the defendant's motion to suppress, the trial court states that, "at oral argument, the defendant withdrew any claims made pursuant to . . . *Stoddard* . . . ." Therefore, we will not consider this claim on appeal. See, e.g., *State* v. *Saucier*, 283 Conn. 207, 222–23, 926 A.2d 633 (2007) (declining to review previously abandoned claim).

the influence of any medications that would impair his ability to freely and rationally decide to waive his rights at the time of the interview. The state also contends that the defendant's statements were made voluntarily because he suffered only minor injuries, was lucid and alert, and was able to communicate appropriately at the time of the interview. Finally, the state claims that, even if the trial court improperly admitted the challenged evidence, any error was harmless beyond a reasonable doubt. We agree with the state that, even if we assume that the trial court improperly admitted the challenged evidence, any error in that regard was harmless beyond a reasonable doubt.

It is well settled that, "[i]f statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine. . . . [W]hether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 459–60, 996 A.2d 251 (2010). "Whether [an] error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 805, 91 A.3d 384 (2014).

We turn to the first factor—namely, the importance of the challenged testimony to the state's case. The defendant claims that the challenged testimony was important to the state's case because it contradicted his own testimony at trial that he accidentally dropped his baby off the bridge and the state used the testimony to impeach him. He also asserts that the state emphasized Buller's testimony that he never asked about his baby while he was in the hospital. We disagree that the challenged testimony was important to the state's case.

In the present case, there was overwhelming, independent evidence of the defendant's intent to kill his baby that the jury could have credited. The text messages sent by the defendant to the baby's mother on the night of the murder were arguably the most persuasive evidence of the defendant's intent. In those messages, prior to throwing his baby off the bridge, he taunted and threatened the baby's mother, saying, *inter alia*, "there was a problem regarding our son," "[y]ou won't talk to me tomorrow or any other day," "[t]here is no more days," and "[e]njoy your new life without us . . . ."

Then, after throwing the baby off the bridge, the defendant told the baby's mother through text messages that "[y]ou tried to take him away from me. You failed. I didn't . . . . Enjoy your life without us now," "[y]our not a parent anymore," and "[the baby is] dead . . . [a]nd soon I will be too . . . ."

These text messages were powerful evidence demonstrating the defendant's intent to kill his baby. Additionally, Solomon, a psychiatry resident who interviewed the defendant the same day that he spoke with Semper,

testified at trial that the defendant told her that he intended to take his baby's life that night. Specifically, Solomon testified that the defendant stated "he became more clear about things last night after he got off the phone with [the baby's mother] and decided he had to take his son's life and his own because he was so afraid of his son living in his current life situation." This evidence further demonstrated that killing his baby was decidedly not accidental. Rather, the defendant specifically intended to kill his baby.

Solomon's testimony also was corroborated and augmented by Buller. After the defendant had consented to Buller's presence in the room while Solomon interviewed him, Buller heard the defendant say that, on the night of the murder, "he wasn't even emotional as he approached the bridge" and that "he knew what he needed to do." Buller further testified that the defendant said that "[h]e needed to kill his son and then himself" because "he was uncertain about what would happen to his son once he was gone." The defendant "didn't want [the baby's maternal family] raising him with all their bullshit," and "the only way he knew that his son would be safe was to kill his son and then himself." The foregoing represents potent evidence of the defendant's intent to kill his baby and his reasons for wanting to do so.

Other evidence contributing to the strength of the state's case was testimony by the defendant's mother that the defendant called her from the bridge and told her to pick up the stroller, iPhone, and iPod so that she would have pictures of the baby, yet he made no mention of picking up the baby. He also told his mother to "tell everyone I'm sorry" close to the time that he threw the baby from the bridge and just before he jumped off the bridge himself. Finally, the defendant testified that he woke his baby up at 11 p.m., packed him in a stroller without any diapers or bottles, and

brought him to the bridge with him with the intention of committing suicide.

The state also did not highlight the challenged evidence, thus minimizing its importance. During its cross-examination of the defendant, the state never asked him about the "free throw" statement or emphasized that it was at variance with any part of his testimony. Furthermore, in the state's summation, the state only briefly mentioned the "free throw" statement.[8] With regard to Buller's testimony that the defendant never asked about his baby, the state did emphasize this for the jury in summation.[9] Significantly, however, the defendant himself admitted to this when he testified, and, in summation, the state did not specifically attribute that testimony to Buller.

Additionally, the challenged evidence was cumulative of other evidence of the defendant's intent that had been presented by the state. The text messages and the testimonies of Solomon and Buller were all evidence of the defendant's intent to kill his baby. The state also presented evidence that the defendant himself admitted to the jury that he chose not to call for help after his baby fell from the bridge and that he never once asked about his baby's welfare the following day. Thus, to the extent that the challenged evidence indicates that he intended to kill his baby by throwing him from the bridge, the free throw statement and lack of concern

[8] In reminding the jury about the testimony of the witness who saw the defendant on the bridge that night, the state argued that, "had she looked at that rearview mirror, she would have seen the free throw that the defendant talks about later." The state mentioned the challenged testimony a second time when it stated: "While at Hartford Hospital, [the defendant] gave two statements. One to [Semper], where the defendant admitted throwing his son off the bridge. Now counsel may . . . show you the video and say, really, does it say anything. Granted, the quality is poor."

[9] The state argued that "what's important and this is a big piece of evidence that's very important, not once . . . does the defendant ask for his son, ask for the whereabouts of his son."

are essentially inconsequential in light of the foregoing overwhelming, independent evidence establishing his intent to kill.

We conclude that, even without the challenged evidence, there was overwhelming, independent evidence of the defendant's intent to kill his baby. The state's case was strong, the challenged evidence was cumulative of other evidence, and the defendant was able to cross-examine the state's witnesses. Given the strength of the state's other evidence, the challenged evidence did not influence the jury. Accordingly, we conclude that, even if the trial court improperly admitted the challenged evidence, the state has met its burden of demonstrating that any error in that regard was harmless beyond a reasonable doubt.

II

The defendant next claims that the trial court improperly denied his motion to suppress because officers conducted a custodial interrogation that was not electronically recorded, as required by § 54-1o.[10] Specifically, the defendant claims that his hospital room was a "place of detention,"[11] as defined in § 54-1o, and that he was in custody for purposes of that statute. He further contends that the presumption of inadmissibility that attaches to unrecorded custodial interrogations in places of detention cannot be overcome because the

[10] General Statutes § 54-1o (b) provides: "An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered."

[11] General Statutes § 54-1o (a) (4) defines " '[p]lace of detention' " as "a police station or barracks, courthouse, correctional facility, community correctional center or detention facility . . . ."

statements are not reliable and were not made voluntarily. See General Statutes § 54-1o (d).[12]

In response, the state claims that the trial court properly denied the defendant's motion to suppress because police officers had no obligation to record the interrogation pursuant to § 54-1o. In particular, the state does not challenge that the defendant was in custody or that it was an interrogation but instead contends that a hospital room is not a "place of detention" for purposes of the statute. Alternatively, the state claims that any error in denying the defendant's motion to suppress was harmless.

The electronic recording requirement expressed in § 54-1o applies only to custodial interrogations conducted at a place of detention. See footnote 10 of this opinion. In denying the defendant's motion to suppress, the trial court concluded that § 54-1o was inapplicable because the defendant's hospital room was not a "place of detention" as defined in the statute. It is not necessary for us to decide in this case, however, whether a hospital room qualifies as a place of detention under the statute because, even if we assume that a hospital room is a place of detention, the admission of the challenged evidence in the present case was harmless. Thus, we conclude that, even if the trial court incorrectly denied his motion to suppress on this basis, any error was harmless.

Where, as here, "an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the [impropriety] was harmful. . . . [A] nonconstitutional [impropriety] is

[12] General Statutes § 54-1o (h) provides: "The presumption of inadmissibility of a statement made by a person at a custodial interrogation at a place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances."

harmless when an appellate court has a fair assurance that the [impropriety] did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 265, 49 A.3d 705 (2012). Moreover, "[w]hether [the improper admission of evidence] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative . . . the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Randolph*, 284 Conn. 328, 364, 933 A.2d 1158 (2007).

We already have concluded in part I of this opinion that the state met its burden of proving that any improper admission of the challenged evidence was harmless beyond a reasonable doubt. For similar reasons, we further conclude that the defendant has not met his burden of proving that the admission of that evidence substantially affected the verdict.

As discussed previously, the state's case was strong because, even without the challenged evidence, there was overwhelming, independent evidence of the defendant's guilt. Specifically, the state presented the following evidence: (1) the incriminating text messages that had been sent by the defendant to the baby's mother on the night of the murder; (2) testimony from both Solomon and Buller that the defendant had stated that he intended to kill his baby that night on the bridge because he didn't want the baby's maternal family "raising him with all their bullshit"; (3) testimony from the defendant's mother that the defendant had called her from the bridge and told her to pick up the stroller, iPhone, and iPod so that she would have pictures of the baby but that he had not mentioned picking up the

baby; (4) testimony that the defendant had asked his mother to "tell everyone I'm sorry"; and (5) the deleted note that the defendant had written in his phone to the same effect shortly after killing his baby and before attempting to take his own life. The defendant also admitted to the jury how he chose not to call for help that night on the bridge, that he never asked about his baby's welfare the following day, and that he brought his baby with him to the bridge with the intention of committing suicide.

In light of this overwhelming, independent evidence demonstrating the defendant's intent to murder his baby, the "free throw" statement to Semper and Buller's testimony that the defendant never asked about his baby were inconsequential and did not substantially affect the verdict. Consequently, on the basis of the foregoing, even if we assume that the trial court improperly admitted the defendant's statements made during the interview with Semper in violation of § 54-1o, any such error was harmless.

III

The defendant also claims that the trial court's refusal to permit him to introduce into evidence a letter in which he offered to plead guilty to a lesser offense deprived him of his right to present a defense under the sixth amendment to the United States constitution.[13] He further claims that evidence of the offer was relevant and not self-serving. The state counters that the trial court did not abuse its discretion in precluding the defendant from introducing the letter into evidence because it was not relevant, it was self-serving, and it

[13] We note that the right to present a defense has been made applicable to the states through the fourteenth amendment to the United States constitution. See *Washington* v. *Texas*, 388 U.S. 14, 17–19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (incorporating right to compulsory process); *State* v. *Perkins*, 271 Conn. 218, 252–53, 856 A.2d 917 (2004) (sixth amendment right to compulsory process includes right to present defendant's version of the facts).

was inadmissible hearsay. We conclude that the trial court properly exercised its discretion in prohibiting the defendant from introducing the letter into evidence because it was not relevant.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant offered to plead guilty to the lesser offense of manslaughter in exchange for a prison term of twenty-five years incarceration. The defendant conveyed the plea offer to the state in a letter. The state rejected the offer. Thereafter, the defendant made an oral motion seeking to introduce the letter into evidence at trial as a judicial admission on the basis that the offer was a conclusive admission that he accepted criminal responsibility for the death of his child but with the mental state associated with manslaughter. The defendant did not reveal the specific contents of the letter to the trial court during the hearing on the motion. He further claimed that evidence of his offer to plead to a lesser offense was a verbal act and that it was not self-serving. In response, the state objected to the admission of any evidence of his offer to plead to a lesser offense because of the inability to cross-examine the letter. The trial court denied the defendant's motion on the basis that it was not a judicial admission and was instead self-serving hearsay.

At the close of the state's presentation of evidence and just prior to the defendant's testimony, the defendant again sought the court's permission to introduce evidence of his offer to plead to a lesser offense, this time in the form of testimony from the defendant. Again, the specific details of the offer were not revealed to the trial court. The state objected on grounds that the evidence was neither relevant nor material. The trial court denied the defendant's request to introduce evidence of his plea offer, concluding that it was not relevant or material, and that it would inject collateral

issues into the jury's determination of whether the state had met its burden of proving that the defendant acted with intent. The defendant immediately moved for a mistrial, claiming that the denial of the opportunity to present evidence of his willingness to enter a plea deprived him of his right to present a defense pursuant to the sixth amendment of the United States constitution. The trial court then denied his motion for a mistrial.

We begin by setting forth the standard of review and the principles of law governing the defendant's claim. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 354–55, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003).

Furthermore, "[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment right to compulsory process includes the right to . . . present the defendant's version of the facts . . . to the jury so that it may decide where the truth lies. . . . The defendant's sixth amendment right, however, does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 252–53, 856 A.2d 917 (2004).

It is well settled that "[t]he trial court has broad discretion in determining the relevancy of evidence." *State* v. *Lombardo*, 163 Conn. 241, 243, 304 A.2d 36 (1972). "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Internal quotation marks omitted.) *State* v. *Perkins*, supra, 271 Conn. 253.

Conversely, "[e]vidence is irrelevant or too remote if there is 'such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in . . . proof of the latter.' " *State* v. *Prioleau*, 235 Conn. 274, 305, 664 A.2d 743 (1995), quoting *State* v. *Kelly*, 77 Conn. 266, 269, 58 A. 705 (1904). "Evidence that is not relevant is inadmissible." Conn. Code Evid. § 4-2.

Because irrelevant evidence is not admissible, we must first address whether the trial court abused its discretion in concluding that the evidence was not relevant to any issue before the jury. It is undisputed that the only contested issue at trial for the jury to determine was whether the defendant intended to murder his baby or whether the baby's death was accidental. The proffered evidence was of no assistance to the jury in carrying out this task. We conclude, therefore, that evidence of the defendant's offer to plead guilty was not relevant.

In an analogous context, our rules of evidence prohibit the admission of evidence related to settlement negotiations. Indeed, in civil cases, it is well settled that

offers to compromise or settle are inadmissible with very few exceptions. See Conn. Code Evid. § 4-8. This is because settlement offers are of little probative value with respect to the central issues of liability or the amount of the claim. See Conn. Code Evid. § 4-8, commentary. Part of the reason for this prohibition, as stated in the commentary to § 4-8, is that "a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim." Conn. Code Evid. § 4-8, commentary. Another reason for the prohibition is that the admission of settlement evidence supports the important policy of encouraging parties to engage in settlement negotiations. See Conn. Code Evid. § 4-8, commentary. We find these same reasons equally applicable to criminal cases with respect to plea bargaining and the use of evidence related thereto.[14]

Indeed, plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). "[I]t is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." *United States* v. *Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976). As the Ohio Court of Appeals aptly stated in *State* v. *Davis*, 70 Ohio App. 2d 48, 51, 434 N.E.2d 285 (1980), "[i]f the prosecutor must bargain with a defendant whose responses are framed with an eye toward their self-serving use at trial, we see little profit to be antici-

[14] We note that the Connecticut Code of Evidence recently was amended to include § 4-8A, which addresses the admissibility of pleas and related statements in civil or criminal cases. See Conn. Code Evid. § 4-8A. The application of that rule is, however, limited to situations in which evidence of the plea is offered against the defendant.

pated from their discussions . . . . Destroy confidentiality, and negotiators tend to make speeches and assume postures, tendencies inherently inimical to compromise."

Moreover, similar to settlement negotiations in the civil context, "[t]he considerations involved in plea bargaining are infinitely variable and complex. For instance, considerations may include: the seriousness of the offense, the availability or suitability of lesser included offenses, the record of the accused, the quality and quantity of the evidence on both sides, the availability and cooperativeness of witnesses or accomplices, unresolved legal issues, probable length of trial and difficulty of trial preparation, and a host of other no-less-significant factors, very few of which bear directly upon the only question the triers of fact will be called upon to decide, i.e., the guilt or innocence of the accused of the crime charged. . . . It seems obvious that any testimony concerning such negotiations will far more likely than not reflect . . . legally extraneous considerations, rather than anything relevant to, or probative of, the ultimate issue on trial." (Citations omitted.) Id.

Due to the myriad reasons a defendant may offer to plead guilty, there is simply no open and visible connection between an offer to plead guilty to a lesser offense, made months after the crime, and the defendant's state of mind at the time of the crime, which is what the jury needed to decide in this case. The defendant made his plea offer just prior to his trial on the charges of murder and risk of injury to a child when he was facing a potential sentence of seventy years incarceration. His offer to plead to the lesser offense of manslaughter in exchange for twenty-five years incarceration likely was a tactical decision and does not reflect on his intent to kill his baby on the night of the murder.

In any event, given that there are so many considerations involved in plea bargaining, we are unpersuaded that evidence of the defendant's willingness to plead guilty to a lesser offense in exchange for a significantly shorter period of incarceration was relevant to the issue before the jury, i.e., the defendant's state of mind at the time that the crime was committed. Knowing that there are many reasons why a defendant would choose to plead guilty, we also agree with the trial court that admission of the evidence would inject collateral issues that could confuse the jury.[15]

Because we conclude that the evidence was not relevant, it was not admissible.[16] Therefore, under the circumstances of this case, we cannot conclude that the trial court abused its discretion by precluding the admission of the defendant's offer to plead guilty.

Our conclusion finds support in other jurisdictions that have considered a similar issue—namely, whether a defendant may present evidence regarding an offer made by the state and rejected by the defendant. Those

[15] We also note that the defendant never identified, and the trial court was not aware of, whether his offer indicated a willingness to plead guilty under *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to enter a plea of nolo contendere, or an unqualified plea. Pursuant to the former two types of guilty pleas, the defendant would not even be admitting any of the elements of the crime but, rather, would be conceding only that there is sufficient evidence for the state to obtain a conviction. See *State* v. *Palmer*, 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985) ("[a] guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless"); *State* v. *Godek*, 182 Conn. 353, 364, 438 A.2d 114 (1980) ("[t]hroughout its history . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency" [internal quotation marks omitted]), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981).

[16] In light of our conclusion that the evidence was not relevant and, thus, was inadmissible, we need not address his additional claim that the evidence was not self-serving.

courts have concluded that evidence of plea bargaining is not relevant and that its admission is outweighed by possible confusion of the issues. See *State* v. *Woodsum*, 137 N.H. 198, 201–202, 624 A.2d 1342 (1993) (explaining "a defendant's posture in plea negotiations at a date after the alleged offense . . . is at best weak evidence of the defendant's state of mind at the time of the alleged crime, and is not relevant to any other element of a chargeable offense"); see also *United States* v. *Goffer*, 721 F.3d 113, 129 (2d Cir. 2013) (concluding that evidence of defendant's rejection of plea offer, which he sought to admit to show "consciousness of innocence," had no probative value), cert. denied, U.S. , 135 S. Ct. 63, 190 L. Ed. 2d 60 (2014); *State* v. *Orji*, 277 N.J. Super. 582, 587–88, 649 A.2d 1368 (App. Div. 1994) (concluding that evidence of defendant's rejection of state's offer to enter pretrial intervention program was not relevant because no logical connection existed between his rejection of state's offer and his professed innocence); *State* v. *Pearson*, 818 P.2d 581, 584 n.6 (Utah App. 1991) ("[The court] seriously question[s] whether plea negotiations are relevant evidence in a criminal prosecution. The negotiation strategy and positioning of either the defense or the prosecution is not evidence of the elements of the crimes charged."). While the aforementioned cases are factually distinguishable, we find their reasoning persuasive to our resolution of the issue before us.

On the basis of the foregoing, we conclude that the trial court did not abuse its discretion in excluding evidence of the defendant's offer to plead to the lesser offense of manslaughter in exchange for twenty-five years incarceration because it was not relevant to the issue before the jury, namely, whether the defendant intended to cause his baby's death.

The judgment is affirmed.

In this opinion the other justices concurred.

CATHERINE LEDERLE *v.* STEVAN SPIVEY
(SC 20016)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the Appellate Court, which reversed the trial court's award of appellate attorney's fees to the plaintiff. Following the dissolution of the parties' marriage, the defendant filed a motion to open the dissolution judgment, which the trial court denied. The defendant appealed to the Appellate Court, which upheld the denial of the motion. In his appeal from the denial of the motion to open, the defendant claimed that the trial court conducted part of the hearing on the motion to open in chambers and off the record and improperly denied the motion without hearing testimony or taking evidence. The plaintiff thereafter filed a motion for attorney's fees incurred in defending that appeal. The trial court, finding that the defendant's appeal from the denial of the motion to open was taken in bad faith and was entirely without color, awarded the plaintiff attorney's fees under the bad faith exception to the American rule that a prevailing party may not recover attorney's fees from the opposing party in the absence of a statutory exception or certain exceptional circumstances. On appeal from the trial court's award of attorney's fees, the Appellate Court concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff on the basis of the bad faith exception because its decision lacked the requisite high degree of specificity as to its finding that the defendant's appeal from the denial of the motion to open was entirely without color. Subsequently, the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff under the bad faith exception to the American rule, the trial court's subordinate findings having been sufficiently specific to support its ultimate findings that the defendant acted in bad faith in knowingly bringing appellate claims that were entirely lacking in color; the trial court's findings that there was no evidence in the record to support the defendant's claim that part of the hearing on the motion to open was conducted in chambers and off the record, that the defendant was physically present at all court proceedings and did not object on the ground that the court was holding part of the hearing in chambers and off the record, and that the parties expressly agreed in open court to a bifurcated process by which the trial court would hear evidence only if it made a certain legal conclusion that it ultimately did not make established the defendant's firsthand

knowledge regarding the basis of his appellate claims and supported the ultimate finding that the defendant knew that his claims lacked merit and, therefore, acted in bad faith in pursuing those claims on appeal.

2. The defendant could not prevail on his claim that, even if the trial court did not abuse its discretion in determining that an award of attorney's fees was warranted under the bad faith exception to the American rule, the amount of the award was unreasonable and excessive: the trial court acted within its discretion in awarding the plaintiff $30,000 in attorney's fees, the evidence from the record of the multiday hearing having indicated that the court, in awarding the plaintiff less than one half of the fees requested, considered the testimony of the plaintiff's attorney regarding his fee affidavit, the fee affidavit itself, the relative rates charged by the attorneys for the parties, and the challenges raised by the defendant regarding certain charges; moreover, a reasonable reading of the transcripts and the fee affidavit supported the conclusion that the trial court had discounted all but the fees for the services rendered by the plaintiff's attorney himself.

Argued January 24—officially released August 27, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and referred to the judicial district of Middlesex, Regional Family Trial Docket; thereafter, the case was tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Emons, J.*, denied the defendant's motion to open the judgment, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Alvord* and *Harper, Js.*, which affirmed the trial court's judgment; thereafter, the court, *Emons, J.*, granted the plaintiff's motion for attorney's fees, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Beach* and *Danaher, Js.*, which reversed the trial court's award of attorney's fees and remanded the case for further proceedings, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Tara C. Dugo, with whom, on the brief, was *Norman A. Roberts II*, for the appellant (plaintiff).

David V. DeRosa, for the appellee (defendant).

Opinion

KAHN, J. In this dissolution of marriage action, the plaintiff, Catherine Lederle, appeals, following our grant of certification,[1] from the judgment of the Appellate Court reversing the decision of the trial court, which had awarded appellate attorney's fees to the plaintiff under the bad faith exception to the American rule.[2] The plaintiff contends that the Appellate Court did not accord the proper level of deference in determining that the trial court's findings lacked sufficient specificity. The defendant, Stevan Spivey, responds that the Appellate Court properly applied the abuse of discretion standard and also correctly concluded that, in determining that the appellate claims lacked color, the trial court improperly assessed the conduct of the defendant's attorney rather than that of the defendant. The defendant claims that the amount of the award was unreasonable and excessive because (1) the plaintiff's success in the appeal for which fees were awarded was not due to the efforts of the plaintiff's counsel, and (2) the defendant's attorney charged him a significantly lower amount of fees for representing him in that appeal.[3]

[1] This court granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly apply the abuse of discretion standard of review in holding that the trial court's memorandum of decision lacked 'factual findings with a high degree of specificity' when the trial court found that the defendant's claims on appeal lacked any indicia of color?" *Lederle* v. *Spivey*, 327 Conn. 954, 171 A.3d 1050 (2017).

[2] Pursuant to the American rule, "except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser." (Internal quotation marks omitted.) *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 155, 735 A.2d 333 (1999).

[3] Although the defendant's claim is outside the scope of the certified issue, the plaintiff has had the opportunity to brief that issue. Therefore, in the interests of judicial economy, we address the defendant's claim. We observe, however, that, even if we agreed with the defendant that the trial court abused its discretion in setting the amount of the award, that conclusion would not serve as an alternative ground to affirm the judgment of the

We reverse the judgment of the Appellate Court and conclude that the trial court did not abuse its discretion in setting the amount of the fees.

The Appellate Court opinions in the present case have set forth the following relevant facts and procedural history. "The parties were married in Darien on December 31, 1998. One child was born of the marriage in 2000. Thereafter, the marriage broke down irretrievably, and, in March, 2005, the plaintiff commenced an action seeking to dissolve the marriage. On May 2, 2007, the court, *Abery-Wetstone*, *J.*, rendered a judgment of dissolution [2007 decision]. As part of this decision, the court acknowledged the plaintiff's claim that she needed to move to Virginia in order to remain competitive in her employment with Lexmark, and found that it was in the best interest of the child to relocate with her to Virginia. The defendant appealed from the judgment, arguing, inter alia, that the court improperly permitted the plaintiff to relocate with their minor child to Virginia. [The Appellate Court] affirmed the judgment of the court, and [the] Supreme Court denied certification to appeal. *Lederle* v. *Spivey*, 113 Conn. App. 177, 965 A.2d 621 [(*Lederle I*)], cert. denied, 291 Conn. 916, 970 A.2d 728 (2009)." *Lederle* v. *Spivey*, 151 Conn. App. 813, 814–15, 96 A.3d 1259 (*Lederle II*), cert. denied, 314 Conn. 932, 102 A.3d 84 (2014). The defendant subsequently learned that the plaintiff had not started her employment at Lexmark because she lost that position but had started a position at a different company in Virginia.

"The defendant subsequently filed an amended motion to open the judgment, in which he claimed that

Appellate Court, which held that the trial court had abused its discretion in awarding attorney's fees *at all*. Our decision in the present case concludes that the trial court did not abuse its discretion in determining that attorney's fees were warranted under the bad faith exception. The Appellate Court did not reach the issue of whether the trial court had abused its discretion as to the amount of the award.

[t]he plaintiff, in her trial testimony committed fraud with respect to the issue of her Lexmark employment and specifically whether or not [her Lexmark employment position] was available in Virginia on the dates testified to. . . . According to the defendant, [t]he plaintiff had a continuing duty to disclose the status of her job situation with Lexmark after [the May 2, 2007] judgment [of the trial court], and before the Appellate Court issued a . . . decision in [March] 2009. . . . The defendant further argued that the plaintiff's failure to disclose the status of her job situation with Lexmark constituted fraud with respect to a material fact or facts which ultimately led to [the trial] court's conclusion that [the] plaintiff and the minor child should be permitted to relocate from the state of Connecticut to the state of Virginia for primarily employment purposes. . . .

"The court, *Emons*, *J.*, heard oral argument on the motion and, after receiving a memorandum of law from counsel for each party in support of their position, issued a memorandum of decision denying the motion to open on January 28, 2013 [2013 decision]. In reaching its decision, the court found that [a]fter the May 2, 2007 judgment, on June 5, the plaintiff lost her employment at Lexmark. . . . On or about August 20, 2007, the plaintiff relocated to Virginia and at or about the same time, began a new job at Xerox, also located in Virginia. The court noted that Judge Abery-Wetstone found numerous reasons why relocation was in the best interest of the minor child and that no single factor controlled the decision of the court. On the basis of the foregoing, the court held that while the plaintiff did have a duty to disclose that she lost her Lexmark job and procured a new one at Xerox, prior to the Appellate [Court's] decision, her failure to disclose [did] not constitute fraud." (Citations omitted; internal quotation marks omitted.) *Lederle* v. *Spivey*, 174 Conn. App. 592, 594–95, 166 A.3d 636 (2017) (*Lederle III*).

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that the court "(1) improperly held a portion of the hearing on the motion to open in chambers and off the record; and (2) abused its discretion by deciding the motion to open, which was based on a claim of fraud and therefore involved a question of material fact, without the benefit of sworn testimony or other evidence."[4] *Lederle II*, supra, 151 Conn. App. 814. The Appellate Court did not directly address either of the defendant's claims. It held that the record was inadequate to review the defendant's first claim. Id., 816. The court rejected the defendant's second claim on the basis of its conclusion that, once the final judgment of dissolution had been rendered, as a matter of law, the plaintiff had no continuing duty to disclose the loss of her Lexmark employment.[5] Id., 819.

While the defendant's appeal from the denial of his motion to open was pending before the Appellate Court, the plaintiff filed the motion that gave rise to the present appeal, seeking appellate attorney's fees for the then

[4] In his brief to this court, the defendant asserts that he raised a third claim on appeal in *Lederle II*, contending that, because "a decision on the motion to [open] was made behind closed doors and without a court reporter, the court effectively sealed the hearing from the public in violation of the public's right to access." Rather than a separate claim, the defendant identifies an additional theory in support of his claim that the court improperly held a portion of the hearing in chambers and off the record.

[5] In his brief to this court, the defendant takes issue with the conclusion of the Appellate Court that the plaintiff had no continuing duty to disclose the loss of her Lexmark employment. That issue, however, is not within the scope of the certified question and, therefore, is not before us in the present appeal.

We further note that we find unpersuasive the defendant's argument that, because the Appellate Court sua sponte concluded that there was no continuing duty to disclose, his claim on appeal that the trial court improperly decided the motion to open without taking evidence was a colorable claim. The fact that the Appellate Court resolved the case on a different ground has no bearing on the merits—or the complete lack thereof—of the claim that the defendant raised before that court.

pending appeal. The trial court held a hearing on the motion on October 30, 2013, but, because the appeal before the Appellate Court was still pending, continued the matter until after the defendant's appeal was resolved. On February 10, 2015, after the Appellate Court had affirmed the judgment of the trial court denying the motion to open the judgment of dissolution; *Lederle II*, supra, 151 Conn. App. 814; the trial court resumed the hearing on the motion for appellate attorney's fees and, subsequently, issued a memorandum of decision, granting the plaintiff's motion for attorney's fees on the basis of its finding that the defendant's appeal was taken in bad faith and was entirely without color (2015 decision).[6]

The defendant appealed from the judgment of the trial court to the Appellate Court, which held that the trial court had abused its discretion in awarding attorney's fees because "its decision lacked the 'high degree of specificity' as to its finding that the defendant's appeal was entirely without color." *Lederle III*, supra, 174 Conn. App. 598. Specifically, the Appellate Court explained that the trial court, in its 2015 decision, (1) did not properly set forth separate, subordinate findings to support each of its ultimate findings as to lack of colorability and bad faith; id., 603–604; and (2) in determining that the defendant's claims lacked color, improperly failed to apply the proper standard for colorability, which, according to the Appellate Court, should have been the standard that applies to a party rather than an attorney. Id., 604. This appeal followed.

We begin by setting forth the general principles governing the application of the bad faith exception to the American rule. "[T]his state follows the general rule that, except as provided by statute or in certain defined

[6] The court in that decision also granted the plaintiff's motion for termination of the stay of proceedings, which she had filed in January, 2015.

exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . It applies both to the party and his counsel." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 844–45, 850 A.2d 133 (2004).

We have explained that, in order to impose sanctions under the bad faith exception, "the trial court must find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, 306 Conn. 651, 663, 51 A.3d 941 (2012). The court must make these findings with "a high degree of specificity . . . ." (Internal quotation marks omitted.) Id., 662. The requirement of an independent finding that the challenged actions or claims are entirely without color ensures that "fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims . . . ." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 845. The requirement of that independent finding means that, if a court concludes that a claim is colorable, it cannot award attorney's fees, even if the court were to conclude that the person against whom sanctions are sought acted in bad faith. When, as in the present case, the actor's bad faith is predicated on the theory that he knowingly brought claims entirely lacking in color, colorability and bad faith are, by necessity, closely linked. For that reason, we take the opportunity to clarify the distinction between colorability and bad faith.

Colorability is measured by an objective standard, whereas bad faith is measured by a subjective one. Colorability focuses on the merits of the claim. A "colorable claim" is defined as one "that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." Black's Law Dictionary (9th Ed. 2009) p. 282. Put another way, a claim is colorable if, given the facts presented and the current law (or a reasonable extension thereof), the claim arguably has merit. Although we have stated that the standard for colorability varies depending on whether the person against whom sanctions are sought is a party or the party's attorney; see *Maris* v. *McGrath*, supra, 269 Conn. 847; we now clarify that the inquiry is the same in either case. As the United States Court of Appeals for the Second Circuit has explained, "[a] claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Nemeroff* v. *Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). Put simply, the colorability inquiry asks whether there is a *reasonable* basis, given the facts, for bringing the claim, regardless of whether it is brought by an attorney or a party.

A determination of bad faith, by contrast, rather than focusing on the objective, reasonable beliefs of the person against whom sanctions are sought, focuses on subjective intent. We have emphasized that, in determining whether a party has engaged in bad faith, "[t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 847. From that conduct, the court may infer the subjective intent of the person against whom sanctions are sought. Some examples of evidence that would support a finding of bad faith

include "a party's use of oppressive tactics or its wilful violations of court orders"; id., 845–46; or a finding that the challenged actions "[are taken] for reasons of harassment or delay or for other improper purposes . . . ." *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 394, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 155, 735 A.2d 333 (1999). When, as in the present case, the claim that an individual has brought or maintained an action in bad faith is predicated on the individual's personal knowledge that there is no factual support for the claim or claims at issue, in order to infer that the individual acted in bad faith, the court must make a finding that the individual knew of the absence of that factual basis.

Applying these principles to the present case, we disagree with the Appellate Court's conclusion that the trial court, in its 2015 decision, abused its discretion in awarding attorney's fees to the plaintiff. In arriving at our conclusion, we are mindful that, in applying the abuse of discretion standard, our "review of the trial court's decision is a deferential one. First, we observe that, [w]here the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record. . . . Additionally, [i]t is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award." (Citation omitted; internal quotation marks omitted.) *Berzins* v. *Berzins*, supra, 306 Conn. 661.

In its 2015 decision, the trial court found that the defendant acted in bad faith in taking an appeal in

Lederle II and that his appellate claims were entirely lacking in color. The court accordingly awarded sanctions against the defendant, as opposed to his attorney. See *Lederle III*, supra, 174 Conn. App. 602. The trial court predicated its ultimate findings on the following subordinate factual findings. As to the defendant's claim on appeal that the trial court improperly held a portion of the hearing on the motion to open in chambers and off the record, the court found that nothing in the record provided support for that claim. The trial court found that the record demonstrated only two instances in which the court conducted any business related to this matter in chambers: first, prior to the start of the hearing to discuss procedural issues with counsel for both parties and, second, to read two decisions as requested by counsel. The court further found that, although the defendant was physically present at all court proceedings, neither he nor his attorney raised any objection on the basis that the court was holding a portion of the hearing in chambers and off the record.

As to the defendant's claim on appeal that the trial court, in its 2013 decision, abused its discretion by ruling on the motion to open—which was predicated on the basis of a claim of fraud—without hearing testimony or taking evidence, the court, in its 2015 decision, predicated its ultimate determination that the claim lacked any indicia of color on two independent findings, either of which on its own would support the court's ultimate finding. First, the court found that the parties agreed to a two part procedure by which the court would first determine whether, but-for the plaintiff's job with Lexmark, the trial court, in its 2007 decision, would not have granted her motion for permission to relocate with the minor child to Virginia. If, and only if, the court answered that question in the affirmative, would it consider whether an evidentiary hearing would be required to resolve the motion to open. The court

found that it had explained the proposed bifurcated procedure not only to counsel, but also to both the plaintiff and the defendant.[7] Second, the court found that the transcript of the October 24, 2012 hearing clearly revealed that, in lieu of an evidentiary hearing, the parties agreed to proceed by filing simultaneous briefs with factual stipulations.

The trial court's subordinate findings were sufficiently specific to support its ultimate findings that the defendant acted in bad faith in knowingly bringing appellate claims that were entirely lacking in color.[8] As to the defendant's first appellate claim—that the court conducted part of the hearing in chambers and off the record—the court's findings were sufficiently specific to support the conclusion that the claim was entirely lacking in color. The court found not only that there was no evidence to support the claim, but also found that the record reflected the purpose of the two instances during the hearing when the court retired to chambers. The first instance was prior to the hearing and related to purely procedural matters and the second instance was when the court retired to chambers to

[7] We find unpersuasive the defendant's contention that, because the trial court also found that the defendant's attorney was aware of the complete lack of any merit to both of the defendant's appellate claims, the trial court failed to make the requisite finding as to the defendant. The mere fact that the trial court made the additional, irrelevant finding that the defendant's attorney was aware that the defendant's appellate claims were completely lacking in color has no bearing on the fact that the trial court also found that the defendant knew that his claims lacked any indicia of color.

[8] Although we have stated that the findings must have a high degree of specificity; *Berzins* v. *Berzins*, supra, 306 Conn. 662; we have never stated that the trial court must separately indicate which factual findings relate to which prong, colorability or bad faith, and we reject that proposition. Frequently, the subordinate factual findings that support bad faith will also provide support for lack of colorability. Rather than requiring a rigid structure in the trial court's analysis, we merely examine the court's findings to determine whether they are sufficiently specific to support the conclusion that the court did not abuse its discretion in arriving at its ultimate findings of bad faith and lack of colorability.

read decisions provided to it by counsel. It is difficult to imagine what more *could* be said, once a court has found that no evidence supports the claim and that the only relevant evidence in the record expressly contradicts the claim. The court further found that the defendant was physically present to observe that lack of evidence. That finding establishes the defendant's first-hand knowledge and supports the ultimate finding that the defendant knew that his claim lacked merit and, therefore, acted in bad faith in pursuing the claim on appeal.

As to the defendant's second appellate claim—that the trial court, in its 2013 decision, improperly denied the motion to open without hearing testimony or taking evidence—the court found, in its 2015 decision, that, during the hearing on the motion to open, the parties had agreed that the court would first resolve the threshold legal issue of materiality and would subsequently hold an evidentiary hearing only if it concluded that the plaintiff's employment with Lexmark was a material fact. Excerpts of the transcripts of the October 24, 2012 hearing on the defendant's motion to open were attached in an appendix to the trial court's 2015 decision. During the October 24, 2012 hearing, after some initial colloquy regarding disputed facts, counsel for both parties proposed that the court decide the motion to open in two steps. As the attorney for the plaintiff explained to the court, they proposed "a methodology [that] perhaps [would result in the court] *not having to sort through these and other important facts* . . . ." (Emphasis added.) The parties had engaged in a series of discussions in an attempt to "boil this down to a nut." As a result of those discussions, they agreed that the defendant could prevail on his motion to open the judgment only if the trial court would not have granted the plaintiff's motion for permission to relocate—and the Appellate Court would not have upheld that ruling—

if she had not been employed by Lexmark in Virginia. Accordingly, they both agreed that the court should first resolve the purely legal determination of whether the plaintiff's employment with Lexmark was the "but-for" cause underlying both the trial court's decision granting the plaintiff's motion for permission to relocate and the Appellate Court decision upholding that ruling. The trial court would proceed to the evidentiary phase only if it answered that legal question in the affirmative. The parties therefore requested that, prior to hearing any evidence, the court first review both the 2007 decision rendering final judgment of dissolution and granting permission to the plaintiff to relocate to Virginia and the Appellate Court decision in *Lederle I* that affirmed the judgment of the trial court. See *Lederle I*, supra, 113 Conn. App. 177.

Before the court took a recess to read the two decisions, it clarified in open court, in the presence of both parties and their counsel, its understanding of the agreed upon procedure as requiring the court to "make an initial determination as to whether this is a 'but-for' situation." The court further clarified the parties' agreement that, if the court resolved the motion to open on the threshold issue, "we're done and you can do whatever you want to do with your motions and everything like that." Finally, the trial court made clear to the parties its understanding that, if the court were unable to resolve the motion on the initial legal issue, then "correct me if I'm wrong . . . we would have to schedule a lengthy factual hearing . . . ."

Following the court's review of the decisions of the trial court and the Appellate Court, in its 2013 decision, the court concluded that the plaintiff's employment with Lexmark was not the "but-for" cause of the decision granting the plaintiff permission to relocate. To the contrary, the court explained, the plaintiff's employment was only one among "numerous reasons" that the

2007 decision had determined that relocation was in the best interest of the minor child. The court quoted from the 2007 decision, which specifically stated that "[n]o single factor has controlled the decision of the court" and that the court had weighed "all the evidence" and considered "all the factors relevant to the child's best interest" in determining to grant the plaintiff permission to relocate. The 2007 decision also noted that, in granting permission to relocate, the court had considered "the body of case law regarding best interest, the specific facts of this case, the testimony and credibility of the various witnesses here, and the court's assessment and evaluation of the best interest of this specific child. The court has considered the recommendations of both the [guardian ad litem] and the family relations counselor of sole custody to the mother and approval of the relocation." On the basis of its review of the Appellate Court's decision in *Lederle I*, the trial court also concluded that the plaintiff's employment with Lexmark was not material to that court's affirmance of the trial court's 2007 decision.[9]

The trial court's findings as to the defendant's second appellate claim are sufficiently specific to support its ultimate findings that the claim lacked any colorability, and that the defendant acted in bad faith by knowingly pursuing a claim entirely lacking in color. The essence of the defendant's claim on appeal in *Lederle II* was that the court improperly decided the motion to open without taking any evidence. As to the colorability of that claim, the trial court found that the parties expressly agreed in open court to the bifurcated procedure by which the court would hear evidence only if it

[9] We note that the 2007 decision *could* reasonably be read to suggest that the plaintiff's employment with Lexmark was material to the court's decision granting relocation. Because the defendant, however, did not challenge the trial court's legal conclusion to the contrary, we need not consider whether the trial court's interpretation of the 2007 decision was correct.

determined that the plaintiff's employment with Lexmark was a fact that was material to both the trial court's 2007 decision and the Appellate Court's decision in *Lederle I*. The trial court also found that it concluded, in its 2013 decision, that the plaintiff's Lexmark employment was not material to either of those decisions. The trial court's resolution of the motion to open, therefore, rested entirely on a legal conclusion and did not require any evidence—which is precisely how the parties had agreed to proceed. Those findings support the trial court's ultimate determination in its 2013 decision that this claim lacked any indicia of color.[10] The court further found that it had clarified in open court, in the presence of the parties and their attorneys, that this procedure was in accordance with the agreement between the parties. The defendant therefore had firsthand knowledge that his appellate claim lacked any indicia of color. That finding supports the court's ultimate finding in its 2013 decision that the defendant acted in bad faith in pursuing this claim on appeal.[11] For the foregoing

[10] As an alternative ground for affirmance, the defendant contends that there was a colorable basis for the two claims that he raised on appeal in *Lederle I*. As we have discussed, the trial court's subordinate findings are sufficiently specific to support the court's ultimate determination that both of his claims were entirely lacking in color. Accordingly, we need not address the defendant's alternative ground for affirmance. We note, however, that our review of the record confirms the trial court's determination that neither of the defendant's appellate claims had any indicia of color.

[11] As we already have stated in this opinion, the trial court predicated its ultimate finding as to the defendant's appellate claim that the court improperly decided the motion to open without hearing evidence on two, independent bases: the parties' agreement to the bifurcated proceeding and an alleged stipulation of facts entered into by the parties in lieu of an evidentiary hearing. Our conclusion that the trial court's finding that the parties agreed to the bifurcated proceeding—which resulted in the motion to open being resolved under the purely legal question—renders it unnecessary for us to consider the alternative ground for affirmance relied on by the defendant, namely, that the trial court's second subordinate finding in support of its ultimate finding of lack of colorability—that the parties entered into a stipulation of facts—was clearly erroneous.

We observe, however, that our review of the October 24, 2012 transcript suggests, to the contrary, that there was no agreement between the parties in

reasons, we conclude that the Appellate Court incorrectly concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff on the basis of the bad faith exception to the American rule.

Finally, we address the defendant's claim that, even if the trial court did not abuse its discretion in determining that an award was warranted under the bad faith exception to the American rule, the amount of the award was unreasonable and excessive because (1) the plaintiff's success at the Appellate Court in *Lederle II* was not due to the efforts of plaintiff's counsel, and (2) the fees sought by the plaintiff were significantly higher than the fees charged by the defendant's attorney for his work on the appeal. We first set forth the applicable standard of review. "[T]he amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion: A court has few duties of a more delicate nature than that of fixing counsel fees. The degree of delicacy increases when the matter becomes one of review on appeal. The principle of law, which is easy to state but difficult at times

court that they would proceed by way of stipulation in lieu of an evidentiary hearing. Although it was later suggested that the parties had exchanged e-mails in which they agreed that their statements of facts in their briefs would serve as a joint stipulation of facts for purposes of the motion to open, there is no mention during the October 24, 2012 hearing of any stipulation entered into by the parties. In fact, the transcript of the October 24, 2012 hearing suggests that, if the trial court had concluded that the plaintiff's employment with Lexmark was material to the 2007 decision granting her permission to relocate, the court would have proceeded to an evidentiary hearing. The court expressly stated that expectation to the parties, and neither party contradicted the court. Moreover, during the course of the hearing, the parties identified various issues that remained contested, including credibility issues, the date when the plaintiff learned that she no longer had a job with Lexmark, and whether she had left that position voluntarily. Because, however, it is clear from the record that the parties agreed to the bifurcated proceeding, it is immaterial that the record does not support the court's finding that the parties entered into a stipulation of facts.

to apply, is that only in case of a clear abuse of discretion by the trier may we interfere. . . . The trier is always in a more advantageous position to evaluate the services of counsel than are we." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 258–59, 828 A.2d 64 (2003).[12]

"It is well established that a trial court calculating a reasonable attorney's fee makes its determination while considering the factors set forth under rule 1.5 (a) of the Rules of Professional Conduct. *Sorrentino* v. *All Seasons Services, Inc.*, [245 Conn. 756, 775, 717 A.2d 150 (1998)] ('[r]ule 1.5 [a] of the Rules of Professional Conduct lists the factors that ordinarily determine the reasonableness of an attorney's fee'); *Andrews* v. *Gorby*, 237 Conn. 12, 24, 675 A.2d 449 (1996) ('[t]ime spent is but one factor in determining the reasonableness of an attorney's fee'). A court utilizing the factors of rule 1.5 (a) considers, inter alia, the time and labor spent by the attorneys, the novelty and complexity of the legal issues, fees customarily charged in the same locality for similar services, the lawyer's experience and ability, relevant time limitations, the magnitude of the case and the results obtained, the nature and length of the lawyer-client relationship, and whether the fee is fixed or contingent." (Footnote omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 259.

The fee hearing took place over the course of four days. The trial court began the hearing on October 30, 2013, but postponed the proceedings until the resolu-

[12] We reject the defendant's suggestion that we should not accord deference to the trial court's decision because the fees incurred were in connection with proceedings before the Appellate Court. The applicable standard of review is deferential because the trial court has heard the testimony and received evidence regarding the reasonableness of the fees and, accordingly, is in the best position to evaluate the evidence and to make the necessary factual findings. The fact that the proceedings giving rise to the claim for attorney's fees took place on appeal does not change the standard of review.

tion of the appeal in *Lederle II*. The final three days of the hearing were held in February, 2015, at which time the court heard testimony and took evidence concerning the amount of the plaintiff's attorney's fees. The court heard the testimony of the plaintiff's attorney, Norman A. Roberts II, who was questioned extensively regarding his fee affidavit as well as the attached, detailed invoices for his firm's services. Roberts claimed that his reasonable fees for the services rendered as a result of the defendant's bad faith claims on appeal amounted to $61,625.90. Included in that total were fees for services rendered by two associate attorneys and a paralegal employed by the firm. Slightly less than one half of the total fees were for services rendered directly by Roberts, who asserted in the fee affidavit that he rendered 60.3 hours of service at a rate of $500 per hour, resulting in fees of $30,150.[13]

The defendant's examination of Roberts and testing of the fee affidavit were thorough. He questioned Roberts concerning the propriety of charging for the services of the paralegal, on the basis that some of those services could be classified as clerical. He also highlighted portions of each of the twenty attached individual invoices, probing the necessity of the time spent on various tasks. For example, with respect to the invoice dated May 31, 2013, the defendant questioned the need to charge for two attorneys, Roberts and an associate, to attend a preargument conference, resulting in a bill for more than ten hours of time. The defendant further questioned Roberts concerning the charges for services rendered in connection with the plaintiff's attempt to recover attorney's fees from the defendant.

[13] Our review of the invoices reveals a slight error in the calculation of Roberts' total hours. The invoices show that he devoted a total of 59.5 hours as a result of the defendant's appellate claims.

The defendant focused particular attention on two issues in his questioning of Roberts. First, he challenged the propriety of the plaintiff's recovering attorney's fees from him for the appeal on the basis that the Appellate Court granted the defendant's motion to strike the portions of the plaintiff's appellate brief that referenced and relied on the October 30, 2013 hearing. In closing argument to the trial court, the defendant contended that, because the Appellate Court rendered judgment in favor of the plaintiff on the basis of theories other than those advanced by Roberts, and because the court granted the defendant's motion to strike portions of the plaintiff's brief, Roberts did not actually "win" the appeal for the plaintiff. Accordingly, the defendant argued, he should not be charged for the time that Roberts spent on the appeal.[14]

Second, the defendant introduced evidence of the fees charged by the defendant's previous appellate counsel, Paul Greenan, which amounted to $9700. The trial court admitted that evidence, over the plaintiff's objection, on the ground that it was relevant to the question of the reasonableness of the plaintiff's fees. The defendant later asked Roberts why his fees were six times higher than his counsel's fees. Roberts explained that the difference was due, in part, to the different rates charged: Roberts' rate is $500 per hour, whereas the defendant's counsel charges $200 per hour. Roberts also testified that the discrepancy was due, in part, to the conduct of the defendant's counsel, which required Roberts to expend more time on the appeal than he otherwise would have. For example, Roberts testified that the defendant's counsel "would come to court and have other business and [Roberts] was forced to stand there and wait while [the defendant's counsel] attended [to] other business . . . ."

[14] The defendant claims that the clean hands doctrine bars recovery on this basis. That argument is without merit.

During the course of the fee hearing, the trial court stated its view that it considered the amount that Roberts sought, approximately $61,000, to be "way . . . too much." At one point, the court stated that it "had a hard time figuring out" how it was possible to justify that amount of fees in connection with the present case.

Ultimately, the court awarded the plaintiff approximately one half of what Roberts had claimed, $30,000. Although the court did not specify the particular facts on which it relied, it is evident from the record that, in awarding the plaintiff less than one half of the fees requested, the court considered Roberts' detailed testimony regarding the fee affidavit, the fee affidavit itself, the relative rates charged by Greenan and Roberts, and the challenges raised by the defendant regarding certain charges. A reasonable reading of the transcripts and the fee affidavit supports the conclusion that the trial court discounted all but the fees for the services rendered directly by Roberts himself. On the basis of the foregoing, we conclude that the trial court acted within its discretion in awarding the plaintiff $30,000 in attorney's fees.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's award of attorney's fees.

In this opinion the other justices concurred.