CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXIX No. 17 October 24, 2017 121 Pages

Table of Contents

CONNECTICUT REPORTS

In re Elianah T.-T. (Order), 327 C 912 . . . 2
Levanti *v.* Conway (Order), 327 C 919 . . . 9
Mangiafico *v.* Farmington (Order), 327 C 920 . . . 10
OneWest Bank, FSB *v.* Gnazzo (Order), 327 C 922 . . . 12
Pronovost *v.* Tierney (Order), 327 C 922 . . . 12
Smith *v.* Commissioner of Correction (Order), 327 C 920 . . . 10
State *v.* Purcell (Order), 327 C 921 . . . 11
State *v.* Reddick (Order), 327 C 921 . . . 11
State *v.* Sampson (Order), 327 C 920 . . . 10
Williams *v.* General Nutrition Centers, Inc. (replacement page), 326 C 667 . . . iii
Volume 327 Cumulative Table of Cases . . . 13

CONNECTICUT APPELLATE REPORTS

Darryl W. *v.* Commissioner of Correction, 177 CA 454 . . . 34A
Habeas corpus; claim that trial counsel provided ineffective assistance by failing to file request to charge jury or to object to trial court's jury instruction on operability of firearm; claim that trial counsel provided ineffective assistance by failing to direct trial court in response to jury's inquiry on operability; whether petitioner demonstrated that he was prejudiced by trial counsel's performance.
Fernschild *v.* Commissioner of Motor Vehicles, 177 CA 472 . . . 52A
Suspension of motor vehicle operator's license; whether record contained substantial evidence to support hearing officer's determination that plaintiff refused to submit to breath test to determine his blood alcohol content in violation of statute (§ 14-227b).
McLeod *v.* A Better Way Wholesale Autos, Inc., 177 CA 423 . . . 3A
Fraud; breach of implied warranty of merchantability in connection with sale of automobile; whether trial court improperly rendered judgment for plaintiff on count of complaint alleging breach of implied warranty of merchantability when court previously dismissed that count; whether, once count was dismissed by trial court, it was effectively removed from case and court had no authority to address merits of dismissed count in its final decision; whether, in light of trial court's dismissal of count alleging breach of implied warranty of merchantability, court improperly determined that defendant violated Magnuson-Moss Act (15 U.S.C. § 2310 [d]), which was based on defendant's alleged breach of implied warranty of merchantability; whether trial court improperly awarded attorney's fees as component of damages under count alleging violation of Magnuson-Moss Act; whether trial court's finding of fraud was legally and logically correct and supported by evidence; whether trial court's finding that defendant made false statement by failing to disclose accurate odometer reading was clearly erroneous; whether trial court improperly awarded punitive damages under fraud count.
Toccaline *v.* Commissioner of Correction, 177 CA 480 . . . 60A
Habeas corpus; whether habeas court properly granted motion to dismiss third petition for writ of habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal as to claims of actual innocence, due process violation where prosecutor was alleged to have unknowingly presented false testimony at criminal trial, and that habeas court improperly dismissed

(continued on next page)

claim that first habeas appellate counsel was ineffective; whether habeas court improperly dismissed claim that first habeas appellate counsel was ineffective on ground that claim was successive; whether claim that first habeas appellate counsel was ineffective lacked merit; whether habeas court abused its discretion in denying certification to appeal as to assertion that counsel in second habeas trial rendered ineffective assistance.

Volume 177 Cumulative Table of Cases 85A

CONNECTICUT PRACTICE BOOK

Rules of Appellate Procedure, effective January 1, 2018 . . . . . 1PB

MISCELLANEOUS

Notice of Appointment of Trustee. 1B
Notice of Suspension of Attorney 1B

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at http://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

as actual, straight time pay.[11] The wage order's command to use a divide by usual hours method therefore precludes use of the fluctuating method's divide by actual hours method, except, of course, when an employee's actual hours match his usual hours.

IV

In sum, we conclude that, although Connecticut's wage laws do not preclude use of the fluctuating method, the plain meaning of the text in the wage order does.

We answer the certified question, "No."

No costs shall be taxed in this court to any party.

In this opinion the other justices concurred.

---

[11] Here is an illustration of this calculation. Suppose an employee who usually works forty hours per week actually worked fifty hours in a week, and earned $400 base pay, plus an additional $100 in commissions, for a total weekly pay of $500. In this scenario, the employee's regular hourly rate for the purpose of calculating overtime is $12.50 per hour ($500/40 usual hours). This differs from his actual rate of pay, which was $10 per hour ($500/50 actual hours). The employee must be compensated at least $18.75 for each overtime hour worked ($12.50 x 1.5). Because the employer has already paid the employee at a rate of $10 for each hour worked, including overtime hours, the employee needs an additional $8.75 for each overtime hour to bring him to $18.75 per hour for each overtime hour. His additional overtime pay is $87.50 ($8.75 x 10 hours of overtime).

This illustration assumes that the employee's base pay and commissions are compensation for the full straight time pay he is entitled to receive for all hours worked. If the employee works more hours in the week than he receives straight time compensation for—according to the employee's compensation arrangement—then the employer must first calculate the employee's correct amount of straight time pay for all hours worked. The employer then uses the employee's correct total pay for the week to calculate the employee's rate of overtime pay under the wage order.

In the present case, the plaintiffs claim that their base pay is compensation for only a forty hour work week, meaning that they are entitled to additional base pay for all hours worked over forty hours. This claim presents an issue of fact that the plaintiffs must resolve in the District Court, not this court on a certified question of law.

ORDERS

CONNECTICUT REPORTS

VOL. 327

IN RE ELIANAH T.-T. ET AL.
(SC 19902)

The motion of the petitioner-appellee, filed August 23, 2017, for reconsideration, having been presented to

the court, it is hereby ordered granted, but the relief requested is denied.

October 18, 2017

ROBINSON, J. Following the release of our decision in *In re Elianah T.-T.*, 326 Conn. 614, 165 A.3d 1236 (2017),[1] in which this court concluded that General Statutes § 17a-10 (c) did not authorize the petitioner, the Commissioner of Children and Families (commissioner), to vaccinate a child placed in her temporary custody over the objection of that child's parents, the commissioner moved for reconsideration pursuant to Practice Book § 71-5. In this motion for reconsideration, the commissioner states that, in briefing this case, she should have claimed that General Statutes § 17a-10 (c) should be interpreted in the context of General Statutes §§ 17a-93 and 17a-98. Specifically, the commissioner contends that the operation of General Statutes § 17a-10 (c) is limited to custody over juveniles who have been adjudicated delinquent, and that General Statutes §§ 17a-93 and 17a-98 confer broader guardianship authority that permits her to vaccinate minor children in her custody. The commissioner candidly acknowledges that she did not advance her arguments concerning the effect of General Statutes §§ 17a-93 and 17a-98 until the filing of this motion for reconsideration. As this argument was not previously advanced to this court, we grant the motion for reconsideration, but deny the relief requested.

It is well settled that a motion for reconsideration is intended "to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or

[1] We note that the listing of justices set forth in this court's decision in *In re Elianah T.-T.*, supra, 326 Conn. 614, which reflected seniority status on this court as of the date of oral argument, remains unchanged for the purpose of considering this motion.

that there has been a misapprehension of facts. . . . It may also be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [*A*] *motion to reargue* [*however*] *is not to be used as an opportunity to have a second bite of the apple* . . . ." (Emphasis added.) *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 624, 35 A.3d 260 (2012); see also, e.g., *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 527, 142 A.3d 363 ("appellate courts will treat as abandoned claims that are not briefed adequately"), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

The commissioner, however, relies on *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 163 n.35, 84 A.3d 840 (2014), for relief, citing that case for the proposition that this court may raise an issue sua sponte "when the parties have misconstrued or overlooked the applicable law and the failure to raise the issue would result in the creation of unsound or questionable precedent or an inconsistency in the law." Beyond the fact that reliance on *Blumberg Associates Worldwide, Inc.*, at this late stage of appellate proceedings would require us to consider any prejudice to the respondents, Giordan T. and Nicanol T.; see id., 163; we emphasize that our "system [remains] an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived." Id., 164. In short, although a motion for reconsideration may be appropriate when a party contends that the court did not address one or more of its arguments or that there has been some mistake in the opinion, it is not proper to use such a motion simply as a means for giving the losing party a second chance to try a new argument.

We recognize the public interest that attends the commissioner's request that we consider the import of

§§ 17a-93 and 17a-98, including the attendant constitutional questions that Chief Justice Rogers identifies in her concurring opinion. Accordingly, our denial of the relief requested in the commissioner's motion for reconsideration should not be taken to prejudice our consideration of those statutory arguments in any way, should those arguments be raised in a subsequent case before this court.

In this opinion the other justices concurred.

ROGERS, C. J., with whom PALMER, EVELEIGH, ESPINOSA and VERTEFEUILLE, Js., join, concurring. In her original brief to this court, the petitioner, the Commissioner of Children and Families, claimed that General Statutes §§ 17a-10 (c)[1] and 17a-1 (12)[2] authorized the Department of Children and Families to vaccinate children in the petitioner's temporary custody over the objection of the children's parents. After the original

[1] General Statutes § 17a-10 (c) provides: "When deemed in the best interests of a child in the custody of the commissioner, the commissioner, the commissioner's designee, a superintendent or assistant superintendent or, when the child is in transit between [Department of Children and Families] facilities, a designee of the commissioner, may authorize, on the advice of a physician licensed to practice in the state, medical treatment, including surgery, to insure the continued good health or life of the child. Any of said persons may, when he or she deems it in the best interests of the child, authorize, on the advice of a dentist licensed to practice in the state, dentistry, including dental surgery, to insure the continued good health of the child. Upon such authorization, the commissioner shall exercise due diligence to inform the parents or guardian prior to taking such action, and in all cases shall send notice to the parents or guardian by letter to their last-known address informing them of the actions taken, of their necessity and of the outcome, but in a case where the commissioner fails to notify, such failure will not affect the validity of the authorization."

[2] General Statutes § 17a-1 (12) (B) defines " '[g]uardian' " in relevant part as "a person who has a judicially created relationship between a child or youth and such person that is intended to be permanent and self-sustaining as evidenced by the transfer to such person of the following parental rights with respect to the child or youth . . . the authority to make major decisions affecting the child's or youth's welfare, including, but not limited to . . . major medical, psychiatric or surgical treatment . . . ."

opinion in this case was released, the petitioner filed a motion for reconsideration in which she raised several new arguments, including that General Statutes §§ 17a-93 (4),[3] 17a-98,[4] and 46b-129 (j) (4)[5] confer on her full guardianship over children committed to her temporary custody pursuant to Chapter 319a of the General Statutes governing child welfare. I agree and join with the majority that it would be inappropriate to consider the petitioner's new statutory claims at this late date. Accordingly, I express no opinion as to whether §§ 17a-93 (4), 17a-98 and 46b-129 (j) (4) were intended to confer on the petitioner full guardianship rights over children in her temporary custody, including the authority to authorize any and all medical treatment for those children over the objection of their parents.

I write separately, however, to emphasize that, if the petitioner's interpretation of these statutes were correct, I would have grave doubts about their constitutionality as applied in these circumstances. See *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate. Even when blood relationships are strained, parents retain a vital interest in preventing

[3] General Statutes § 17a-93 (4) defines " '[g]uardianship' " in relevant part to mean "the obligation of care and control, the right to custody and the duty and authority to make major decisions affecting such minor's welfare, including, but not limited to . . . major medical, psychiatric or surgical treatment . . . ."

[4] General Statutes § 17a-98 provides in relevant part that the petitioner "shall exercise careful supervision of each child under [her] guardianship or care and shall maintain such contact with the child and the child's foster family as is necessary to promote the child's safety and physical, educational, moral and emotional development . . . ."

[5] General Statutes § 46b-129 (j) (4) provides in relevant part: "The [petitioner] shall be the guardian of [a] child [committed to her custody] for the duration of the commitment . . . ."

the irretrievable destruction of their family life."); see also *Diana H.* v. *Rubin*, 217 Ariz. 131, 136, 171 P.3d 200 (App. 2007) (under federal constitutional due process principles, when parents object to vaccination of child in temporary custody of state, "state must demonstrate a compelling interest to justify overriding the combination of religious and parental rights involved"); *In re G.K.*, 993 A.2d 558, 566 (D.C. App. 2010) (under statute defining "residual parental rights," parents retained right to consent to certain medical treatment for child in legal custody of state); *In the Mattter of Lyle A.*, 14 Misc. 3d 842, 850, 830 N.Y.S.2d 486 (2006) (implicit in routine procedures used by Department of Human Services was that "[a] parent whose child is in foster care has the right to make the decision regarding whether or not his or her child will be given psychotropic drugs"); *In the Matter of Martin F.*, 13 Misc. 3d 659, 676, 820 N.Y.S.2d 759 (2006) (if parent of child in temporary foster care opposes administration of mental health medicine it cannot lawfully be prescribed unless court determines "whether the proposed treatment [by medication] is narrowly tailored to give substantive effect to the [child] patient's liberty interest"); *In re Guardianship of Stein*, 105 Ohio St. 3d 30, 35–36, 821 N.E.2d 1008 (2004) ("the decision to withdraw life-supporting treatments goes beyond the scope of making medical decisions," and, therefore, "[t]he right to withdraw life-supporting treatment for a child remains with the child's parents until the parents' rights are permanently terminated"); but see *In re Deng*, 314 Mich. App. 615, 626–27, 887 N.W.2d 445 (because determination of unfitness "so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship," state could vaccinate children in temporary custody over objection of parents pursuant to statute allowing parents to opt out based on religious objections [internal quotation marks omitted]), appeal

denied, 500 Mich. 860, 884 N.W.2d 580 (2016). In my view, when the petitioner has only temporary custody over a child and the rights of the parents have not been terminated, the parental right to make decisions for the child, the child's interest in continuing good health and the state's parens patriae interest in protecting the well-being of the child must be balanced. See *In the Matter of McCauley*, 409 Mass. 134, 136–37, 139, 565 N.E.2d 411 (1991).[6]

Under the assumption that this balancing test is constitutionally required, I also believe that, with respect

[6] The court stated in *In the Matter of McCauley*: "We are faced with the difficult issue of when a [s]tate may order medical treatment for a dangerously ill child over the religious objections of the parents. . . . [T]here are three interests involved: (1) the natural rights of parents; (2) the interests of the child; and (3) the interests of the [s]tate. . . .

"Courts have recognized that the relationship between parents and their children is constitutionally protected, and, therefore, that the private realm of family life must be protected from unwarranted [s]tate interference. . . . The rights to conceive and to raise one's children are essential . . . basic civil rights . . . . The interest of parents in their relationship with their children has been deemed fundamental, and is constitutionally protected. . . . Parents, however, do not have unlimited rights to make decisions for their children. Parental rights do not clothe parents with life and death authority over their children. . . . The [s]tate, acting as parens patriae, may protect the well-being of children. . . .

"The right to the free exercise of religion, including the interests of parents in the religious upbringing of their children is, of course, a fundamental right protected by the [federal] [c]onstitution. . . . However, these fundamental principles do not warrant the view that parents have an absolute right to refuse medical treatment for their children on religious grounds. . . .

"The [s]tate's interest in protecting the well-being of children is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. . . . When a child's life is at issue, it is not the rights of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In the Matter of McCauley*, supra, 409 Mass. 136–37.

to the narrow question of whether the petitioner has the right to authorize the vaccination of children in her temporary custody, our legislature has already concluded as a matter of public policy that the interest of parents in opting not to vaccinate their children on religious grounds outweighs the child's interest in being immune from certain diseases and the state's parens patriae interest in ensuring the well-being of the child and the public at large. See General Statutes § 10-204a (a) ("[a]ny such child who . . . presents a statement from the parents or guardian of such child that such immunization would be contrary to the religious beliefs of such child . . . shall be exempt from [certain immunizations required for attending school]"). I can see no reason why this policy determination would not be binding on the petitioner and the courts. Therefore, I find it highly unlikely that the petitioner would have the right to vaccinate a child in her temporary custody over of the objection of the parents, and I concur in the granting of the motion for reconsideration, but the denial of the relief requested therein.

DEBBIE A. LEVANTI *v.* MARGARET D. CONWAY ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 172 Conn. App. 904 (AC 38437), is denied.

Debbie A. Levanti, self-represented, in support of the petition.

Decided October 11, 2017

ENRICO MANGIAFICO *v.* TOWN OF FARMINGTON ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 173 Conn. App. 158 (AC 37620), is granted, limited to the following question:

"Did the Appellate Court properly conclude that the trial court lacked subject matter jurisdiction to entertain the plaintiff's federal civil rights complaint due to the plaintiff's failure to exhaust administrative remedies?"

Jon L. Schoenhorn, in support of the petition.

Kenneth R. Slater, Jr., in opposition.

Decided October 11, 2017

MICHAEL SMITH *v.* COMMISSIONER OF CORRECTION

The petitioner Michael Smith's petition for certification to appeal from the Appellate Court, 173 Conn. App. 905 (AC 38546), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

Decided October 11, 2017

STATE OF CONNECTICUT *v.* TYRAN SAMPSON

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 624 (AC 37925), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided October 11, 2017

STATE OF CONNECTICUT *v.* ROBERT JOHN PURCELL

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 401 (AC 38206), is granted, limited to the following question:

"Given his statements during custodial interrogation, was the defendant's constitutional right to counsel denied by the trial court when it denied his motion to suppress?"

Richard Emanuel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided October 11, 2017

STATE OF CONNECTICUT *v.* JERMAINE E. REDDICK

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 536 (AC 38446), is denied.

Robert E. Byron, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided October 11, 2017

JAMIE PRONOVOST *v.* MARISA TIERNEY

The plaintiff's petition for certification to appeal from the Appellate Court, 174 Conn. App. 368 (AC 38572), is denied.

Matthew J. Forrest, in support of the petition.

Thomas S. Lambert, in opposition.

Decided October 11, 2017

ONEWEST BANK, FSB *v.* DOUGLAS V. GNAZZO, TRUSTEE FOR THE ANTONIO GNAZZO TRUST

The defendant's petition for certification to appeal from the Appellate Court (AC 38755) is granted, limited to the following question:

"Can a sole trustee and sole beneficiary of an inter vivos trust represent 'his or her own cause' pursuant to General Statutes § 51-88 (d) (2)?"

Douglas V. Gnazzo, self-represented, in support of the petition.

Decided October 11, 2017

Cumulative Table of Cases
Connecticut Reports
Volume 327

(Replaces Prior Cumulative Table)

American First Federal, Inc. *v.* Gordon (Order) . . . 909
Bank of America, N.A. *v.* Fisher (Order) . . . 903
Bank of America, N.A. *v.* Sabir (Order) . . . 903
Bozelko *v.* D'Albero (Order) . . . 912
Bueno *v.* Commissioner of Correction (Order) . . . 907
Fitzpatrick *v.* U.S. Bank National Assn. (Order) . . . 902
Gordon *v.* Gordon (Order) . . . 904
Haughey *v.* Commissioner of Correction (Order) . . . 906
Heinonen *v.* Gupton (Order) . . . 902
Hutterly *v.* Miller (Order) . . . 904
In re Elianah T.-T. (Order) . . . 912
Inzitari *v.* Commissioner of Correction (Order) . . . 902
Ionescu *v.* Stratford (Order) . . . 901
James *v.* Commissioner of Correction . . . 24
Habeas corpus; whether calculation of presentence confinement credit should be adjusted for concurrent sentences imposed under one docket number but on different dates due to mistrial; whether denial of presentence confinement credit impermissibly burdened petitioner's constitutional right to pursue double jeopardy claim on retrial.
JPMorgan Chase Bank, National Assn. *v.* Davis (Order) . . . 908
Kruger *v.* Grauer (Order) . . . 901
Levanti *v.* Conway (Order) . . . 919
Mangiafico *v.* Farmington (Order) . . . 920
MYM Realty, LLC *v.* Doe (Order) . . . 908
OneWest Bank, FSB *v.* Gnazzo (Order) . . . 922
Pires *v.* Commissioner of Correction (Order) . . . 907
Pronovost *v.* Tierney (Order) . . . 922
Ramos *v.* Commissioner of Correction (Order) . . . 904
Reserve Realty, LLC *v.* BLT Reserve, LLC (Order) . . . 911
Reserve Realty, LLC *v.* Windemere Reserve, LLC (Orders) . . . 910, 911
Sinchak *v.* Commissioner of Correction (Order) . . . 901
Smith *v.* Commissioner of Correction (Order) . . . 920
Sousa *v.* Sousa (Order) . . . 906
State *v.* Ames (Order) . . . 908
State *v.* Andino (Order) . . . 906
State *v.* Holley (Order) . . . 907
State *v.* Jones (Order) . . . 905
State *v.* Joseph (Order) . . . 912
State *v.* Pelella . . . 1
Threatening second degree; appeal by state on granting of permission; first amendment to United States constitution; whether trial court improperly granted motion to dismiss charges; claim that trial court incorrectly determined that law required alleged threat to be imminent for it to constitute true threat; whether trial court improperly viewed evidence before it in light most favorable to defendant in ruling on motion to dismiss; whether issue of whether statement constituted true threat was for jury to decide.
State *v.* Purcell (Order) . . . 921
State *v.* Reddick (Order) . . . 921
State *v.* Sampson (Order) . . . 920
State *v.* Smith (Order) . . . 910
State *v.* Toro (Order) . . . 905
State *v.* Torres (Order) . . . 910
State *v.* Wiggins (Order) . . . 908
Szymonik *v.* Szymonik (Order) . . . 903

Thorpe *v.* Commissioner of Correction (Order) 905
Townsend *v.* Hardy (Order) 909

CONNECTICUT APPELLATE REPORTS

Vol. 177

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BRENDA MCLEOD *v.* A BETTER WAY WHOLESALE AUTOS, INC.
(AC 38608)

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

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of the implied warranty of merchantability in connection with her purchase of an automobile from the defendant. The case was tried to the court, and, at the close of the plaintiff's case, the defendant moved for a judgment of dismissal on all counts of the complaint, which the trial court granted as to certain counts, including count one alleging breach of the implied warranty of merchantability. Thereafter, the defendant presented its evidence, and the trial court subsequently rendered judgment for the plaintiff on counts one through four of the complaint, from which the defendant appealed to this court. Subsequently, the trial court granted the plaintiff's motions for attorney's fees, and the defendant filed an amended appeal. On appeal, the defendant claimed, inter alia, that the trial court improperly rendered judgment for the plaintiff on count one because the court previously had dismissed that count. The defendant also claimed that, in light of the trial court's dismissal of count one, the court improperly determined that the defendant had violated the Magnuson-Moss Act (15 U.S.C. § 2310 [d]), as alleged in count two of the complaint, which violation was based on the defendant's alleged failure to comply with its obligations under the implied warranty of merchantability. *Held*:

1. The trial court improperly rendered judgment for the plaintiff on count one of the complaint; that court clearly and unequivocally rendered a judgment of dismissal as to count one, and, once it did so, the count was effectively removed from the case, and the court had no authority to address the merits of that dismissed count in its final decision or to award damages on the basis of the dismissed cause of action; moreover, even though a trial court has the authority to correct clerical errors in a prior judgment or to clarify or interpret an ambiguous judgment, the trial court never indicated to the parties that it had determined that its prior dismissal of count one was in error, and its subsequent ruling on the merits could not be construed as an implicit reversal, sua sponte, of its prior determination that the plaintiff had failed to present a prima facie case on that count, as that could have unfairly prejudiced the defendant, which did not have an opportunity to present evidence in defense of that count, it having believed that it was dismissed.
2. The trial court improperly rendered judgment for the plaintiff on count two of the complaint alleging a violation of the Magnuson-Moss Act: because the plaintiff's general theory of recovery with respect to count

two hinged on her state law claim in count one, which alleged a violation of the implied warranty of merchantability, the court's dismissal of count one for failure to make out a prima facie case precluded any finding that such a breach formed the basis of a violation of the Magnuson-Moss Act; moreover, the court could not have found that the plaintiff proved a violation of that act on the basis of its finding of a breach of an express warranty, as alleged in count three of the complaint, because the plaintiff never pleaded such a violation.

3. The trial court improperly awarded the plaintiff attorney's fees as a component of damages under count two of the complaint for the defendant's purported violation of the Magnuson-Moss Act, which contains an express statutory exception to the general rule that a successful party may not recover attorney's fees and ordinary expenses of litigation in the absence of a contractual or statutory exception; in light of this court's determination that the trial court improperly rendered judgment for the plaintiff on count two, the plaintiff could not reasonably rely on the express statutory grant of authority for attorney's fees under the Magnuson-Moss Act as a legal basis for upholding the trial court's award of attorney's fees under that count.

4. The trial court's finding that the defendant had committed fraud was legally and logically correct and supported by the evidence; the court's finding that the defendant made a false statement by failing to disclose an accurate odometer reading was supported by the evidence and was not clearly erroneous, and the court properly found, on the basis of the evidence presented and inferences reasonably drawn therefrom, that the mileage of the vehicle purchased by the plaintiff was not accurately recorded by the defendant's representatives, the recording failures were a deliberate attempt to record lower mileage, that deceit and misrepresentation were to the detriment of the plaintiff because they impacted her ability to take full advantage of the warranty period, the defendant's actions were intended to induce the plaintiff's reliance on its representations, and the plaintiff purchased the vehicle believing the sale included warranty coverage for 3000 miles, when in fact, due to the defendant's actions, the vehicle warranty would expire after fewer miles, lowering the value of the vehicle and reducing the defendant's potential liability for repairs.

5. The trial court improperly awarded the plaintiff punitive damages of $15,000 under count four, which alleged fraud; the court failed to explain the factual basis for its award and had no evidence before it regarding the plaintiff's total litigation expenses, as the plaintiff had submitted an affidavit from her attorney claiming attorney's fees of nearly $7000 but did not provide any evidence from which the court reasonably could have inferred an additional $8000 in nontaxable costs, and, although some award of punitive damages was permissible in conjunction with the fraud count, a new hearing was necessary to determine the actual

amount of the plaintiff's litigation expenses, which, in addition to reasonable attorney's fees, would include other nontaxable costs.

Argued April 10—officially released October 24, 2017

Procedural History

Action to recover damages for, inter alia, breach of the implied warranty of merchantability, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Brazzel-Massaro*, *J.*; thereafter, the court granted in part the defendant's motion for a judgment of dismissal and rendered judgment for the plaintiff, from which the defendant appealed to this court; subsequently, the court, *Brazzel-Massaro*, *J.*, granted the plaintiff's motions for attorney's fees, and the defendant filed an amended appeal. *Vacated in part*; *reversed in part*; *judgment directed*; *further proceedings*.

Kenneth A. Votre, for the appellant (defendant).

Louis E. Faiella, with whom, on the brief, was *Scott Jackson*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this action for damages arising out of the purchase of a used automobile, the defendant, A Better Way Wholesale Autos, Inc., appeals, following a trial to the court, from the judgment rendered in favor of the plaintiff, Brenda McLeod, on counts one through four of her six count complaint.[1] Counts one through four alleged, respectively, that the defendant breached the implied warranty of merchantability, violated the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss Act), 15 U.S.C. § 2301 et seq., breached an express statutory warranty,

[1] The court previously dismissed counts five and six, which alleged a revocation of acceptance and a violation of the state's unfair trade practices act, General Statutes § 42-110a et seq. The plaintiff has not appealed or cross appealed from the court's judgment of dismissal.

and committed common-law fraud. In total, the court awarded the plaintiff $5435 in actual damages, $15,000 in punitive damages, and $7045.35 in attorney's fees. The defendant claims on appeal that the court improperly (1) determined that the defendant had breached the implied warranty of merchantability as alleged in count one because that count previously had been dismissed along with counts five and six at the close of the plaintiff's case-in-chief pursuant to Practice Book § 15-8; (2) determined that the defendant had violated 15 U.S.C. § 2310 (d) of the Magnuson-Moss Act, despite the plaintiff's having pleaded that the alleged violation arose from the defendant's breach of the implied warranty of merchantability as alleged in count one, which the court had dismissed because the plaintiff had failed to establish a prima facie case; (3) awarded the plaintiff attorney's fees; (4) determined that the defendant committed common-law fraud without clear and convincing evidence of either a false statement or intent to defraud; and (5) awarded the plaintiff punitive damages on the fraud count.[2] We agree with the defendant as to all but the fourth claim and, accordingly, reverse in part the judgment of the court and remand the case with direction to render judgment in accordance with this opinion and for a new hearing in damages. We otherwise affirm the court's judgment.

The following facts, as found by the court, and procedural history are relevant to our resolution of the defendant's claims on appeal. The plaintiff lived in Waterbury and commuted to work in Monroe. In September, 2012, she determined that she needed a more reliable automobile, and she visited the defendant's used car dealership and met with one of its sales representatives. During that first visit, she expressed an interest in buying a Jeep that she saw on the sales lot and provided a $500

[2] For clarity and ease of analysis, we address the defendant's claims in an order different from how they were presented in the defendant's brief.

deposit to hold the vehicle. She returned to the dealership on October 1, 2012, and looked at other vehicles. On that date, she test-drove a 2008 Saab. She expressed her interest in purchasing the Saab and changed her deposit to that vehicle. A retail purchase order was completed and signed by the plaintiff on October 1, 2012. The purchase order indicated that the mileage on the Saab's odometer was 65,738.

The vehicle was serviced by the defendant on October 5, 2012. At that time, a repair order was completed that listed the vehicle's mileage as 65,743.

The plaintiff returned to the defendant's business on October 10, 2012—this time with her fiancé. They test-drove the Saab for a second time. After the plaintiff indicated that she wanted to purchase the Saab, the defendant prepared the necessary paperwork, which included an invoice, loan documents, registration, an odometer statement, and a new retail purchase order listing the total cash price for the vehicle as $16,267.67. The October 10, 2012 odometer statement indicated that the Saab had 65,738 miles. That mileage was identical to the odometer reading listed on the October 1, 2012 retail purchase order, despite the additional test drive that occurred on October 10, 2012. The mileage was also less than the mileage recorded on the October 5, 2012 repair order.

The plaintiff finalized the purchase and took possession of the Saab on October 17, 2012. When she returned that day, she noted that the car had been returned to the sales lot rather than placed in a secure location. Her understanding was that the vehicle would be separated from other inventory so that it would not be test-driven by other potential customers. She noticed that the Saab had additional miles on the odometer since she first expressed her interest in purchasing it.[3] The defendant

[3] The plaintiff never provided any testimony quantifying how many additional miles she believed the vehicle had been driven.

did not prepare a new odometer reading on October 17, 2012, when the plaintiff completed the purchase documents and accepted delivery of the Saab. Included among the various purchase documents was a limited express warranty, mandated by statute, covering specified parts for sixty days or 3000 miles, whichever occurred first.[4] See General Statutes § 42-221 (b). The warranty, which was dated October 17, 2012, did not contain a specific odometer reading. In fact, none of the purchase documents indicated the odometer reading as of October 17, 2012, the day of delivery. Although the plaintiff noted a chemical smell coming from the vehicle that day, she was told that this would burn off.

On Friday, December 7, 2012, during her commute to work, the plaintiff began experiencing problems with the vehicle's operation. The next day, she called the defendant to alert it to the problems and, later that same day, brought the vehicle to the defendant's business. A representative of the defendant drove the vehicle to determine if there was a problem, but the plaintiff was told that the service department was not open on that Saturday and that she needed to return with the vehicle at a later date. No paperwork was completed by the defendant on that date to memorialize the nature of the plaintiff's complaint, the condition of the vehicle, or the vehicle's mileage as of that date.

The plaintiff returned with the vehicle on the following Monday, December 10, 2012. At that time, a repair order was completed. Although the typed portion of the repair order form indicated that the "current mileage" was 65,743, in the next box designating "mileage out," there is a handwritten indication that the mileage

[4] Although the court states at several points in its memorandum of decision that the express warranty had a durational term of three months, that finding is not supported by the record, including the exhibit cited by the court. That discrepancy, however, had no bearing on the court's analysis or on our review on appeal.

was 68,931. The form also listed incorrectly the "delivery date" as October 3, 2012. Handwritten notes on the form indicated "needs engine" and estimated repairs totaling $5000.

At some point, the defendant informed the plaintiff that the vehicle would need a new engine and that the repairs would not be covered by her warranty because the car was 188 miles over the mileage warranty limit of 3000 miles. The defendant attempted to convince the plaintiff to enter into a new contract with it to replace the vehicle. The plaintiff retained counsel, who, on April 9, 2013, sent a letter to the defendant revoking acceptance of the vehicle and demanding that the defendant return all moneys paid in connection with the purchase of the Saab. The plaintiff filed the present action on January 31, 2014, challenging, inter alia, the defendant's denial of her warranty claim.

The complaint contained six counts. Count one alleged a breach of the implied warranty of merchantability and asserted that the vehicle was not in merchantable condition when sold to the plaintiff and was not fit for the ordinary purpose for which a car is used. See General Statutes § 42a-2-314 (1) ("[u]nless excluded or modified as provided by section 42a-2-316, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind").

Count two alleged a violation of the Magnuson-Moss Act. Specifically, the plaintiff alleged that the vehicle was a consumer product as defined by the act and that the defendant, as a warrantor under the act, had "failed to comply with its obligations *under the implied warranty of merchantability*" and, thus, was liable to her for "her damages, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 2310 (d)."[5] (Emphasis added.)

[5] Section 2310 (d) of title 15 of the 2012 edition of the United States Code provides in relevant part: "(1) . . . a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any

Count three alleged a violation of the express warranty, in accordance with § 42-221, that she was provided at the time of the sale.[6] In particular, she claimed that the vehicle had been sold with the statutorily required warranty that it would be mechanically operational and sound for at least sixty days or 3000 miles, and that she possessed and controlled the vehicle for less than sixty days and operated the vehicle for less than 3000 miles at the time she reported her operational problems to the defendant.

Count four alleged that the defendant committed fraud by registering the sale of the vehicle to her with the Department of Motor Vehicles using an odometer reading that was significantly lower than the actual odometer reading on the vehicle as of the date of delivery. The defendant allegedly then used that fraudulently disclosed odometer reading to deny her claim for repairs under the warranty.

Count five alleged that she had "justifiably and effectively" revoked her acceptance of the Saab on April 9,

obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

"(A) in any court of competent jurisdiction in any State . . . .

"(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate. . . ."

[6] General Statutes § 42-221 (b) provides in relevant part: "Each contract entered into by a dealer for the sale of a used motor vehicle which has a cash purchase price of five thousand dollars or more shall include an express warranty, covering the full cost of both parts and labor, that the vehicle is mechanically operational and sound and will remain so for at least sixty days or three thousand miles of operation, whichever period ends first, in the absence of damage resulting from an automobile accident or from misuse of the vehicle by the consumer. . . ."

2013, and that the defendant had refused to return all amounts paid by the plaintiff. See General Statutes § 42a-2-608.[7]

Finally, count six alleged that the defendant's actions violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. According to the plaintiff, the defendant had engaged in unfair and deceptive acts or practices by, inter alia, committing fraud with respect to the odometer readings and then using that fraud to deny the plaintiff warranty coverage; failing to abide by any implied warranties; and failing to recognize the plaintiff's revocation of acceptance. In addition to damages, the plaintiff sought attorney's fees, costs, and punitive damages pursuant to CUTPA.

The matter was tried to the court, *Brazzel-Massaro*, *J.*, on September 16, 2015. At the close of the plaintiff's case, the defendant moved for a judgment of dismissal as to all counts of the complaint on the ground that the plaintiff had failed to make out a prima facie case. See Practice Book § 15-8.[8]

[7] General Statutes § 42a-2-608 (2) sets forth the conditions that must be met before a revocation of acceptance following the discovery of a defect will be valid, including that a revocation is not effective until "the buyer notifies the seller of it" and that such a revocation must be made "within a reasonable time" after the buyer discovers or should have discovered the defect at issue.

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

"A prima facie case . . . is one sufficient to raise an issue to go to the trier of fact. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove." (Internal quotation marks omitted.) *Chen* v. *Hopkins School, Inc.*, 148 Conn. App. 543, 548, 86 A.3d 482 (2014).

With respect to count one, the defendant argued that in order to prove a breach of the implied warranty of merchantability, the plaintiff needed to have produced some evidence that the vehicle was not in a merchantable condition at the time the vehicle was sold to her. According to the defendant, the only evidence before the court demonstrated that the vehicle was in proper working condition when it was sold and that it was utilized thereafter by the plaintiff, without difficulties, for a considerable period of time.

As to count two alleging a violation of the Magnuson-Moss Act, the defendant argued that the act was designed primarily to ensure that warranties were properly disclosed and explained to consumers, and that the plaintiff had presented no evidence demonstrating any disparity or disagreement as to the terms of the express warranty at issue in the present case, which was disclosed in writing to the plaintiff.

The defendant initially argued that there was no evidence presented that the defendant had breached the express warranty as alleged in count three because the only credible evidence presented demonstrated that the vehicle had been driven more than 3000 miles at the time it was presented for warranty repairs. The defendant later conceded, however, that the evidence the plaintiff had presented thus far may have been sufficient to raise a factual dispute regarding that issue.

According to the defendant, the plaintiff also had failed to produce any evidence, let alone clear and convincing evidence, demonstrating that the defendant misrepresented a material fact or had the necessary intent to support the allegation of fraud in count four.

Regarding the fifth count alleging a revocation of acceptance, the defendant argued that this claim failed as a matter of law because the evidence presented demonstrated that the purported revocation was not made

within a reasonable period of time. Specifically, the revocation was made via an April, 2013 letter, which was six months after the vehicle was delivered to the plaintiff and four months after the warranty dispute arose.

Finally, the defendant argued that the plaintiff had failed to establish a prima facie case of a CUTPA violation as alleged in count six. The defendant again noted that the plaintiff had failed to present any evidence rising to the level of fraud, which it claimed was the only stated basis in the complaint for the CUTPA count.

In response, the plaintiff argued that the court should deny the defendant's motion to dismiss as to all six counts. The plaintiff first argued that she had presented evidence that the vehicle needed a new engine to be operable and that this was sufficient to move forward on the claim of breach of the implied warranty of merchantability, which requires that goods be fit for the ordinary purpose for which they are sold. With respect to the Magnuson-Moss count, the plaintiff argued that it goes "hand in hand with the express warranty as provided by state statute" and, thus, was directly linked to the breach of the express warranty as alleged in count three of the complaint. The plaintiff further argued that she had established a prima facie case of breach of the express warranty because, according to her testimony, she had provided the defendant with notice of her warranty claim prior to its expiration, even if the vehicle had been driven in excess of 3000 miles by the time the vehicle was brought into the dealer to effectuate the necessary repairs.[9] With respect to the fraud count,

[9] The plaintiff's theory, in part, is that the defendant was on notice of her warranty claim when she first brought the vehicle into the dealership on Saturday, December 8, 2012, but was told the repair shop was closed, a fact disputed by the defendant. According to the plaintiff, the car was under the mileage limit on Saturday, but she added more than 200 miles commuting back and forth to work before the car could be seen by the defendant the following Monday.

the plaintiff argued that she had established a prima facie case on the basis of both the discrepancies in the mileage recorded on the purchase paperwork and the fact that the defendant tried to get her to spend more money on a replacement vehicle without first informing her that the repairs to the Saab fell outside the warranty period. The plaintiff disagreed with the defendant that her attempt to revoke the sale was not made within a reasonable time after discovering the ground for revocation. Finally, the plaintiff essentially argued that her CUTPA claim was not solely based upon fraud but upon a multitude of unfair and deceptive practices by the defendant and that the CUTPA count remained viable on the basis of the evidence presented.

After hearing argument from the parties and considering a memorandum of law submitted by the defendant, the court issued the following oral decision: "As to count one, *the court is going to dismiss count one*. I don't think that the plaintiff has presented sufficient evidence to indicate that there's been any implied warranty of merchantability that has been in any way proven by you. I do agree with defense counsel that I think you needed more than just to say that the car broke down. It was obviously working at the time. [The] plaintiff testified that she took it for two test drives, and it seemed to be fine, and everything was good about it, had been through whatever mechanical work it needed to have done in order to put it on the lots, so there's nothing to indicate that, in fact, that there was *at the time that she took it off the lot* a problem with the car.

"The other counts do create some concern. And some question I think is still left in the mind of the court as to count[s] two, three, and four, how—so, I will not grant the motion to dismiss as to each of those counts. I think a lot of that has to do with the time period and also what the miles were on the car. The court has

heard evidence which could be interpreted in many ways as to what the mileage of the car was from the time that she first picked it up on October 17 [2012] until the first time at the dealer, which was December the 10th—I'm sorry—December the 8th, when it was actually driven by somebody, as the plaintiff has testified—I haven't heard anything that would be contrary to that—on December the 8th to the dealer. So, counts two, three, and four, the court will not grant the motion to dismiss.

"I will grant the motion to dismiss as to the CUTPA claim. I don't think that there's sufficient evidence to rise to the level of a CUTPA claim—or, I'm sorry, that's count six as to the CUTPA claim—simply because the car broke down at some point and there's a question about the warranty. I think that the level of evidence that's necessary in a CUTPA claim has not been satisfied in this particular action.

"As to count five regarding revocation of acceptance, I noted that exhibit 3, which was provided to the court, was actually a letter that was provided to her counsel some months later to the dealer. There doesn't seem to be any evidence other than that there was a revocation of acceptance. In fact, they were in negotiations going back and forth. I don't think there was a revocation of acceptance. And I would grant the motion to dismiss as to count five also.

"*So, what we have remaining is counts two, three, and four of the complaint.*" (Emphasis added.)

The defendant then proceeded to put on its evidence. At the close of all evidence, the court instructed the parties that it would accept simultaneous posttrial briefs of ten pages or less on or before September 30, 2015. Each party submitted a memorandum of law on that date. No motion for reconsideration ever was filed

regarding those counts of the complaint that were dismissed during the trial, nor did the court ever open, vacate, or modify its judgment dismissing counts one, five and six.

On October 30, 2015, the court issued a memorandum of decision. After setting forth its factual findings, the court first indicated that it had already "directed a verdict" as to counts five and six, and that the remaining causes of action to be considered were those in counts one through four. Although technically the court had dismissed certain counts rather than having "directed a verdict" for a particular party, the court's failure to recognize that it had already disposed of count one is far more significant to our analysis, as we discuss in parts I and II of this opinion.

The court next turned to a discussion of what it aptly identified as the primary factual dispute in this case, namely, whether the 3000 mile provision of the express warranty had lapsed by the time the plaintiff sought coverage under the warranty. The court determined, on the basis of the paperwork that had been admitted into evidence and the testimony of witnesses, that the defendant had failed to document accurately the vehicle's odometer readings throughout its dealings with the plaintiff. The court noted that accurate odometer readings were essential to evaluating warranty claims and found that the lack of accurate documentation in the present case was detrimental to the plaintiff's ability to establish her rights under the warranty. The court thus resolved any factual dispute regarding mileage in favor of the plaintiff. In particular, the court found that the defendant's errors regarding the odometer readings, when coupled with the fact that the plaintiff was permitted to engage in additional and significant travel after the defendant had received notice of a claimed defect but prior to its evaluation of the vehicle, provided a sufficient basis on which the court could "determine

that the plaintiff was within the warranty period and, thus, there [was] a breach of warranty" by the defendant. The court stated: "Although the actions of the defendant can be characterized as careless and sloppy, they are also dishonest in that when the car left the lot on October 17, 2012, the plaintiff was relying on a warranty that was not appropriately calculated, and the mileage was not accurately noted by the defendant when she first brought the car to the defendant dealer on December 8 or December 10, 2012."

The court then continued its analysis by turning to a discussion of each of the purportedly unresolved counts, stating: "Having determined that the plaintiff was within the warranty period, the court examines the claims." With respect to count one alleging a breach of the implied warranty of merchantability, which it had already dismissed, the court found that the defendant had sold the vehicle with an assurance of merchantability, and that it would not be expected that a vehicle with a cash value of more than $16,000 would need a new engine costing between $4000 and $5000. The court found that the vehicle was not in merchantable condition because it was not fit for the ordinary purpose for which it was intended, which the court identified as "normal and reliable driving to work and elsewhere." The court concluded that the plaintiff was entitled to recover her actual damages, which the court calculated to be "so much of the price as has been paid through her trade-in allowance of $4500 and the additional costs of $800 as the gap contract and title and government license and registration fees of $135 for a total of $5435 . . . ."

Turning to count two, the court indicated that the Magnuson-Moss Act permits a consumer to sue a warrantor for a breach of a written or implied warranty, but creates no additional basis for liability, limiting recovery to those damages existing under state law plus

reasonable attorney's fees. In other words, the court noted, claims under the Magnuson-Moss Act "stand or fall with [the] express and implied warranty claims under state law." The court concluded that "based upon the finding by the court that there is liability for breach of warranty, the plaintiff is entitled to the $5435 actual damages as awarded for the breach of warranty and reasonable attorney's fees . . . ."

The court next awarded the plaintiff her actual damages of $5435 for violation of the express warranty as alleged in count three. The court found that the plaintiff had proven her cause of action because, as it already determined, at the time the plaintiff submitted her request for repairs, the vehicle had been driven less than 3000 miles and, thus, remained under warranty.

Finally, as to the fraud allegations in count four, the court also ruled in favor of the plaintiff. After setting forth the elements of a cause of action sounding in fraud and properly noting that fraud must be proven by " 'clear and satisfactory' " evidence, the court stated: "In this action, the defendant was the party responsible for recording accurately the odometer readings. The testimony of [the defendant's representative] is that when repairs are done, the miles are first noted by the service department in the [repair order]. This testimony is not accurate, given the documents which the court has earlier described as cookie cutter because it appears that the numbers are not an accurate reflection of the odometer, but are more a copying from paperwork. The defendant provided the plaintiff with the warranty not on October 10 but on October 17, 2012 when she came back to the dealer. Their failure to do an actual reading with the warranty is not only sloppy but can be viewed in no other way than as a deliberate act to record lower miles knowing that the car has been driven to emissions, for a number of test drives and repair work. The statement of the mileage is not correct

based upon the testimony and the dealer's records. It must be known to the dealer when there has been no change in the mileage although the car has been on the lot presumably with test drives, servicing, and emissions testing that the readings should reflect these normal activities. The plaintiff relied upon the defendant in establishing the base number for her warranty, and there is no testimony that anyone ever looked specifically at the odometer to record the mileage (other than possibly sometime after the plaintiff returned the second time for repairs), even for the mandated odometer reporting.

"Therefore, the plaintiff has proven that the defendant's actions were fraudulent in failing to properly record the odometer readings, refuse warranty coverage, and attempt to have her enter into other purchase contracts with the defendant to replace the car. These acts demonstrate fraudulent misconduct in the form of deceit and misrepresentation by the defendant and impacted the plaintiff. Thus, the plaintiff is entitled to the actual damages of $5435 and punitive damages in the amount of $15,000." In summarizing its decision, the court indicated that it was awarding the plaintiff "actual damages of $5435, punitive damages in the amount of $15,000 and reasonable attorney fees in accordance with count two to be awarded upon the submission to the court of an affidavit filed by [the] plaintiff's counsel and the costs as submitted by the plaintiff in the attachment to the memorandum dated September 30, 2015."[10]

On November 6, 2015, the plaintiff filed a motion for counsel fees, attached to which was an affidavit of attorney's fees in the amount of $6655.35. The plaintiff also submitted a bill of costs totaling $668.58. On

[10] The record before us does not contain a bill of costs attached to the plaintiff's posttrial memorandum.

November 18, 2015, the defendant filed an objection challenging the reasonableness of the requested fees and costs. That same day, the defendant timely filed the present appeal from the court's October 30, 2015 judgment.[11]

The court heard argument regarding attorney's fees on November 30, 2015, granted the plaintiff's motion, and overruled the defendant's objection. The court further awarded the plaintiff additional attorney's fees for the time spent filing and arguing the postjudgment motion. The plaintiff submitted a supplemental affidavit of attorney's fees later that day in the amount of $390, which the court granted on December 14, 2015, bringing the total award of attorney's fees to $7045.35. The defendant amended this appeal on January 4, 2016, disputing the award of attorney's fees.

Before turning to the claims raised by the defendant, it is important to take note of what has not been challenged by the defendant in the present appeal. In summarizing its arguments, the defendant suggests in its brief that if this court were to rule in the defendant's favor as to all claims, we should reverse the court's judgment "in its entirety." The defendant, however, failed to advance or adequately brief any claims on appeal regarding the court's decision holding the defendant liable under count three of the complaint for breach of the express statutory warranty and awarding compensatory damages on that count in the amount of $5435. Although the defendant states in its reply brief that such a claim was "discussed at length" in its main brief, there is no mention of this claim in the statement

[11] We note that, in *Paranteau* v. *DeVita*, 208 Conn. 515, 544 A.2d 634 (1988), our Supreme Court adopted a "bright-line rule"; id., 522; that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." Id., 523.

of issues, and the only discussion resembling a challenge to the court's finding of a breach of the express warranty comes within the defendant's discussion of the Magnuson-Moss count and contains no legal citations or references to the record. Indeed, the plaintiff did not brief issues related to the express warranty count, presumably because she did not construe the defendant's brief on appeal as challenging the court's determination on that count. Accordingly, even if the defendant were to prevail on all the claims raised and briefed, the practical effect would not be a judgment for the defendant "in its entirety," but merely a potential reduction in the overall damages award to $5435. Having noted the limits of this appeal, we turn to our discussion of the claims raised.

I

The defendant first claims that the court improperly rendered judgment in favor of the plaintiff on count one of the complaint alleging a breach of the implied warranty of merchantability because the court previously had dismissed that count pursuant to Practice Book § 15-8. We agree.

Whether the court properly rendered judgment on a previously disposed count presents a question of law over which we exercise plenary review. There is no dispute that, after the plaintiff presented her evidence at trial and rested, the defendant made an oral motion to dismiss all counts of the complaint pursuant to Practice Book § 15-8. "For the court to grant [a] motion [for judgment of dismissal pursuant to Practice Book § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish

the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." (Citation omitted; internal quotation marks omitted.) *Gambardella* v. *Apple Health Care, Inc.*, 86 Conn. App. 842, 846, 863 A.2d 735 (2005).

Applying that standard in the present case, the court clearly and unequivocally rendered a judgment of dismissal as to count one of the plaintiff's complaint.[12] The court stated on the record: "As to count one, the court is going to dismiss count one." It also dismissed counts five and six, indicating at the close of its oral decision that "what we have remaining is counts two, three, and four of the complaint." The trial proceeded, therefore, only as to those counts. In dismissing count one, the court indicated: "I don't think that the plaintiff has presented sufficient evidence to indicate that there's been any implied warranty of merchantability that has been in any way proven by you." Once the court had dismissed count one, it effectively was removed from the case, and the court had no authority to address the merits of that dismissed count in its final decision or to award damages on the basis of that dismissed cause of action.

It is true that a court has the authority, even sua sponte, to correct clerical errors in a prior judgment

[12] "A motion for judgment of dismissal has replaced the former motion for nonsuit for failure to make out a prima facie case." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 391, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). The remedy afforded in response to a successful motion brought pursuant to Practice Book § 15-8 is accordingly more akin to a directed judgment on the merits in favor of the proponent of the motion. Although it appears to be somewhat of a misnomer to call the resulting judgment a judgment of dismissal, we use that terminology nevertheless because it comports with the language used in our rules of practice.

or to clarify or interpret an ambiguous judgment. *Sanzo* v. *Sanzo*, 137 Conn. App. 216, 222 n.5, 48 A.3d 689 (2012). The court may also open a judgment, although generally the court will not do so absent a motion by a party. See *Carabetta* v. *Carabetta*, 133 Conn. App. 732, 735–36, 38 A.3d 163 (2012). If the court in the present case determined that its prior dismissal of count one was somehow in error and, thus, should be opened and set aside, it never indicated this to the parties on the record prior to rendering judgment. On the basis of the record before us, we decline to construe the court's subsequent ruling on the merits as an implicit reversal sua sponte of its prior determination that the plaintiff had failed to present a prima facie case. Doing so here would unfairly prejudice the defendant, which never had an opportunity to present its own evidence in defense of count one, believing it was dismissed.

The only argument made by the plaintiff in response to this claim is that any mistake by the court in ruling on count one is harmless because the court awarded the same measure of damages with respect to count three of the complaint alleging breach of the express warranty. That does not justify or excuse the error, and speaks only to the damages awarded, not the finding of liability. Simply put, any judgment rendered on the merits of a previously dismissed count, in the absence of any proper restorative action, amounts to reversible error. The judgment for the plaintiff on count one, accordingly, is vacated.

II

Next, the defendant claims that the court improperly determined that the defendant had violated the Magnuson-Moss Act, 15 U.S.C. § 2310 (d), because the plaintiff had pleaded in count two of the complaint that the Magnuson-Moss violation was the result of the defendant's failure to comply with its obligations under the

implied warranty of merchantability. It argues that any judgment for the plaintiff on count two, therefore, was logically incongruous with the court's dismissal of count one, which alleged a breach of the implied warranty of merchantability. We agree.

"Magnuson-Moss, enacted by Congress in 1975, is not limited in its application to the sale of automobiles but applies to consumer products in general. It does not require that warranty be given, but if there is a written warranty, Magnuson-Moss imposes certain requirements as to its contents, disclosures, and the effect of extending a written warranty." (Emphasis omitted.) *Szajna* v. *General Motors Corp.*, 115 Ill. 2d 294, 312–13, 503 N.E.2d 760 (1986). A Magnuson-Moss Act violation may be premised upon either the breach of an express or implied warranty or both. See 15 U.S.C. § 2310 (d) (1) (2012); see also *Sandoval* v. *PharmaCare US, Inc.*, 145 F. Supp. 3d 986, 998 (S.D. Cal. 2015) (explaining Magnuson-Moss "allows consumers to enforce written and implied warranties in federal court, borrowing state law causes of action" [internal quotation marks omitted]). If a Magnuson-Moss claim is premised solely upon a state law warranty claim, the Magnuson-Moss claim will "stand or fall" with the state law claims. *Clemens* v. *DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 and n.3 (9th Cir. 2008). Accordingly, we must first look to the pleadings to decide the scope of the plaintiff's Magnuson-Moss claim in the present case and whether the defendant was entitled to judgment on that count because of the dismissal of the associated state law claim.

"The interpretation of pleadings is always a question of law for the court . . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . .

[T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012).

Turning to the complaint in the present case, we note that count one alleged a violation of the implied warranty of merchantability as expressed in this state's Uniform Commercial Code, General Statutes § 42a-2-314. Count two, alleging a violation under the Magnuson-Moss Act, immediately followed and incorporated the allegations of count one. After alleging facts necessary to invoke the protection of the federal statute, the plaintiff alleged: "[The] defendant failed to comply with its obligations under the implied warranty of merchantability, and it is liable to the plaintiff for her damages, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 2310 (d)." Thus, the reasonable and rational construction of that count is that the plaintiff's general theory of recovery with respect to the Magnuson-Moss

count hinged upon the state law claim in count one, which alleged a violation of the implied warranty of merchantability. Although, on appeal, the plaintiff attempts to shift the focus away from the breach of implied warranty count and to tie the Magnuson-Moss allegations to its claim of a breach of the express warranty, there is simply no support for that in the pleadings.

The breach of express warranty claim is found in count three of the complaint. That count, however, does not incorporate any of the allegations set forth in count one or two, and makes no mention of a violation of the Magnuson-Moss Act. There are simply no allegations set forth in count three that would have alerted the court or the defendant that the plaintiff was alleging a Magnuson-Moss violation on the basis of the breach of express warranty count, which, up to that point in the complaint, had not yet been pleaded. Having elected to hinge its allegations of a Magnuson-Moss violation to the breach of implied warranty claim asserted in count one, the success or failure of the counts are inextricably tied.

In its memorandum of decision, the court summarily found for the plaintiff on the Magnuson-Moss count on the basis of its finding "that there is liability for breach of warranty . . . ." Although this finding immediately followed its ruling regarding the breach of the implied warranty of merchantability, the court did not clearly identify whether it was referring to that finding or to its later holding that the defendant breached the express written warranty as alleged in count three. It is, however, unnecessary to resolve this ambiguity because the ruling would be improper under either scenario.

As we have explained, to the extent that the Magnuson-Moss Act violation found by the court was tied to

the alleged breach of the implied warranty of merchantability, the court's dismissal of the implied warranty count for failure to make out a prima facie case should have precluded any finding that such a breach formed the basis for a Magnuson-Moss Act violation. On the other hand, if the court intended to hold that the plaintiff proved a Magnuson-Moss violation on the basis of its finding of a breach of the express warranty, that determination would be improper because the plaintiff never pleaded such a violation. See *Brochu* v. *Brochu*, 13 Conn. App. 681, 684, 538 A.2d 1093 (1988) ("[i]t is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint" [internal quotation marks omitted]). Accordingly, we agree with the defendant that the court improperly ruled in favor of the plaintiff on count two, and that portion of the judgment is reversed.

III

The defendant next claims that the court improperly awarded the plaintiff attorney's fees in addition to compensatory damages. The defendant argues that the plaintiff was not entitled to recover her attorney's fees as a matter of law and that the amount of attorney's fees was unreasonable. We agree that the plaintiff was not entitled to recover attorney's fees.

"Ordinarily, 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. . . . [If], however, a damages award is challenged on the basis of a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Accurate Title Searches, Inc.*, 173 Conn. App. 463, 496, 164 A.3d 682 (2017).

"The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . *or a statute may confer such rights*." (Emphasis added; internal quotation marks omitted.) *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d 697 (2007).

In the present case, the court's award of attorney's fees was a component of the damages for the purported Magnuson-Moss Act violation as alleged in count two. That act contains an express statutory exception to the American rule. See *Chrysler Corp.* v. *Maiocco*, 209 Conn. 579, 588, 552 A.2d 1207 (1989) ("Magnuson-Moss [Act] gives authority to the court to grant attorney's fees in a civil suit").[13]

Because we have determined in part II of this opinion, however, that the court improperly rendered judgment in favor of the plaintiff on count two, the plaintiff cannot reasonably rely upon that statutory grant of authority as a legal basis for upholding the court's award of attorney's fees with respect to count two. Further, attorney's fees also may be awarded at the discretion of the court for a CUTPA violation, the court dismissed that count of the complaint. The plaintiff has not cited in her brief

[13] Specifically, 15 U.S.C. § 2310 (d) (2) provides in relevant part that a prevailing plaintiff "may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate."

to this court any alternative statutory or common-law basis for an award of attorney's fees with respect to count two. Accordingly, the court's award of attorney's fees must be set aside. Because we determine that the court improperly awarded attorney's fees to the plaintiff as a matter of law, at this juncture, we need not reach the defendant's additional argument that the amount of attorney's fees awarded by the court was unreasonable.

IV

The defendant next claims that the trial court incorrectly concluded that the defendant committed fraud because the plaintiff failed to present clear and convincing evidence that the defendant made a false representation or had the requisite intent to defraud the plaintiff. We are not persuaded.

"Under the common law . . . it is well settled that the essential elements of fraud are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury." (Internal quotation marks omitted.) *Leonard* v. *Commissioner of Revenue Services*, 264 Conn. 286, 296, 823 A.2d 1184 (2003). "It is well established that common law fraud must be proven by a higher standard than a fair preponderance of the evidence. This middle tier standard has been described as 'clear and satisfactory evidence' and as 'clear, precise and unequivocal evidence.' " (Footnote omitted.) *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 327–28, 593 A.2d 478 (1991); see also *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 595 n.7, 930 A.2d 768 (2007) (describing burden of proof in common-law fraud cases as requiring "clear and convincing evidence"), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007).

"Fraud and misrepresentation cannot be easily defined because they can be accomplished in so many different ways. They present, however, issues of fact. . . . The trier of facts is the judge of the credibility of the testimony and of the weight to be accorded it. . . . When the trial court finds that a plaintiff has proven all of the essential elements of fraud, its decision will not be reversed or modified unless it is clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [A]s a reviewing court [w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 449–51, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

In reviewing whether a plaintiff has proven her case by clear and convincing evidence, we are cognizant that the trier of fact "may draw reasonable, logical inferences from the facts proven as long as [it does] not resort to speculation and conjecture. . . . Insofar as circumstantial evidence can be and is routinely used to meet the higher standard of proof in a criminal prosecution, so can it be used in a case . . . [in which]

the applicable standard is that of clear and convincing proof." (Citations omitted; emphasis added.) *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 193, 485 A.2d 1362 (1985). With these principles in mind, we turn to the defendant's arguments.

The defendant first argues that the court improperly found that the defendant made a false statement by failing to disclose an accurate odometer reading because the court had no evidence before it from which to determine the vehicle's true mileage either at the time of sale or when the vehicle was delivered. Accordingly, the defendant argues, there was no evidence to refute the mileage as stated on the sales agreement or the odometer statement. We disagree and conclude that the court's finding is supported by evidence in the record and, thus, is not clearly erroneous.

Although the defendant is correct that, in her testimony at trial, the plaintiff could not recall the precise odometer readings she had observed, she did testify that the odometer reading at the time of delivery on October 17, 2012, was higher than what she observed when test-driving the vehicle. The court was entitled to credit that testimony. The court also had evidence that the same mileage number was recorded on documents despite the reasonable inference that the mileage should have increased as a result of subsequent test drives by the plaintiff and by the defendant's service department.

The defendant also argues that there was no evidence from which the court could have found that the defendant intended to induce the plaintiff to rely upon the inaccurately recorded mileage in order to influence her decision to purchase the Saab. We disagree.

The court found, on the basis of the evidence presented and its assessments of the credibility of the witnesses, including its negative view of the testimony

provided by the defendant's service department representative, that the vehicle's mileage was not accurately recorded by the defendant's representatives on paperwork. Rather, the court found that the mileage was simply carried over in "cookie cutter" fashion from one document to another. The court also found that the defendant's recording failures were not merely sloppy but a deliberate attempt to record lower mileage, and that this deceit and misrepresentation were done to the detriment of the plaintiff because they impacted her ability to take full advantage of the warranty period. In considering whether there was clear and convincing evidence of fraud, the court, as the trier of fact, was permitted to draw reasonable inferences, including that the defendant's actions were intended to induce the plaintiff's reliance upon its representations and that she purchased the vehicle believing the sale included warranty coverage for 3000 miles, when in fact, due to the defendant's actions, the vehicle warranty would expire after fewer miles, lowering the value of the vehicle and reducing the defendant's potential liability for repairs.[14]

We conclude, on the basis of our review of the record, including the court's memorandum of decision, that the court's determination that the defendant engaged in fraud was legally and logically correct and supported

[14] To the extent that the defendant's arguments can be construed as challenging whether the court had sufficient evidence from which to find that the plaintiff purchased the vehicle in reliance on the defendant's misrepresentations, we deem any such claim abandoned for lack of adequate briefing. "We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014).

by the evidence adduced at trial. The defendant's claim to the contrary, therefore, fails.

V

Finally, the defendant claims that the court improperly awarded the plaintiff punitive damages of $15,000. We agree.

"Punitive damages may be awarded upon a showing of fraud." *Plikus* v. *Plikus*, 26 Conn. App. 174, 180, 599 A.2d 392 (1991). Common-law punitive damages, however, are limited under well established Connecticut law "to litigation expenses, such as attorney's fees, less taxable costs." *Hylton* v. *Gunter*, 313 Conn. 472, 484, 97 A.3d 970 (2014).

In the present case, the court awarded $15,000 in punitive damages under the fraud count without explaining the factual basis for that order. The court had no evidence before it regarding the total litigation expenses of the plaintiff. Although the plaintiff had submitted an affidavit from the plaintiff's attorney claiming attorney's fees of nearly $7000, the plaintiff did not provide any evidence from which the court reasonably could have inferred an additional $8000 in nontaxable costs. In other words, there is simply no evidentiary or legal basis supporting the court's award of $15,000 in punitive damages. Accordingly, although we conclude that some award of punitive damages was permissible in conjunction with the fraud count, a new hearing in damages is necessary to determine the actual amount of the plaintiff's litigation expenses, which, in addition to reasonable attorney's fees, will include other nontaxable costs.

The judgment is vacated as to count one and reversed as to count two, including the award of attorney's fees, and the case is remanded with direction to render judgment in favor of the defendant as to those counts; the

award of punitive damages in connection with count four is vacated and the case is remanded with direction to conduct a new hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DARRYL W. *v.* COMMISSIONER OF CORRECTION (AC 38410)

Prescott, Beach and Mihalakos, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that his trial counsel provided ineffective assistance by failing to file a request to charge the jury or to object to the trial court's jury instruction on the operability of a firearm, and failing to direct the trial court in its response to an inquiry from the jury concerning operability. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner failed to establish that his trial counsel was ineffective in failing to file a request to charge the jury or to object to the trial court's jury instruction on operability, the petitioner having failed to demonstrate that he was prejudiced by trial counsel's performance; no evidence was presented at the habeas trial as to what specific request to charge trial counsel should have submitted to the court, and, in the absence of any evidence as to the language of an instruction that should have been submitted by trial counsel, it could not be determined whether that particular instruction would have likely changed the outcome of the trial.
2. The habeas court properly determined that the petitioner's trial counsel was not ineffective for failing to direct the trial court in its response to the jury's inquiry on operability; trial counsel made clear his position on how to address the inquiry on operability, but the trial court disagreed, choosing to take a more cautious approach, and, therefore, the habeas court properly determined that the trial counsel's performance did not fall below an objective standard of reasonableness.

Argued May 23—officially released October 24, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, denied the petitioner's motion for summary judgment; thereafter, the matter was tried to the court; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Craig A. Sullivan, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc Ramia*, assistant state's attorney, for the appellee (respondent).

Opinion

MIHALAKOS, J. The petitioner, Darryl W.,[1] appeals from the judgment of the habeas court denying his amended petition for writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly denied his amended petition because the record established that his criminal trial counsel had rendered ineffective assistance by (1) failing to file a request to charge the jury and/or to object to the trial court's jury instruction and (2) failing to direct the trial court in its response to the jury's inquiry on operability. We conclude that the habeas court properly determined that the petitioner failed to establish his claim of ineffective assistance of counsel in that he failed to establish that he was prejudiced by counsel's failure to file a request to charge the jury and/or to object to the jury instruction and that counsel performed deficiently by failing to direct the trial court in its response to the jury's inquiry.

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

Accordingly, we affirm the judgment of the habeas court.

The record discloses the following facts. In the underlying criminal matter of *State* v. *Darryl W.*, the petitioner was charged with kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a, attempted aggravated sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70a (a) (1), and sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (B). After a trial by jury, he was found guilty of all three counts. In the petitioner's direct appeal, our Supreme Court affirmed the judgment.

In its opinion, our Supreme Court set forth the factual background as follows: "The [petitioner was] married to the sister of the victim, D. Following the loss of her house due to foreclosure, D, along with her husband and two children, resided with the [petitioner], his wife and their four children for several months. D and her family then moved out of the [petitioner's] house to live with her parents and subsequently began looking for a house to buy. On the day of the incident, the [petitioner] tricked D, whom he had offered to help find a house, into meeting him alone at a commuter parking lot in Waterbury and driving with him to his house. When they arrived, the [petitioner] asked D to help carry a box into the house. Once inside, he held D at gunpoint, handcuffed her and brought her to a bedroom. There, he removed her pants, placed duct tape over her mouth, kissed her breasts, touched her vagina, briefly tied her feet to a bed, removed his pants and climbed on top of her. The [petitioner] stopped short of intercourse, saying he 'couldn't do this,' and subsequently agreed to let D leave after she brought him back to his vehicle in the commuter lot.

"The gun that the [petitioner] used was an air pistol that the police later seized in a search of a vehicle

belonging to the [petitioner]. The pistol was designed to shoot BBs propelled by compressed carbon dioxide, or CO_2. At the time the police seized it, the pistol contained neither BBs nor a CO_2 cartridge, but a later test confirmed that it was capable of firing when equipped with BBs and a cartridge.

"At trial, the [petitioner] testified that he and D had previous romantic encounters and that on the day in question they engaged in consensual intimate activity but stopped after deciding that doing so was wrong. The defendant also sought to show that the seized air pistol was not on his person at the time of the incident but had in fact been stored in his vehicle for several months. In the alternative, for purposes of the charge of kidnapping in the first degree with a firearm, he asserted an affirmative defense that, even if he had been armed with the air pistol, it was inoperable.

"Pursuant to the amended information that the state filed after the close of its case, the trial court instructed the jury that it did not need to find that the [petitioner] actually possessed an operable pistol to convict him on the kidnapping and aggravated sexual assault charges, which required only that he represented by words or conduct that he possessed such a weapon. The court further instructed the jury, pursuant to the [petitioner's] affirmative defense, that it should acquit him of the kidnapping charge if it found that he proved that the air pistol was not operable. The jury returned a verdict convicting the [petitioner] on all counts." (Footnote omitted). *State* v. *Darryl W.*, 303 Conn. 353, 357–59, 33 A.3d 239 (2012).

After his unsuccessful appeal, the petitioner brought this amended petition for writ of habeas corpus, claiming, inter alia, that his trial counsel, Mark Ouellette, was ineffective because he failed to file a request to charge the jury and/or to object to the trial court's jury

instruction and because he failed to direct the court in its response to the jury's inquiry on operability.[2] By its oral decision on August 4, 2015, the habeas court denied the amended petition. On August 17, 2015, the habeas court granted the petitioner's petition for certification to appeal from its judgment. This appeal followed. Additional facts will be set forth as necessary.

We first set forth our standard of review and the relevant law governing ineffective assistance of counsel claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, supra, [687], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To

[2] The petitioner raised other claims in his amended petition, and the habeas court did not find in his favor on those allegations. Those determinations, however, are not challenged in this appeal.

satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 125 Conn. App. 97, 105, 7 A.3d 395 (2010), aff'd, 306 Conn. 664, 51 A.3d 948 (2012).

I

The petitioner first claims that trial counsel rendered ineffective assistance by failing to file a request to charge the jury on the operability of the firearm and/or failing to object to the trial court's jury instruction. Specifically, the petitioner argues that trial counsel should have requested a charge that the jury should not find the petitioner guilty of kidnapping in the first degree with a firearm if it finds that the pistol was, at the time of the crime, one from which a shot could not be discharged and that the petitioner did not have the means to make the pistol capable of discharging a shot. In addition, the petitioner argues that trial counsel should have requested a charge that the jury could not find the petitioner guilty of attempted aggravated sexual assault in the first degree unless it found sufficient evidence to prove, beyond a reasonable doubt, that the pistol was, at the time of the crime, one from which a shot could be discharged, or it found that the pistol was not one from which a shot could be discharged, but that the petitioner had under his control the means to make the pistol capable of discharging a shot.[3] We are not persuaded.

The habeas court was presented with evidence of the following additional facts. At the close of evidence, but prior to the charging conference, the trial court

[3] The petitioner has not raised a claim related to the trial court's instruction on sexual assault in the third degree.

provided a copy of its drafted jury charge to trial counsel and the prosecutor. The court asked counsel to be prepared to comment on the instructions and to discuss any concerns they may have. The following day, the court stated that it was willing to hear any requests that either counsel wanted to make regarding the charge. In response, trial counsel for the petitioner stated: "I have no changes as it was presented this morning." The court then noted that it had included in its charge the affirmative defense that the petitioner had requested.

On the charge of kidnapping in the first degree with a firearm, the court instructed the jury in relevant part: "The third essential element is that during the abduction the [petitioner] represented by his words or conduct that he possessed a pistol. A pistol is defined by statute as 'any firearm having a barrel less than twelve inches.' A firearm is defined by statute to mean in relevant part 'a weapon, whether loaded or unloaded, from which a shot may be discharged.' Represented by words or conduct means that 'the [petitioner] did or said something to indicate to the [victim] that he possessed a pistol.' It is not necessary that the state prove that the [petitioner] actually possessed such a weapon or that the weapon was actually capable of discharging a shot.

"With respect to this charge, the [petitioner] has asserted an affirmative defense under [General Statutes § 53-16a] that any pistol displayed by him was not a weapon from which a shot could be discharged. [Section 53-16a] provides in relevant part that it shall be an affirmative defense that the pistol was not a weapon from which a shot could be discharged. In this case, such an affirmative defense, if proven, is a complete bar to a conviction for the offense of kidnapping in the first degree with a firearm. . . . If you find that the [petitioner] has proved by a preponderance of the evidence that the pistol was not a weapon from which a shot could be discharged, then you must find him not

guilty on the offense of kidnapping in the first degree with a firearm under count one of the information." (Emphasis omitted.)

On the charge of aggravated sexual assault in the first degree, the trial court instructed the jury in relevant part: "The third essential element which the state must prove beyond a reasonable doubt is that the [petitioner], while attempting to commit the sexual assault, represented by words or conduct that he possessed a deadly weapon. For purposes of this case, the term deadly weapon means 'any weapon, whether loaded or unloaded, from which a shot may be discharged.' Represented by words or conduct means that 'the defendant did or said something to indicate to the [victim] that he had a deadly weapon in his possession.' It is not necessary that the state prove that the [petitioner] actually possessed such a weapon or that the weapon was actually capable of discharging a shot." (Emphasis omitted.)

At the habeas trial, trial counsel testified that, during the criminal trial, he submitted a request to charge, which included a request for the affirmative defense. He further testified that, at the subsequent charging conference, he agreed to the charges suggested by the court. Christopher Duby, an attorney qualified as an expert in criminal defense matters in state court, testified that the proper way to preserve an instructional issue for appeal was to file a request to charge or to object to the trial court's charge. He further testified that trial counsel had acquiesced to the jury charge proposed by the court.

Following the close of evidence at the habeas trial, the court denied the amended petition for writ of habeas corpus on the ground that trial counsel did not provide ineffective assistance. The court concluded that "[t]he testimony at trial from . . . Ouellette indicated that he

did indeed file his own jury charge. Assuming that this was not the case, however, the court finds no deficient performance in that the state, the judge, and trial counsel met prior to trial and agreed on the jury charge. Additionally, there's nothing in the jury charge that this court finds establishes prejudice to the [defendant's] case." We agree with the habeas court and conclude that the petitioner has failed to demonstrate that trial counsel provided ineffective assistance.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 141 Conn. App. 626, 632, 62 A.3d 554, cert. denied. 308 Conn. 947, 67 A.3d 290 (2013).

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Hickey* v. *Commissioner of Correction*, 162 Conn. App. 505,

519, 133 A.3d 489, cert. granted, 323 Conn. 914, 149 A.3d 498 (2016).

In the present case, the petitioner has failed to demonstrate that trial counsel's performance prejudiced him. No evidence was presented at the habeas trial as to what specific request to charge counsel should have submitted to the court. Although Duby presented evidence from which the court could have determined that counsel was ineffective, specifically that counsel did not submit his own charge to the jury and did not object to the court's proposed jury charge, he did not testify as to what instruction should have been requested by counsel. In the absence of any evidence as to the language of an instruction that should have been submitted by counsel, we have no way of determining whether that particular instruction would have likely changed the outcome of trial. See *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 650–52, 153 A.3d 1264 (2017) (petitioner failed to present evidence that, had he requested charge to jury, court would have adopted suggestion or that adoption of such charge would have established reasonable probability that petitioner would not have been convicted of murder). Consequently, we conclude that there can be no finding of prejudice as to trial counsel's failure to file a request to charge the jury and/or to object to the trial court's jury instruction.

II

The petitioner next claims that his trial counsel rendered ineffective assistance by failing to direct the court in its response to the jury's inquiry on the operability of the pistol. Specifically, the petitioner argues that it was imperative for his trial counsel to request that the court clarify the issue of operability by including in its answer that if the jury found that, at the time of the crime, the pistol was incapable of firing a shot because

of a missing necessary component, the pistol should have been considered inoperable unless the jury also found that the petitioner had under his control the means by which to replace the missing component. We are not persuaded.

The habeas court was presented with evidence of the following additional facts. During deliberations, the jury sent a note that read, "Does the gun need to be theoretically operable or actually operable at the time the crime was committed?" The court, trial counsel, and the prosecutor engaged in a lengthy discussion as to how to best answer the question. The following exchange occurred between the court and counsel during this discussion:

"The Court: Does counsel want to be heard on how I should answer that question? . . .

"The Court: What's your view [Ouellette]?

"[Ouellette]: Well, I just think my—my opinion is certainly known to the Court.

"The Court: Well, but how would you—I mean it is and it isn't. I mean, how would you . . . have me answer this question?

"[Ouellette]: I think you could . . . answer that question that it is—what did they say, theoretically—

"The Court: Operable or—

"[Ouellette]: —and actually?

"The Court: —actually operable at the time the crime was committed.

"[Ouellette]: I think you would have to answer the question in my opinion, no, to both of those.

"The Court: No to both. How so?

"[Ouellette]: Well, because it's not—at the time of the commission if it was actually operable it didn't have

BBs in it and it didn't have a cartridge in it, so you couldn't actually operate it. Theoretically was it operable? Well, I guess if you believe Officer Rainone's philosophy he said [mechanically] it could . . . operate, it was mechanical but it couldn't fire a BB in the condition it was in, so—

"The Court: Well, the—and I know . . . you argued this to the jury but frankly I think you were wrong in terms of—whether there was a BB in it or not is—is irrelevant under the statute. The statute says whether loaded or unloaded. Okay. So even if there's no BB in the gun, it's still capable of firing a shot under the language of the statute.

"[Ouellette]: Okay.

"The Court: So loaded or unloaded for purposes of this is really—it doesn't matter under the statute because it says whether loaded or unloaded. So . . . this is one tough question, frankly, because I don't want to . . . mislead them in any way. And . . . the statute . . . doesn't give me any guidance on this question. . . . So I'm reluctant to say too much is the dilemma that I have. I guess the question that I would have for both counsel, should the response—

"[The Prosecutor]: Your Honor, I think almost—it seems to me . . . that they're . . . using the phrase theoretically and actually and I think . . . if it had a cartridge and a BB in it would it work or is it—that would be actually operable or theoretically operable. . . . I think the answer to both questions is yes, now that I've thought about it.

"The Court: That [it] has to be both? . . .

"[The Prosecutor]: . . . I think the answer is—the answer to both is yes. That's what the law says . . . either actually or theoretically operable.

"[Ouellette]: But the key thing I think there, Judge, is at the time they . . . put that in there specifically. Right? Which I guess—

"The Court: At the time the crime was committed, yes.

"[Ouellette]: So I guess . . . that's the time that we're talking about, would we—

"The Court: But that is the time that's . . . at issue here . . . is whether at the time that the crime was committed, whether it was capable of firing . . . a shot. . . . I'm inclined [to] be—because I'm—because of my concern with—I'm really not sure of what they mean by theoretically operable or actually operable, so I'm . . . a little concerned with directly answering the question because . . . I'm not quite sure how they're defining those two terms and my fear is if I . . . say yes to one, not to the other, or yes to both, or no to both they may have an interpretation of those terms that are unknown to be and—and problematic. . . . [T]hat's part of my problem. I mean . . . the three of us aren't even sure what . . . is meant by those . . . terms. . . .

"The Court: . . . [W]hat I'm considering doing . . . I mean one option is to simply cite for them, you know, the statute. I mean that's certainly the easy way out, whether loaded or unloaded, capable of firing a shot. And I can tell them that's . . . as much guidance as I can give them . . . .

"The Court: . . . My concern with . . . just saying actually operable is that the . . . legislature has indicated that it's not just actually operable because they've decided you don't have to have any ammunition in the gun to make it operable. . . . [W]hat's someone's normal view is of operable, which is there's a bullet in the chamber, it's ready to go. I can shoot it and . . . a bullet's going to come out or a BB's going to come out.

Well, that's not what the legislature said because they said even if it's not loaded, it can be capable of firing a shot, or you look at it whether it's capable of firing a shot even if it's not loaded. And one of the issues in this case, which is a little unclear, which I think is what they have to try and figure out is I think a reasonable position for them to take here, based on the evidence and based on the testimony—now I'm not saying they're going to find this, but I think they could. And I think—this is what I believe [the prosecutor] argued to them, is you put the canister in, it's part of loading it. You put in the BB, you put in the canister and then you fire it. And that's really all part of the loading process, so not having that there doesn't make it not capable of firing a shot. And that's a reasonable interpretation under the facts here. I understand [Ouellette's] position and also reasonable and one that they could accept, which is, if you don't have that canister there, that's part of the mechanism for firing this weapon and . . . there's no evidence that it was ever there that means that it's not capable. That, to me, is a factual determination for the jury to decide . . . . I think under the . . . facts as presented here, it's factual and, so, I'm a little bit hesitant about defining theoretical or actual because I don't want to take a position one way or another on that factual question and appear to be leading them towards a verdict, which would certainly be inappropriate here. . . . Does anybody want to be heard any further?

"[The Prosecutor]: No. . . .

"[Ouellette]: No, Your Honor. . . .

"The Court: I guess I'm inclined at this point . . . to tell them that I can't answer their question directly . . . . I think at this point, all I'm inclined to do is reread for them the definition of a firearm that it's a weapon, whether loaded or unloaded, is capable of

firing a shot, ask them to continue to deliberate . . . . [I]f there [are] any additional questions they have in this area, they're free to ask them. . . . Anybody want to be heard on that?

"[The Prosecutor]: [The] [s]tate will live with that. . . .

"[Ouellette]: Your Honor, I guess, the only . . . other thing I would suggest is if the court was going to give them that instruction that that's the definition that they keep, that they use that definition in the context of it and in addition to the arguments that were made. I mean, I think you can take that as a matter of law, they still have to use the facts of the case to decide whether or not the arguments fit into the law that you're giving them to look at so . . .

"The Court: Yes, so I—what's your position at this point as to what I should do?

"[Ouellette]: . . . I think I agree with Your Honor, that you're limited in what you can give them based upon . . . the statute . . .

"[Ouellette]: The statutory language . . . that you were suggesting is what I'm talking about.

"The Court: Right. And you're in agreement with that?

"[Ouellette]: Well, no, I—

"The Court: Oh

"[Ouellette]: I'm thinking that by then getting that vanilla boilerplate definition that they're gonna just look at that . . . and not take it in the context that they maybe would have, having that definition and hearing the argument . . . .

"The Court: Yes, but all of this is in the context of obviously the evidence and . . . they know that and that's clear from my instructions. And they're just trying

to apply the law to . . . the facts and . . . they're asking for additional clarification on . . . the law and they're asking . . . in a way that I'm not comfortable giving now and I think it would . . . cause more problems than it would answer. . . . I don't think I can answer this question. And, so, I am just going to simply give them the statutory definition but . . . tell them if they have additional questions and they want to present them to me . . . after they've discussed it some more, then they're certainly free to do that. And if they put it in a different way that . . . I can answer it more directly, I'm certainly willing to do that."

The jury then returned to the court room, and the trial court provided the following instruction: "Ladies and gentlemen . . . I want to discuss the question . . . that you gave me. . . . I cannot directly answer your question and I apologize for that, but I'm just not able to do that. What I do want to do, though, is repeat for you what . . . I've told you already, what's in the charge, that I think bears upon this question, which is that the statute defines firearm, a pistol is a firearm, having a barrel less than [twelve] inches. And a firearm is defined by statute . . . as any weapon, whether loaded or unloaded . . . from which a shot may be discharged. So it's any weapon, whether loaded or unloaded, from which a shot may be discharged. So that's the best I can do in response to your question." The jury sought no further guidance on the issue of operability.

At the habeas trial, trial counsel testified that, during deliberations, the jury sent a note that asked whether the pistol had to be theoretically or actually operable at the time of the crime. He further testified that he, the prosecutor, and the court did not know what the jury meant by the phrase "theoretically operable," and that he discussed with the court how to interpret the question and address the jury. Trial counsel recalled

that the court proposed that it reread to the jury the statutory definition for a firearm, to which he objected. When the court ultimately decided to reread the statutory definition of a firearm, trial counsel did not object further. Duby opined that he did not know if he "could fault [trial counsel] for [not asking for additional language or some other charge] mainly for the fact that [Duby didn't] know what that note meant. . . . [T]he safest course of action for the court at least was to do what the court did in [this] instance."

Following the close of evidence at the habeas trial, the court denied the amended petition for writ of habeas corpus on the ground that trial counsel's failure to direct the court in its response to the jury's inquiry did not render trial counsel's performance deficient. The court concluded that there was "no deficient performance, in that, upon a review of the court's actions, there was nothing improper in the court's repetition of the relevant portion of the jury charge."

To satisfy the performance prong of an ineffective assistance of counsel claim, "the petitioner must show that [trial counsel's] representation fell below an objective standard of reasonableness . . . . In other words, the petitioner must demonstrate that [trial counsel's] representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . In analyzing [trial counsel's] performance, we indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . The petitioner bears the burden of overcoming this presumption." (Citations omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 460, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L.Ed.2d 77 (2006).

In the present case, the trial court, after reviewing the jury's inquiry, expressed its confusion about the use of the word "theoretically" and asked counsel for their opinion on the proper way to answer the question. The court suggested it merely reread the statutory definition of a firearm. Trial counsel expressed his disagreement with such a response, and engaged the court in a discussion about his concerns. In this discussion, trial counsel made clear his position that the absence of the CO_2 cartridge made the pistol inoperable. The court, however, determined that providing the jury with information on what makes the pistol operable could lead to the court's invading the fact-finding function of the jury. That is, whether a firearm is operable is a question of fact for the jury to decide; see *State* v. *Bradley*, 39 Conn. App. 82, 91, 663 A.2d 1100 (1995), cert. denied, 236 Conn. 901, 670 A.2d 322 (1996); and defining a pistol as inoperable for lack of a component infringes upon the role of the jury. Although the court has a duty to adequately address a jury's inquiry for clarification; *State* v. *Fletcher*, 10 Conn. App. 697, 701–702, 525 A.2d 535 (1987), aff'd, 207 Conn. 191, 540 A.2d 370 (1988); it is not required to broaden the scope of the jury's inquiry, nor is it required to give additional instructions. Practice Book § 42-27; *State* v. *Stavrakis*, 88 Conn. App. 371, 387–88, 869 A.2d 686, cert. denied, 273 Conn. 939, 875 A.2d 45 (2005). In rereading the definition of a firearm to the jury, the court simultaneously brought to the jury's attention the relevant portion of the charge that it thought may bring clarity to the jury and avoided potentially guiding the jury in its finding on operability. Thus, the petitioner's claim that trial counsel failed to direct the court in its response to the jury's inquiry did not amount to deficient performance because trial counsel made clear his position on how to address the inquiry on operability, and the court disagreed, choosing to take a more cautious approach.

Accordingly, we conclude that the habeas court properly determined that the petitioner's trial counsel had not performed below an objective standard of reasonableness. As such, the petitioner's claim of ineffective assistance of counsel as to the failure to direct the trial court in its response to the jury's inquiry fails.

The judgment is affirmed.

In this opinion the other judges concurred.

MATTHEW FERNSCHILD *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 39418)

Sheldon, Beach and Mihalakos, Js.

Syllabus

The plaintiff, who had been arrested for operating a motor vehicle while under the influence of intoxicating liquor, appealed to the trial court from the decision of the defendant Commissioner of Motor Vehicles suspending the plaintiff's motor vehicle operator's license for a period of six months, pursuant to the applicable statute (§ 14-227b), for his refusal to submit to a breath test to determine his blood alcohol content. The trial court rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed to this court. *Held* that the record did not contain substantial evidence to support the finding by a hearing officer that the plaintiff had refused to submit to a chemical analysis of his breath; the record did not include the necessary factual recitation to support a conclusion that the suspension of the plaintiff's motor vehicle operator's license was based on substantial evidence, as the evidence before the hearing officer supporting a finding of refusal included only conclusions by the police officers that the plaintiff refused the breath test, and the record contained no description of the behavior, conduct or words of the plaintiff that led the officers to conclude that there had been a refusal, either expressly or by conduct.

Argued May 25—officially released October 24, 2017

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license, brought to the Superior Court in the judicial district of New

Britain and tried to the court, *Schuman*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Reversed; judgment directed.*

Devin W. Janosov, with whom was *Donald A. Papcsy*, for the appellant (plaintiff).

Drew S. Graham, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, Matthew Fernschild, appeals from the judgment of the Superior Court dismissing his appeal from the decision of the defendant, the Commissioner of Motor Vehicles (commissioner), ordering a six month suspension of his license to operate a motor vehicle, pursuant to General Statutes § 14-227b,[1] for his refusal to submit to a chemical alcohol test. The plaintiff claims that the trial court improperly concluded that there was substantial evidence in the record to support the finding of the hearing officer that the plaintiff refused to submit to a chemical analysis of his breath. We agree and reverse the judgment of the trial court.

The following facts and procedural history are relevant to the disposition of the appeal. On February 19, 2015, the plaintiff was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a.[2] Following the incident, Officer Brian Hamm of the Stratford police department prepared a report that

[1] Although § 14-227b was the subject of amendments in 2016; see Public Acts 2016, No. 16-55, §§ 6 and 7; Public Acts 2016, No. 16-126, § 17; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] General Statutes § 14-227a was amended by No. 16-126, § 3, of the 2016 Public Acts, which made changes to the statute that are not relevant to this appeal. In the interest of simplicity, we refer to the current revision of the statute.

included the following information. When Hamm arrived on the scene, the plaintiff's vehicle was disabled in a snowbank. Upon asking the plaintiff to place the vehicle in park and step out of the vehicle, Hamm observed that the plaintiff appeared confused. He asked Hamm and Sergeant Rosenbaum several times where he was. Hamm had to lean the plaintiff against his vehicle because of the plaintiff's inability to stand safely on his own. The plaintiff said that he had been playing tennis and, when asked where he was going, he responded, "tennis." Hamm noted that the plaintiff appeared to be under the influence of alcohol or drugs. Neither he nor Rosenbaum were able to detect an odor of alcohol at that time because of the cold weather.

Hamm and Rosenbaum then asked the plaintiff if he had any medical issues, and the plaintiff responded that he might be a diabetic. The plaintiff was "very disoriented," and said that he did not know where he was. Because of the plaintiff's inability to answer questions, Hamm requested that Stratford fire and emergency medical services respond to the scene. Another officer went to the plaintiff's residence to determine if his family was aware of any medical conditions affecting the plaintiff; the response was that the plaintiff had no known medical condition. The plaintiff was placed in the rear of the patrol vehicle to stay warm. After Hamm and Rosenbaum sat in the patrol vehicle for a few minutes, they were able to detect the odor of alcoholic beverages. Stratford fire and emergency medical services arrived at the scene and, after evaluating the plaintiff, "cleared [him] of any medical emergency." The plaintiff refused medical treatment.

Hamm did not conduct any field sobriety tests because of the inability of the plaintiff to stand and the plaintiff's failure to cooperate in answering questions. The plaintiff was arrested and transported to the Stratford police station, where he was processed. According

to Hamm's report, the plaintiff "refused to waive his rights and also refused to answer any questions in the postarrest interview. . . . [The plaintiff] was afforded the opportunity to call an attorney at [2:24 a.m.]. [The plaintiff] refused to submit to the breath test."

Pursuant to § 14-227b (c), Hamm completed an A-44 form.[3] He checked a box indicating that the plaintiff had refused to perform field sobriety tests and had refused to answer whether he had any physical illness or injury preventing him from performing the field sobriety tests. Hamm noted on the form that probable cause to arrest was based on the motor vehicle crash and the odor of alcoholic beverages on the plaintiff's breath. The second page of the form, as filled out by Hamm, indicated that the plaintiff had refused to answer questions or to take a breath test. Sergeant Anthony Rhew swore to a printed statement on the form that the plaintiff "refused to submit to such test or analysis when requested to do so. The refusal occurred in my presence and my endorsement appears below." A Breathalyzer test strip included in its printout the words "test aborted refusal."

On February 24, 2015, the commissioner sent a notice to the plaintiff to inform him of the suspension of his license pursuant to § 14-227b. On March 17, 2015, an administrative hearing was held before a hearing officer pursuant to § 14-227b (g). On the same day, the hearing officer issued a decision finding, in its entirety, that (1) the arresting officer had probable cause to arrest the plaintiff, (2) the plaintiff was arrested, (3) the plaintiff refused to submit to chemical alcohol testing, (4) the plaintiff was operating a motor vehicle and (5) the plaintiff was not younger than twenty-one years of age. The

[3] "The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." *Roy* v. *Commissioner of Motor Vehicles*, 67 Conn. App. 394, 396 n.3, 786 A.2d 1279 (2001).

hearing officer ordered that the plaintiff's driver's license be suspended for six months.

The plaintiff appealed to the Superior Court from the commissioner's decision suspending his operator's license. In a written memorandum of decision, the court found that there was substantial evidence to support the hearing officer's finding of refusal. The court reasoned that although the "evidence does not provide detail as to the conversation between the officer and the plaintiff, there is no such requirement. . . . The fact that the record contains four separate references to the plaintiff's refusal [to submit to chemical alcohol testing], albeit without great detail, provides a substantial and corroborated basis to conclude that the plaintiff did, in fact, refuse, and that the references to his refusal are not fabricated or erroneous." The court also stated that the plaintiff's claim that a physical condition rendered a test inadvisable was inadequately briefed and, in any event, had no effect on the question of whether the hearing officer's conclusion was based on substantial evidence. The court dismissed the appeal.[4] This appeal followed.

"The determination of whether the plaintiff's actions constituted a refusal to submit to a Breathalyzer test is question of fact for the hearing officer to resolve." *Wolf* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 76, 81, 797 A.2d 567 (2002).

"In an administrative appeal, the plaintiff bears the burden of proving that the commissioner's decision to suspend a motor vehicle operating privilege was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. . . . Judicial review of an administrative agency decision requires a court

[4] The court denied the plaintiff's motion to stay the suspension of his operator's license pending the outcome of the present appeal. See General Statutes § 4-183 (f).

to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The evidence must be substantial enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . [I]f the administrative record provides substantial evidence upon which the hearing officer could reasonably have based his finding . . . the decision must be upheld. . . . The obvious corollary to the substantial evidence rule is that a court may not affirm a decision if the evidence in the record does not support it." (Citations omitted; internal quotation marks omitted.) *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 708–709, 692 A.2d 834 (1997).

"[D]ifficulties [are] inherent in ascertaining when a person is 'refusing' to submit to the breath test. 'Refusal' is difficult to measure objectively because it is broadly defined as occurring whenever a person 'remains silent or does not otherwise communicate his assent after being requested to take a blood, breath or urine test under circumstances where a response may reasonably be expected.' Regs., Conn. State Agencies § 14-227b-5." *Winsor* v. *Commissioner of Motor Vehicles*, 101 Conn. App. 674, 684, 922 A.2d 330 (2007). "Refusal to submit to a blood alcohol test may be established by one's actions or by verbally expressing one's unwillingness." *Pizzo* v. *Commissioner of Motor Vehicles*, 62 Conn. App. 571, 581, 771 A.2d 273 (2001).

The plaintiff claims that the hearing officer's determination that the plaintiff had refused to submit to a chemical alcohol test was not supported by substantial evidence. He argues that the record contained only

mere conclusions of refusal without any underlying facts as to the plaintiff's verbal expressions or conduct supporting the conclusion of the hearing officer that the plaintiff had refused to submit to the Breathalyzer test.[5] We agree.

The evidence before the hearing officer supporting a finding of refusal consisted, in its entirety, of the following: (1) the printout from the breath test, which reads "test aborted refusal," (2) the A-44 form, on which the box "test refusal" was checked in the section entitled "Chemical Alcohol Test Data," (3) the signature of Rhew, the witnessing officer, on the section of the A-44 form which reads "[t]he operator named above refused to submit to such test or analysis when requested to do so . . . [and] [t]he refusal occurred in my presence and my endorsement appears below," and (4) the case incident report, in which Hamm states that the plaintiff "refused to submit to the breath test."

This case is governed by principles expressed in *Winsor* v. *Commissioner of Motor Vehicles*, supra, 101 Conn. App. 674. In *Winsor*, the officer who had signed the statement on the A-44 form witnessing a refusal to submit to a chemical test testified before the hearing officer that she "witnessed" the refusal only on closed-circuit television. Id., 678. This court held that, in the absence of any legislative clarification, a witness had to be physically present in order to satisfy the requirement of the governing statute; thus, the A-44 form was inadmissible. Id., 682–88. There were three possible remaining sources to support the conclusion that the plaintiff in *Winsor* had refused to submit to the test: the printout reading "test refused," the officer's testimony that she "witnessed" the event via television, and the officer's narrative statements in his reports that the plaintiff refused to take the breath test. Id., 689.

[5] The plaintiff raises several arguments in support of his appeal. Because we agree with this argument, we need not address the remaining arguments.

In *Winsor*, this court observed that "[a]lthough all of these three sources of evidence indicate that the plaintiff refused to submit to the breath test, none provide any information about the circumstances supporting that conclusion. [No officer] described what behavior on the part of the plaintiff led [him or her] to infer that [the plaintiff] was refusing the breath test. Without any facts or details to buttress that inference, we have no basis on which to conclude that substantial evidence supports the hearing officer's determination." Id. Analogizing the case to *Bialowas* v. *Commissioner of Motor Vehicles*, supra, 44 Conn. App. 702, this court held that there had to be some factual recitation, rather than opinion or conclusion, to support a reviewing court's conclusion that the suspension was based on substantial evidence. *Winsor* v. *Commissioner of Motor Vehicles*, supra, 689–90.

The evidence before the hearing officer in the present case was similarly bereft of underlying factual information. It included only conclusions by Hamm and Rhew that the plaintiff refused the breath test. The record contains no description, however brief, of the behavior, conduct or words of the plaintiff that led the officers to conclude that there had been a refusal, either expressly or by conduct.[6] Without any underlying evidentiary basis to support the inference of a refusal, we are constrained to conclude that there was not substantial evidence in the record to support the determination of the hearing officer that there had been a refusal.

[6] The only significant factual difference between the present case and *Winsor* is that in *Winsor* the A-44 form had been excluded, and in the present case the form may be considered by the reviewing court. The analysis in *Winsor*, however, is grounded in the necessity for some factual information, and the attestation of the witness to a statement on the form provides no greater level of factual support.

We note that the required level of evidentiary detail need not necessarily be voluminous; depending on the circumstances, brief description may suffice.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the appeal of the plaintiff.

In this opinion the other judges concurred.

LENNARD TOCCALINE *v.* COMMISSIONER OF CORRECTION (AC 38415)

Lavine, Sheldon and Flynn, Js.

Syllabus

The petitioner filed a third amended petition for a writ of habeas corpus, claiming, inter alia, that he was actually innocent of the crimes of which he had been convicted, and that his rights to due process were violated as a result of the prosecutor's unknowing presentation of false testimony and alleged failure to disclose certain exculpatory evidence. The petitioner further claimed that he received ineffective assistance from his criminal trial counsel, from S, his counsel in his first habeas trial and first habeas appeal, and from P Co., his counsel in his second habeas trial. The first habeas court had rendered judgment granting the petition for a writ of habeas corpus as to certain of the petitioner's claims, but this court reversed that judgment on the ground that the habeas court did not use the proper standard for deciding ineffective assistance of counsel claims and directed the habeas court on remand to dismiss the petition. After a second habeas trial, the habeas court rendered judgment dismissing and denying certain of the petitioner's claims, and this court affirmed that judgment. Thereafter, the petitioner filed a third amended habeas petition, and the respondent Commissioner of Correction filed a motion to dismiss that petition. The habeas court granted the respondent's motion to dismiss and rendered judgment dismissing the third amended habeas petition, and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim of actual innocence, that court having properly determined that the petitioner's actual innocence claim was barred by the doctrine of res judicata; the claim had been raised, litigated and decided on the merits in his first two habeas actions, the petitioner did not appeal from the rejection of that claim in either of those actions, and he conceded in the present appeal to this court that he did not have, and did not intend to present, any newly discovered evidence.

2. The habeas court did not abuse its discretion in denying the petition for certification to appeal as to the petitioner's claim that his rights to due process were violated when the prosecutor unknowingly presented false testimony: there was no Connecticut case that supported the proposition that the petitioner's due process rights could have been violated by the prosecutor's presentation of false testimony when the prosecutor neither knew nor should have known that the testimony was false, the issue has not been decided by the United States Supreme Court, and the claim would fail even under the more lenient approach that provides that due process is violated when the testimony is material and the court is left with a firm belief that, but for the perjured testimony, the petitioner most likely would not have been convicted, as the petitioner failed to show that absent the inaccurate testimony, there was a reasonable probability that he would not have been convicted in light of the other significant, incriminating evidence that had been presented against him.
3. Although the habeas court improperly dismissed the claim that S was ineffective as the petitioner's first habeas appellate counsel on the ground that it was successive, the court, nevertheless, did not abuse its discretion in denying the petition for certification to appeal on the alternative ground that the claim was without merit: the petitioner failed to show that S's performance was deficient for failing to move to have the first habeas court articulate its factual findings, as the petitioner did not allege which factual findings were absent or show that the first habeas court did not articulate the factual findings supporting its decision; moreover, although this court subsequently reversed the decision of the first habeas court, that reversal was not because the court's factual findings were insufficient or because the record was inadequate for review.
4. There was no merit to the petitioner's claim that the habeas court abused its discretion in denying the petition for certification to appeal as to his assertion that P Co. was ineffective in representing him in his second habeas trial, as the petitioner failed to show that P Co. was ineffective in failing to raise or adequately argue claims in counts one through six of his third amended habeas petition; the petitioner's claim in count one of actual innocence was successive, his claim in count two that the prosecutor violated his due process rights by failing to timely disclose a certain report had been fully litigated, and this court previously decided that any failure to disclose the report was harmless error, the assertion in count three that the prosecutor violated the petitioner's rights to due process by unknowingly presenting false testimony failed to state a claim on which relief could be granted, the petitioner's claims in counts four and five that his criminal trial counsel and S, as his first habeas counsel, rendered ineffective assistance were previously rejected by this court, and the petitioner could not show that he was prejudiced as a result of P Co.'s failure to allege that S was ineffective as appellate counsel in the first habeas appeal as alleged in count six, as the petitioner

could not show that the outcome of his criminal trial would have been different in light of the incriminating evidence against him and the significant evidence supporting his guilt.

Argued May 16—officially released October 24, 2017

Procedural History

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

Andrew P. O'Shea, for the appellant (petitioner).

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, was *Michael J. Proto*, assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petition for a writ of habeas corpus at issue in the present appeal is the third filed by the petitioner, Lennard Toccaline. He appeals following the habeas court's denial of his petition for certification to appeal from the judgment of the habeas court granting the motion to dismiss filed by the respondent, the Commissioner of Correction. He claims that the habeas court abused its discretion by denying his petition for certification to appeal and improperly dismissed four counts of his third amended petition. We dismiss the appeal.

The following facts and lengthy procedural history are relevant to our resolution of the petitioner's appeal. In 1999, following a jury trial, the petitioner was convicted of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the fourth degree in violation of General Statutes (Rev. to 1995) § 53a-73a (a) (1) (A), and three counts of risk of injury to a child in violation of General Statutes (Rev.

to 1995) § 53-21 (2), as amended by No. 95-142, § 1, of the 1995 Public Acts. Subsequently, the trial court, *Sferrazza*, *J.*, found the petitioner guilty of being a persistent felony offender in violation of General Statutes (Rev. to 1995) § 53a-40 (a). The petitioner was sentenced to a total effective term of forty years imprisonment, execution suspended after twenty-five years, followed by ten years of probation.

In 2001, he appealed from his conviction,[1] and our Supreme Court set forth in detail the facts underlying his conviction. It explained that the petitioner, a thirty-five year old man, had engaged in three acts of sexual contact with MC, the twelve year old victim.[2] After MC told her mother about the sexual contact, the petitioner gave an incriminating statement to the police, which was read to the jury at trial. In the statement, the petitioner claimed that MC never objected to the contact and that the contact did not constitute sexual intercourse.[3] *State* v. *Toccaline*, 258 Conn. 542, 546–47, 783

[1] Our Supreme Court transferred the petitioner's appeal from this court pursuant to Practice Book § 65-4. *State* v. *Toccaline*, 258 Conn. 542, 545 n.5, 783 A.2d 450 (2001).

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

[3] "The [petitioner's] statement provided in relevant part: On one occasion when [MC] was over she and I had been horsing around. . . . I recall that MC usually had worn either a halter top and shorts, a bathing suit or usually some other summer attire. During our horsing around I recall that I moved her T-shirt up exposing her mid section, put my mouth on her skin and blew onto her skin causing a fart like noise. . . . I may have put my mouth on her in the area of her breasts and if I hit any part of her breast it was by accident. [MC] had just begun to develop her breast[s] and my mouth never touched her nipples. . . . During the time when [MC] and I were horsing around [on the boat] I may have had an erection and [MC] may have grabbed my erection by accident. When she may have grabbed my erection she didn't make a big deal about it. I never asked [MC] to grab my erection. After [MC] grabbed my erection, she didn't make a big deal about it and I never mentioned this incident to anyone. . . . On one occasion, I recall being on my bed in the bedroom. . . . During our horsing around I ended up on top of her on the bed. Sometime during our horsing around

A.2d 450 (2001) (*Toccaline I*). Our Supreme Court affirmed the petitioner's conviction because the claims were not reviewable[4] but noted that "the jury was presented with *significant evidence*, aside from the victim's testimony, that the sexual abuse had in fact occurred. For example, MC's physician testified that a physical examination revealed that MC had experienced vaginal penetration, which most likely was caused through sexual relations. . . . *Most importantly, the* [*petitioner's*] *own written statement corroborated much of what MC claimed to have occurred.*" (Emphasis added.) Id., 552 n.13.

In 2002, the petitioner filed his first petition for a writ of habeas corpus. He was represented by Attorney Conrad Ost Seifert in both his first habeas trial and his subsequent habeas appeal. His amended first petition alleged: (1) eleven counts of ineffective assistance by

she would sometime[s] get the advantage and end up on top of me. When I ended up on top of her I recall having her arms pinned up above her head holding her down. I was on top of her for just a couple of minutes and as I was on top of her she was moving around trying to get away. . . . While she was trying to get away her clothes were moving around. During the time I was on top of her when we were horsing around, it's possible that I became excited and got an erection. Being in the position that I was in on top of her she would have felt my erection in the area of her vagina. Due to the fact that we were both moving around she may have misunderstood that for sexual contact." (Internal quotation marks omitted.) *State* v. *Toccaline*, supra, 258 Conn. 547 n.7.

[4] The petitioner's claims on direct appeal were that "the trial court improperly permitted an expert witness to offer his opinion as to the credibility of the victim's claims of sexual assault by the [petitioner] and further, to testify regarding the guilt of the [petitioner]." *Toccaline I*, supra, 258 Conn. 543–44. Our Supreme Court concluded that "[a]lthough the trial court, upon proper objection by the [petitioner], would have been required to exclude this testimony, the presentation of [the expert's] statements to the jury in the absence of such an objection did not implicate a constitutional right or result in a fundamentally unfair trial." Id., 550–51. It also concluded that "the trial court's admission of [the expert's] testimony was not plain error. . . . [*W*]*e see nothing in the record that leads us to conclude that the verdict constituted manifest injustice to the* [*petitioner*] *or will lead to diminished confidence in our judicial system.*" (Emphasis added.) Id., 553.

his trial counsel, Attorney Mark C. Hauslaib; (2) ineffective assistance by his direct appellate counsel, Attorney Richard S. Cramer; and (3) factual innocence. Following a habeas trial, the habeas court, *Hon. Richard M. Rittenband*, judge trial referee, granted the petitioner's first petition on his claims of ineffective assistance by trial and direct appellate counsel. Judge Rittenband expressly rejected his actual innocence claim on the ground that his incriminating statement to the police made his claim meritless. *Toccaline* v. *Commissioner of Correction*, Superior Court, judicial district of Hartford, Docket No. CV-02-0814816S, 2002 WL 31304820, *1 (September 12, 2002) (*Toccaline II*), rev'd, 80 Conn. App. 792, 837 A.2d 849 (*Toccaline III*), cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

The respondent appealed from Judge Rittenband's decision granting the habeas petition on the petitioner's claims of ineffective assistance by trial and direct appellate counsel, but the petitioner did not cross appeal as to the denial of his actual innocence claim. This court agreed with the respondent, reversing Judge Rittenband's decision on the petitioner's claims of ineffective assistance by trial and direct appellate counsel, and, accordingly, directed the habeas court on remand to dismiss the petition.[5] *Toccaline III*, supra, 80 Conn. App. 795, 820.

[5] This court found that Judge Rittenband (1) "improperly found trial counsel ineffective by failing to object to inappropriate testimony of the state's [expert witness]"; *Toccaline III*, supra, 80 Conn. App. 803; because Attorney Hauslaib's decision to not object to the testimony was a matter of trial strategy and that even if his performance in failing to object was deficient, the petitioner could not show that he suffered prejudice in light of the other " 'significant evidence' " of the petitioner's guilt; id.; (2) "improperly concluded that Hauslaib was ineffective for not requesting the sequestration of the [witnesses]" because his decision was a matter of trial strategy; id., 804; (3) "incorrectly concluded that it was ineffective for Hauslaib not to have objected to the prosecutor's closing remarks to the jury"; id., 805; regarding the expert's testimony because the testimony was already in evi-

In 2008, the petitioner filed his second petition for a writ of habeas corpus. He was represented on the petition by the Pattis Law Firm. In his amended second petition, he alleged: (1) ineffective assistance by his habeas trial counsel, Seifert, during his first habeas trial, and (2) actual innocence. On June 29, 2008, the habeas court, *Schuman*, *J.*, granted the respondent's motion to dismiss the petitioner's actual innocence claim on the ground of res judicata. *Toccaline* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-05-4000344-S, 2008 WL 2796997, *1 n.2 (June 25, 2008) (*Toccaline IV*), aff'd, 119 Conn. App. 510, 987 A.2d 1097 (*Toccaline V*), cert. denied, 295 Conn. 921, 991 A.2d 566 (2010). After conducting a habeas trial, Judge Schuman

dence and, therefore, the prosecutor did not commit impropriety in commenting on the evidence; id., 806; (4) "incorrectly found that the petitioner was prejudiced by the absence of [a certain] police report"; id., 809; because the issue of the relationship between [another individual] and the victim was already "squarely before the jury"; id.; (5) "incorrectly found Hauslaib ineffective for failing to present an adequate alibi defense"; id.; because "[i]t is unreasonable to conclude that presented with the petitioner's inculpatory statement as well as the state's evidence in chief, the outcome of the trial could have been different had the petitioner been able to present further evidence concerning his whereabouts on certain dates not contained within the state's charging document or part of its case-in-chief"; id., 811; (6) "incorrectly granted the habeas petition on the ground that Hauslaib was ineffective for not having the petitioner testify at the suppression hearing concerning the petitioner's statement to the police"; id., 811–12; because the petitioner failed to show that he suffered prejudice; id., 813; (7) "incorrectly found Hauslaib ineffective for not having the petitioner testify at the criminal trial that he was innocent of the charges"; id., 814; because the decision was a matter of sound trial strategy; id., 815; (8) "incorrectly concluded that Hauslaib was ineffective for failing to investigate"; id.; because the record was clear that "the petitioner did not inform his trial counsel about"; id., 817; the existence of a potentially material witness until after the trial had ended; id., 816–17; (9) incorrectly found that Hauslaib was ineffective for not failing to file a motion for a new trial on the basis of newly discovered evidence because the petitioner failed to plead this claim in his petition; id., 817; and (10) "improperly ruled that the petitioner had established ineffective assistance of appellate counsel"; id., 818; because the prosecutor did not engage in impropriety, and, therefore, Cramer could not have been ineffective for failing to ask our Supreme Court to exercise its supervisory authority to review a prosecutorial impropriety claim. Id., 819.

denied the petitioner's ineffective assistance of habeas trial counsel claim. Id., *1. The petitioner appealed from Judge Schuman's decision denying his ineffective assistance of habeas trial counsel claim but did not challenge on appeal the dismissal of his actual innocence claim. *Toccaline V*, supra, 512 n.1. After certification to appeal was granted, this court affirmed the judgment on appeal. Id., 511–12.

In 2012, the petitioner filed his third petition for a writ a habeas corpus, which provides the basis of the present appeal. On March 10, 2015, represented by Attorney Andrew P. O'Shea, he filed a second amended third petition, alleging: (1) actual innocence, (2) violation of his right to due process as a result of the prosecutor's failure to disclose material, exculpatory evidence during his criminal trial, (3) violation of his right to due process as a result of the prosecutor's unknowing presentation of false testimony during his criminal trial, (4) ineffective assistance from his criminal trial counsel, Hauslaib, (5) ineffective assistance from his first habeas trial counsel, Seifert, during his first habeas trial (*Toccaline II*), (6) ineffective assistance from his first habeas appellate counsel, Seifert, during his first habeas appeal (*Toccaline III*), and (7) ineffective assistance from his second habeas trial counsel, the Pattis Law Firm, during his second habeas trial (*Toccaline IV*). On April 24, 2015, the respondent filed his return, in which he denied the petitioner's claims and asserted special defenses. Thereafter, on May 28, 2015, he filed a motion to dismiss. On June 3, 2015, the petitioner filed a third amended petition, which is the operative petition in this appeal. On June 19, 2015, the petitioner objected to the respondent's motion to dismiss.

On June 23, 2015, the habeas court, *Fuger*, *J.*, held a hearing on the respondent's motion to dismiss. On August 21, 2015, the habeas court granted the respondent's motion to dismiss the petitioner's third amended

petition. On August 25, 2015, the petitioner filed a petition for certification to appeal from the judgment, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate [1] that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; [2] that a court could resolve the issues [in a different manner]; or [3] that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 228, 965 A.2d 608 (2009); see also *Simms* v. *Warden*, supra, 230 Conn. 616, quoting *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991). "In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's . . . claims satisfy one or more of the three criteria . . . . Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448, 150 A.3d 1166

(2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

"The conclusions reached by the [habeas] court in its decision to dismiss the habeas petition [on a motion to dismiss] are matters of law, subject to plenary review. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts in the record." (Internal quotation marks omitted.) *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 276, 35 A.3d 337, cert. granted on other grounds, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013).

The petitioner claims that the habeas court improperly dismissed counts one, three, six, and seven of his third amended petition.[6] In determining whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claims to determine whether they satisfy one or more of the three *Simms* criteria set forth in *Kearney* and *Lozada*.

I

COUNT ONE

The petitioner claims that the habeas court abused its discretion when it denied his petition for certification to appeal from the dismissal of his actual innocence claim. We disagree.

In count one, the petitioner raised, for the third time, an actual innocence claim, arguing that he "did not have a full and fair opportunity to litigate this claim in any prior proceedings." The habeas court granted the

[6] The petitioner has not challenged on appeal the habeas court's dismissal of counts two, four, and five of his third amended petition.

respondent's motion to dismiss count one on the ground of res judicata.[7]

"The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding. . . .

"[W]here successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Citations omitted; internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, supra, 113 Conn. App. 233–35.

In the absence of any newly discovered evidence or allegations of new facts, we conclude that the habeas court properly determined that the petitioner's actual innocence claim was barred by the doctrine of res judicata. After conducting a full evidentiary hearing, Judge Rittenband found that the petitioner's actual innocence claim was meritless in light of the petitioner's inculpatory written statement to the police. *Toccaline II*, supra, 2002 WL 31304820, *16. Thus, the claim was previously raised, fully litigated, and decided on the merits. The

[7] The habeas court also concluded that count one failed because it was "successive [and] not premised on newly discovered evidence that was not reasonably available at any of the prior proceedings . . . ." We conclude that the habeas court did not abuse its discretion in dismissing count one on these grounds as well. See *Zollo* v. *Commissioner of Correction*, supra, 133 Conn. App. 279; *Weinberg* v. *Commissioner of Correction*, 112 Conn. App. 100, 119, 962 A.2d 155, cert. denied, 291 Conn. 904, 967 A.2d 1221 (2009).

petitioner did not file a cross appeal as to Judge Rittenband's decision rejecting that claim or appeal from Judge Schuman's dismissal of this claim on the ground that it was barred by the doctrine of res judicata. On appeal, the petitioner concedes that he did not have, and did not intend to present, any "newly discovered evidence."

Because the petitioner's claim has no merit, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal as to count one of his third amended petition.

II

COUNT THREE

The petitioner next claims that the habeas court abused its discretion in denying his petition for certification to appeal from the dismissal of his claim that his federal and state rights to due process were violated because of the prosecutor's unknowing presentation of false testimony at his criminal trial.[8] We disagree.

In count three, the petitioner alleged that the prosecutor "unknowingly presented the . . . false testimony" of MC, her aunt, and her mother[9] at his criminal trial.[10]

[8] The petitioner does not argue that the prosecutor unknowingly presented *perjured* testimony. See *United States* v. *Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) ("[a] witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory"), cert. denied, 535 U.S. 1070, 122 S. Ct. 1946, 152 L. Ed. 2d 849 (2002). He also does not argue that the prosecutor *should have known* that the testimony of MC, her aunt and her mother was false. See *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 371–72, 71 A.3d 512 (2013).

[9] MC's aunt and MC's mother testified at the petitioner's first habeas trial. Judge Rittenband found that, in light of the other potential alibi evidence the petitioner presented at the habeas trial, the testimony of MC, her mother, and her aunt at the petitioner's criminal trial was false with regard to the year in which the sexual assaults occurred. *Toccaline II*, supra, 2002 WL 31304820, *13–14.

[10] The respondent argues at length on appeal that the petitioner cannot overcome the defense of "procedural default." Although the respondent

The habeas court granted the respondent's motion to dismiss count three on the ground that the petitioner failed to state a claim upon which relief can be granted because "there is no established precedent in this state to support and grant habeas corpus relief as to count [three]."[11]

Our Supreme Court "has not yet addressed the question of whether the state's unknowing use of perjured testimony violates due process principles. . . . Although [a] majority of the federal circuit courts require a *knowing* use of perjured testimony by the prosecution to find a violation of due process . . . the United States Court of Appeals for the Second Circuit [in *Ortega* v. *Duncan*, 333 F.3d 102, 108 (2d Cir. 2003)] has held that, when false testimony is provided by a government witness without the prosecution's knowledge, due process is violated . . . if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." (Citations omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 800–801, 138 A.3d 908 (2016).[12] "The United States Supreme Court

asserted the affirmative defense of procedural default in his reply, he failed to assert it in his motion to dismiss. Therefore, we will not consider the respondent's argument.

[11] The habeas court also found that the petitioner failed to show prejudice as a result of any violation on the basis of this court's conclusion that the petitioner failed to show that he suffered prejudice as a result of Hauslaib's performance. We need not decide whether the habeas court properly relied on this court's analysis in rendering its decision.

[12] The Second Circuit held that the prosecutor unknowingly presented *perjured* testimony and that the jury would not have found the defendant guilty without the perjured testimony. *Ortega* v. *Duncan*, supra, 333 F.3d 108 n.3 and 109. It is unclear whether *Ortega* requires that a petitioner show that the testimony at issue was in fact perjured or only that it was false. In any event, the Second Circuit represents the minority viewpoint. See, e.g., *Killian* v. *Poole*, 282 F.3d 1204, 1208–1209 (9th Cir. 2002), cert. denied, 537 U.S. 1179, 123 S. Ct. 992, 154 L. Ed. 2d 927 (2003). The clear majority of jurisdictions require that a petitioner must prove that the prosecutor *knew or should have known* that the testimony at issue was false in order to

has not addressed the issue." *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 570 n.18, 22 A.3d 1196 (2011).

We conclude that the petitioner's claim fails for two reasons. First, there is no Connecticut case that supports the proposition that the petitioner's due process rights could have been violated by the prosecutor's presentation of false testimony when the prosecutor neither knew nor should have known that the testimony was false, and the issue has not yet been decided by the United States Supreme Court. Second, even under the more lenient approach taken by the Second Circuit in *Ortega*, his claim would still fail. The petitioner cannot show that absent the inaccurate testimony of MC, her mother, and her aunt, there is a reasonable probability that he would not have been convicted in light of the other significant, incriminating evidence presented against him, most notably his own admission that he had sexual contact with MC. See footnote 3 of this opinion; see also *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 801–802 (reaching similar conclusion).

Because the claim has no substantive merit, we conclude that the habeas court did not abuse its discretion in denying his petition for certification to appeal as to count three of his third amended petition.

III

COUNT SIX

The petitioner next claims that the habeas court abused its discretion in denying his petition for certification to appeal from its dismissal of his claim that Seifert was ineffective in representing him in his first habeas appeal. The respondent concedes that the habeas court

establish a due process violation. See *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 800–801; *Westberry* v. *Commissioner of Correction*, 169 Conn. App. 721, 735, 152 A.3d 87 (2016), cert. denied, 324 Conn. 914, 153 A.3d 1289 (2017).

improperly dismissed count six on the ground that it was successive. We agree that the habeas court improperly concluded that the claim was successive. Nevertheless, we conclude that the habeas court did not abuse its discretion in denying certification to appeal on the alternative ground that the petitioner's claim is meritless.[13] We review the petitioner's claim solely to determine whether the habeas court abused its discretion in denying certification to appeal.

In count five of his third amended petition, the petitioner alleged that Seifert was ineffective in representing him in his first habeas trial before Judge Rittenband in *Toccaline II*, in part, because Seifert "failed to adequately motion for the habeas court to articulate its factual findings in support of its conclusion that trial counsel provided ineffective assistance to the petitioner by: (i) failing to object to the improper bolstering of the complainant's credibility by state's witnesses; and, (ii) failing to present an adequate alibi defense."[14] The petitioner alleged in count six that Seifert was ineffective in representing the petitioner in appealing from Judge Rittenband's decision to this court in *Toccaline III* for the same reason articulated in count five.

The habeas court granted the respondent's motion to dismiss count six, stating that "the claim in count

[13] "That the court relied on a wrong theory does not render the judgment erroneous. We can sustain a right decision although it may have been placed on a wrong ground." (Internal quotation marks omitted.) *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 105 n.4, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015).

[14] The petitioner alleged in count five that Seifert's performance "was deficient because: (A) he failed to adequately plead, prove, and argue claims one through four of this third amended petition for a writ of habeas corpus; (B) he failed to adequately create and preserve a record for review; and, (C) he failed to adequately motion for the habeas court to articulate its factual findings in support of its conclusion that trial counsel provided ineffective assistance to the petitioner by: (i) failing to object to the improper bolstering of the complainant's credibility by state's witnesses; and, (ii) failing to present an adequate alibi defense."

six is the same generic legal basis for the same relief asserted as a component of count five. . . . The ground—ineffective assistance by the identical attorney on appeal from the case in which he was habeas counsel—is indistinguishable. The petitioner merely reformulates a claim from count five in the context of count six. Additionally, any relief the petitioner would obtain as to the claims in counts five and six is identical (i.e., a new criminal trial) because he has to convince a habeas or appellate court that he has undermined the reliability of his conviction. The court, therefore, dismisses count six because it is successive, albeit because count six is an alternative way in which a part of count five is alleged. Practice Book § 23-29 (3) and (5)." (Citation omitted; internal quotation marks omitted.)

"The claim of ineffective assistance of habeas [appellate] counsel, when added to the claim of ineffective assistance of [habeas] trial counsel, results in a different issue. . . . A claim of ineffective assistance of counsel involving a habeas attorney is not subject to dismissal on the ground that an earlier habeas petition that was based on the ineffectiveness of trial counsel had been unsuccessful." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 309–10, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016).

The claim in count six—that Seifert was ineffective in representing the petitioner as his habeas appellate counsel—was not successive because the petitioner did not raise this claim in any prior proceeding. Moreover, the petitioner, who was then represented by the Pattis Law Firm, did not allege in his second petition that Seifert was ineffective at the first habeas trial on the ground that Seifert failed to move to have Judge Rittenband articulate his factual findings. Therefore, although we affirm the habeas court's denial of certification to

appeal on an alternative ground, we conclude that the habeas court improperly concluded that count six was successive.

"In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"Our Supreme Court has adopted [the] two part analysis [set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] in reviewing claims of ineffective assistance of appellate counsel. . . . To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Because the petitioner must satisfy both prongs of the *Strickland* test to prevail on a habeas corpus petition, this court may dispose of the petitioner's claim if he fails to meet either prong. . . .

"Under the performance prong, [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . [Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . [I]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since *the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation*." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Gray* v. *Commissioner*

of Correction, 138 Conn. App. 171, 176–78, 50 A.3d 406, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012).

On the basis of our review of the entire record, we conclude that the petitioner has failed to show that Seifert was ineffective during *Toccaline III* because he failed to show that Seifert's performance was deficient. In count six of the petitioner's third amended petition, he alleged that Seifert was ineffective in representing the petitioner in his first habeas appeal in *Toccaline III*, in that Seifert "was deficient because he failed to adequately motion for the habeas court to articulate its factual findings in support of its conclusion that trial counsel [Hauslaib] provided ineffective assistance to the petitioner by: (A) failing to object to the improper bolstering of the complainant's credibility by state's witnesses; and, (B) failing to present an adequate alibi defense." The petitioner has failed to show, or even assert, why an articulation by Judge Rittenband is required to resolve the issue on appeal.

Judge Rittenband, however, *fully articulated his decisions on both of these claims in Toccaline II* when he found that Hauslaib's representation of the petitioner was ineffective. In support of (A), Judge Rittenband found that Hauslaib was ineffective in failing to object to the questions posed to Elton Grunden, the state's expert who testified that it was "his opinion that the victim had suffered sexual abuse perpetrated by the [petitioner]." *Toccaline II*, supra, 2002 WL 31304820, *2. Judge Rittenband also found Hauslaib ineffective for failing to object to the prosecutor's closing remarks pertaining to Grunden's testimony. Id., *4. In support of (B), Judge Rittenband gave a detailed explanation as to why Hauslaib was ineffective in failing to "present effectively an alibi defense and/or factually impossible defense for the petitioner to have committed the crimes alleged." Id., *6.

This court in *Toccaline III* subsequently reversed Judge Rittenband's decision. This reversal, however, was *not* on the ground that Judge Rittenband's factual findings were insufficient or that the record was inadequate for review. Rather, this court decided that Judge Rittenband did not use the proper standard for deciding ineffective assistance of counsel claims and that, when analyzed under the *Strickland* standard, the petitioner had failed to show that Hauslaib was ineffective because he failed to show either that Hauslaib rendered deficient performance or that he suffered prejudice because of Hauslaib's deficient performance. See *Toccaline III*, supra, 80 Conn. App. 800–17.

Because the petitioner has failed to show that Judge Rittenband did not articulate the factual findings supporting his decision or allege which factual findings were claimed to be absent, the petitioner's claim that Seifert was ineffective for failing to move to have Judge Rittenband articulate his factual findings is unpersuasive. Therefore, the petitioner's claim in count six is without merit, and, accordingly, we conclude that the habeas court did not abuse its discretion by denying certification to appeal as to count six of his third amended petition on an alternative legal ground than that relied upon by the habeas court.

IV

COUNT 7

The petitioner claims that the habeas court abused its discretion by denying his petition for certification to appeal from the dismissal of his claim that the Pattis Law Firm was ineffective in representing him in his second habeas trial in *Toccaline IV*. We disagree.

The petitioner alleged in count seven of his third amended petition that the Pattis Law Firm "was deficient because [it] failed to adequately plead, prove, and

argue claims one through six of this third amended petition . . . .'' The habeas court granted the respondent's motion to dismiss count seven ''because the claim in count seven is premised on, and derivative of, the claims in counts one through six, which have been dismissed because they are either successive or barred by res judicata, or fail to state a claim upon which habeas corpus relief can be granted, [and, thus] the court dismisses count seven because it fails to state a claim upon which habeas corpus relief can be granted . . . .''

''To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . .

''[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore . . . a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task.'' (Citations omitted; internal quotation marks

omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 437–39, 119 A.3d 607 (2015). "This standard holds a petitioner to a higher standard when claiming ineffective assistance of habeas counsel; it does not require this court to hear improperly raised issues." *Maldonado* v. *Commissioner of Correction*, 141 Conn. App. 455, 463, 62 A.3d 528, cert. denied, 308 Conn. 941, 66 A.3d 883 (2013). We conclude that the petitioner has not performed this herculean task.

A

The petitioner alleged that the Pattis Law Firm was ineffective in failing to adequately plead and prove count one, which was his actual innocence claim. As explained in part I of this opinion, the petitioner's actual innocence claim was fully litigated and decided on the merits. Judge Rittenband decided that with "the existence of the alleged confession, [and the] petitioner's written statement to the state police, this court cannot find by clear and convincing evidence that [the] petitioner is factually innocent." *Toccaline II*, supra, 2002 WL 31304820, *16. The petitioner did not file a cross appeal as to Judge Rittenband's decision on this claim or as to Judge Schuman's dismissal of this claim on the ground of res judicata. Therefore, the Pattis Law Firm could not be ineffective because the claim in count one was successive, and the petitioner cannot show prejudice.

B

The petitioner alleged that the Pattis Law Firm was ineffective in failing to raise count two, in which the petitioner claimed that the prosecutor violated his federal and state constitutional rights to due process when the prosecutor "failed to timely disclose to the petitioner or his counsel a police report from March 30, 1998 . . . ." This claim was also fully litigated, and this court decided that the habeas court incorrectly found

that the petitioner was prejudiced by the absence of the report. *Toccaline III*, supra, 80 Conn. App. 809. Therefore, the Pattis Law Firm could not be ineffective for failing to raise this claim because the claim in count two would have been successive, and the petitioner could not have been prejudiced by the failure to raise it.

C

The petitioner alleged that the Pattis Law Firm was ineffective in failing to raise count three, in which the petitioner argued that the prosecutor violated his constitutional right to due process by unknowingly presenting false testimony. As noted in part II of this opinion, his claim is, and was at the time of the petitioner's criminal trial and subsequent appeals, unsupported by either Connecticut state or federal law. "[T]o perform effectively, counsel need not recognize and raise every conceivable constitutional claim"; *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 460, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006); and "counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance." Id., 461. Thus, the petitioner cannot show that the Pattis Law Firm's performance was deficient in failing to assert the claim in count three because the petitioner failed to state a claim upon which relief could be granted in count three.

D

The petitioner alleged that the Pattis Law Firm was ineffective in failing to raise count four, in which the petitioner claimed that Hauslaib rendered ineffective assistance of trial counsel. All of these allegations were previously addressed and fully litigated in *Toccaline III*, and this court determined that either Hauslaib did not render deficient performance or that the petitioner

was not prejudiced by any deficient performance.[15] See *Toccaline III*, supra, 80 Conn. App. 800–18. Therefore, the petitioner cannot show that the Pattis Law Firm was ineffective for failing to raise the claim in count four in his second habeas trial because the claim would have been successive, and the petitioner suffered no prejudice by the failure to raise it.

E

The petitioner alleged that the Pattis Law Firm was ineffective in failing to adequately argue count five, in which the petitioner claimed that Seifert was ineffective as his first habeas counsel. As with count four, Judge Schuman and this court previously found that Seifert was not ineffective, in particular, that Seifert was not ineffective for failing to raise a claim that Hauslaib was ineffective for failing to file a motion for a new trial during the criminal proceedings. *Toccaline IV*, supra, 2008 WL 2796997, *1–3; see also *Toccaline V*, supra, 119 Conn. App. 514–16.

Although the third claim of ineffective assistance of counsel was not raised in the second petition; see part III of this opinion; the petitioner could have brought this claim in his second habeas petition because there are no facts or allegations that were not previously available to him at the time the Pattis Law Firm filed the second petition. "[W]here successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Internal quotation

[15] To the extent that Hauslaib was deficient in failing to file a motion for a new trial after the jury returned its verdict, we conclude that the petitioner failed to show that he suffered any prejudice in light of the inculpatory statement he gave to the police admitting that he had had sexual contact with MC. See footnote 3 of this opinion; *Toccaline I*, supra, 258 Conn. 552 n.13.

marks omitted.) *Maldonado* v. *Commissioner of Correction*, supra, 141 Conn. App. 462; see *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 846, 878 A.2d 1088 (2005) ("a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice" [quoting *McCleskey* v. *Zant*, 499 U.S. 467, 489, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)]).

Because the claim in count five was successive, the petitioner cannot show that the Pattis Law Firm was ineffective in arguing this claim at his second habeas trial, for the petitioner could not have suffered prejudice due to counsel's failure to raise it.

F

Finally, the petitioner alleged that the Pattis Law Firm was ineffective in failing to raise count six, in which he alleged that Seibert was ineffective in representing him during his first habeas appeal. We conclude that the Pattis Law Firm was not ineffective for failing to argue this claim because the petitioner failed to show that he suffered prejudice.

First, as explained in part III of this opinion, the claim would have been meritless. Second, despite the lengthy history of litigation presented by this case, we cannot ignore our Supreme Court's conclusion in the petitioner's direct appeal in 2001. It noted the obvious fact that there was other "significant evidence"; *Toccaline I*, supra, 258 Conn. 552 n.13; that supported the petitioner's guilt, notably the testimony of MC's physician that MC suffered sexual trauma and the petitioner's own admission that he had had sexual contact with her. See footnote 3 of this opinion; *Toccaline I*, supra, 547 n.7 and 552 n.13. In short, even if the petitioner could show that any one of his attorneys' performances was deficient, we conclude that the petitioner has failed to show

that he suffered any prejudice because he cannot show that, in light of the incriminating evidence against him, the outcome of his criminal trial would have been different. See *Mukhtaar* v. *Commissioner of Correction*, supra, 158 Conn. App. 443–44.

Because the petitioner's claim has no merit, we conclude that the habeas court did not abuse its discretion in denying certification to appeal from the dismissal of count seven of his third amended petition. The petitioner has not shown that the issues are debatable among jurists of reason, that the court could resolve the issues in a different manner or that the questions are adequate to deserve encouragement to proceed further.

The appeal is dismissed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 177

(Replaces Prior Cumulative Table)

Bank of New York Mellon, Trustee *v.* Mauro 295
Foreclosure; whether trial court improperly granted motion for judgment of strict foreclosure on basis of ruling granting motion for summary judgment as to liability for foreclosure; claim that genuine issues of material fact existed as to whether counterclaims had reasonable nexus to making, validity, or enforcement of mortgage and note that precluded granting of motion for summary judgment; whether trial court properly concluded that counterclaims based on alleged misdealings with defendants by original lender failed as matter of law because there was no evidence of record that plaintiff expressly assumed liabilities of original lender when it took mortgage from original lender by assignment; whether trial court properly rendered judgment in favor of plaintiff on all five counts of counterclaim; whether trial court properly rendered judgment dismissing counterclaims that pertained to plaintiff's conduct during mediation that occurred years after execution of mortgage and defendants' default; whether counterclaims were improperly joined in action pursuant to transaction test of applicable rule of practice (§ 10-10); motion for summary judgment seeking dismissal of counterclaims for improper joinder treated as motion to strike; whether party may properly use motion for summary judgment as means of testing whether counterclaims satisfied transaction test of § 10-10.
Byrd *v.* Commissioner of Correction 71
Habeas corpus; claim that ex post facto law passed after petitioner was sentenced improperly invalidated application of risk reduction credits toward petitioner's parole eligibility date; motion for summary judgment; whether habeas court properly determined that it lacked subject matter jurisdiction over habeas petition; whether habeas court abused its discretion in denying petition for certification to appeal; whether ex post facto prohibition was implicated where changes to law had no bearing on punishment to which petitioner's criminal conduct exposed him when he committed crime; whether parole eligibility under statute (§ 54-125a) constitutes cognizable liberty interest sufficient to invoke habeas jurisdiction.
Darryl W. *v.* Commissioner of Correction 454
Habeas corpus; claim that trial counsel provided ineffective assistance by failing to file request to charge jury or to object to trial court's jury instruction on operability of firearm; claim that trial counsel provided ineffective assistance by failing to direct trial court in response to jury's inquiry on operability; whether petitioner demonstrated that he was prejudiced by trial counsel's performance.
Diehl *v.* Powell (Memorandum Decision) 902
Eder's Appeal from Probate 163
Probate appeal; remainder beneficiaries of irrevocable trust; claim that trial court improperly concluded that settlor's intent in adopting two adult children was not relevant to determination of whether adoptions were sham; claim that trial court erred in holding purpose of trust was not contravened by settlor's adoption of two adult children; whether adults adopted by settlor could be considered natural objects of settlor's bounty; whether adopted children were allowed to take under trust; whether intent of trust is determined from language of trust.
Faile *v.* Stratford. 183
Tax appeals; whether trial court abused its discretion in rendering judgments of nonsuit; whether more deferential general abuse of discretion standard of review applied to trial court's judgments of nonsuit, or more nuanced abuse of discretion standard as set forth in Millbrook Owners Assn., Inc. *v.* Hamilton Standard *(257 Conn. 1); whether trial court's findings that plaintiff violated court's pretrial settlement conference order by not having someone with ultimate authority to settle matters present at pretrial settlement conference, and by failing to bring to conference every physical piece of paper that would be offered into evidence at trial were clearly erroneous; whether plaintiff established clear error in trial*

court's finding that attorney did not have ultimate authority to settle tax appeals related to plaintiff limited liability company; whether dismissal or nonsuit as sanction for failure of party to attend pretrial settlement conference when party was ill and in hospital served justice or vindicated legitimate interests of other party and court.

Fernschild *v.* Commissioner of Motor Vehicles 472

Suspension of motor vehicle operator's license; whether record contained substantial evidence to support hearing officer's determination that plaintiff refused to submit to breath test to determine his blood alcohol content in violation of statute (§ 14-227b).

JPMorgan Chase Bank, National Assn. *v.* Essaghof 144

Foreclosure; whether trial court's finding that defendants were not fraudulently induced into executing agreement to modify original loan was clearly erroneous; whether trial court abused discretion in rejecting special defense of unclean hands; whether trial court properly found that representations were not false; claim that originator of loan had concealed motivation for modification agreement and that defendants were pressured into signing modification agreement; claim that trial court abused discretion by granting motion for equitable relief; whether trial court improperly ordered defendants to reimburse plaintiff for property taxes paid during pending appeal.

Lange *v.* Stratford (See Faile *v.* Stratford) 183

Little *v.* Commissioner of Correction 337

Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal as to claim that State *v.* Salamon *(287 Conn. 509) applied retroactively to collateral attack on kidnapping conviction when, pursuant to plea agreement, petitioner pleaded guilty to only that charge; adoption of general presumption that* Salamon *applies retroactively in habeas corpus proceedings; whether traditional rationales underlying writ of habeas corpus favored applying* Salamon *retroactively; whether there was risk that petitioner stood convicted of act that law did not make criminal; reviewability of claim of actual innocence raised for first time on appeal.*

McFarline *v.* Mickens 83

Negligence; summary judgment; claim that issues of material fact existed as to whether plaintiff's injury from trip and fall on public sidewalk was caused by negligence of abutting property owner due to defective sidewalk with grass growing wildly through crack; whether abutting landowner owed duty to maintain public sidewalk in reasonably safe condition; whether positive act exception to general rule absolving landowners of liability for defective sidewalks applied; claim that trial court erroneously considered facts outside of record and thereby violated plaintiff's right to due process of law; claim that trial court abused discretion by denying motions to reargue and to amend complaint.

McLeod *v.* A Better Way Wholesale Autos, Inc. 423

Fraud; breach of implied warranty of merchantability in connection with sale of automobile; whether trial court improperly rendered judgment for plaintiff on count of complaint alleging breach of implied warranty of merchantability when court previously dismissed that count; whether, once count was dismissed by trial court, it was effectively removed from case and court had no authority to address merits of dismissed count in its final decision; whether, in light of trial court's dismissal of count alleging breach of implied warranty of merchantability, court improperly determined that defendant violated Magnuson-Moss Act (15 U.S.C. § 2310 [d]), which was based on defendant's alleged breach of implied warranty of merchantability; whether trial court improperly awarded attorney's fees as component of damages under count alleging violation of Magnuson-Moss Act; whether trial court's finding of fraud was legally and logically correct and supported by evidence; whether trial court's finding that defendant made false statement by failing to disclose accurate odometer reading was clearly erroneous; whether trial court improperly awarded punitive damages under fraud count.

N759ZD, LLC *v.* Stratford (See Faile *v.* Stratford) 183

Pellet *v.* Keller Williams Realty Corp. 42

Contracts; whether trial court improperly directed verdict in favor of defendants on ground that all counts of complaint were based on breaches of professional standards of care and plaintiff failed to present expert testimony as to applicable standard of care; whether all counts of complaint summarily could be characterized as one general claim of professional negligence; whether court improperly concluded that plaintiff's failure to tender expert witness resulted in lack of

evidence on professional standards of care; whether jury had before it testimony from which it could have inferred that standards of care were breached by defendants; whether court improperly granted motions for special finding, pursuant to statute (§ 52-226a), that action was brought without merit and in bad faith.

Pritsker *v.* Keating (Memorandum Decision) 901

Propel Financial 1, LLC *v.* Ortiz (Memorandum Decision) 901

Puff *v.* Puff 103

Dissolution of marriage; postjudgment motions for modification of alimony and contempt; whether trial court erred in concluding that parties' oral agreement was enforceable, binding agreement; claim that trial court improperly modified oral agreement when reducing terms to written decision; whether trial court improperly failed to canvass plaintiff pursuant to statute (§ 46b-66); whether trial court improperly granted motion for contempt; whether plaintiff wilfully violated court order.

Seaport Capital Partners, LLC *v.* Speer 1

Writ of error; claim that receivership was void because trial court lacked subject matter jurisdiction over foreclosure action; whether plaintiff in error rebutted presumption that defendant in error, as holder of notes, had standing to commence foreclosure actions; whether trial court improperly granted motions for order of payment with respect to receiver of rents; whether receiver of rents had obligation to collect and account for rents for properties; whether trial court abused discretion in denying motions to reargue; whether findings of fact by trial court were clearly erroneous; whether doctrine of judicial estoppel applied to bar claim for order of payment.

Seaport Capital Partners, LLC *v.* Spear (See Seaport Capital Partners, LLC *v.* Speer) . . . 1

Seaport Capital Partners, LLC *v.* 76–78 Truman Street, LLC (See Seaport Capital Partners, LLC *v.* Speer) 1

Smith *v.* Redding. 283

Public nuisance; reviewability of claim that trial court abused its discretion by excluding evidence of subsequent remedial measures by defendant town; failure of plaintiff to provide complete record of trial proceedings; reviewability of claim that trial court failed to instruct jury on applicable zoning regulations as safety standard.

State *v.* Cuadrado (Memorandum Decision) 901

State *v.* Hall-Davis 211

Murder; conspiracy to commit murder; criminal possession of firearm; whether trial court properly declined to instruct jury on theory of defense of others; whether evidence supported finding that victim was at imminent risk of great bodily harm; whether preemptive strike is justified under defense of others theory; whether defendant met burden of showing that it would have been objectively reasonable for him to believe that victim was at imminent risk of having great bodily harm inflicted on her; unpreserved claim that trial court improperly restricted defense counsel from arguing defense of others and renunciation of criminal purpose during closing argument; whether defendant demonstrated that alleged constitutional violation existed and deprived him of fair trial; whether defendant was entitled to relief under plain error doctrine; whether defendant waived claim that trial court gave jury faulty and misleading instruction on conspiracy when he had meaningful opportunity to review instruction but failed to object.

State *v.* Hathaway 279

Motion to correct illegal sentence; claim that trial court improperly dismissed motion to correct illegal sentence for lack of subject matter jurisdiction; claim that sentence of twenty-five years of incarceration for murder imposed upon juvenile violated prohibition in eighth amendment to United States constitution against cruel and unusual punishment; claim that sentence of twenty-five years of incarceration for murder imposed upon juvenile violated article first, §§ 8 and 9, of state constitution.

State *v.* Redmond 129

Writ of error; whether trial court improperly ordered forfeiture of seized property pursuant to statute (§ 54-36a [c]); claim that § 54-36a (c) applied only to seized contraband and certain cash linked to illegal drug transactions, and not to firearms; whether trial court's determination that requisite nexus existed between seized firearms and narcotics business of defendant in underlying criminal matter was supported by record; claim that trial court should have conducted in rem forfeiture proceedings pursuant to statute ([Rev. to 2013] § 54-33g) in order

to effectuate forfeiture of seized firearms; claim that trial court improperly entered forfeiture order without providing plaintiff in error with notice and opportunity to be heard, in violation of in rem forfeiture procedures set forth in § 54-33g; whether § 54-36a (c) requires court or state to provide formal notice to any individual that may have interest in seized property that is to be forfeited; failure of plaintiff in error to file timely motion for return of seized property during pendency of criminal action pursuant to applicable rule of practice (§ 41-13).

State *v.* Rivera 242

Motion to correct illegal sentence; claim that trial court improperly dismissed motion to correct illegal sentence for lack of subject matter jurisdiction; claim that twenty-five year mandatory minimum sentence without possibility of parole for juvenile homicide offender was unconstitutional under eighth amendment to United States constitution, as interpreted by Miller *v.* Alabama *(567 U.S. 460); whether sentencing court was required to consider juvenile offender's youth and attendant characteristics as mitigating factors prior to sentencing juvenile homicide offender to life without possibility of parole where defendant was now eligible for parole; claim that mandatory minimum sentence of twenty-five years of incarceration without possibility of parole imposed on juvenile homicide offender was unconstitutional under article first, §§ 8 and 9, of state constitution; whether factors set forth in* State *v.* Geisler *(222 Conn. 672) to be considered in defining scope and parameters of state constitution supported defendant's state constitutional claim; whether mandatory minimum sentence of twenty-five years of incarceration imposed on juvenile offender constituted cruel and unusual punishment under federal precedent; reviewability of unpreserved claim that trial court committed constitutional error when it improperly accepted defendant's waiver, through counsel, of right to presentence investigation report without canvassing defendant prior to permitting waiver; failure to raise claim in motion to correct illegal sentence.*

State *v.* Stonick 181

Larceny in sixth degree; illegal use of credit card; whether trial court improperly noted entry of nolle prosequi over defendant's objection and request for dismissal when there was no allegation by state that any material witness had died, disappeared or become disabled, or that material evidence had disappeared or had been destroyed and that further investigation was necessary, as required by statute (§ 54-56b).

State *v.* Taylor 18

Murder; robbery in first degree; conspiracy to commit robbery in first degree; hindering prosecution; tampering with physical evidence; claim that evidence was insufficient to support conviction of murder, robbery in first degree and conspiracy to commit robbery in first degree; claim that, because there was no evidence that robbery had occurred, there was no proof of robbery or conspiracy to commit robbery or of murder under doctrine of Pinkerton *v.* United States *(328 U.S. 640); whether trial court abused discretion by granting motion to disqualify defendant's first court-appointed counsel; whether defendant, who was indigent, had right to select appointed counsel; whether it was permissible for court to change appointed counsel when potential conflict of interest existed; whether defendant was prejudiced by disqualification of appointed counsel.*

State *v.* Thomas 369

Sexual assault in first degree; unlawful restraint in first degree; false statement in second degree; claim that trial court violated defendant's constitutional rights to confrontation and to present defense when it ruled that rape shield statute (§ 54-86f [a]) prohibited him from introducing evidence of victim's prior sexual conduct; claim that evidence of victim's prior sexual conduct was admissible to impeach her credibility pursuant to exceptions to § 54-86f (a); whether victim testified, either explicitly or by reasonable inference, about her sexual conduct with anyone other than defendant such that evidence of her prior sexual conduct was admissible for impeachment purposes under § 54-86f (a) (2); whether impeaching victim's credibility with evidence of her prior sexual conduct, and with inconsistent statement she had made to hospital nurse, was so relevant and material, pursuant to § 54-86f (a) (4), that its exclusion violated defendant's constitutional rights; reviewability of unpreserved claim that evidence of victim's prior sexual conduct should have been admitted, pursuant to § 54-86f (a) (1), to show alternative source for scrapes and bruises on victim's body after sexual assault; reviewability of unpreserved claim that defendant was improperly prohibited from inquiring and presenting evidence about victim's relationship with

another man in order to show victim's motive and bias to lie; whether unpreserved claim was of constitutional magnitude for purposes of review pursuant to State *v.* Golding *(213 Conn. 233); whether evidence of victim's prior sexual conduct was probative, pursuant to § 54-86f (a) (1), of whether her vaginal injuries could have been caused by anyone other than defendant; claim that trial court abused its discretion by denying motion for funds to pay for investigative services for defense; whether trial court had discretion to grant request for funds; whether defendant failed to make proper showing that funds for investigative services were reasonable and necessary to defense; claim that defendant was denied right to fair trial as result of prosecutorial impropriety; whether comments of prosecutor demeaned or impugned integrity of defense counsel; whether prosecutor improperly appealed to jurors' emotions or referred to facts or documents that were not in evidence; reviewability of claim that prosecutor improperly vouched for victim's credibility; failure to brief claim adequately.*

Toccaline *v.* Commissioner of Correction 480

Habeas corpus; whether habeas court properly granted motion to dismiss third petition for writ of habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal as to claims of actual innocence, due process violation where prosecutor was alleged to have unknowingly presented false testimony at criminal trial, and that habeas court improperly dismissed claim that first habeas appellate counsel was ineffective; whether habeas court improperly dismissed claim that first habeas appellate counsel was ineffective on ground that claim was successive; whether claim that first habeas appellate counsel was ineffective lacked merit; whether habeas court abused its discretion in denying certification to appeal as to assertion that counsel in second habeas trial rendered ineffective assistance.

Williams *v.* Commissioner of Correction 321

Habeas corpus; ineffective assistance of counsel; whether habeas court properly rejected claim that petitioner's trial counsel was ineffective in failing to challenge state's medical evidence by consulting and calling rebuttal medical expert witness; whether habeas court properly concluded that petitioner failed to prove that trial counsel was ineffective by failing to present testimony of witness to support potential defense of physical incapability.

Zhang *v.* 56 Locust Road, LLC 420

Quiet title; claim that trial court improperly found in plaintiffs' favor on claim of adverse possession; claim that trial court improperly granted defendant easement by necessity.

RULES OF APPELLATE PROCEDURE

NOTICE

Notice is hereby given that the following amendments to the Rules of Appellate Procedure were adopted to take effect on January 1, 2018. The amendments were approved by the Appellate Court on October 16, 2017, except that the adoption of Sections 77-3 and 77-4 was approved by the Appellate Court on September 14, 2017. The amendments were approved by the Supreme Court on October 18, 2017.

Attest:

Carolyn Ziogas

Chief Clerk Appellate

INTRODUCTION

Contained herein are amendments to the Rules of Appellate Procedure. These amendments are indicated by brackets for deletions and underlined text for added language. The designation ''NEW'' is printed with the title of each new rule.

This material should be used as a supplement to the Connecticut Practice Book until the 2018 edition of the Practice Book becomes available.

CHAPTER AND SECTION HEADINGS OF THE RULES

CHAPTER 60
GENERAL PROVISIONS RELATING TO APPELLATE RULES AND APPELLATE REVIEW

Sec.
60-1. Rules to Be Liberally Interpreted
60-2. Supervision of Procedure
60-3. Suspension of the Rules
60-7. Electronic Filing; Payment of Fees

CHAPTER 62
CHIEF JUDGE, APPELLATE CLERK AND DOCKET: GENERAL ADMINISTRATIVE MATTERS

Sec.
62-7. Matters of Form; Filings; Delivery and Certification to Counsel of Record

CHAPTER 63
FILING THE APPEAL; WITHDRAWALS

Sec.
63-4. Additional Papers to Be Filed by Appellant and Appellee when Filing Appeal

CHAPTER 66
MOTIONS AND OTHER PROCEDURES

Sec.
66-2. Motions, Petitions and Applications; Supporting Memoranda

CHAPTER 67
BRIEFS

Sec.
67-2. Format of Briefs and Appendices; Copies; Electronic Briefing Requirement

CHAPTER 70
ARGUMENTS AND MEDIA COVERAGE OF COURT PROCEEDINGS

Sec.
70-3. Order of Oral Argument; Nonappearance at Oral Argument

CHAPTER 71
APPELLATE JUDGMENTS AND OPINIONS

Sec.
71-4. Opinions; Rescripts; [Notice;] Official Release Date

CHAPTER 77
PROCEDURES CONCERNING COURT CLOSURE AND SEALING ORDER OR ORDERS LIMITING THE DISCLOSURE OF FILES, AFFIDAVITS, DOCUMENTS OR OTHER MATERIAL

Sec.
77-3. (NEW) Sealing Documents or Limiting Disclosure of Documents on Appeal
77-4. (NEW) Motion to Seal; Lodging of Documents with Appellate Clerk

CHAPTER 79a
APPEALS IN CHILD PROTECTION MATTERS

Sec.
79a-11. Official Release Date

CHAPTER 85
SANCTIONS

Sec.
85-2. Other Actions Subject to Sanctions
85-3. Procedure on Sanctions

RULES OF APPELLATE PROCEDURE

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

CHAPTER 60
GENERAL PROVISIONS RELATING TO APPELLATE RULES AND APPELLATE REVIEW

Sec. 60-1. Rules to Be Liberally Interpreted

The design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any [case] appellate matter where it shall be manifest that a strict adherence to them will work surprise or injustice.

Sec. 60-2. Supervision of Procedure

The supervision and control of the proceedings [on appeal] shall be in the court having appellate jurisdiction from the time the [appeal] appellate matter is filed, or earlier, if appropriate, and, except as otherwise provided in these rules, any motion the purpose of which is to complete or perfect the record of the proceedings below for presentation on appeal shall be made to the court in which the appeal is pending. The court may, on its own motion or upon motion of any party, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of an appeal. It may also, for example, on its own motion or upon motion of any party: (1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal; (2) consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in the appendix of any party; (3) order improper matter stricken from a brief or appendix; (4) order a stay of any proceedings ancillary to a case on appeal; (5) order that a party for good cause shown may file a late appeal, petition for certification, brief or any other document unless the court lacks jurisdiction to allow the late filing; (6) order that a hearing be held to determine whether it has jurisdiction over a pending matter; (7) order an appeal to be dismissed unless the appellant complies with specific orders of the trial court, submits to the process of the trial court, or is purged of contempt of the trial court; (8) remand any pending matter to the trial court for the resolution of factual issues where necessary; or (9) correct technical or other minor mistakes in a published opinion which do not affect the rescript.

Sec. 60-3. Suspension of the Rules

In the interest of expediting decision, or for other good cause shown, the court in which the [appeal] appellate matter is pending may suspend the requirements or provisions of any of these rules [in a particular case] on motion of a party or on its own motion and may order proceedings in accordance with its direction.

Sec. 60-7. Electronic Filing; Payment of Fees

(a) Counsel of record must file all appellate papers electronically unless the court grants a request for exemption. Papers may be filed, signed or verified by electronic means that comply with procedures and standards established by the chief clerk of the appellate system under the direction of the administrative judge of the appellate system. A paper filed by electronic means in compliance with such procedures and standards constitutes a written paper for the purpose of applying these rules.

(b) At the time of filing, the appellant must (1) pay all required fees; or (2) upload a signed application for waiver of fees and the order of the trial court granting the fee waiver; or (3) certify that no fees are required. Any document that requires payment of a fee as a condition of filing may be returned by the appellate clerk or rejected by the court upon review for compliance with the rules of appellate procedure.

(c) All self-represented parties must have an account with E-Services and submit an appellate access form (JD-AC-15), unless exempt from electronic filing pursuant to Section 60-8.

[(c)] (d) The requirements of this section do not apply to documents filed by incarcerated self-represented parties, the clerk of the trial court, the official court reporter, or the clerk of the court for any other state, federal or tribal court. This section also does not apply to any state board or commission filing documents with the appellate clerk pursuant to Sections 68-1, 74-2A, 74-3A, 75-4, 76-3, or 76-5.

CHAPTER 62
CHIEF JUDGE, APPELLATE CLERK AND DOCKET: GENERAL ADMINISTRATIVE MATTERS

Sec. 62-7. Matters of Form; Filings; Delivery and Certification to Counsel of Record

(a) It is the responsibility of counsel of record to file papers in a timely manner and in the proper form. The appellate clerk may return any papers filed in a form not in compliance with these rules; in returning, the appellate clerk shall indicate how the papers have failed to comply. The clerk shall note the date on which they were received before returning them, and shall retain an electronic copy hereof. Any papers correcting a noncomplying filing shall be deemed to be timely filed if a complying document is refiled with the appellate clerk within fifteen days. The time for responding to any such paper shall not start to run until the correcting paper is filed.

(b) All papers except the transcript and regulations filed pursuant to Section 81-6 shall contain: (1) certification that a copy has been delivered to each other counsel of record, except as provided in Section 63-4 (a) (3), which certification shall include**[**ing**]** names, addresses, e-mail addresses, and telephone numbers; (2) certification that the document has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (3) certification that the document complies with all applicable rules of appellate procedure. Electronic papers shall contain a certification as set forth in subsection (b) (1), but filers can comply with the certification requirements set forth in subsections (b) (2) and (b) (3) during the electronic filing process. Any request to deviate from the requirement regarding personal identifying information shall be filed with the appellate clerk pursuant to Section 67-2 (k). Briefs and appendices require additional certifications pursuant to Section 67-2 (g) and (i). Other certification requirements may be required by the rules under which specific documents are filed.

(c) Any counsel of record who files a document electronically with the court must deliver it electronically to all other counsel of record, **[**as defined by Section 60-4**]** except as provided in Section 63-4 (a) (3), unless the intended recipient has notified the appellate clerk and all other counsel of record in writing that the recipient declines to accept electronic delivery of documents or the intended recipient is exempt from the requirements of electronic filing pursuant to Section 60-8. Any counsel of record who has signed an electronically filed document shall be deemed to have consented to electronic delivery under this section. Delivery by e-mail is complete upon ending the electronic notice unless the party sending notice learns that the attempted delivery did not reach the e-mail address of the intended recipient.

If the intended recipient has declined to accept electronic delivery or is exempt from the requirements of electronic filing, a document may be delivered to counsel of record by hand or by first class or express mail delivered by the United States Postal Service or an equivalent commercial service, postage repaid, to the last known address of the intended recipient.

CHAPTER 63
FILING THE APPEAL; WITHDRAWALS

Sec. 63-4. Additional Papers to Be Filed by Appellant and Appellee when Filing Appeal

(a) Within ten days of filing an appeal, the appellant shall also file with the appellate clerk the following:

(1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to: (A) present for review alternative grounds upon which the judgment may be affirmed; (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial; or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on the appeal, that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue.

(2) A certificate stating that no transcript is deemed necessary, or a copy of the transcript order acknowledgment form (JD-ES-38) with section I thereof completed, filed with the official reporter pursuant to Section 63-8. If any other party deems any other parts of the transcript necessary, that party shall, within twenty days from the filing of the appellant's transcript papers, file a copy of the order form (JD-ES-38), which that party has placed in compliance with Section 63-8.

If the appellant is to rely on transcript delivered prior to the taking of the appeal, an order form (JD-ES-38) shall be filed stating that an electronic version of a previously delivered transcript has been ordered. The detailed statement of the transcript to be relied on required by Section 63-8 also must be filed. If any other party deems any other parts of the transcript necessary, and those parts have not been delivered at the time of the taking of the appeal, that party shall have twenty days to order those additional parts. If any other party is to rely on transcript delivered prior to the taking of the appeal, an order form (JD-ES-38) shall be filed within twenty days, stating that an electronic version of a previously delivered transcript has been ordered.

(3) A docketing statement containing the following information to the extent known or reasonably ascertainable by the appellant: (A) the names and addresses of all parties to the appeal, the names, addresses, and e-mail addresses of trial and appellate counsel of record, and the names and addresses of all persons having a legal interest in the cause on appeal sufficient to raise a substantial question whether a judge should be disqualified from participating in the decision on the case by virtue of that judge's personal or financial interest in any such persons; (B) the case names and docket numbers of all pending appeals to the supreme court or appellate court which arise from substantially the same controversy as the cause on appeal, or involve issues closely related to those presented by the appeal; (C) whether there were exhibits in the trial court; and (D) in criminal cases, the defendant's conviction(s) and sentence(s) that are the subject of the appeal, and whether the defendant is incarcerated as a result of the proceedings in which the appeal is being filed. If additional information is or becomes known to, or is reasonably ascertainable by the appellee, the appellee shall file a docketing statement supplementing the information required to be provided by the appellant.

When an appellant or an appellee is aware that one or more appellees have no interest in participating in the appeal, the appellant and any other appellees may be relieved of the requirement of certifying copies of filings to those appellees by designating the nonparticipating appellee(s) in a section of the docketing statement named ''Nonparticipating Appellee(s).'' This designation shall indicate that if no docketing statement in disagreement is filed, subsequent filings will not be certified to those appellees.

If an appellee disagrees with the nonparticipating designation, that appellee shall file a docketing statement indicating such disagreement within twenty days of the filing of that designation. All documents filed on or before the expiration of the time for an appellee to file a docketing statement in disagreement as stated above

shall be delivered pursuant to Section 62-7 (b) to all counsel of record. If no docketing statement in disagreement is filed, subsequent filings need not be certified to nonparticipating appellees.

(4) In all noncriminal matters, except for matters exempt from a preargument conference pursuant to Section 63-10, a preargument conference statement.

(5) A constitutionality notice, in all noncriminal cases where the constitutionality of a statute has been challenged. Said notice shall identify the statute, the name and address of the party challenging it, and whether the statute's constitutionality was upheld by the trial court. The appellate clerk shall deliver a copy of such notice to the attorney general. This section does not apply to habeas corpus matters based on criminal convictions, or to any case in which the attorney general is a party, has appeared on behalf of a party, or has filed an amicus brief in proceedings prior to the appeal.

(6) In matters in which documents are under seal, conditionally or otherwise, or limited as to disclosure, a copy of the time, date, scope and duration of sealing order form (JD-CL-76). (See Section 77-2.)

(b) Except as otherwise provided, a party may as of right file amendments to the preliminary statement of issues at any time until that party's brief is filed. Amendments to the docketing statement may be filed at any time. Amendments to the transcript statement may be made only with leave of the court. If leave to file such an amendment is granted, the adverse party shall have the right to move for permission to file a supplemental brief and for an extension of time. Amendments to the preargument conference statement shall not be presented in writing but may be presented orally at the preargument conference, if one is held.

(c) Failure to comply with this rule shall be deemed as sufficient reason to schedule a case for sanctions under Section 85-3 or for dismissal under Section 85-1.

COMMENTARY—The designation of an appellee as nonparticipating pursuant to Section 63-4 (a) (3) in no way affects that appellee's status in the appeal. The appellate clerk will continue to send notice to all parties pursuant to Section 60-4.

CHAPTER 66
MOTIONS AND OTHER PROCEDURES

Sec. 66-2. Motions, Petitions and Applications; Supporting Memoranda

(a) Motions, petitions and applications shall be specific. No motion, petition or application will be considered unless it clearly sets forth in separate paragraphs appropriately captioned: (1) a *brief history* of the case; (2) the *specific facts* upon which the moving party relies; and (3) the *legal grounds* upon which the moving party relies. A separate memorandum of law may but need not be filed. If the moving party intends to file a memorandum of law in support of the motion, petition or application, however, such memorandum shall be filed either as an appendix to or as a part of the motion, petition or application. A party intending to oppose a motion, petition or application shall file a brief statement clearly setting forth in separate paragraphs appropriately captioned the *factual* and *legal grounds* for opposition within ten days after the filing of the motion, petition or application. If an opposing party chooses to file a memorandum of law in opposition to a motion, petition or application, that party shall do so within ten days after the filing of the motion, petition or application. An opposition shall not include any request for relief that should be filed as a separate motion by the opposing party to the motion, petition or application. Responses to oppositions are not permitted. Except as provided in subsection (e) below, no proposed order is required.

(b) Except with special permission of the appellate clerk, the motion, petition or application and memorandum of law filed together shall not exceed ten pages, and the memorandum of law in opposition thereto shall not exceed ten pages.

(c) Where counsel for the moving party certifies that all other parties to the appeal have consented to the granting of the motion, petition or application, the motion, petition or application may be submitted to the court immediately upon filing and may be acted upon without awaiting expiration of the time for filing opposition papers. Notice of such consent certification shall be indicated on the first page of the document.

(d) Motions which are not dispositive of the appeal may be ruled upon by one or more members of the court subject to review by a full panel upon a motion for reconsideration pursuant to Section 71-5.

(e) Motions that are directed to the trial court, such as motions to terminate stay pursuant to Section 61-11 or motions for rectification or articulation pursuant to Section 66-5, shall: (1) include both the trial court and the appellate court docket numbers in the caption of the case; (2) state in the first paragraph the name of the trial judge, or panel of judges, who issued the order or orders to be reviewed; (3) include a proper order for the trial court if required by Section 11-1; and (4) comply with the requirements of Section 66-3. Such motions will be forwarded to the trial court by the appellate clerk.

(f) When the appellate clerk issues an order on a motion, petition or application, the official notice date shall be the date indicated on the order for notice to the clerk of the trial court and all counsel of record. The official notice date is not the date that such order is received.

COMMENTARY—For the official release date of an opinion or memorandum decision, see Section 71-4.

CHAPTER 67
BRIEFS

Sec. 67-2. Format of Briefs and Appendices; Copies; Electronic Briefing Requirement

(a) **[**Original b**]**Briefs and appendices shall be typewritten or clearly photocopied from a typewritten original on white 8 1/2 by 11 inch paper. Unless ordered otherwise, briefs shall be copied on one side of the page only. Appendices may be copied on both sides of the page. The page number for briefs and appendices shall be centered on the bottom of each page. The brief shall be fully double spaced and shall not exceed three lines to the vertical inch or twenty-seven lines to the page; footnotes and block quotations may, however, be single spaced. Only the following two typefaces, of 12 point or larger size, are approved for use in briefs: arial and univers. Each page of a brief or appendix shall have as a minimum the following margins: top, 1 inch; left, 1 and 1/4 inch; right, 1/2 inch; and bottom, 1 inch. Briefs and appendices shall be firmly bound 1/4 inch from the left side, at points approximately 1/4, 1/2 and 3/4 of the length of the page, so as to make an easily opened volume.

(b) When possible, parts one and two of the appendix shall be bound together. In addition, parts one and two of the appendix may be bound together with the brief. When, however, binding the brief and appendix together would affect the integrity of the binding, the appendix shall be bound separately from the brief. When either part of the appendix exceeds one hundred and fifty pages, parts one and two of the appendix shall be separately bound.

(c) An appendix shall be paginated separately from the brief. The appendix shall be numbered consecutively, beginning with the first page of part one and ending with the last page of part two, and preceded by the letter ''A'' (e.g., A1 . . . A25

. . . A53). An appendix shall have an index of the names of witnesses whose testimony is cited within it. If any part of the testimony of a witness is omitted, this shall be indicated by asterisks. After giving the name of a witness, the party who called that witness shall be designated, and it shall be stated whether the testimony quoted was given on direct, cross or other examination.

(d) If constitutional provisions, statutes, ordinances, regulations or portions of the transcript are contained in an appendix, they may be reproduced in their original form so long as the document is not reduced to less than 75 percent of its original form.

(e) Briefs and separately bound appendices shall have a suitable front cover of heavy paper in the color indicated: briefs for appellants and plaintiffs in error, light blue; briefs for appellees and defendants in error, pink; reply briefs, white; briefs for amicus curiae, light green. Covers of briefs filed for cross appeals shall be of the same color as indicated for that party on the original appeal briefs. If a supplemental brief is ordered or permitted by the court, the cover shall be the same color as indicated for that party's original brief. A back cover is not necessary; however, if one is used, it must be white.

(f) Briefs and separately bound appendices must bear on the cover, in the following order, from the top of the page: (1) the name of the court; (2) the number of the case; (3) the name of the case as it appears in the judgment file of the trial court; (4) the nature of the brief (e.g., brief of the defendant-appellant; brief of the plaintiff-appellee on the appeal and of the plaintiff-cross appellant on the cross appeal); and (5) the name, address, telephone and facsimile numbers and e-mail address of individual counsel who is to argue the appeal and, if different, the name, address, telephone and facsimile numbers and e-mail address of the party's counsel of record. The foregoing shall be displayed in the upper case of an arial or univers typeface of 12 point or larger size.

(g) Counsel of record filing a brief shall submit an electronic version of the brief and appendix in accordance with guidelines established by the court and published on the judicial branch website. Where paper copies of the brief and appendix are bound together, the brief and appendix shall be submitted electronically as separate documents. The electronic version shall be submitted prior to the timely filing of the party's paper brief and appendix pursuant to subsection (h) of this section. Counsel of record must certify that electronically submitted briefs and appendices: (1) have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

(h) If the appeal is in the supreme court, **[**the original and**]** fifteen legible photocopies of each brief and appendix, if any, shall be filed with the appellate clerk. If the appeal is in the appellate court, **[**the original and**]** ten legible photocopies of each brief and appendix, if any, shall be filed with the appellate clerk.

(i) **[**The original and a**]**All copies of the brief filed with the supreme court or the appellate court must be accompanied by: (1) certification that a copy of the brief and appendix has been sent to each counsel of record in compliance with Section 62-7**[** and to any trial judge who rendered a decision that is the subject matter of the appeal**]**; (2) certification that the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically pursuant to subsection (g) of this section; (3) certification that the brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (4) certification that the brief complies with all provisions of this rule. The certification that a copy of the brief and appendix has been sent

to each counsel of record in compliance with Section 62-7[, and to any trial judge who rendered a decision that is the subject matter of the appeal] may be signed by counsel of record or the printing service, if any. All other certifications pursuant to this subsection shall be signed by counsel of record only.

(j) A copy of the electronic confirmation receipt indicating that the brief and appendix were submitted electronically in compliance with subsection (g) of this section shall be filed with the [original] briefs.

(k) Any request for deviation from the above requirements, including requests to deviate from the requirement to redact or omit personal identifying information or information that is prohibited from disclosure by rule, statute, court order or case law, shall be filed with the appellate clerk.

CHAPTER 70
ARGUMENTS AND MEDIA COVERAGE OF COURT PROCEEDINGS

Sec. 70-3. Order of Oral Argument; Nonappearance at Oral Argument

(a) Counsel of record for the appellant or plaintiff in error will be entitled to open and close [the] oral argument. On a reservation, the plaintiff will open and close, unless the court otherwise directs, except in suits for the construction of wills or of interpleader, when the court will fix the order of oral argument. If there are cross appeals, the original appellant will open and the cross appellant will close unless the court otherwise orders for cause shown. If there are consolidated appeals, the parties in the appeal filed first [in the trial court] will argue first unless the court otherwise orders.

(b) If either party fails to appear at oral argument, the court may decide the case on the basis of the briefs, the record, and the oral argument of the appearing party. If neither party appears at oral argument, the court may decide the case on the basis of the briefs and record only, without oral argument. The court may impose sanctions on a nonappearing party in accordance with Section 85-3, including dismissal of the case.

CHAPTER 71
APPELLATE JUDGMENTS AND OPINIONS

Sec. 71-4. Opinions; Rescripts; [Notice;] Official Release Date

(a) After the court [hands down] releases an opinion in any case other than a case involving a question certified from a federal court, the reporter of judicial decisions shall send a copy of the opinion and the [original] rescript to the clerk of the trial court and shall send [a copy of] the rescript to the appellate clerk. Notice of the decision of the court shall be deemed to have been given, for all purposes, on the official release date that appears in the court's opinion or memorandum decision.

[(b) Notices of decisions upon motions and of orders of the court shall be given by the appellate clerk to the clerk of the trial court and to all counsel of record.

(c) The official release date of an opinion or memorandum decision appears in the court's opinion or memorandum decision. In the case of an order on, for example, a motion or petition, the official release date is the date that the appellate clerk issues notice of an order to the clerk of the trial court and to all counsel of record.]

[(d)](b) The opinions of the court in the bound volumes of the Connecticut Reports and the Connecticut Appellate Reports are the official opinions. The appellate clerk is authorized to furnish official copies of those opinions and, until the bound volumes are published, of the opinions as they appear in the Connecticut Law Journal.

CHAPTER 77
PROCEDURES CONCERNING COURT CLOSURE AND SEALING ORDERS OR ORDERS LIMITING THE DISCLOSURE OF FILES, AFFIDAVITS, DOCUMENTS OR OTHER MATERIAL

(NEW) Sec. 77-3. Sealing Documents or Limiting Disclosure of Documents on Appeal

(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the appellate clerk shall be available to the public.

(b) Except as otherwise provided in this section and except as otherwise provided by law, the court shall not order that any document filed or lodged with the appellate clerk be sealed or its disclosure limited.

(c) Upon written motion or upon its own motion, the court may order that any document filed or lodged with the appellate clerk be sealed or its disclosure limited only if the court concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such document. The court shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. An agreement of the parties to seal or limit the disclosure of documents filed or lodged with the appellate clerk shall not constitute a sufficient basis for the issuance of such an order.

(d) The court may, upon determination that the resolution of the motion requires findings of fact, refer the motion to the trial court to make such findings.

(NEW) Sec. 77-4. Motion to Seal; Lodging of Documents with Appellate Clerk

(a) A motion to seal any document filed previously with the appellate clerk or to be filed with the appellate clerk shall be filed in accordance with the provisions of Sections 60-7 and 60-8 and delivered to all counsel of record in accordance with 62-7, but shall not disclose any information that the filing party is seeking to seal and shall indicate if documents are being lodged with the appellate clerk.

(b) If the motion to seal pertains to a document previously filed with the appellate clerk, the appellate clerk will, upon receipt of the motion, promptly remove the document in question from the Judicial Branch website on a temporary basis until the resolution of the motion. The motion to seal shall be accompanied by a memorandum explaining why the document should be sealed or its disclosure limited. The memorandum and any supporting documents shall be lodged with the appellate clerk on paper, but shall not be filed in accordance with the provisions of Section 60-7.

(c) If the motion to seal pertains to a document that has not yet been filed with the appellate clerk, the motion shall be accompanied by a memorandum explaining why the document or documents should be sealed. The memorandum, the document that the party is seeking to seal, and any supporting documents shall be lodged with the appellate clerk on paper, but shall not be filed in accordance with the provisions of Section 60-7

(d) Any response to a motion to seal shall be filed in accordance with the provisions of Sections 60-7 and 60-8 and be delivered to all counsel of record in accordance with 62-7, shall not disclose any information that the movant is seeking to seal and shall indicate if documents are being lodged with the appellate clerk. Any memorandum or documents filed in support of the response shall be lodged with the appellate clerk on paper, but shall not be filed in accordance with the provisions of Section 60-7.

(e) Upon the filing of a motion to seal or to limit disclosure of any records, or upon the court's own motion, the court may issue any orders it deems necessary to aid in the court's jurisdiction. Before a motion to seal or to limit disclosure may be granted, notice to the public of the motion shall be given, and a hearing shall

be held. Such notice shall be posted on the Judicial Branch website, listing the motion and the time and place of the hearing. In the order granting the motion, the court shall articulate the overriding interest being protected and set forth the more narrowly tailored method of protecting the overriding interest it considered inadequate or unavailable and the duration of the order. If any findings would reveal information entitled to remain confidential those findings shall be set forth in a sealed portion of the record. The order shall be posted immediately on the Judicial Branch website.

(f) Following a decision on the motion to seal, any documents lodged with the appellate clerk will be retained under seal or returned to the filing party.

COMMENTARY—The purpose of this rule is to provide a procedure for sealing a document or limiting its disclosure for the first time on appeal. All filers are obligated to redact such information from any documents before they are filed pursuant to Section 62-7. A motion to seal is appropriate, however, if a party is seeking to keep confidential any information that is not otherwise protected by statute, rule or case law. In addition, a motion to seal is appropriate if a party is unable to file a redacted document because doing so would render the document incomprehensible.

CHAPTER 79a
APPEALS IN CHILD PROTECTION MATTERS

Sec. 79a-11. Official Release Date

A judgment in child protection appeals shall be deemed to have been rendered on the date an opinion or memorandum decision appears in the Connecticut Law Journal; except that if an opinion or memorandum decision is issued by slip opinion, the official release date is the date indicated in the slip opinion, and the parties shall be notified and sent the opinion or memorandum decision by the reporter of judicial decisions via **[**electronic**]** e-mail. If any of the parties who participated in the appeal has not provided the reporter of judicial decisions with an **[**electronic**]** e-mail address, then the slip opinion or memorandum decision shall be mailed to the parties by the appellate clerk on the date indicated in the slip opinion.

If a judgment in a child protection appeal is given by oral announcement from the bench, then the judgment shall be deemed to have been rendered on the date the oral announcement is made.

[The official release date of decisions upon motions, petitions and of orders of the court shall be the date the appellate clerk issues notice to the parties. See Sections 71-1 and 71-4 and General Statutes §§ 51-213 and 51-215a.**]**

CHAPTER 85
SANCTIONS

Sec. 85-2. Other Actions Subject to Sanctions

Actions which may result in the imposition of sanctions include, but are not limited to, the following:

(1) Failure to comply with rules and orders of the court.

(2) Filing of any papers which unduly delay the progress of an appeal.

(3) Presentation of unnecessary or unwarranted motions or opposition to motions.

(4) Presentation of unnecessary or unwarranted issues on appeal.

(5) Presentation of a frivolous appeal or frivolous issues on appeal.

(6) Presentation of a frivolous defense or defenses on appeal.

(7) Failure to attend preargument settlement conferences.

(8) Failure to appear at oral argument.

[(8)**]** (9) Disregard of rules governing withdrawal of appeals.

[(9)**]** (10) Repeated failures to meet deadlines.

Offenders will be subject, at the discretion of the court, to appropriate discipline, including the prohibition against appearing in the court or filing any papers in the court for a reasonable and definite period of time, the imposition of a fine pursuant to General Statutes § 51-84, and costs and payment of expenses, together with attorney's fees to the opposing party.

The sanction of prohibition against filing any papers in the court shall not prevent an offender from filing a motion for reconsideration of that sanction within seven days.

Offenders subject to such discipline include both counsel and self-represented parties and, if appropriate, parties represented by counsel.

Sec. 85-3. Procedure on Sanctions

Sanctions may be imposed by the court, on its own motion, or on motion by any party to the appeal. A motion for sanctions may be filed at any time, but a request for sanctions may not be included in an opposition to a motion, petition or application. Before the court imposes any sanction on its own motion, it shall provide notice to the parties and an opportunity to respond.

Appointment of Trustee

Pursuant to Practice Book § 2-64, on September 26, 2017 in docket number HHD-CV-17-6081049, Attorney Stephanie Sgambati (juris# 421014) of New Haven, CT is appointed as trustee to inventory Attorney Pasquale Amodeo's (juris#413167) files, to secure his clients' fund/IOLTA account(s), secure and review his office mail, and take such action as seems indicated to protect the interests of Attorney Amodeo's clients and to provide an accounting(s) and reports to the Court.

David Sheridan
Administrative Judge

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on October 18, 2017, in Docket Number HHD-CV-17-6080746, Guarika Anand was ordered suspended from the practice of law for a period of one year, with conditions, as reciprocal discipline for her Supreme Judicial Court for Suffolk County, MA discipline. Respondent shall not be required to comply with P.B. Section 2-53 for reinstatement to the Connecticut Bar.

David Sheridan
Administrative Judge